

NO. 79872-9

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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition  
of:

RICHARD J. DYER,

Petitioner.

RESPONSE OF THE  
INDETERMINATE  
SENTENCE REVIEW  
BOARD TO MR. DYER'S  
PERSONAL RESTRAINT  
PETITION

COMES NOW the Respondent, INDETERMINATE SENTENCING REVIEW BOARD (ISRB or Board), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and GREGORY J. ROSEN, Assistant Attorney General, and submits the following response to Mr. Dyer's personal restraint petition pursuant to RAP 16.9.

**I. BASIS FOR CUSTODY**

Petitioner, Richard J. Dyer, is in the custody of the Washington Department of Corrections (DOC) and under the jurisdiction of the ISRB pursuant to his 1982 Kitsap County Superior Court convictions for two counts of first degree rape. Appendix 1, Amended Judgment and Sentence, State v. Dyer, Kitsap County Superior Court Cause Number 81-1-00398-1. The trial court imposed maximum sentences of life for each rape conviction. Appendix 1, at 4. The sentences were ordered to run concurrently. Id.

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ORIGINAL

## II. STATEMENT OF THE CASE

### A. **FACTUAL HISTORY.**

The Washington Court of Appeals previously summarized the facts of Mr. Dyer's crimes of conviction in resolving his direct appeal as follows:

Richard J. Dyer was convicted by a jury of first degree rape of Ms. A, first degree rape of Ms. B, and first degree rape of his ex-wife Ms. W, as well as unlawful imprisonment of Ms. W and first degree burglary of her apartment. He appeals, challenging the validity of a search warrant, the denial of his motion to suppress Ms. B's in-court identification, and the denial of his repeated motions to sever the offenses involving Ms. W from those involving Ms. A and Ms. B. The State cross-appeals, contending the court erred by instructing the jury that if it found Dyer guilty of the first degree rapes of Ms. A and Ms. B, it was not to find him guilty of their first degree kidnappings as separately charged. We affirm in part and reverse in part.

On January 27, 1980, after accepting a ride home 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.

Dyer was charged by a seven-count amended information with, inter alia, first degree rape and first degree kidnapping of Ms. A. His defense was misidentification. In addition to describing a car and a house which were similar Dyer's, Ms. A identified some rope, a blue shirt with horizontal red stripes, and a blue jacket as being similar to items used or glimpsed during her ordeal. These items had been taken from Dyer's house pursuant to a search warrant.

The second of the three rape victims was Ms. B. 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.

The charges against Dyer for first degree rape and first degree kidnapping of Ms. B were joined with those involving Ms. A. Dyer's defense again was misidentification. In addition to describing the rapist's car and house, both similar to Dyer's, Ms. B identified a Timex watch that the rapist had given her. Ms. A testified that the watch was hers and had been lost during her struggles in the back seat.

Appendix 2, Unpublished Opinion, State v. Dyer, Court of Appeals  
Number 6162-7-II.

## **B. BOARD PROCEDURAL HISTORY.**

When Mr. Dyer was initially warranted to the DOC custody and Board jurisdiction, the Board fixed his original minimum terms for the rape convictions at 600 months each. Appendix 3, Board Decision re Richard J. Dyer dated July 6, 1982.

In 1986, the Board redetermined his minimum terms considering the standards, purposes, and ranges of the Sentencing Reform Act and fixed an exceptional minimum term at 240 months for each rape conviction. Appendix 4, Decisions and Reasons re Richard Dyer dated September 15, 1986.<sup>1</sup> The Board cited three reasons in support of its exceptional minimum term: 1) The rapes manifested deliberated cruelty toward the victims; 2) the guideline ranges were insufficient to punish the conduct for which he was convicted; and, 3) the sentencing judge and prosecuting attorney recommended minimum terms of life and 50 years, respectively. Appendix 4 at 1-2. The Board particularly noted the strong recommendation of the sentencing judge. *Id.*

The Board held a parolability hearing in 1994, in advance of Mr. Dyer's 1995 parole eligibility review date. After reviewing the facts of

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<sup>1</sup> Mr. Dyer previously filed a personal restraint petition challenging the Board's failure to redetermine his 600-month minimum terms by considering the standards, purposes, and ranges of the SRA. See In re the Personal Restraint Petition of Richard Dyer, Court of Appeals Number 10055-0-II. The Board acknowledged it had not yet redetermined his minimum term and agreed to do so. The Washington Court of Appeals dismissed the petition. The Board's subsequent redetermination is reflected in Appendix 4.

the crime, a psychological evaluation by Dr. Helmut Riedel, letters of support from the community, the recommendations of the institution, and Mr. Dyer's representations to the Board, it found him not parolable. Appendix 5, Decision and Reasons re Richard J. Dyer dated February 24, 1994, at 1. The Board recounted its reasoning as follows:

The 052 recommendation from the institution is poor. This is clearly based on his lack of remorse for the victims, his denial of the crimes, and the seriousness of the offenses. The psychological evaluation was prepared on March 5, 1993, by Dr. Helmut Riedel who states that the MMPI is essentially normal. There is no evidence of psychopathology. Dr. Riedel does state that Mr. Dyer's risk of reoffense is very high and his depth of sexual deviancy is high. He does recommend that he under go penile plethysmograph and polygraph in relation to his sexual deviancy. Dr. Riedel does not recommend that Mr. Dyer be put in lower levels of custody because he continues to present symptoms of Post Traumatic Stress Syndrome, plus Dr. Riedel has concerns over the series of Rape convictions, the number of infractions for violence and one escape attempt. As mentioned earlier, Mr. Dyer continues to be in denial of the Rapes and this makes him of course not eligible for the SOTP [Sex Offender Treatment Program] Program. The elements of each of the Rapes were severely aggravated because of the treatment toward the victims. . . . [T]he women were held in total darkness having their eyes taped shut for numerous hours. They were raped on more than one occasion throughout the span of time that he held them and each victim was forced to another location and released in a wooded area. The victim[]s were held for hours, gagged, blindfolded and tied to a bed. They were forced to bathe with their hands tied behind their back, and the first victim was beaten severely resulting in bruises to her face, neck, wrist, jaw, knee and ribs as well as her mouth required 13 stitches. Based on this and other aggravating reasons, the Board originally set an aggravated minimum term. This panel can see no basis

for a reduction in that minimum term at this time. Under current Sentencing Reform Act (SRA) law, these Rapes would be running consecutive, however in Mr. Dyer's case they run concurrent. What we have here is a man whose prison conduct has been quite appropriate in most areas. Mr. Dyer has been working for Redwood Industries for the last eight years, he has completed power sewing, completed his GED while in the Army, and is currently attending college level classes in prison. He completed the anger/stress management program in 1987, the STOP [Short Term Offender Program] evaluation indicates that he does not have an abuse problem. He is currently married and has been married since his incarceration to his current and third wife. He has three children by that union. He has been involved in [T]oastmasters, the hobby shop program, and the Leonard Shaw Seminars, a Course in Miracles and is a facilitator in the Breaking Barriers Program. It should be noted that Mr. Dyer's attorney has provided the Board with considerable information along [with] which is a letter of support from Thomas Harvey, a letter of support from his wife Renetta Dyer, and a letter of support from Leonard Shaw. Mr. Dyer once again mentioned that he continues to deny these crimes adamantly. He is sorry that the crimes themselves occurred, but he absolutely denies that he perpetrated either of these Rapes. This of course, presents somewhat of a dilemma. He has taken his cases to court on numerous occasions. The Appellate Court did in fact, as mentioned in an earlier part of this dictation, reverse his convictions for one count of Rape in the First Degree, and First Degree Burglary and Unlawful Imprisonment. However, they upheld the convictions on the two Rapes for which he is before us now. The Board can find no evidence that calls these convictions into question other than Mr. Dyer's denial. It is very difficult to take a look at the aggravated nature of these crimes and the psychological report and the 052 report and the lack of any kind of crime related counseling or treatment as well as the denial, and then find Mr. Dyer parolable. On the other hand, it is difficult to ignore the progress while in the institution and the efforts that he has made to make good use of his time. Most experts in this field agree that an

admission of responsibility for the behavior is the first step toward the elimination of the possibility of recidivism. This case has been a problem for this panel with regard to the denial, however on balance we find very little basis for a[n] early finding of parolability.

Appendix 5 at 3-4 (emphasis added).

The Board again conducted an in-person parolability hearing with Mr. Dyer on March 8, 1995, his parole eligibility review date.<sup>2</sup> See Appendix 6, Decision and Reasons re Richard Dyer dated March 8, 1995. After considering Dr. Riedel's 1993 psychological evaluation (Appendix 7, Psychological Evaluation re Richard Dyer dated March 5, 1993 by Helmut Riedel, Ph.D.), the 1994 psychological evaluation of Dr. William Jones (Appendix 8, Psychological Evaluation re Richard Dyer dated December 7, 1994 by William C Jones, Ph.D.), a DOC report (Appendix 9, Classification Referral Report re Richard Dyer dated January 5, 1995), and Board file materials, the Board found Mr. Dyer not suitable for parole and added 60 months to his minimum term. Appendix 6. The Board succinctly stated the bases for its decision as follows:

Mr. Dyer is an untreated, convicted rapist who denies his culpability and is therefore not amenable or receptive to treatment. Dr. Jones, in his December 1994 psychological evaluation, diagnoses him as [suffering from] Post Traumatic Stress Disorder and sexual sadism. Dr. Jones states further that without treatment, the risk of reoffense remains high; that the depth of Mr. Dyer's sexual deviancy cannot be assessed because he is uncooperative in that area. We note the sentencing Judge recommended that he not be

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<sup>2</sup> An offender's parole eligibility review date is the expiration of his Board-fixed minimum term, less applicable good-time credits. RCW 9.95.011, .070, .100, and .110.

released until his is no longer a threat to the community. The threat continues to exist, absent treatment. The Board takes into consideration a prior psychological report from March of 1993 authored by Dr. Helmut Riedel, which provides documentation of Mr. Dyer's tendency toward denial and relates that although he denies the physical abuse of women, the record clearly shows that his first wife had a restraining order issued against him and accused him of physical violence. It is believed that until he effectively starts dealing with the conviction behavior, even if it may have been an offshoot of Post Traumatic Stress Disorder, it would be difficult to release this man back into the community.

On the positive side, he has had no infractions since 1988, has been gainfully employed with Redwood Industries, and is not a management problem. He is a leader /facilitator for the Alternatives to Violence Program inside of the prison. He is married. His wife and three children reside in Oklahoma, where he intends to reside upon parole.

Appendix 6, at 3-4.

On August 11, 1998, the Board conducted an in-person parolability hearing with Mr. Dyer. After considering a current psychological evaluation by Dr. Lauby from June of 1998, a review of the ISRB and DOC files, as well as a face to face interview with Mr. Dyer, coupled with receiving a number of letters of support submitted on Mr. Dyer's behalf, the Board found Mr. Dyer to be not parolable, and added 60 months to his minimum term. Appendix 10, Decision and Reasons, Richard Dyer, August 11, 1998. In its Decision and Reasons, the Board stated as follows:

The Board last saw Mr. Dyer in March of 1995. At that time it was noted that he was in denial of the underlying crimes, as he is today. It also should be noted that Mr.

Dyer was eventually arrested when he committed a similar crime against his wife, which was reported to the police. This led to his arrest and conviction.

There is a current psychological from Dr. Lauby dated June of 1998, which rates his risk of re-offense, based on results of the Level of Service Inventory-Revised (LSI-R) and Hare Psychopathy Checklist-Revised (PCL-R), as low to medium. He notes that Mr. Dyer has a moderate likelihood of sexual deviancy based on the Risk Level Classification (RLC).

On the Multiphasic Sex Inventory (MSI) testing, Dr. Lauby noted he failed to acknowledge even normal sexual desires and interests. His replies indicated very little, if any, motivation for treatment. He considered that Mr. Dyer's knowledge of human sexuality is borderline and his general performance may be considered fairly dishonest.

Mr. Dyer has received an infraction in April of 1995 for fighting. It was testified to at the .100 hearing that in March of 1998 there was another incident that involved Mr. Dyer fighting on the unit, which did not result in an infraction but he was transferred to a different unit. His current and past counselor both testified that Mr. Dyer is manipulative and controlling on the unit and has threatened legal action if he is not satisfied with the response he receives from staff. There is a current investigation ongoing with respect to Mr. Dyer dealing with a phone scam at Airway Heights, which apparently is currently under investigation. No additional information was available besides the original incident report dated June of 1998. This investigation was noted, but not considered in today's .100 hearing.

Mr. Dyer is under the Board's jurisdiction for two violent and predatory sex crimes. As previously noted, he is in denial of these crimes, as well as the offense against his wife which led to his arrest. In reviewing Mr. Dyer's file, the psychological from March 1993 by Dr. Riedel and the December 1994 psych by Dr. Jones was reviewed. Both of

these psychologicals rated Mr. Dyer's risk of re-offense to be high. Dr. Reidel rated his risk of sexual deviancy to be high, while Dr. Jones noted that without the benefit of special treatment for sexual deviancy the risk of re-offense remains high. A review of the underlying criminal behavior reflected a high level of manipulation and sophistication. A review of Mr. Dyer's institutional adjustment and behavior with staff seems to indicate additional manipulation and control. After a careful review of all available file materials, it is the Board's conclusion that the only responsible decision is to continue to find Mr. Dyer not parolable.

Appendix 10, at 2-3 (emphasis added).

On December 4, 2001, the Board conducted another in-person parolability hearing in Mr. Dyer's case. Following the hearing, the Board determined that Mr. Dyer was not parolable and added 60 months to his minimum term. Appendix 11, Decision and Reasons, Richard Dyer, January 30, 2002. In its Decision and Reasons, the Board stated the following:

The Board last saw Mr. Dyer in August of 1998. Mr. Dyer's psychological reports consistently indicate low to medium risk. His behavior in the institution is quite good, his last infraction was in 1994. He maintains some contact with his wife and children, who now reside in Oklahoma, and with siblings that live in the area. Mr. Dyer has a veteran's disability for Post Traumatic Stress Disorder. He's had carpal tunnel syndrome and gastric distress. He presently works as a gardener in the institution with excellent marks. He is not considered a management problem in the institution.

A central difficulty for the Board is 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. More serious and significant to the Board is that these particular types of rape appear to be in reaction to stress. There is extensive file material concerning Mr. Dyer's childhood, the multiple boyfriends of his mother, and difficulties in the marriage also involving this kind of behavior, which apparently led to the discovery and eventual prosecution in Bremerton. Mr. Dyer shows that he is an orderly person, careful in his work and is able to maintain himself within the institution. The central difficulty for the Board, as discussed with Mr. Dyer and his counsel today, is that's precisely the behavior demonstrated in the crimes. The calculation, the laundering and washing to remove clues and not resorting to deadly force, but releasing the victims, are all consistent with the typeology that this particular crime exhibits. In making a decision about Mr. Dyer's rehabilitation and fitness to be released, we consider the crime as proven in a court of law and the appeal process exhausted. **Thus Mr. Dyer, for the Board, is an untreated sex offender with behaviors that are apparently motivated when he is in a period of stress.** The Board would anticipate that upon release, even at the age of 52, Mr. Dyer would encounter far more stresses than he may now, having accommodated to his life in the institution. It's the potential reaction to that stress that is of significant concern to the Board as a trigger to more attacks.

Psychological data in the file from the early 1990s indicated a relatively high reoffense risk. As indicated, this risk appears to have been ameliorated in current psychological tests. Of concern to the Board is the ability to learn how to take psychological tests. As indicated, the underlying criminal behavior reflects a high level of manipulation and sophistication. After full review of all available file materials it is the Board's conclusion the only responsible decision is to continue to incapacitate Mr. Dyer as not rehabilitated and fit to be released.

Appendix 11, at 2-4 (emphasis added).

On December 5, 2006, following this Court's Opinion at 157 Wn.2d 358 that Mr. Dyer's case be remanded for another parolability hearing, the Board entered another decision and reasons in his case in which it found him to be not parolable and added 80 months to his minimum term. Appendix 12, Decision and Reasons of December 5, 2006, Richard J. Dyer, DOC #281744. In its highly meticulous decision, the Board provided the following reasons for its most recent decision in Mr. Dyer's case:

*The Board is statutorily required to 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. (RCW 9.95.009(3))* Additionally, the Board is statutorily directed to not release a prisoner before the expiration of their maximum term; *unless in its opinion his or her rehabilitation has been complete and he or she is a fit subject for release. (RCW 9.95.100).*

The Board has the duty to thoroughly inform itself as to the facts of the person's crime; therefore all available information is reviewed in consideration of an offender's rehabilitation and risk. In carrying out its statutory duties, the Board conducts a complete review of an inmate's file; reviews all past materials and any newly available psychological evaluations and reports from the DOC, and conducts an in-person hearing with the inmate. The Board notes that Mr. Dyer was represented by legal counsel in the person of David B. Zuckerman at his hearing today.

At this .100 parole eligibility hearing, Mr. Dyer continued to deny any involvement in the crimes for which he was convicted. He has continued to deny these crimes from the very beginning. Despite Mr. Dyer's continued protestations

of innocence, however, it is not within this Board's jurisdiction to retry cases or to adjudicate guilt or innocence of those offenders under its jurisdiction. Rather, as set out in RCW 9.95.100, the Board's function is to determine, based upon an amalgam of different factors, whether an offender's rehabilitation is complete and that he or she is a fit subject for release. Mr. Dyer has been convicted of these crimes by a court and his conviction's for these two counts under our jurisdiction were reaffirmed by a court. RCW 9.95.100 unequivocally places the burden of proof regarding rehabilitation on the inmate.

File materials indicate that Mr. Dyer had jury convictions involving three rapes, he has had several failed appeals, all three victims identified him as the perpetrator, investigators were able to confirm he owned the vehicles identified by the two stranger victims, and there was similarity of method in all of the rapes. The behaviors demonstrated in the rapes are consistent with Mr. Dyer's personality profile as identified in varying degrees in all of the psychological reports conducted on him. The Board is therefore faced with an inmate who has been convicted of multiple violent sexual assaults, who is an untreated sex offender who has not demonstrated any insight into the criminal behavior that resulted in his convictions.

File materials also indicate that Mr. Dyer has participated in the following programs during his incarceration: Family Dynamics-Restorative Retelling Story Group; Non-Violent conflict Resolution; Anger/Stress Management; Victim Awareness; Moral Reconciliation Therapy and Love and Forgiveness Couples Seminar. There was a chemical dependency evaluation conducted on November 16<sup>th</sup> 2000, that indicated no specific problems. He was interviewed for the Sex Offender Treatment Program (SOTP) in January 1993 and found not amenable for treatment due to his denial of guilt. Mr. Dyer is not enrolled in a vocational program, but does work as a Recreational Assistant and receives class three compensation. Additionally, he runs an outside business which supports his family.

Mr. Dyer's early incarceration history consisted of a number of infractions involving physical violence and one suspected escape attempt in 1987. In recent years, he has demonstrated more control of his behavior. His last institutional infraction was in 1999 and his last serious infraction was in 1995.

At the behest of his attorney, Mr. Dyer discussed with the Board today his diagnosis of Post Traumatic Stress Disorder (PTSD). This diagnosis was made after he was incarcerated and was tied to his two tours of duty in Viet Nam. He reports that some of the symptoms were nightmares, inability to sweat inability to have empathy for other people's reactions. He reported that he was having these nightmares before he was arrested and convicted of the underlying offenses. He reports that he has gone through Gestalt therapy to address and understand his PTSD; he reports that he now perspires, was able to gain empathy for other people's experiences, and has utilized Toastmasters as a way to talk about and work through his military experiences.

While the Board does not base any decision of rehabilitation and assessment of risk solely on psychological evaluations, we none-the-less do consider them in our decision making process. In fact, the Board considers all available information in its deliberations. The Board's file materials in Mr. Dyer's case include psychological evaluations dating from 1993.

- The 1993 psychological evaluation assessed him as high risk for reoffense based on the assumption that the jury convictions were accurate and that Mr. Dyer was currently in a state of denial. The depth of sexual deviancy was also estimated to be high based on the same assumption and that any sexual deviancy had remained essentially untreated. This 1993 report also stated that he continued to demonstrate PTSD symptoms.

- A 1994 report found that his PK scale was at an average elevations, which did not corroborate his claimed PTSD symptoms. The 1994 report indicated impulsivity, poor judgment, aggression and blaming. The report also states that his risk of reoffense remained high and that the depth of sexual deviancy could not truly be assessed with an uncooperative client.
- The next psychological report in the file is from 1998 and it is more extensive than past reports, consisting of 13 pages: This report indicates that Mr. Dyer was diagnosed with PTSD and Sexual Sadism, as well as Personality Disorder with compulsive dependent, histrionic, and anti-social features; however, it also notes that his risk of reoffense in the community appears to be low to moderate with the moderate potential for a violent reoffense in the community. Of special interest is the psychological evaluation's notation that Mr. Dyer presented himself as an individual with an asexual image, failing to acknowledge even normal sexual desires and interests. It further noted that Mr. Dyer's knowledge of human sexuality is borderline and his general performance may be considered frankly dishonest. Mr. Dyer's scores on a personal preference inventory appear to have been high on the need for order, planning and organization in detail; the need to receive encouragement from others and to have others behave kindly and sympathetically to him; the need to work hard at a task or puzzle until it is solved; and the need to be able to do things better than others. This report summarized his higher scores on the inventory as suggesting the present of a strong compulsive tendency, while the lower scores suggested low needs to express himself to others in aggressive ways.
- The next psychological report was completed in 2001 and is five pages in length with supporting

testing materials included. This report indicates a number of health issues that should be addressed by the medical department. This report utilized some risk assessment instruments and rated him to be low risk for reoffense. However, it is noted that when scoring the MNSOST-R, under length of sexual reoffending history the reviewer scored him as having a sex offending history of less than one year. The personality inventory in this report is substantially shorter than in the 1998 report, but is not markedly different. Notably, the 1998 psychological report identified him as scoring remarkably low on the psychopathy scale.

- The most recent psychological evaluation conducted on Mr. Dyer was completed in February of 2005 by Dr. Monson, who had reviewed and concurred in the 2001 report. Dr. Monson scored Mr. Dyer as a low risk to reoffend sexually; the scoring tools utilized were not provided with this report. On the other hand, Mr. Dyer reportedly scored on one test in a manner characteristic of prisoners who might be referred to as “psychopathic manipulators” and the report noted that individuals in this group tend to be brighter than most offenders but lack achievement drive. It further notes that inmates who score as Mr. Dyer did are more likely to be diagnosed a psychopathic rather than psychotic. Dr. Monson notes that Mr. Dyer has strong inclination to behave in an accommodating and compliant manner, to follow rules and regulations faithfully, and to try to be a model prisoner. However, Mr. Dyer’s score on the psychopathy checklist appears to be even lower in this report than in the 2001 report.

Mr. Dyer’s attorney requested that the Board consider a June 2006 Washington State Institute for Public Policy (WDIPP) paper that compared the five year recidivism rate for 432 participants in the Department of Corrections’ Sex Offender Treatment Program (SOTP) and 432 sex offenders

who were willing to, but did not, participate in the SOTP. That report concluded that the SOTP does not reduce the recidivism rates of participants; it found a .8 percentage point difference in the felony sex recidivism rate between the two study groups. This paper is one of a whole series of reports on sex offenders done by the WSIPP.

The Board notes that another paper by the WSIPP in June 2006 found that those offenders not willing to participate are significantly different than those willing to participate in the SOTP. They report that some of the largest differences are related to risk for reoffending. **The 340 sex offenders not willing to participate in SOTP have much higher recidivism rates than those willing to participate: 63 percent recidivated with a felony offense, 30 percent with a violent felony, and almost 13 percent with a felony sex offense.**

The key findings in that report are:

- Offenders who were unwilling to participate in SOTP differ significantly from those who volunteer to participate.
- The criminal histories, risk scores, and demographic characteristics are much higher for those who are unwilling to participate.

Mr. Dyer's decision to not admit guilt necessarily results in an inability to participate in the SOTP; therefore, the paper that Mr. Zuckerman asked us to consider has little applicability to Mr. Dyer.

**The difficulty the Board has with Mr. Dyer's continual denial is that it makes him not amenable to treatment.**

We do not view sex offender treatment as a cure; what sex offender treatment can do is assist the offender in identifying their sexuality deviant beliefs that contribute to their behaviors; it may enable them to identify their offense patterns and provide them with the opportunity to develop tools and skills to intervene in an offense cycle. 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.

Mr. Dyer is to be commended for the self improvement work he has completed while incarcerated and for demonstrating an ability to significantly reduce his infraction behavior. However, without an exploration and understanding of the behaviors that directly resulted in his incarcerations, he remains at risk to repeat those behaviors in the community. Therefore, the Board does not find that Mr. Dyer has sufficiently demonstrated that he is completely rehabilitated and a fit subject for release.

Appendix 12 at 7-12 (emphasis added).

### **III. PRIOR STATE COURT HISTORY**

This Court entered a decision regarding Mr. Dyer's prior personal restraint petition on July 27, 2006, determining that the ISRB abused its discretion in denying Mr. Dyer parole, and remanded his case for a new parolability hearing before the Board. See In re Dyer, 157 Wn. 2d 358, 139 P. 3d 320 (2006). As noted above, the Board has since conducted a new parolability hearing in Mr. Dyer's case, based on this Court's Order of remand. See Id. at 369 and Appendix 12.

### **IV. ISSUES**

In Mr. Dyer's current personal restraint petition, he presents the following 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.

Personal Restraint Petition with Legal Authorities, at 4-5.

#### V. STANDARD OF REVIEW

An offender may also 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. In re Cashaw, 123 Wn.2d 138, 150, 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. Washington State courts have recognized that they 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, 763 P.2d 199 (1988); In re Myers, 105 Wn.2d 257, 264, 714 P.2d 303 (1986). This rule also applies to Board decisions denying proposed parole plans. One who contends

an agency's action is arbitrary and capricious carries a heavy burden and the scope of the court's review of such a challenge is narrow. Pierce County Sheriff v. Civil Service Commission, 98 Wn.2d 690, 695, 658 P.2d 648 (1983).

When the Board finds an offender not parolable, it must necessarily extend the offender's minimum term. In re Ecklund, 139 Wn.2d 166, 174, 985 P.2d 342 (1999); Cashaw, 123 Wn.2d at 143; In re Ayers, 105 Wn.2d 161, 167, 713 P.2d 88 (1986). In making decisions regarding parole, the Board is endowed with a "high degree of discretion." Ecklund, 139 Wn.2d at 174. While the Board is mandated by RCW 9.95.009(2) to consider the standards, purposes and ranges of the SRA in making decisions regarding duration of confinement and release on parole, the Board is not required to make decisions precisely congruent with SRA ranges. Addleman v. Board of Prison Terms and Paroles, 107 Wn.2d 503, 511, 730 P.2d 1327 (1986). The Board may set a term outside the relevant SRA standard range up to the limit of the maximum sentence provided it sets forth adequate written reasons for doing so. Id.; Myers, 105 Wn.2d at 262. This is precisely what the Board did. Unlike sentencing courts, the Board may (and in fact, must) consider additional factors, such as "rehabilitative aims" and future dangerousness, in determining a minimum term for a prisoner sentenced before enactment of the SRA. In re Locklear, 118 Wn.2d 409, 413-14, 823 P.2d 1078 (1992).

A Board decision fixing a new minimum term is reviewed for an abuse of discretion. Locklear, 118 Wn.2d at 418. The general standard for reviewing an exceptional sentence under the SRA is well-established and similar to that for reviewing a Board-imposed exceptional new term. To reverse a sentence outside the standard range, the reviewing court must find: (a) the reasons supplied by the sentencing judge are not supported by the record before the judge or those reasons do not justify a sentence outside the standard range for that offense; or (b) the sentence imposed was clearly excessive or clearly too lenient. RCW 9.94A.210(4); State v. Ritchie, 126 Wn.2d 388, 392-96, 894 P.2d 1308 (1995); State v. Pryor, 115 Wn.2d 445, 446, 799 P.2d 244 (1990); State v. Oxborrow, 106 Wn.2d 525, 530-31, 723 P.2d 1123 (1986). For a sentence to be clearly excessive, it must be shown to be clearly unreasonable (i.e., the result of authority or discretion exercised on untenable grounds or reasons, or an action no reasonable person would have taken). State v. Stephens, 116 Wn.2d 238, 803 P.2d 319 (1991); Oxborrow, 106 Wn.2d at 531.

A record evidencing lack of rehabilitation appropriately forms the basis for an aggravated exceptional minimum term. In re Robles, 63 Wn. App. 208, 217, 817 P.2d 419 (1991); In re Chavez, 56 Wn. App. 672, 675, 784 P.2d 1298 (1990). Predictions of future dangerousness justify an aggravated exceptional minimum term. In re George, 52 Wn. App. 135, 147, 758 P.2d 13 (1988).

“Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration and in disregard of the facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.” State v. Rowe, 93 Wn.2d 277, 284, 609 P.2d 1348 (1980). An abuse of discretion exists only if it can be said that the Board acted for untenable reasons, or if no reasonable person could have made the same decision. Wilson v. Board of Governors, 90 Wn.2d 649, 585 P.2d 136 (1978).

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) states the following:

Notwithstanding the provisions of subsection (2) of this section, the Indeterminate Sentence Review Board **shall 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.

RCW 9.95.009(3) (emphasis added). Based on the above statutes, the Board can legitimately be seen as a guarantor of the public’s safety.

Inmates have no liberty interest in being released before serving their maximum sentence. In re Marler, 108 Wn. App. 799, 807, 33 P.3d

743 (2001) (citing Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 [1979]); In re Ayers, 105 Wn.2d 161, 164-166, 713 P.2d 88 (1986). When it imposes sentences outside the standard range, the ISRB may consider the pre-SRA offender's level of rehabilitation. In re Chavez, 56 Wn. App. 672, 675, 784 P.2d 1298 (1990).

## VI. ARGUMENT

### A. **BECAUSE THE ISRB DID NOT ABUSE ITS DISCRETION IN DENYING MR. DYER PAROLE AND INCREASING HIS MINIMUM TERM BY 80 MONTHS, HIS FIRST GROUND FOR RELIEF FAILS.**

In his first ground for relief, Mr. Dyer argues that they Board abused its discretion. See Personal Restraint Petition at 23-29. Mr. Dyer's first ground for relief is without merit.

The central theme of Mr. Dyer's current personal restraint petition is that he is entitled to be released on parole, but goes beyond. Indeed, his current personal restraint petition expresses a righteous indignation as to the alleged injustice done to him by the Board when denying him parole. Mr. Dyer omits mention, however, of the horrific violations performed by him as to both of his rape victims. Forgotten in Mr. Dyer's personal restraint petition are his rapes, torture and humiliation of two utterly defenseless women who were bound and gagged during his predatory and sadistic rapes. Disregarded by Dyer as well are the inevitable aftereffects of such rapes upon the womens' lives. Instead, Mr. Dyer's personal restraint petition myopically focuses on his being allegedly wronged by

the Board. His petition is offensive in that regard, and this Court should find it equally so.

This Court previously held that an abusive discretion exists only if it can be said that the Board acted for untenable reasons, or if no reasonable person could have made the same decision. See Wilson v. Board of Governors, 90 Wash. 2d 649, 585 P. 2d 136 (1978).

In the Board's most recent decision in Mr. Dyer's case, the Board found Mr. Dyer not parolable, and added 80 months to his minimum term (though, as the Board explained, adding 80 months is the equivalent to adding 60 months from the date of Mr. Dyer's hearing. See Appendix 12, Decision and Reasons of December 5, 2006, at 1. Mr. Dyer was previously scheduled to have his parolability hearing occur on March 22, 2005, but Mr. Dyer's attorney Mr. Zuckerman, requested in writing that the hearing be postponed until a decision was issued by the Washington Supreme Court regarding Mr. Dyer's previous personal restraint petition).

The most recent psychological evaluation conducted on Mr. Dyer was completed in February of 2005, by Dr. Monson, who had reviewed and concurred in the earlier 2001 psychological report. See Appendix 12 at 10. The Board clearly noted in its decision the favorable psychological evidence for Mr. Dyer that Dr. Monson scored Mr. Dyer as a low risk to reoffend sexually. The Board also noted, however, that Mr. Dyer reportedly scored on one test in manner characteristic of prisoners who might be referred to as "psychopathic manipulators". See Id.

Additionally, Mr. Dyer's attorney requested that the Board consider a June 2006 Washington State Institute for Public Policy (WSIPP) paper that compared the five year recidivism rate for 432 participants in the DOC Sex Offender Treatment Program (SOTP) and 340 sex offenders who were willing to, but did not, participate in the SOTP. See Id. at 11. That report concluded that the SOTP did not reduce the recidivism rates of participants, but found a .8 percentage point difference in the felony sex recidivism rate between the two study groups. Id.

The Board noted also, however, that another paper by the WSIPP in June 2006 found that those offenders not willing to participate in treatment are significantly different than those willing to participate than those willing to participate in the SOTP. A latter report by the WSIPP reported that, for the Board, that some of the largest differences were related to risk for reoffending. Specifically, that the 340 not willing to participate in SOTP have much higher recidivism rates than those willing to participate: 63% recidivated with a felony offense, 30% with a violent felony, and almost 13% with a felony sex offense. See Id. at 11. The Board noted that the key findings in that report the following:

1. Offenders who were unwilling to participate in SOTP differed significantly from those who volunteered to participate.

2. The criminal history, risk scores, and demographic characteristics are much higher for those who are unwilling to participate.

See Id. at 11.

The Board found that the paper provided by Mr. Zuckerman, Mr. Dyer's attorney, had little applicability to Mr. Dyer, given Mr. Dyer's decision not to admit guilt for either of his two rape in the first degree convictions necessarily resulted in an inability to participate in the SOTP. See Id.

Based on the above, the Board summarized its conclusion in Mr. Dyer's case as follows:

The difficulty the Board has with Mr. Dyer's continual denial is that it makes him not amenable to treatment. We do not view sex offender treatment as a cure; what sex offender treatment can do is assist the offender in identifying their sexually deviant beliefs that contribute to their behaviors; it may enable them to identify their offense patterns and provide them with the opportunity to develop tools and skills to intervene in an offense cycle. 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.

Mr. Dyer is to be commended for the self improvement work he has completed while incarcerated and for demonstrating an ability to significantly reduce his infraction behavior. However, without an exploration and understanding of the behaviors that directly resulted in his incarceration, he remains a risk to repeat those behaviors in the community. Therefore, the Board does not find that Mr. Dyer has sufficiently demonstrated that he is completely rehabilitated and a fit subject for release.

Appendix 12 at 12.

As noted above, Mr. Dyer's personal restraint petition appears to contain an unwarranted sense of entitlement to parole. Neither the law nor the facts of his case justify such a sense of entitlement. As this Court made

plain in 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.” (Emphasis added.) See also Appendix 12 at 7-12.

In its most recent decision, the Board clearly did not ignore the available psychological evidence in Mr. Dyer’s case, as this Court found in its July 2006 decision in Mr. Dyer’s case, since the Board considered and made note of the most recent and favorable psychological evaluation of Mr. Dyer in February 2005 by Dr. Monson. See Appendix 12 at 10-11. The Board is certainly required to consider all relevant evidence as it bears on Mr. Dyer’s possible parolability, and it clearly did so as to Dr. Monson’s favorable psychological report. When considering such evidence, however, the Board need not and should not delegate its statutory discretion in making parolability decisions to any psychologist or any psychological evaluation, whether favorable or unfavorable to the offender. Ultimately, the Board is directed by statute and this Court’s jurisprudence to make parolability decisions. See RCW 9.95.100; see also In re Ecklund, 139 Wn.2d at 174 and January v. Porter, 75 Wn.2d 768, 774-76, 453 P.2d 876 (1969)

The Board also considered, at the suggestion of Mr. Dyer’s attorney, a June 2006 Washington State Institute for Public Policy paper that compared five year recidivism rates. The Board correctly noted, however, that Mr. Dyer’s decision not to admit guilt necessarily resulted in his inability to participate in the SOTP, therefore the paper that Mr.

Zuckerman asked the Board to consider had limited applicability to Mr. Dyer.

Moreover, the Board noted the significant findings of another paper by WSIPP in June 2006 that noted that 340 sex offenders not willing to participate in SOTP had much higher recidivism rates than those willing to participate. See Id. at 11 and Appendix 13, Sex Offender Sentencing In Washington State, Washington State Institute for Public Policy, June 2002, at 6. Given Mr. Dyer's continual denial of guilt as to his two rape in the first degree convictions, he remains not amenable to sex offender treatment within the SOTP. Without such treatment, Mr. Dyer will be unable to identify the sexual deviant beliefs that contribute to his behaviors with the ultimate of such treatment that the offender will not reoffend. Because Mr. Dyer has made a calculated decision not to admit guilt, the consequence of his choice is that he does not receive the treatment which might ultimately permit him to be found parolable. Therefore, although Mr. Dyer repeatedly castigates the Board for its decision not to parole him, it is Mr. Dyer, and not the Board, who bears the express statutory burden, as all potential parolees do, to demonstrate that they are completely rehabilitated and fit subjects for release. See RCW 9.95.100. As this Court is fully aware, the Board is statutorily prohibited from releasing an offender ("the Board shall not") unless the offender meets that demanding standard. Thus, although Mr. Dyer attempts to reverse that presumption based on the facts of his case, his attempt to do so is without merit. Because Mr. Dyer's refusal to admit

guilt and thus participate in SOTP suggests he had a much higher chance of recidivism than those offenders willing to participate in SOTP, the Board's decision to find him not parolable cannot have been an abuse of its discretion --- that no reasonable persons could have made the same decision, or that the Board acted for untenable reasons. If Board Member Dennis Thaut did not "see anything changing" in Mr. Dyer's case, that is because Mr. Dyer remains steadfast in his denial of guilt for two horrific rape **convictions**, and thus purposefully render himself unamenable for sex offender treatment. See Petition of Dyer at 28, citing App. P at 12. This Court should find that Mr. Dyer's decision to do so should be given no credence, and that his choice not to admit guilt prevents his rehabilitation through participation in the SOTP – and thus consequently – results in denial of parole. RCW 9.95.100.

Consequently, Mr. Dyer's first ground for relief fails.

**B. THE BOARD'S DECISION TO DENY MR. DYER PAROLE DID NOT VIOLATE RCW 9.95.009(2).**

In Mr. Dyer's second ground for relief, he contends that the Board's decision in this case violated RCW 9.95.009(2) because it is not "reasonably consistent" with the sentencing reform act (SRA). Mr. Dyer's second ground for relief is without merit.

Statute or regulation may establish a state-created liberty interest if it contains substantive limits on official decision-making; that is, no discretion is accorded and the outcome is dictated by the existence of a condition precedent. In re Cashaw, 123 Wn.2d at 144. "Thus, laws that dictate

particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot.” *Id.* (emphasis added).

The statute governing parolability decisions expressly confers full 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). Notwithstanding the statutory requirement the Board make decisions considering the standards, purposes and range of the SRA, it is not absolutely bound by the SRA and may exceed the SRA ranges provided it sets forth adequate written reasons. RCW 9.95.009(2). The SRA did not supplant the parole statute or the Board’s discretion in making parolability decisions; “The Board is making the same types of decisions but it is now required to consider different factors.” Addleman v. Board of Prison Terms, 107 Wn.2d at 511.

Contrary to Mr. Dyer’s assertion, RCW 9.95.009(2) and the SRA do not establish substantive predicates such that he has a state-created liberty interest in parole release upon the expiration of his original minimum term. The exercise of Board discretion continues to be the sole basis for parole release. In any case, it is stare decisis that Washington state parole statutes do not contain the kind of substantive predicates sufficient to constitute a state-created liberty interest in parole. In re Ayers, 105 Wn.2d 161, 164-167, 713 P.2d 88 (9186). Accordingly, this claim lacks merit.

Inmates have no liberty interest in being released before serving the full maximum sentence. In re Marler, 108 Wn. App. 799, 807, 33 P.3d 743 (2001) citing Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); In re Ayers, 105 Wn.2d at 164-166. A prisoner's sentence prior to the enactment of the SRA is "subject entirely to the discretion of the Board, which may parole him now or never." In re Marler, 108 Wn. App. at 807, citing In re Ecklund, 139 Wn.2d 166, 174-175, 985 P.2d 342 (1999), quoting In re Powell, 117 Wn.2d 175, 196, 814 P.2d 636 (1991). Mr. Dyer cites In re Myers for the proposition that the "ISRB created precisely the sort of "gross disparity" that RCW 9.95.009(2) was designed to prevent." See In re Myers, 105 Wn.2d at 267." Opening Brief, at 18. However, as this Court stated in Myers:

Myers argues that the language of RCW 9.95.009(2) is void for vagueness. In support of this argument, Myers points to the language of RCW 9.95.009(2), which requires the Board to "attempt" to be "reasonably consistent" with SRA guidelines. Myers argues that a person in his class who receives a sentence after July 1, 1984, for a crime committed before that date cannot be certain what standards and guidelines the Board will use in setting his minimum term. Therefore, according to Myers, the law does not state with sufficient clarity the consequences of violating the criminal code.

...

This court construes remedial statutes liberally in order to effect the remedial purpose for which the Legislature enacted the statute. *State v. Grant*, 89 Wn.2d 678, 685, 575 P.2s 210 (1978). See also *Peet v. Mills*, 76

Wash. 437, 439, 136 P. 685 (1913); *Ingersoll v. Gourley*, 72 Wash. 462, 472, 130 P. 743 (1913). The Legislature clearly enacted RCW 9.95.009(2) 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. Accordingly, this court should construe the provision liberally to advance the overall legislative purpose. *State v. Grant, supra* at 685. *See also State v. Bishop*, 94 Wn.2d 116, 118, 614 P.2d 655 (1980).

The Legislature apparently realized that the Board could not comply exactly with the SRA, and therefore gave the SRA prospective application, subject to the requirement of RCW 9.95.009(2). The requirement that the Board "attempt" to be "reasonably consistent" with the SRA reflects this realization. The Legislature intended that the Board consider and impose sentences reasonably consistent with the SRA. Reasonable persons need not guess at the meaning of the challenged provision. *See Seattle v. Rice, supra; State v. Grant, supra*. Accordingly, we hold that RCW 9.95.009(2) is not void for vagueness under either the Fourteenth Amendment's due process clause, or under article 1, section 3 of the Washington Constitution.

In re Myers, 105 Wn.2d at 267-268 (emphasis added). When it imposes sentences outside the standard range, the ISRB may consider the pre-SRA offender's level of rehabilitation. In re Chavez, 56 Wn. App. 672, 675, 784 P.2d 1298 (1990).

Mr. Dyer argues that his minimum sentence, as based upon the Board's most recent addition of 80 months to that minimum sentence, places that sentence far beyond the high end of the standard range of 85 months. Opening Brief, at 17. RCW 9.95.009(3), however, states the following:

Notwithstanding the provisions of subsection (2) of this section, the Indeterminate Sentence Review Board shall 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.

RCW 9.95.009(3). Because Mr. Dyer remains in denial for his two horribly violent and predatory sex crimes, because he cannot be treated in the sexual offender treatment program (SOTP) without admitting to such offenses, and because Dr. Jones previously noted that without the benefit of special treatment for sexual deviancy, Mr. Dyer's risk of re-offense remains high, the Board acted appropriately and in accordance with RCW 9.95.009(3) when it found in December 2006 that Mr. Dyer remained not parolable. See Appendix 12. As this Court instructed in In re Locklear:

Locklear's argument is based on theory that posits exact congruency between post-and pre-SRA practices and decision-making criteria. However, RCW 9.95.009(2) requires that ISRB decisions on duration of confinement be "reasonably consistent" with SRA purposes, standards, and sentencing ranges. Addleman. While the ISRB "shall consider" the purposes, standards, and sentencing ranges of the SRA, it is not required to make decisions that are based on exactly the same criteria as an SRA exceptional sentence: the Board "shall *attempt* to make decisions *reasonably consistent* with [SRA] ranges, standards, purposes, and [minimum term] recommendations [of the sentencing judge and prosecuting attorney]". (Italics ours.) 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.<sup>3</sup>

In re Locklear, 118 Wn.2d at 413-14 (emphasis added and in the original).

Moreover, the beginning of RCW 9.95.009(3) states the following:

**(3) Notwithstanding the provisions of subsection (2) of this section...** the indeterminate sentence review board shall give public safety considerations the highest priority when making all discretionary decisions...regarding the ability for parole....”

(Emphasis added.)

As noted above, the Board need not mirror an inmate’s minimum term with that of the SRA ranges, but is required to attempt to make its decision reasonably consistent with the SRA. See In re Ecklund, 139 Wn.2d at 173-74. Given the significant risk of recidivism in Mr. Dyer’s case, for the reasons stated above, the Board’s exceptional sentence in his case was not an abuse of its discretion, given the adequate reasons expressed by the Board in its most recent decision. See Appendix 12.

In this Court’s July 2006 Dyer decision, the dissent filed by Justice Fairhurst, to which three other Justices affixed their names in agreement,

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<sup>3</sup> In past decisions, this court has recognized the rehabilitative purpose of the indeterminate sentence and parole system. See In re Mota, supra at 476; Pierce v. Department of Social & Health Servs., 97 Wn.2d 552, 557, 646 P.2d 1382 (1982) (the purpose of parole “is to reintegrate [convicted criminals] into society . . .”). Pierce also recognized that parole revocation and more time in jail serves a rehabilitative purpose. The point of recommitting an individual to prison after revoking his or her parole is “to protect society and improve the chances of rehabilitation.” (Italics ours.) Pierce, at 558. (Footnote by court.)

eloquently captured the essence of Mr. Dyer's case then, as it captures it

now:

Although the ISRB generally has broad discretion in determining whether to release a prisoner, the ISRB must determine that a prisoner has been rehabilitated before it may release him. Under RCW 9.95.100, the legislature has statutorily precluded the ISRB from releasing a prisoner prior to the expiration of his maximum term, "unless in its opinion [the prisoner's] rehabilitation has been complete and he or she is a fit subject for release." Additionally, in WAC 381-60-160(1), the first reason listed as a possible justification for a finding of non-parolability is "[a]ctive refusal to participate in available program or resources designed to assist an offender to reduce the risk of reoffense . . ." In Ecklund, this court upheld the ISRB's decision not to parole a prisoner because he refused treatment for his alcoholism, despite other evidence of good behavior in prison, including participation in other offender change programs. 139 Wn.2d at 169, 176. Thus, the majority's contention that Dyer "does not actively refuse to participate in the sex offender treatment programs" is meritless. Majority at 364.

This court should uphold the ISRB's decision not to release Dyer because he has not participated in sex offender treatment. In its written decision, the ISRB noted that Dyer "is an untreated sex offender with behaviors that are apparently motivated when he is in a period of stress." Ex. 11, at 3. The ISRB concluded that "the only responsible decision is to continue to incapacitate Mr. Dyer as not rehabilitated and fit to be released." Id. at 4. The ISRB followed the statutory directives in WAC 381-60-160, which allows the ISRB to deny release based on refusal to participate in a treatment program, and in RCW 9.95.009(3) and .100, which direct the ISRB to deny release based on refusal to participate in a treatment program, and in RCW 9.95.009(3) and .100 which direct the ISRB to give public safety the highest priority and not release a prisoner until he has been rehabilitated. Thus, I cannot say that the ISRB's decision is arbitrary and

capricious or that the ISRB acted willfully or unreasonably. Based on the ISRB's statutory directives, I would hold that the ISRB did not abuse its discretion by basing its decision on the fact that Dyer was not rehabilitated because he had not received sex offender treatment.

In re Dyer, 157 Wn.2d at 381-82.

Based on the above, Mr. Dyer's second ground for relief fails.

**C. BECAUSE NEITHER RCW 9.95.009(3) NOR RCW 9.95.009(2) VIOLATES THE FEDERAL EX POST FACTO CLAUSE, MR. DYER'S THIRD AND FIFTH GROUNDS ARE WITHOUT MERIT.**

In his third and fifth grounds for relief, Mr. Dyer contends that the Board's reliance on RCW 9.95.009(3), which requires it to give "highest priority" to public safety, violates the federal ex post facto clause. See Personal Restraint Petition of Dyer at 5 and 41-43. In his fifth ground, Mr. Dyer contends that as applied by the Board, RCW 9.95.009(2) violates the federal ex post facto Clause. See Petition at 5 and 45-46. Mr. Dyer's third and fifth grounds for relief are without merit.

The Washington State Constitution and the United States Constitution prohibit the enactment of ex post facto laws. U.S. Const., art. I, § 23; Const. art. I, § 10, cl. 1. The Washington Supreme Court has long held that Washington's ex post facto prohibition is co-extensive with the federal provision. Johnson v. Morris, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976) (adopting analytical framework of Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L. Ed. 2d 648 (1798)); see also State v. Hennings, 129 Wn.2d 512, 524-25, 919 P.2d 580 (1996) (approving United States Supreme Court holding in

California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995)). Ex post facto guarantees prohibit enactment of laws that “retroactively alter the definition of crimes or increase the punishment for criminal acts.” California Dep't of Corrections v. Morales, 115 S. Ct. at 1601; accord, State v. Hennings, 129 Wn.2d at 525.

A law violates the ex post facto prohibition if it:

- (1) is substantive, as opposed to merely procedural;
- (2) is retrospective (applies to events which occurred before its enactment); and,
- (3) disadvantages the person affected by it.

Hennings, 129 Wn.2d at 525.

Disadvantage is not determined by weighing the disadvantageous aspects against the ameliorative effects. See Personal Restraint of Powell, 117 Wn.2d 175, 189-190, 814 P.2d 635 (1991). Rather, the sole determinative factor is “whether the law alters the standard of punishment which existed under prior law.” State v. Ward, 123 Wn.2d 488, 497, 869 P.2d 1062 (1994) (emphasis in original); accord, Hennings, at 526. “Finding a[n ex post facto] violation turns upon whether the law changes legal consequences of acts completed before its effective date.” State v. Edwards, 104 Wn.2d 63, 71; 701 P.2d 508 (1985). Ex post facto concerns do not comprehend an individual’s right to reduced punishment or, strictly speaking, avoiding the risk of increased punishment. Dobbert v. Florida, 432 U.S. 282, 293, 97 S. Ct. 2290, 2298, 53 L. Ed. 2d 344 (1977). The evil to be avoided is “the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the

crime was consummated.” Powell, 117 Wn.2d at 184-185. Ultimately, if a change in the law does not increase the punishment available at the time the crime was committed, it does not constitute an ex post facto violation. In re Williams, 111 Wn.2d 353, 363, 759 P.2d 436 (1988).

The ex post facto prohibition does not preclude any intervening legislative enactment or amendment that has a “speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes.” Morales, 115 S. Ct. at 1605. Therefore, in order to prevail on an ex post facto challenge, the petitioner must “show with certainty that the sentence is harsher. The change in the law cannot result in mere speculation that the punishment is more severe.” Personal Restraint of Stanphill, 134 Wn.2d at 173.

Mr. Dyer is serving a life sentence and has no right to parole at any particular time. Thus, he does not show with certainty that but for the “public safety” admonition, he would have been released on parole. As this Court stated in Stanphill:

“the SRA ranges do not guarantee release and pre-SRA offenders must still establish parolability. For this reason, any inmate serving an indeterminate life sentence can never establish [that] more punishment is being imposed under whatever SRA guidelines the Board applies.”

Stanphill, 134 Wn.2d at 172 (emphasis added).

In this case, Respondent need not address the first two prongs of the ex post facto inquiry because Mr. Dyer does not and cannot demonstrate with certainty that RCW 9.95.009(3) makes his punishment more severe. At

the time of his crimes, the statutory presumption required that Mr. Dyer would serve the entirety of the maximum sentence imposed by the trial court: Life. RCW 9.95.100. The enactment of RCW 9.95.009(3) in no way altered that punishment. Any assertion that he might have been released on parole earlier, absent the direction of RCW 9.95.009(3), is mere speculation and insufficient to support an ex post facto challenge.

As a result, because Mr. Dyer is serving a life sentence and has no right to parole at any particular time, he cannot show with certainty that but for the “public safety” admonition, he would have been released on parole. Therefore, Mr. Dyer’s ex post facto claim must fail.

For the same reasons as above, Mr. Dyer’s contention that RCW 9.95.009(2) as applied by the Board, violates the federal ex post facto clause also fails. Moreover, as Mr. Dyer himself concedes, this Court rejected the claim that RCW 9.95.009(2) was an ex post facto law in its holding in In Re Powell, 117 Wn.2d 175, 186-187, 814 P. 2d 635 (1991). As this Court definitively held in Powell, RCW 9.95.009(2) is not violative of ex post facto. See In re Powell, 117 Wn.2d at 184-196. Consequently, Mr. Dyer’s fifth ground for relief fails.

**D. THE ISRB’S DECEMBER 2006 DECISION IN MR. DYER’S CASE DID NOT VIOLATE HIS FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION.**

In his fourth ground for relief, Mr. Dyer complains that the Board’s decision violated his right to equal protection under the

Fourteenth Amendment to the U.S. Constitution. See Petition at 5 and 43-45. This claim is also without merit.

It is well-established that the distinction between the Sentencing Reform Act (SRA) and indeterminate offenders does not violate equal protection. In re Whitesel, 111 Wn.2d 621, 763 P.2d 199 (1988); In re Storseth, 51 Wn. App. 26, 32, 751 P.2d 1217 (1988); McQueary v. Blodgett, 924 F.2d at 835; and, Foster v. Indeterminate Sentence Review Board, 878 F.2d 1233 (9th Cir. 1989). Therefore, equal protection does not require that Mr. Dyer receive a minimum term equal to that of an SRA offender.

Both the Constitutions of the United States and the State of Washington guarantee equal protection under the law, directing similar treatment for similarly situated persons. U.S. Const. amend. XIV, § 1; Const. art. I, § 12; State v. Ward, 123 Wn.2d 488, 515, 869 P.2d 1062 (1994). For the purposes of constitutional analysis, this Court has treated the federal equal protection clause and the Washington privileges and immunities clause as providing similar protections. O'Day v. King Cy., 109 Wn.2d 796, 812, 749 P.2d 142 (1988); Cosro, Inc. v. Liquor Control Bd., 107 Wn.2d 754, 759, 733 P.2d 539 (1987).

The first step in any equal protection determination is to identify the appropriate standard of judicial scrutiny. In re Borders, 114 Wn.2d 171, 175-76, 786 P.2d 789 (1990). Challenges to criminal sentencing are examined under a rational basis standard. State v. Heiskell, 129 Wn.2d 113, 123-24, 916 P.2d 366 (1996); Borders, 114 Wn.2d at 175-76; Whitesel, 111 Wn.2d at 634. Reviewing courts then determine whether there is a rational

relationship between that classification and a legitimate state interest. State v. Heiskell, 129 Wn.2d at 123-24.

In order to withstand scrutiny under the rational basis standard, the classification must: 1) apply equally to all members in the designated class; 2) be premised on reasonable grounds for distinguishing between those within the class and those outside the class; and, 3) bear a rational relationship to the purpose of the legislation. O'Day v. King Cy., 109 Wn.2d at 814; accord Forbes v. Seattle, 113 Wn.2d 929, 943, 785 P.2d 431 (1990); Everett v. Heim, 71 Wn. App. 392, 399, 859 P.2d 55 (1993). Demonstrating unequal treatment alone is insufficient to establish an equal protection violation; equal protection guarantees equal treatment under the law, not equal results. In re Ayers, 105 Wn.2d at 167; McQueary v. Blodgett, 924 F.2d 829, 835 (9th Cir. 1991).

It is stare decisis that differences between indeterminate sentences and SRA sentences do not violate equal protection guarantees. Personal Restraint of Stanphill, 134 Wn.2d at 175; Whitesel, 111 Wn.2d at 632-35. Second, for the purposes of equal protection analysis, it is immaterial that other indeterminate offenders have been released or received final discharges while Mr. Dyer has not. He has received the same treatment under the law (fixing of a minimum term, fixing of new minimum terms, parolability review after expiration of minimum term less good-time credits, written decisions regarding each Board action) as all other indeterminate offenders. Equal protection does not require identical results for different persons. See Ayers, 105 Wn.2d at 167. The very nature of Board decision-making

requires an individualized review of each offender to determine that person's rehabilitation and fitness for release. RCW 9.95.100, .110, and .170.

It is the processes which must be similar and not, as Mr. Dyer urges, the result. He does not demonstrate that other indeterminate offenders are paroled without first undergoing in-person parolability hearings or without the Board first finding they are both rehabilitated or a fit subject for release. He does not demonstrate other indeterminate offenders receive final discharges from supervision without first completing three years of successful parole in the community. See RCW 9.96.050. Because he does not demonstrate he is being treated dissimilarly under the law, his equal protection challenge fails.

**E. BECAUSE THIS COURT HELD IN IN RE MYERS THAT RCW 9.95.009(2) WAS NOT VOID FOR VAGUENESS UNDER THE FEDERAL DUE PROCESS CLAUSE, MR. DYER'S SIXTH GROUND FOR RELIEF FAILS.**

This Court definitively determined in In re Myers (see above) that RCW 9.95.009(2) was not void for vagueness:

The Legislative apparently realized that the Board could not comply exactly with the SRA, and therefore gave the SRA prospective application, subject to the requirement of RCW 9.95.009(2). The requirement that the Board "attempt" to be "reasonably consistent" with the SRA reflects this realization. The Legislature intended that the Board consider and impose sentences reasonable consistent with the SRA. Reasonable persons need not guess at the meaning of the challenged provision. See Seattle v. Rice, supra; State v. Grant, supra. Accordingly, **we hold that RCW 9.95.009(2) is not void for vagueness under either the Fourteenth Amendment's due process clause, or**

**under article 1, section 3 of the Washington Constitution.**

In re Myers 105 Wn.2d at 268 (emphasis added). Based on this Court's holding above in Myers, Mr. Dyer's sixth ground for relief fails.

**F. BECAUSE THE ISRB'S DECEMBER 2006 DECISION IN MR. DYER'S CASE DID NOT VIOLATE HIS FOURTEENTH AMENDMENT RIGHT TO SUBSTANTIVE DUE PROCESS, HIS SEVENTH CLAIM FAILS.**

In Mr. Dyer's seventh ground for relief, he contends that the decision in his case violated his fourteenth amendment right to substantive due process. See Petition of Dyer, at 5 and 47-48. Mr. Dyer's seventh ground for relief lacks merit.

In his petition, Mr. Dyer states that "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." See Petition at 48. Mr. Dyer's assertion is utterly disingenuous, however, because he knows quite well that there is a well defined task which is entirely within his control that he can perform to be paroled, but simply chooses not to do it: admit his guilt for his convictions for two counts of rape in the first degree, for which a jury found him guilty, and thus, based on that admission, enter, fully participate in and successfully complete the SOTP.

Thus, when Mr. Dyer complains that there is "absolutely nothing he can do to be paroled," he ignores the reality that he was convicted of both rapes, and of his legal burden that he must demonstrate that he is completely rehabilitated and a fit subject for release. By choosing in

calculated fashion to deny his guilt, he renders himself, as he is well aware, to being unamenable for treatment in the SOTP. Therefore, his contention that there is “absolutely nothing” he can do to be paroled is meritless on its face. Therefore, Mr. Dyer’s seventh ground for relief fails.

**G. THE BOARD’S HISTORY OF DECISIONS IN MR. DYER’S CASE DOES NOT AMOUNT TO CRUEL AND UNUSUAL PUNISHMENT.**

In his petition, Mr. Dyer contends that the Board’s actions in this case constitute cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution and Article I, Section 14 of the Washington State Constitution. See Petition at 5 and 48. This claim is utterly meritless.

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment. The Eighth Amendment is applicable to the states by way of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962). Outside the context of capital sentences, the United States Supreme Court has indicated:

[S]uccessful challenges to the proportionality of particular sentences [will be] exceedingly rare. . . . Reviewing courts . . . should grant substantial deference to the broad authority that the legislature necessarily possesses in determining the types and limits of punishments for crimes.

Solem v. Helm, 463 U.S. 277, 289-90, 103 S. Ct. 3001, 3009-10, 77 L. Ed. 2d 637 (1983) (internal cites and quotes omitted).

The Eighth Amendment precludes certain methods of punishment. Harmelin v. Michigan, 501 U.S. 957, 979, 111 S. Ct. 2680, 2693, 115 L. Ed. 2d 836 (1991). It does not prohibit disproportionate punishment. Harmelin v. Michigan, 501 U.S. at 986-87, 111 S. Ct. at 2696-97. Instead, it forbids extreme sentences that are disproportionate to the crime. Harmelin, 501 U.S. at 996, 111 S. Ct. at 2702. "Generally, as long as the sentence imposed on the defendant does not exceed statutory limits, we will not overturn it on eighth amendment grounds." United States v. Zavala-Serra, 853 F.2d 1512, 1518 (9th Cir. 1988). After incarceration, only the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment. Whitley v. Albers, 475 U.S. 312, 319, 106 S. Ct. 1078, 1084, 89 L. Ed. 2d 251 (1986). The Ninth Circuit previously rejected contentions that disparity between indeterminate and determinate sentences under the SRA or that the longer indeterminate sentences constitute cruel and unusual punishment. McQueary v. Blodgett, 924 F.2d 829, 835-836 (9th Cir. 1991).

A prisoner denied parole notwithstanding his accumulation of good time credits has not been subjected to cruel and unusual punishment. After incarceration, only the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment. Whitley v. Albers, 475 U.S. 312, 319 (1986); Estelle v. Gamble, 429 U.S. 97, 103 (1976). The Board setting of a minimum term to amount to an exceptional sentence under the SRA does not constitute

cruel and unusual punishment. McQueary v. Blodgett, 924 F.2d 829 (9th Cir. 1991).

At the time Mr. Dyer committed the rapes for which he was convicted (1980), the Washington legislature directed that First Degree Rape was punishable by a maximum sentence of no less than 20 years. RCW 9A.44.040(2)(1979); 9A.20.020(1)(a) (1979). Sentencing courts were authorized to impose maximum sentences up to life. Id. In no case was the Board permitted to fix a minimum term of less than three years. RCW 9A.44.040(2) (1979).

Mr. Dyer's maximum sentence of Life falls within legislative mandate extant at the time of his crimes and convictions. His original minimum term was precisely the minimum allowable maximum sentence available in 1980. Although his Board-fixed minimum term exceeds the SRA standard ranges, it does not exceed the exceptional aggravated sentence that could be imposed under the SRA. See RCW 9.94A.120(13) (court may not impose term of confinement exceeding statutory maximum) and 9A.20.021(1)(a) (maximum sentence for Class A felony is life imprisonment). Nor does it exceed his maximum sentence. Appendix 1.

In any case, Mr. Dyer's sentence is not being increased by the Board. His sentence, fixed by the trial court, was and remains Life. See Appendix 1. The Board cannot and does not alter his maximum sentence. See Honore v. State Board of Prison Terms and Paroles, 77 Wn.2d at 700; St. Peter v. Rhay, 56 Wn.2d at 299. Rather, the Board fixes and adjusts his minimum term. RCW 9.95.040 and 9.95.052. This it may

properly do provided it does not exceed the court-imposed maximum sentence, RCW 9.95.040, and provided it sets forth adequate written reasons for exceeding a comparable SRA standard range (RCW 9.95.009(2)). Mr. Dyer's lack of rehabilitation (i.e., denial of culpability for adjudicated crimes, lack of crime-related counseling, lack sexual deviancy treatment) is an appropriate basis for adding, most recently, 80 months to his minimum term. Personal Restraint of Locklear, 118 Wn.2d at 409, 415, 823 P.2d 1078 (1992); In re Storseth, 51 Wn. App. at 31.

Finally, Mr. Dyer does not demonstrate that the Board's total minimum term is the result of wanton and unnecessary infliction of pain. Cook, 114 Wn.2d at 813-814 (unsubstantiated allegations should not form the basis of personal restraint relief). The record of the Board's decision-making reflects a reasoned basis for fixing a 240-month original minimum term, finding him not parolable, followed by three subsequent 60 month additions to that minimum term. See Appendices 4, 5, 6, 7, 8, 9, 10 and 11. Consequently, the Board's adding another 80 months to Mr. Dyer's minimum term in December 2006 constitutes neither cruel nor unusual punishment. Appendix 12. Therefore, this claim must fail.

**H. EVEN IF THIS COURT FINDS THAT MR. DYER'S CURRENT PETITION MERITS RELIEF, THE SEPARATION OF POWERS DOCTRINE PROHIBITS THIS COURT FROM ORDERING MR. DYER'S PAROLE, OR, ORDERING THE ISRB TO PAROLE HIM.**

In his current personal restraint petition, Mr. Dyer argues that the appropriate remedy in Mr. Dyer's case is for this Court to issue an order

directing the ISRB to parole Dyer. See Personal Restraint Petition of Dyer, at 29-35. Because the remedy Mr. Dyer seeks above would violate the separation of powers doctrine, this Court cannot order that the ISRB parole Mr. Dyer, even if this Court finds that the Board's last decision in his case constituted an abuse of its discretion.

First, Mr. Dyer's request that this Court simply order the Board to parole him, rather than remanding the case for a new parolability hearing, flies in the face of this Court's own jurisprudence. Washington State courts have recognized that they 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, 763 P.2d 199 (1988); In re Myers, 105 Wn.2d 257, 264, 714 P.2d 303 (1986). This rule also applies to Board decisions denying proposed parole plans.

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) states the following:

Notwithstanding the provisions of subsection (2) of this section, the Indeterminate Sentence Review Board **shall 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.

RCW 9.95.009(3) (emphasis added). Based on the above statutes, the Board can legitimately be seen as a guarantor of the public's safety.

Moreover, inmates have no liberty interest in being released before serving their maximum sentence. In re Marler, 108 Wn. App. 799, 807, 33 P.3d 743 (2001) (citing Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 [1979]); In re Ayers, 105 Wn.2d 161, 164-166, 713 P.2d 88 (1986).

In his petition to this Court, Mr. Dyer cites a number of cases in support of his contention that this Court should not only find that the Board's last decision in his case was an abuse of its discretion, but that the Court should order the Board, an executive branch agency, to simply parole Dyer, rather than remanding the matter for a new parolability hearing. Mr. Dyer's unprecedented request that this Court order the Board to parole him should be denied by this Court.

Second, several of the cases cited by Mr. Dyer in support of his contention that this Court should simply order the Board to parole him apply to a variety of contexts that have no relationship to the legal issue before this Court: Mr. Dyer's potential parole, based on the case law and statutes of the State of Washington. See Petition of Dyer, at 30-32. And, as Mr. Dyer himself concedes, there are no published Washington cases in

which the court has ordered an offender's parole. Id. at 35. In his concession, Mr. Dyer goes on to argue that while no such cases exist to support his position in this regard, he states that "such a ruling would be consistent with this Court's decision in other cases." Id. Mr. Dyer then proceeds to cite two cases, Coalition for the Homeless v. DSHS 133 Wn.2d 894, 914, 949 P.2d 1291 (1997) and Group Health etc. v. King Co. Med. Soc. 39 Wn.2d 586, 669, 237 P.2d 737 (1951) neither of which have any factual applicability to his case whatsoever.

Additionally, Mr. Dyer's citation to those cases which actually dealt with the issue of parole is distinguishable from his own. For example, in Mickens-Thomas v. Vaughn, 321 F.3d 374 (3<sup>rd</sup> 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's decision not to parole an offender, despite an earlier decision by the Court remanding the case to the parole board, resulted in the court granting the offender "unconditional habeas corpus relief." Mickens, 355 F.3d at 310. The court noted in its decision that its prior decision in the offender's case granting conditional habeas relief was based upon its finding of systematic ex post facto violations by the parole board in applying newly amended Pennsylvania parole laws and guidelines to the offender's parole applications – a finding which has no applicability to this Court's prior decision's in Dyer's case. Id. at 298.

Second, the Third Circuit stated in its decision the following:

If the Guidelines recommend release, the board should fairly consider the weight of this recommendation. A decision contrary to a Guidelines recommendation must be buttressed by *unique factors* which outweigh the Guidelines endorsement. Moreover, **release on parole is a Board policy presumption, and parole should be granted unless countervailing negative factors affirmatively outweigh reasons supporting release.**

Mickens-Thomas v. Vaughn, 355 F.3d at 303 (emphasis added and in the original). In the State of Washington, as this Court is aware, the express statutory presumption is **against** parole, not in favor of it, unless the offender demonstrates that he is completely rehabilitated and a fit subject for release. See RCW 9.95.100.

Mr. Dyer's case is also distinguishable from both Marino v. Travis, 13 A.D. 3d 453, 787 N.Y. S.2d 54 (2004) and Trantino v. New Jersey State Parole Board, 166 N.J. 113, 764 A.2d 940 (2001), cases cited by him in his petition. As Mr. Dyer himself points out, the parole statutes in both New York and New Jersey state that the inmate shall be released at the expiration of his minimum term unless the parole board determines there is a reasonable probability that the inmate will not live and remain at liberty without violating the law or, it is shown by a preponderance of the evidence that there is a substantial likelihood that the offender will commit a crime if released. See Petition of Dyer at 34, n. 11; see also Marino, 13 A.D. at 455 and Trantino, 166 N.J. at 126. Thus, the presumption in favor of release in each of these cases is the exact opposite of Washington's presumption against release, which distinguishes Mr. Dyer's case from both Marino and Trantino. RCW 9.95.100. Moreover, unlike in Trantino,

where the Board disregarded substantial evidence of rehabilitation, Mr. Dyer has demonstrated absolutely no rehabilitation whatsoever, because he has not yet begun the SOTP, based on his calculated choice not to admit to his crimes. Thus, because he has not yet begun his rehabilitation let alone completed it, the ISRB cannot have abused its discretion by denying him parole. See RCW 9.95.100.

Additionally, Mr. Dyer's baseless attempt to shift the burden from the offender being statutorily required to affirmatively demonstrate he is entitled to release, to, instead, the Board being required to show that its denial of parole was justified is meritless on its face, unless this Court completely invalidates RCW 9.95.100 and overturns its earlier ruling in In re Ecklund, 139 Wn.2d at 175-76.

Finally, Mr. Dyer's citation to In re Smith 109 Cal. App. 4<sup>th</sup> 489, 134 Rptr. 2d 781 (2003) is equally misplaced. Again, as Mr. Dyer points out, the California system of parole differs significantly from Washington's, given the role that the Governor plays in the California parole system. See Petition of Dyer at 34-35; see also In re smith, 109 Cal. App. 4<sup>th</sup> at 503. Therefore, the decision of the Smith court has little applicability, if any, to Mr. Dyer's case.

Of even greater significance to this case is Mr. Dyer's position that this Court should order the Board to parole him, rather than remand the matter for a new parolability hearing. See Petition of Dyer, at 29-35. Mr. Dyer's position, however, is clearly violative of the separation of powers doctrine.

The Board of Prison Terms and Paroles (now the ISRB, see RCW 9.95.001) was established by the legislature in 1935. See Laws of 1935, ch. 114, § 1, at 308-319. The ISRB is an executive branch agency. The ISRB is empowered under RCW 9.95.100 not to release a prisoner on parole until his or her maximum term expires unless in its opinion, the prisoner's rehabilitation has been complete and he or she is a fit subject for release. See Id.

The Washington Constitution does not include a formal separation of powers clause. See Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). Nevertheless, the courts have traditionally interpreted the state's division of power among the three different branches to give rise to a separation of powers doctrine in Washington. Id. at 135, citing In re Juvenile Director, 87 Wn.2d 232, 238-40, 552 Wn.P.2d 163 (1976). The separation of powers doctrine serves mainly to ensure that the fundamental functions of each branch remain inviolate, but does not require the three branches to be completely sealed off from one another. Carrick at 135. In an effort to preserve flexibility in government, the state doctrine will rarely draw definitive boundaries between the three governing branches. Id. As this Court has held:

The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch **threatens the independence or integrity or invades the prerogatives of another.** Id.

Carrick v. Locke 125 Wn.2d at 135, citing Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975) (emphasis added).

The separation of powers doctrine “embedded in the federal constitution applies only to the federal government, and does not control the functioning of our state government.” Carrick at 135, n.1. See also Mistretta v. United States, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (finding a tradition of extrajudicial service is evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity). As this court held in Carrick:

In examining the ability of federal judges to operate legislatively,<sup>4</sup> the United States Supreme Court has put a slightly different twist on this inquiry: “[T]he Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time.” Mistretta v. United States, 488 U.S. 361, 404, 102 L.Ed.2d 714, 109 S.Ct. 647 (1989). See also Osloond, at 589. Mistretta succinctly describes our paramount concerns regarding separation of powers challenges to judicial action:

In cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers; first, that the Judicial Branch neither be assigned nor allowed “tasks that are more properly accomplished by [other] branches,” and, second, that no provision of law “impermissibly threatens

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<sup>4</sup> In Mistretta v. United States, 488 U.S. 361, 102 L.Ed.2d, 109 S.Ct. 647 (1989), the Supreme Court upheld the constitutionality of the United States Sentencing Commission. The Commission formulates federal sentencing guidelines, and the validity of these guidelines was challenged on separation of powers grounds due to the involvement of federal judges on the Commission. In part, the Court depended on the long history of federal judges serving in extrajudicial offices to find their membership on the Commission to be constitutional. (Footnote by the Court.)

the institutional integrity of the Judicial Branch.”

(Citations omitted.) Mistretta, 488 U.S. at 383.

Unlike many other constitutional violations, which directly damage rights retained by the people, the damage caused by a separation of powers violation accrues directly to the branch invaded. The maintenance of a separation of powers protects institutional, rather than individual, interests. Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 851, 92 L.Ed.2d 675, 106 S.Ct. 3245 (1986). In adjudging the potential damage to one branch of government by the alleged incursion of another, it is helpful to examine both the history of the practice challenged as well as that branch’s tolerance of analogous practices. *E.g.*, Mistretta, 488 U.S. at 398-401 (allowing judicial participation on Sentencing Guidelines Commission based on historical analogues of extrajudicial activity). “Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610, 96 L.Ed. 1153, 72 S.Ct. 863, 26 A.L.R.2d 1378 (1952) (Frankfurter, J., concurring). Thus, a long history of cooperation between the branches in any given instance tends to militate against finding any separation of powers violation.

Carrick 125 Wn.2d at 135-36.

In Inquest into the Death of Adam E. Boston, 112 Wn. App. 114, 47 P.3d 956 (2002), the Court of Appeals held that courts do not have the authority to review the investigative findings of a coroner inquest, even when a district judge presides over the proceeding. 112 Wn. App. at 116. Boston reasoned inquests are purely an executive function. Id. at 118. While RCW 36.24 delegates quasi-judicial functions to an inquest, the

court recognized the statute does not provide a process to review the result. Id. at 117-18.

In Carrick v. Locke, this Court did not find the incursion by the judiciary upon the executive to constitute a violation of the separation of powers because the cooperation between the two branches permitted both to remain sufficiently independent. In Carrick, county executives sought review of an injunction that enjoined the participation of district judges in inquest proceedings. 125 Wn.2d at 132. In finding judicial involvement to be permissible, this Court reasoned while a criminal investigation is primarily an executive function, the judiciary serves a role in investigations before the filing of formal charges (e.g., issuance of warrants; presiding over grand juries, an analogous practice to a coroner inquests). Id. at 137. With respect to the division of labor between the two branches, Carrick noted judicial inquests do not assign the judiciary responsibilities better served by the executive because the proceeding maintains a quasi-judicial character. Id. at 138. Furthermore, the Court emphasized judge involvement in coroner investigations did not threaten the institutional integrity of either the executive or the judiciary as a result of the tradition of cooperation between the two branches, the authorizing law did not compel judicial involvement in the proceedings, and the combined governing functions involved are not central to the mission of either branch. Id. at 139.

This case is distinct from the result in Carrick, where the Court reasoned the combined functions of the judiciary and executive in an

inquest proceeding are not central to the mission of either branch. 125 Wn.2d at 139. As in Boston, judicial involvement constitutes an impermissible incursion into the realm of the executive, threatening the independence and prerogatives of the ISRB.

Finally, the executive branch has the greater capacity to assess an inmate's eligibility for parole. In Carrick, because an inquest investigation involves cooperation between the executive and the judicial, the court reasoned that either branch may properly undertake the proceeding. 125 Wn.2d at 138. In the present case, there is no cooperation between the executive and the judiciary with respect to the consideration of an inmate's petition for parole. See RCW 9.95.100. In addition, the release of convicted felons into society is a "risky business," and the courts universally hold the decision to grant or deny parole rests exclusively within the discretion of the board, and that parole is not a right but a privilege conferred as an act of grace by the administrative agency. January, 75 Wn.2d at 774. The ISRB has greater access to information and the necessary experience to evaluate the evidence that supports a decision to grant or deny parole. Furthermore, in the interests of judicial economy, the ISRB is able to consider a greater volume of inmate petitions than the Supreme Court, and continue to supervise parolees following their release. Experience and expertise necessitates the continued need for the ISRB's exclusive authority over parole hearings. See Chapter 259, Laws of 1989; Chapter 350, Laws of 1997 (extending the tenure of the ISRB).

In the present case, based on a separation of powers analysis alone, the Court should find it does not have the authority to order the Board to parole Mr. Dyer. First, there is no history of cooperation between the executive and the judiciary with respect to an evaluation whether an inmate is rehabilitated and fit for release. Second, the decision to grant or deny parole is purely a function of the executive, and judicial incursion into the processes threatens the integrity of the ISRB. Finally, the executive is the branch best suited to serve the process that determines eligibility for parole.

Third, an absence of inter-branch cooperation with respect to the determination whether an inmate is rehabilitated and may be released does not militate against a finding that a court ordered parole would violate the state separation of powers doctrine. In Carrick, the court recognized judges have served the role of coroners since before the state adopted its constitution. 125 Wn.2d. at 138. Carrick reasoned the long, unchallenged association between the executive and judicial branches supported a finding that the statute did not violate the separation of powers doctrine. Id. at 138-39.

The state courts have long recognized a strict division of power and the transfer of jurisdiction over a finally convicted felon from the judicial to the executive branch. January v. Porter, 75 Wn.2d at 774 (holding a convicted felon in the custody of the parole board has no right to bail and courts are without power to admit the felon to bail). Moreover, as this Court held in January:

As so clearly established by the Attorney General's brief herein, the courts have long recognized, too, that, although releasing a convicted felon on parole may be beneficent and rehabilitative and in the long run produce a genuine social benefit, it is also a risky business. The parole may turn loose upon society individuals of the most depraved, sadistic, cruel and ruthless character who may accept parole with no genuine resolve for rehabilitation nor to observe the laws and customs promulgated by the democratic society, which in the process of self-government granted the parole. Thus, recognizing the risky nature of parole as well as its beneficent qualities, the courts have universally held that the granting or denial of parole by the Board of Prison Terms and Paroles rests exclusively within the discretion of the board; that parole is not a right but a mere privilege conferred as an act of grace by the state through its own administrative agency. Pierce v. Smith, 31 Wn.2d 52, 195 P.2d 112 (1948), cert. denied, 335 U.S. 834, 93 L. Ed. 387, 69 S. Ct. 24 (1948); Butler v. Cranor, 38 Wn.2d 471, 230 P.2d 306 (1951); State v. Farmer, 39 Wn.2d 471, 230 P.2d 306 (1951); State ex rel. Alldis v. Board of Prison Terms & Paroles, 56 Wn.2d 412, 353 P.2d 412 (1960).

January v. Porter, 75 Wn.2d at 774 (emphasis added).

This Court also held in January v. Porter as follows:

Decisions concerning revocation of parole and return to imprisonment thus **rest entirely within the discretion of the Board of Prison Terms and Paroles** (Lindsey v. Washington, 301 U.S. 397, 81 L. Ed. 1182, 57 S. Ct. 797 (1937); Pierce v. Smith, supra) – or perhaps in some instances in the Governor. But the statutory powers do not end there. A further broad investment of control over the parolee, to the near exclusion of the courts, and including the power to summarily arrest and detain a parolee is seen in RCW 9.95.120 . . . .

....

One on parole from a final judgment and sentence of imprisonment is not a free man; he has not, by his parole, satisfied the judgment and sentence; his release is conditional only, and whether he has fulfilled the conditions of his parole is a **determination to be made by the Board of Prison Terms and Paroles and not by the courts.**

January v. Porter, 75 Wn.2d at 775-76 (emphasis added).

Fourth, the decision to grant or deny parole is purely a function of the executive, and judicial involvement into those processes threatens the integrity of the ISRB. RCW 9.95.100 states the ISRB shall not release a prisoner unless it decides the offender's rehabilitation is complete and he is deemed a fit subject for release. The legal effect of the statute gives the ISRB sole discretion to determine who is eligible for release, and mandamus from the courts may not be issued to control such action. See State ex rel. Linden v. Bunge, 192 Wash. 245, 73 P.2d 516 (1937) (holding decisions relating to parole are functions of discretionary power that are subject only to the limitations imposed by applicable statute). Furthermore, with an entry of a final judgment the legal authority over the accused is transferred to the ISRB and the Office of Correctional Operations, and those two agencies of the executive shoulder the full responsibility for executing the judgment and sentence, or granting of parole. See January, 75 Wn.2d at 773-74. In Boston, judicial review of an inquest threatened to convert the investigation into a judicial trial, thereby altering the fundamental nature of the executive proceeding. 122 Wn. App. at 121-22. In the present case, an Order by this Court to the Board to

parole an inmate, rather than remanding the matter to the Board for it to exercise its discretion in a new parolability hearing, would alter the fundamental nature of the Board's authority over such hearings. If the Court orders the parole of an inmate without a new ISRB parolability hearing, the ISRB would essentially be rendered superfluous.

Moreover, for this Court to do so would also alter a fundamental holding of this Court:

We also reiterate, as we clearly held in *Myers*, that the courts are *not* a super Indeterminate Sentencing Review Board, and will not interfere with a Board determination in this area 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 at 628 (emphasis in the original). If this Court were to find merit in Mr. Dyer's current petition, and order the Board to parole him as he now requests rather than to remand the matter to the Board, this Court would clearly become the "super" ISRB it previously refused to become.

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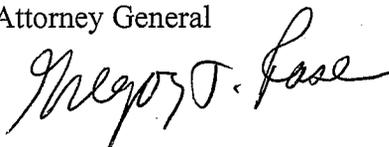
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**VII. CONCLUSION**

For the above stated reasons, Respondent respectfully requests that this Court dismiss Mr. Dyer's current Personal Restraint Petition with prejudice.

RESPECTFULLY SUBMITTED this 1 day of June, 2007.

ROBERT M. MCKENNA  
Attorney General



GREGORY J. ROSEN, WSBA #15870  
Assistant Attorney General  
Criminal Justice Division  
P.O. Box 40116  
Olympia, WA 98504-0116  
(360) 586-1445

**CERTIFICATE OF SERVICE**

I certify that I served a copy of the RESPONSE OF THE INDETERMINATE SENTENCING REVIEW BOARD TO PETITIONER'S PERSONAL RESTRAINT PETITION on all parties or their counsel of record as follows:

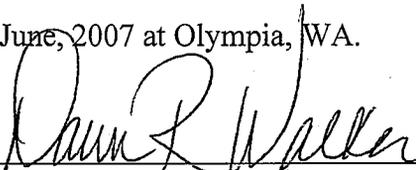
- US Mail Postage Prepaid
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by \_\_\_\_\_

TO:

DAVID ZUCKERMAN  
ATTORNEY AT LAW  
705 2<sup>ND</sup> AVENUE, SUITE 1300  
SEATTLE, WA 98104-1797

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

EXECUTED this 15<sup>th</sup> day of June, 2007 at Olympia, WA.

  
DAWN R. WALKER

## **APPENDIX 1**

FILED  
IN OPEN COURT

DEC 9 1986

ROBERT L. FREUDENSTEIN, Clerk  
By \_\_\_\_\_

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KITSAP COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 81-1-00398-1.
	)	
-vs-	)	
	)	AMENDED
RICHARD JAMES DYER	)	JUDGMENT AND SENTENCE
	)	
Defendant.	)	
	)	

THIS MATTER coming on before the undersigned Judge of the above-entitled Court for entry of an Amended Judgment and Sentence and Warrant of Commitment the defendant having been found guilty by verdicts of the crimes of (1) FIRST DEGREE RAPE - Count II (RCW 9A.44.040), (2) FIRST DEGREE RAPE - Count IV (RCW 9A.44.040), (3) UNLAWFUL IMPRISONMENT - Count V (RCW 9A.40.040), (4) FIRST DEGREE BURGLARY - Count VI (RCW 9A.52.020), (5) FIRST DEGREE RAPE - Count VII (RCW 9A.44.040), [Count I - KIDNAPPING having merged into Count II - FIRST DEGREE RAPE; Count III - KIDNAPPING having merged into Count IV - FIRST DEGREE RAPE], on January 28, 1982; the defendant having been originally sentenced on February 19, 1982 for the above convictions at which the original sentencing hearing the defendant was present in person and was represented by his attorneys, ANTHONY SAVAGE and JAMES L. REESE, the State of Washington being represented by C. DANNY CLEM, Prosecuting Attorney and KENNETH G. BELL, Deputy

AMENDED JUDGMENT AND SENTENCE -1-

APPENDIX 1

C. DANNY CLEM  
 Prosecuting Attorney  
 Kitsap County  
 614 Division Street  
 Port Orchard, WA. 98366  
 876 - 7174

1 Prosecuting Attorney for Kitsap County; the defendant being asked at  
2 the original sentencing if there was any legal cause why judgment  
3 should not be pronounced and no legal cause was shown at which time  
4 the Court entered a judgment of guilty to the crimes of (1) Count II  
5 - FIRST DEGREE RAPE, (2) Count IV - FIRST DEGREE RAPE, (3) Count V -  
6 UNLAWFUL IMPRISONMENT, (4) Count VI - FIRST DEGREE BURGLARY, and (5)  
7 Count VII - FIRST DEGREE RAPE; and it appearing that at said  
8 sentencing hearing the Court ordered the defendant sentenced as  
9 follows;

10 The defendant is sentenced to a maximum term of:

11 Life for the crime of: Count II - FIRST DEGREE RAPE

12 Life for the crime of: Count IV - FIRST DEGREE RAPE

13 Five (5) years for the crime of: Count V - UNLAWFUL

14 IMPRISONMENT

15 Life for the crime of: Count VI - FIRST DEGREE BURGLARY

16 Life for the crime of: Count VII - FIRST DEGREE RAPE

17 In such facility as the Department of Corrections shall  
18 deem appropriate;

19 The Court further ordered the sentences to run concurrently  
20 and that the defendant pay costs in the amount of \$3,111.90 and that  
21 the defendant pay an additional assessment to the crime victim's  
22 fund of \$25.00 and the defendant was ordered remanded into the  
23 custody of the Sheriff of Kitsap County to be detained and delivered  
24 to the custody of the proper officers for transportation to and  
25

26 AMENDED JUDGMENT AND SENTENCE -2-

C. DANNY CLEM  
Prosecuting Attorney  
Kitsap County  
614 Division Street  
Port Orchard, WA. 98366  
876 - 7174

1 confinement in the appropriate facility. Said original Judgment and  
2 Sentence was entered by the HONORABLE ROBERT J. BRYAN on February  
3 19, 1982.

4 After said sentence the defendant appealed and an opinion  
5 was filed on August 14, 1984, which reversed the convictions of  
6 Count V - UNLAWFUL IMPRISONMENT, Count VI - FIRST DEGREE BURGLARY,  
7 and Count VII - FIRST DEGREE RAPE, but affirmed the convictions for  
8 FIRST DEGREE RAPE entered in Counts II and IV. It appears that the  
9 defendant was never retried on Counts V, VI, and VII; and that it  
10 appears that an Amended Judgment and Sentence should be entered  
11 clarifying the defendant's present status and it appears that  
12 Judge Robert J. Bryan is no longer a Judge for Kitsap County but  
13 that Judge Karen Conoley is now the Judge of the same department and  
14 that it would be in the interest of justice to have an Amended  
15 Judgment and Sentence entered reflecting valid convictions only as  
16 to Counts II and IV in order that the defendant's minimum time  
17 properly can be set by the parole board and that the appellant costs  
18 can properly be taxed in this Amended Judgment and Sentence; it is  
19 therefore,

20 ORDERED, ADJUDGED, AND DECREED that the defendant is guilty  
21 of Count II - FIRST DEGREE RAPE and Count IV - FIRST DEGREE RAPE,  
22 and that the defendant has been asked if there was any legal cause  
23 why judgment should not be now pronounced and no legal cause was  
24 shown; it is hereby

25  
26 AMENDED JUDGMENT AND SENTENCE -3-

C. DANNY CLEM  
Prosecuting Attorney  
Kitsap County  
614 Division Street  
Port Orchard, WA. 98366  
876 - 7174

1 ORDERED, ADJUDGED, AND DECREED that the defendant is guilty  
2 of Counts II and IV, FIRST DEGREE RAPE and that the defendant is  
3 sentenced to life imprisonment for the crime charged in Count II -  
4 FIRST DEGREE RAPE (RCW 9A.44.040) and Life for the crime charged in  
5 Count IV - FIRST DEGREE RAPE (RCW 9A.44.040); and is further

6 ORDERED, ADJUDGED, AND DECREED that the defendant shall  
7 serve said sentences concurrently; and is further

8 ORDERED, ADJUDGED, AND DECREED that the defendant shall pay  
9 costs in this matter of \$3,111.90, and is further *with credit for payments previously*  
10 *made and made*

11 ORDERED, ADJUDGED, AND DECREED that the defendant shall *W*  
12 also pay an assessment to the crime victim's fund in the amount of  
13 \$25.00; and is further

14 ORDERED, ADJUDGED, AND DECREED that the defendant shall pay  
15 costs on appeal as taxed by mandate from the Court of Appeals in the  
16 amount of \$113.08; and is further

17 ORDERED, ADJUDGED, AND DECREED that the defendant is given  
18 credit for time served of 1850 days as of December 9, 1986.

19 The defendant is remanded into the custody of the Sheriff  
20 of Kitsap County to be detained and delivered back into the custody  
21 of the proper officers for transportation to and confinement in the  
22 appropriate facility.

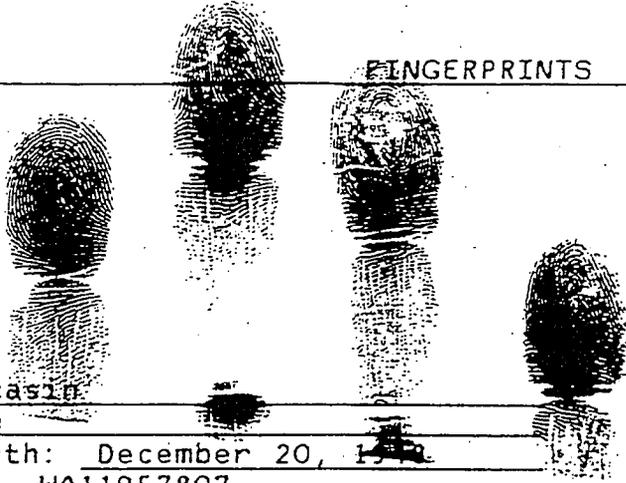
23 DATED THIS 9<sup>th</sup> day of December, 1986.

24 *Karen B. Conoley*  
25 KAREN B. CONOLEY, JUDGE

26 AMENDED JUDGMENT AND SENTENCE -4-

C. DANNY CLEM  
Prosecuting Attorney  
Kitsap County  
614 Division Street  
Port Orchard, WA. 98366  
876 - 7174

FINGERPRINTS



Race: Caucasian  
Sex: Male  
Date of Birth: December 20, 1952  
SID Number: WA11957807

DATED this \_\_\_\_\_ day of December, 1986.

FINGERPRINTS ATTESTED BY:

ROBERT L. FREUDENSTEIN  
CLERK

By: Mary Dodeward  
DEPUTY CLERK

PRESENTED BY:

C. Danny Clem  
C. DANNY CLEM  
Prosecuting Attorney

APPROVED FOR ENTRY  
J. P. Olbertz  
~~JAMES K. SELLS~~ Z. P. OLBERTZ  
Attorney for Defendant

THE DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE SAME HAVING BEEN FILED Dec. 9, 1986  
ATTEST 12-9 1986

ROBERT L. FREUDENSTEIN  
COUNTY CLERK AND CLERK OF THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF KITSAP

BY Debra Masteca DEPUTY



RECEIVED  
AUG 26 1985  
BOARD OF PRISON  
TERMS AND PAROLES  
8/14/84  
Petrie

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,	)	NO. 6162-7-II
	)	
Respondent,	)	Division Two
	)	
v.	)	Unpublished Opinion
	)	
RICHARD J. DYER,	)	
	)	
Appellant.	)	Filed <u>August 14, 1984</u>

REED, J. -- Richard J. Dyer was convicted by a jury of first degree rape of Ms. A, first degree rape of Ms. B, and first degree rape of his ex-wife Ms. W, as well as unlawful imprisonment of Ms. W and first degree burglary of her apartment. He appeals, challenging the validity of a search warrant, the denial of his motion to suppress Ms. B's in-court identification, and the denial of his repeated motions to sever

the offenses involving Ms. W from those involving Ms. A and Ms. B. The State cross-appeals, contending the court erred by instructing the jury that if it found Dyer guilty of the first degree rapes of Ms. A and Ms. B, it was not to find him guilty of their first degree kidnappings as separately charged. We affirm in part and reverse in part.

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.

Dyer was charged by a seven-count amended information with, inter alia, first degree rape and first degree kidnapping of Ms. A. His defense was misidentification. In addition to describing a car and a house which were similar to Dyer's, Ms. A identified some rope, a blue shirt with horizontal red

stripes, and a blue jacket as being similar to items used or glimpsed during her ordeal. These items had been taken from Dyer's house pursuant to a search warrant.

The second of the three rape victims was Ms. B. 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.

The charges against Dyer for first degree rape and first degree kidnapping of Ms. B were joined with those involving Ms. A. Dyer's defense again was misidentification. In addition to describing the rapist's car and house, both similar to Dyer's, Ms. B identified a Timex watch that the rapist had given her. Ms. A testified that the watch was hers and had been lost during her struggles in the back seat. Unlike Ms. A, Ms. B was not asked before trial to make a lineup identification of Dyer. While sitting in the hall before testifying, Ms. B saw Dyer in handcuffs being led into court by police. Dyer's objection to the in-court identification of Dyer by Ms. B was overruled, and Ms. B pointed to Dyer as the rapist.

The third rape victim was Ms. W. Until April 1, 1981, she was married to Richard J. Dyer. On October 24, 1980, at a time when they were separated, Ms. W was held overnight at Dyer's house in Bremerton against her will. Dyer grabbed her when she arrived to pick up their child and pulled her into the back bedroom. He undressed her and tied her hands to the bed using ropes that were already there. He had sexual intercourse with her repeatedly through the night, changing her position from back to stomach. He released Ms. W in the morning.

Another incident involving Dyer and Ms. W occurred on September 2, 1981 when they had been divorced for several months and Ms. W was living in her own apartment. Ms. W awoke that morning to find Dyer at the foot of her bed. Dyer bound her hands together with silver duct tape which he had brought with him in a paper bag and raped her. He then drove her into the country, bound her ankles with a cloth army belt after taking her out of the car, and disappeared with a shovel. When he returned, Ms. W persuaded him to take her home. At the apartment Dyer followed her in and raped her again. Afterward, he forced her to take a shower. Then he left.

By the same seven-count information, Dyer was charged with unlawful imprisonment of Ms. W for the October 24, 1980 incident<sup>1</sup> and first degree rape and first degree burglary for the September 2, 1981 incident. Dyer defended by claiming that Ms. W consented. Before trial and twice at appropriate times

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<sup>1</sup>In 1983 the Legislature amended the first degree rape statute, RCW 9A.44.040, by deleting "not married to the perpetrator." Laws of 1983, ch. 118 § 1. Until that time, it was not a crime for one spouse to rape the other.

during trial, Dyer moved to sever the Ms. W offenses from the Ms. A and Ms. B offenses. The motion was denied each time. Ms. W identified at trial some duct tape and a shovel which had been seized from Dyer's house pursuant to the search warrant.

After hearing the testimony of the three victims as well as numerous corroborative witnesses, the jury found Dyer guilty as charged of all but the first degree kidnappings of Ms. A and Ms. B. The court gave a jury instruction which effectively merged the two kidnappings into the rapes of Ms. A and Ms. B. Dyer received concurrent sentences on all convictions.

First, Dyer contends that the prosecutor's complaint for search warrant dated September 5, 1981 does not establish probable cause to believe that the items to be seized as evidence of the January 1980, August 1980, and September 2, 1981 rapes were then in either Dyer's residence or car. The information in the complaint, he claims, was stale. We do not agree.

An affidavit supporting a search warrant must be sufficiently comprehensive to provide the issuing magistrate with facts from which he can conclude that there is probable cause to believe the items sought are at the location to be searched. State v. Spencer, 9 Wn.App. 95, 510 P.2d 833 (1973). The facts must be current, not remote, and sufficient to justify a conclusion that the items are at the place to be searched at the time the warrant is issued. State v. Spencer, 9 Wn.App. at 97. Probable cause is a common sense, practical question to be tested under the totality of the circumstances. Illinois v. Gates, U.S. , 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983).

Dyer's staleness claim must fail. The complaint for search warrant requested seizure of such things as specifically described articles of clothing, duct tape, rope and a shovel. Because of the nature of these things, each was likely to be retained for some time. None was incriminating in itself and, therefore, it was unlikely that it would be disposed of immediately following the crime. See I W. LaFave, Search and Seizure § 3.7 (1978). Having determined that probable cause existed at the time the warrant was issued for the search and seizure of these items, there is no basis for application of the exclusionary rule here.

Second, Dyer claims that the court erred by refusing to suppress Ms. B's in-court identification. Her confrontation with him as he was led into the courtroom handcuffed and in police custody was, Dyer argues, so suggestive and conducive to irreparable mistaken identification that he was denied due process of law. Again we do not agree.

An identification should be excluded only if the identification procedure is so impermissibly suggestive as to create a very substantial likelihood of irreparable misidentification. Neil v. Biggers, 409 U.S. 188, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972); Simmons v. United States, 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968); State v. Bockman, 37 Wn.App. 474, P.2d (1984); State v. Cook, 31 Wn.App. 165, 639 P.2d 863 (1982). Paramount in assessing the likelihood of misidentification is the reliability of the witness' identification under the totality of the circumstances. Manson v. Brathwaite, 432 U.S. 98, 53 L. Ed. 2d 140, 97 S. Ct. 2243 (1977); State v. Bockman, supra. The

United States Supreme Court has identified five factors to determine whether an identification is reliable: (1) the opportunity of the victim to observe the subject at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description, (4) the level of certainty at the confrontation, and (5) the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. at 199-200.

Under the totality of the circumstances, Ms. B's identification was sufficiently reliable. Ms. B was in the rapist's presence for a considerable period of time before she was blindfolded. The men in the car stopped and twice offered her a ride. The first time she talked with them for 5 to 10 minutes. The second time, about 30 minutes later, she talked with them for about 10 minutes before the passenger grabbed her and threw her into the back seat. The car's dome light lit up when the door opened, and there were street lights on in the area. At the dump site the rapist let her in and out of the car several times as they tried to get the car unstuck. In addition, she had a good look at his face when he helped her up after she was grazed by the car when it became suddenly unstuck. Regarding her prior description, the physical description she gave of the rapist resembled Dyer; her description of the car, a brown two-door Capri with a sunroof, matched the car Dyer owned at that time. At the hearing held outside the presence of the jury, Ms. B was very certain Dyer was the rapist, saying on cross-examination "I never forgot his face. I never forgot the way he looked that night." The fact that Ms. B told the police when she reported the incident that

she would not be able to identify the rapist is for the jury to consider in weighing this evidence. Although a year and a half separated the crime from the identification, elapsed time in itself is not enough to mandate exclusion. Considering these indicia of reliability, there was no error in allowing Ms. B to identify Dyer in court.

Finally, Dyer claims that the court abused its discretion by refusing to grant his timely motions to sever the Ms. W offenses from the Ms. A and Ms. B offenses. Severance is a matter within the discretion of the trial court whose determination is reversible only for an abuse of discretion. State v. Thompson, 88 Wn.2d 518, 564 P.2d 315 (1977); State v. Weddel, 29 Wn.App. 461, 629 P.2d 912 (1981); see CrR 4.4(b). Several factors have been identified as mitigating the prejudice arising from trying multiple counts together. These factors are:

- (1) the strength of the State's case in each count, (2) clarity of defenses to each count, (3) the court properly instructs the jury to consider evidence of the crime, and (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined.

State v. Smith, 74 Wn.2d 744, 446 P.2d 571 (1968), vacated in part, 408 U.S. 934 (1972); State v. Harris, 36 Wn. App. 746, 677 P.2d 202 (1984).

The only troublesome factor in this case is the fourth: cross-admissibility of the crimes. We consider first whether the Ms. W offenses would be admissible in a separate trial of the Ms. A and Ms. B offenses.

The issue in the Ms. A and Ms. B cases was identity. Evidence of acts other than those charged is admissible to

establish the identity of an accused as the perpetrator when the method employed in the commission of both the other crime and the crime charged is so unique that mere proof that an accused committed the other crime creates a high probability that he also committed the act charged. State v. Coe, 101 Wn.2d 772, P.2d (1984); State v. Fernandez, 28 Wn.App. 944, 628 P.2d 818, 640 P.2d 731 (1980); State v. Irving, 24 Wn.App. 370, 601 P.2d 954 (1979), review denied, 93 Wn.2d 1007 (1980). This is the handiwork or modus operandi exception to the rule of evidence which usually prohibits the admission of other acts by the accused. See ER 404(b). Because of the distinctive nature of Dyer's sexual assaults of Ms. W on October 24, 1980 and September 2, 1981, these other acts would have been admissible if the Ms. A and Ms. B offenses had been tried separately.

The method employed by Dyer during his sexual assaults of Ms. W contains these unique features: The sexual assault on October 24 occurred in a bedroom of Dyer's own house. Dyer himself undressed the victim, Ms. W. She was laid on her back and tied to the bed. The ropes were already there. Dyer had sexual intercourse with Ms. W repeatedly throughout the night. At some point, he changed her position from her back to her stomach and had intercourse in the new position. During the September 2 incident that occurred in Ms. W's apartment Dyer bound Ms. W's wrists before raping her and before taking her out to the car. He drove her to a rural area. When they returned to the apartment and Dyer had raped her the second time, Dyer ordered her to bathe. He voluntarily released Ms. W at the end of both incidents. Because these features are so

unique and yet so strikingly similar in detail to the rapes of Ms. A and Ms. B, the Ms. W offenses would have been admissible in the Ms. A and Ms. B rape cases on the issue of identity.

However, regarding the admissibility of the Ms. A and Ms. B offenses in a separate trial of the Ms. W offenses, we reach the opposite conclusion. The Ms. A and Ms. B offenses would not have been admissible in a separate trial of the Ms. W offenses.

The issue in the Ms. W rape case was consent. Dyer admitted the fact of sexual intercourse. Our Supreme Court has held that forcible rapes of other victims by the defendant are not admissible to prove that the victim of the crime charged did not consent. State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982). Therefore, in a separate trial of the Ms. W offenses, the forcible rapes of Ms. A and Ms. B would not be admissible to prove nonconsent of Ms. W. The Ms. W offenses should not have been tried together with the Ms. A and Ms. B offenses. The court's exercise of discretion in the denial of Dyer's motions to sever was, to this extent, abused.

Having concluded that Dyer was prejudiced by the joinder of offenses only as to the Ms. W offenses, we affirm Dyer's convictions of first degree rape of Ms. A and first degree rape of Ms. B, but reverse his convictions for the Ms. W offenses -- unlawful imprisonment, first degree burglary and first degree rape -- and remand for a new trial as to these charges.

We now turn to the merger issue raised by the State's cross-appeal. The State claims that the court erred by instructing the jury that if it found him guilty of the first degree rapes of Ms. A and Ms. B, it should not render a verdict

on the two kidnapping charges. The State argues that whether or not the kidnappings of Ms. A and Ms. B were separate and distinct from their rapes was a question of fact for the jury and should not have been decided by the court as a matter of law.

We assume, without deciding, that double jeopardy would not bar a retrial on the kidnapping charges and, therefore, that the State has the right to appeal pursuant to RAP 2.2(b)(1).<sup>2</sup>

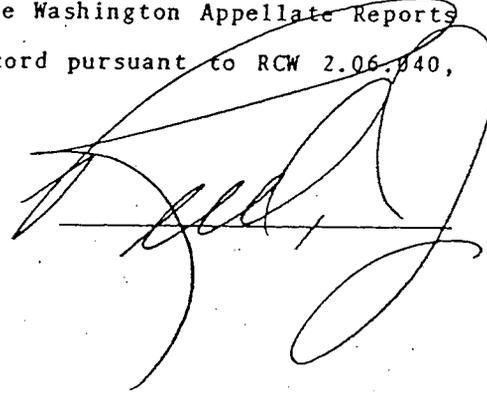
Under the case law and the evidence, the court's instruction to the jury with reference to the merger of the kidnapping charges into the rape charges was correct. In State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979), the court held that a separate conviction for the crime aggravating rape to first degree cannot be allowed to stand unless that crime involves some injury to the person or property of the victim or others which is separate and distinct from and not merely incidental to, the crime of which it forms an element. The court suggested that ". . . the jury should be instructed that if it finds the defendant guilty of a greater offense [first degree rape], it cannot find him guilty of a lesser offense [assault or kidnapping] which is included in the greater." Johnson, 92 Wn.2d at 680. In the instant case, the court did nothing more than follow the clear suggestion of our Supreme Court. In addition, the only possible conclusion from the evidence is that the sole purpose of Dyer's kidnappings of Ms. A and Ms. B was to rape them. The kidnappings and rapes were not distinct crimes on these facts. The jury was properly instructed.

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<sup>2</sup> Defendant did not challenge the State's right to appeal. The issue was not briefed and so is not addressed.

We reverse Dyer's convictions for the crimes involving Ms. W -- unlawful imprisonment, first degree rape, and first degree burglary -- and remand for a new trial. His convictions for first degree rape of Ms. A and first degree rape of Ms. B are affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

A large, stylized handwritten signature, likely of a judge, written in black ink. The signature is highly cursive and loops around itself, crossing over the horizontal line of the text it appears to be over.

WE CONCUR:

Worawich, A.C.J.

Petrie, J.



STATE OF WASHINGTON  
BOARD OF PRISON TERMS AND PAROLES

9

Date 7-6-82

To: Superintendent  
Washington State Penitentiary

Attention: Associate Superintendent  
Classification and Treatment

Subject: BOARD DECISION ON DOCKET CASE

Re: DYER, Richard J.  
281744

The decision of the Board in regard to the 5-10-82  
(date)  
Admission hearing for the above-named  
(type)

individual is as follows has been revised as follows:

Previously: DD

Now: MT 600 months on Cts. I, IV, VI & VII, 60 months on Ct. V, all CC.  
NXt Mtg to be scheduled.

CSW

BOARD OF PRISON TERMS AND PAROLES

APPENDIX 3





STATE OF WASHINGTON  
INDETERMINATE SENTENCE REVIEW BOARD

OLYMPIA, WASHINGTON

DYER, RICHARD 281744 WSR OBERT MYER REDETERMINATION 9/15/86 GJ & PM 31	:NAME :NUMBER :INSTITUTION :TYPE OF MEETING :DATE :PANEL MEMBERS :DOCKET NUMBER	DECISIONS AND REASONS
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BOARD DECISION:

WE SET THE MT AT 240 MONTHS AND WE HAVE DECIDED TO DEPART FROM THE SRA GUIDELINE FOR THE FOLLOWING REASONS:

REASONS:

THE COMMISSION OF THE OFFENSE MANIFESTED DELIBERATE AND CRUELTY TO THE VICTIM. SHE WAS TIED BY THE HANDS AND FEET TO THE BED WITH ROPE, HER EYES WERE TAPED WITH COTTON BALLS AND WHILE THEY CONTINUED TO RAPE HER THROUGHOUT THE NIGHT AT ONE POINT THEY TURNED HER OVER ON HER STOMACH AND AGAIN RAPED HER IN THAT NEW POSITION.

MR. DYER DIDN'T JUST DO IT TO ONE INDIVIDUAL BUT DID IT TO THE SECOND INDIVIDUAL USING THE SAME TYPE OF METHOD OF OPERATION WITH THE TAPE AND THE COVERING OF THE EYES.

IN GIVING THIS SETTING WE TOOK INTO ACCOUNT THAT THE SRA GUIDELINES RANGE IS 63-88 FOR RAPE 1ST COUNTS 1 AND 63-85 FOR RAPE 1ST COUNT 4. WITH AN ADJUSTED GUIDELINE IT APPEARS THAT MR. DYER NEEDS TO SERVE MORE TIME THAN THAT.

ANOTHER REASON WHY WE DEPARTED FROM THE SRA GUIDELINE IS BECAUSE THE P.A. RECOMMENDATION WAS 50 YEARS AND THE JUDGE'S RECOMMENDATION IS LIFE. AND I READ A QUOTE FROM HIS LETTER DATED FEBRUARY 20, 1982 WHERE HE INDICATES THAT "MR. DYER IS A DANGEROUS OFFENDER. I DENIED HIM A RELEASE PENDING APPEAL ON THE GROUNDS THAT HE IS A DANGER TO BE AT LARGE. THERE ARE SOME DISCUSSIONS ABOUT WHETHER HIS SENTENCE SHOULD BE CONCURRENT AS OPPOSED TO CONSECUTIVE IN VIEW OF THE DANGER TO THE PUBLIC THAT HE POSES.

(CONTINUED ON NEXT PAGE)

CC: INSTITUTION  
RESIDENT  
FILE

PB 213

APPENDIX 4



STATE OF WASHINGTON  
INDETERMINATE SENTENCE REVIEW BOARD

OLYMPIA, WASHINGTON

DYER, RICHARD 281744 WSR OBERT MYER REDETERMINATION 9/15/86 GJ & PM 31	:NAME :NUMBER :INSTITUTION :TYPE OF MEETING :DATE :PANEL MEMBERS :DOCKET NUMBER	DECISIONS AND REASONS
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BOARD DECISION:

PAGE 2 (CONTINUED FROM PREVIOUS PAGE)

REASONS:

I ADVISED THE LAWYERS AND I WANT TO ADVISE THE PAROLE BOARD THAT IT HAS NOT ALWAYS BEEN MY PHILOSOPHY THAT I SHOULD PLAY GAMES WITH THE BOARD IN TRYING TO GUESS WHAT THEY WILL DO IN MINIMUM TERM SETTING. MR. DYER CAN NOT RECEIVE MORE THAN A LIFE SENTENCE AND A LIFE SENTENCE CANNOT BE EXTENDED BY MAKING MORE THAN ONE LIFE SENTENCE CONCURRENT WITH ANOTHER. MR. DYER, IN MY JUDGEMENT, SHOULD BE HELD IN CUSTODY UNTIL THE PAROLE BOARD IS ABSOLUTELY SURE THAT HE WILL NOT REOFFEND OR UNTIL THE END OF HIS NATURAL LIFE WHICHEVER SHOULD FIRST OCCUR. A LENGTHLY MINIMUM IS APPROPRIATE."

TODAY MR. DYER PRESENTED HIMSELF TO THE BOARD STILL WITH THE DENIAL STAGE. HE CLAIMS THAT HE DID NOT COMMIT ANY OF THE CRIMES AND THAT THE CHARGES 5, 6, & 7 WERE DROPPED. WE ADVISED HIM THAT THE REASON THAT THEY WERE DROPPED IS BECAUSE THE COUNTY ELECTED NOT TO RETRY THOSE CHARGES. THOSE CHARGES OF RAPE WERE INVOLVING HIS WIFE.

NEXT ACTION IS TO SCHEDULE A 2/88 ADMINISTRATIVE PROGRESS HEARING. WE ADVISED MR. DYER TO TAKE ADVANTAGE OF ANY TREATMENT AVAILABLE FOR HIM WITHIN THE INSTITUTION IN REFERENCE TO PSYCHOLOGICAL TREATMENT THROUGH THE INSTITUTION IF THERE IS SOME AVAILABLE. ALSO TO TAKE ADVANTAGE OF ANY ANGER STRESS MANAGEMENT CLASS THAT'S AVAILABLE FOR HIM SO THAT WHEN HE DOES COME UP FOR CONSIDERATION FOR ANY TYPE OF PAROLE HE SHOULD BE PREPARED TO SUCCEED ON PAROLE. WHEN THE TIME COMES FOR PAROLE A  
(CONTINUED ON NEXT PAGE)

CC: INSTITUTION  
RESIDENT  
FILE



STATE OF WASHINGTON  
INDETERMINATE SENTENCE REVIEW BOARD

OLYMPIA, WASHINGTON

DYER, RICHARD 281744 WSR OBERT MYER REDETERMINATION 9/15/86 GJ & PM 31	:NAME :NUMBER :INSTITUTION :TYPE OF MEETING :DATE :PANEL MEMBERS :DOCKET NUMBER	DECISIONS AND REASONS
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**BOARD DECISION:**

PAGE 3 (CONTINUED FROM PREVIOUS PAGE)

**REASONS:**

PSYCHOLOGICAL EVALUATION SHOULD BE COMPLETED THAT DEALS WITH SEXUAL DEVIANCY BEHAVIOR AND RECOMMENDATIONS MADE BY THAT EVALUATION BE PART OF A PAROLE PLAN.

HIS CONTINUAL DENIAL OF THIS RAPE CERTAINLY MAKES IT DIFFICULT FOR ANY TREATMENT TO BE AFFECTIVE.

PM/LFG  
9/25/86

CC: INSTITUTION  
RESIDENT  
FILE

PB 213





STATE OF WASHINGTON

INDETERMINATE SENTENCE REVIEW BOARD

4317 Sixth Ave., S.E. • P.O. Box 40907 • Olympia, Washington 98504-0907 • (206) 493-9266  
(TDD Relay 1-800-833-6388)

DECISION AND REASONS

---

NAME: DYER, Richard J.  
NUMBER: 281744  
INSTITUTION: WSR  
TYPE OF MEETING: .100  
DATE: February 24, 1994  
PANEL MEMBERS: KB & GJ

---

BOARD DECISION:

The Board finds Mr. Dyer not parolable at this time.

NEXT ACTION:

Schedule .100 hearing 90 days prior to his PERD (parole eligibility review date). The Board specifically requests an updated 530X and an .052 recommendation from the Superintendent which is current at the time of the hearing. The Board also requests a psych evaluation which is no more than two years old at the time of the hearing.

HISTORY/COMMENTS:

Mr. Dyer is in custody for a Kitsap County cause for two counts of Rape in the First Degree, Ct II and Count IV. Mr. Dyer was originally sentenced on three counts of Rape in the First Degree, Unlawful Imprisonment and First Degree Burglary. His convictions were later amended after successful appeal, and his convictions were reduced to Rape in the First Degree Count II, and Rape in the First Degree Count IV. At the Obert Myer Review the Board reduced the minimum term on those two counts to 240 months having previously imposed longer sentences. The Sentencing Reform Act (SRA) range for both counts of Rape in the First Degree were 67 to 89 months prior to the application of Phelan. The prosecutor's recommendation was 50 years. The judge's recommendation was not to release Mr. Dyer until the Parole Board could verify that he was not longer a threat to the community. Mr. Dyer's first conviction for Rape involved an incident in 1980 when he and an unknown accomplice picked up the victim as she was walking

CONTINUED (NEXT PAGE)

APPENDIX 5

DYER, Richard  
(DOC #281744)

HISTORY/COMMENTS CONTINUED - PAGE 2

along side the road after offering her a ride. After a short distance she realized that they were not going to let her out, she grabbed the wheel, hit the breaks, and Mr. Dyer hit her severely in the mouth with his elbow causing a laceration which later required 13 stitches. Mr. Dyer then stopped the car, threw her in the back seat, jumped in the back seat with her and began hitting her with his fists. The unknown accomplice continued to drive the vehicle, Dyer continued hitting her and kept her on the floorboards of the car. They stopped on a deserted road by a pond, where Dyer pulled off her clothes, offered her to the driver, who declined, and then Mr. Dyer raped her vaginally. He then tied her up with a rope and pushed her back on the floor. After driving approximately 15 minutes, they took her to his house, tied her to the bed, taped her eyes shut and stuffed her mouth with cotton, and the second subject raped her. Mr. Dyer then raped her again and then he would go to sleep, wake, and rape her again. He did this approximately 8 times from the evening through the next afternoon. On two occasions, he made her get up and bathe. Prior to intercourse he would use spermicidal foam and he washed her clothes before he redressed her and took her to a deserted area and released her. The second crime occurred in August of 1980, the first in January of 1980. The second incident occurred when the victim went for a walk with her dog and went downtown where she met some friend. Upon returning home, a vehicle offered her a ride and she declined. Two white men in the vehicle then returned and forced her into the car. The two men drove her into the country where the car became stuck twice, she was forced to help, and the car rolled onto her injuring her leg. When they arrived at Mr. Dyer's home, she was then tied to the bed. The rope was taped to prevent burns on her arms and legs. Dyer then took off her clothes and raped her. He made her get up, take a shower, tied her up again, and went to sleep. The victim was able to get loose, but a dog awakened Mr. Dyer. She was recaptured and retied to the bed. He then again fell asleep. She was again able to get loose and the dog again woke up Mr. Dyer. She was again retied and woke up about 5:30 a.m. and forced to take a bath. Mr. Dyer washed her clothes, redressed her and let her go in a forested area of the county. Upon letting her go, he apologized, said he was drunk, and the reports say he gave her wrist watch which actually belonged to the first victim. Mr. Dyer was arrested for these crimes as the behavior to the victims, including the rape and tying them up in his own home, were similar to those reported by Mr. Dyer's wife to the police. The conviction involving Mr. Dyer's wife was remanded by the appellate court and the prosecutor declined to prosecute a second time. However, the mode of operation in these crimes were so similar that they led the police to Mr. Dyer. Prior to this Mr. Dyer had no prior criminal record of any kind. His employment record was very good, he had been in the Army for nine years and

CONTINUED (NEXT PAGE)

DYER, Richard  
(DOC #281744)

HISTORY/COMMENTS CONTINUED - PAGE 3

was given an honorable discharge in 1976. He served two tours in Vietnam and had a considerable list of awards for heroism during those tours. Mr. Dyer has consistently denied these crimes.

REASONS:

The 052 recommendation from the institution is poor. This is clearly based on his lack of remorse for the victims, his denial of the crimes, and the seriousness of the offenses. The psychological evaluation was prepared on March 5, 1993 by Dr. Helmut Riedel who states that the MMPI is essentially normal. There is no evidence of psychopathology. Dr. Riedel does state that Mr. Dyer's risk of reoffense is very high and his depth of sexual deviancy is high. He does recommend that he undergo penile plethysmograph and polygraph in relationship to his sexual deviancy. Dr. Riedel does not recommend that Mr. Dyer be put in lower levels of custody because he continues to present symptoms of Post Traumatic Stress Syndrome, plus Dr. Riedel has concerns over the series of Rape convictions, the number of infractions for violence and one escape attempt. As mentioned earlier, Mr. Dyer continues to be in denial of the Rapes and this makes him of course not eligible for the SOTP Program. The elements of each of the Rapes were severely aggravated because of the treatment toward the victims. Each of the women were held in total darkness having their eyes taped shut for numerous hours. They were raped on more than one occasion throughout the span of time that he held them and each victim was forced to another location and released in a wooded area. The victim's were held for hours, gagged, blindfolded and tied to a bed. They were forced to bathe with their hands tied behind their back, and the first victim was beaten severely resulting in bruises to her face, neck, wrist, jaw, knee and ribs as well as her mouth required 13 stitches. Based on this and other aggravating reasons, the Board originally set an aggravated minimum term. This panel can see no basis for a reduction in that minimum term at this time. Under current Sentencing Reform Act (SRA) law, these Rapes would be running consecutive, however in Mr. Dyer's case they run concurrent. What we have here is a man whose prison conduct has been quite appropriate in most areas. Mr. Dyer has been working for Redwood Industries for the last eight years, he has completed power sewing, completed his GED while in the Army, and is currently attending college level classes in prison. He completed the anger/stress management program in 1987, the STOP evaluation indicates that he does not have an abuse problem. He is currently married and has been married since his incarceration to his current and third wife. He has three children by that union. He has been involved in toastmasters, the hobby shop program, and the Leonard Shaw Seminars, a Course in Miracles and is a facilitator in the Breaking Barriers Program. It should be noted that Mr. Dyer's attorney has provided the Board with considerable information among which is a letter of

CONTINUED (NEXT PAGE)

DYER, Richard

(DOC #281744)

REASONS CONTINUED - PAGE 4

support from Thomas Harvey, a letter of support from his wife Rennetta Dyer, and a letter of support from Leonard Shaw. Mr. Dyer has once again mentioned that he continues to deny these crimes adamantly. He is sorry that the crimes themselves occurred, but he absolutely denies that he perpetrated either of these Rapes. This of course, presents somewhat of a dilemma. He has taken his cases to court on numerous occasions. The Appellate Court did in fact, as mentioned in an earlier part of this dictation, reverse his conviction for one count of Rape in the First Degree, and First Degree Burglary and Unlawful Imprisonment. However, they upheld the convictions on the two Rapes for which he is before us now. The Board can find no evidence that calls these convictions into question other than Mr. Dyer's denial. It is very difficult to take a look at the aggravated nature of these crimes and the psychological report and the 052 report and the lack of any kind of crime related counseling or treatment as well as the denial, and then find Mr. Dyer parolable. Other the other hand, it is difficult to ignore the progress while in the institution and the efforts that he has made to make good use of his time. Most experts in this field agree that an admission of responsibility for the behavior is the first step toward the elimination of the possibility of recidivism. This case has been a problem for this panel with regard to the denial, however on balance we find very little basis for a early finding of parolability. At this point, according to his attorney, Mr. Dyer has exhausted all legal remedies while maintaining his claim of innocence.

FACTS RELIED UPON:

In reaching this conclusion the Board reviewed the DOC file, exhaustibly reviewed the ISRB file, reviewed Dr. Riedel's psychological report and previous reports, reviewed the letters of support and information provided by the attorney as well as relying on the 052 report and the interview with Mr. Dyer today. Additionally the panel has reviewed Mr. Dyer's letter dated February 27, 1994 sent with his attorney's letters of March 25, 1994 which also included a number of trial transcripts which the Board considered.

KB:rr

CC: INSTITUTION  
RESIDENT  
FILE



STATE OF WASHINGTON

INDETERMINATE SENTENCE REVIEW BOARD

4317 Sixth Ave., S.E. • P.O. Box 40907 • Olympia, Washington 98504-0907 • (206) 493-9266  
(TDD Relay 1-800-833-6388)

MEMORANDUM

TO: FULL BOARD

March 23, 1994

FROM: Robin

SUBJECT: DYER, Richard #281744

The panel of Bail and Johnson recommend to the full Board that Mr. Dyer be found not parolable. His is a Category III.

Agree with Panel

Disagree with Panel

PA 3/24/94  
PJF 3/24/94

AO 3-28-94

KB 3/28/94

into jail  
3/28/94





STATE OF WASHINGTON

INDETERMINATE SENTENCE REVIEW BOARD

4317 Sixth Ave., S.E. • P.O. Box 40907 • Olympia, Washington 98504-0907 • (206) 493-9266  
(TDD Relay 1-800-833-6388)

DECISION AND REASONS

NAME:	DYER, Richard
NUMBER:	281744
INSTITUTION:	Washington State Reformatory
TYPE OF MEETING:	.100 Hearing
DATE:	March 8, 1995
PANEL MEMBERS:	GWJ & JG

BOARD DECISION:

The decision of the full Board is to find Mr. Dyer not parolable and to add 60 months to his minimum term.

NEXT ACTION:

Schedule a March 1997 Administrative Progress Review.

HISTORY AND COMMENTS:

Mr. Dyer has now served 157 months on two counts of Rape in the First Degree, each count with a Life sentence maximum. The sentencing Judge recommended "do not parole until the ISRB can verify that he is no longer a threat to the community" and the prosecuting attorney recommended 50 years or 600 months on each count. They run concurrent. The SRA (Sentencing Reform Act) ranges on each count are 67 to 89 months, adjusted for Phelan credits to 63 to 85 months on each count. There is a 36 month non-waivable mandatory with each count.

Mr. Dyer was originally sentenced to prison on three counts of Rape in the First Degree, Unlawful Imprisonment, and Burglary in the First Degree. On a successful appeal, the sentence was amended to two counts of Rape in the First Degree, Counts II and IV. The conviction for Rape, Count II,

(continued on next page)

APPENDIX 6

<p>O B T S UPDATED 4/1/95 jao</p>
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DYER, Richard

DOC #281744

HISTORY AND COMMENTS CONTINUED - PAGE 2

involved an incident on January 27, 1980, when Mr. Dyer and an unknown accomplice picked up the victim as she was walking along the side of the road after offering her a ride. After a short distance she realized that they were not going to let her out. She grabbed the wheel and hit the brakes, and Mr. Dyer hit her severely in the mouth with his elbow, causing a laceration which later required 13 stitches. Mr. Dyer then stopped the car, threw her in the back seat, jumped in the back seat with her and began beating her with his fists. The unknown accomplice continued to drive the car. Mr. Dyer continued to hit the victim and kept her on the floorboard of the car. They stopped on a deserted road near a pond, where Mr. Dyer pulled off the victim's clothes and offered her to the driver. The driver declined, and Mr. Dyer raped her vaginally. He then tied her up with a rope and pushed her back onto the floor of the automobile. After driving some distance, they took her to his home, tied her to the bed, taped her eyes shut, stuffed her mouth with cotton, and the second subject then raped her. Mr. Dyer then raped her again and then he would go to sleep, wake up and rape her again, and this occurred approximately eight times throughout the evening until the next afternoon. On two occasions he made her get up and take a bath prior to raping her. He would use spermicidal foam and cream on her, made her wash her clothes before he would allow her to redress, and then took her to a deserted area before he released her.

The second Rape incident occurred on August 24, 1980, when the victim was out walking her dog and went downtown, where she met some friends. Upon returning home, a vehicle offered her a ride and she declined. The two men in the vehicle then returned and she was forced into their car. The two men then drove out in the country where their car became stuck twice. She was forced to help free the car, and the car rolled onto her, injuring her leg. She was taken to Mr. Dyer's home where she was then tied to the bed, and the rope was taped to prevent burns to her arms and legs. Mr. Dyer then undressed her and raped her. He made her get up, take a shower, tied her up again, and he went to sleep. While he was asleep the victim was able to get loose, but a dog awakened Mr. Dyer. She

(continued on next page)

DYER, Richard

DOC #281744

HISTORY AND COMMENTS CONTINUED - PAGE 3

was recaptured and retied to the bed. He fell asleep again. She was again able to get loose and again the dog awakened Mr. Dyer. She was again retied, and was later awaked and forced to take a bath. She was allowed to wash her clothes, redress, and then she was permitted to be released into a forested area in the county. Upon letting her go Mr. Dyer apologized, said he was drunk, and gave her a wristwatch. It should be noted that this wristwatch belonged to the first rape victim in the incident in January 1980.

In September of 1981 two similar kinds of behaviors were done to Mr. Dyer's wife, and this is how the police were able to identify him as the rapist in the two incidents noted above. The tying to the bed, forcing to shower, rewashing the clothes, and the use of spermicidal foam all convinced the jury and led the police to believe that Mr. Dyer was the one who had committed the prior rapes. Victim number one was able to identify Mr. Dyer, whereas victim number two was never able to get a clear picture of the rapist because her eyes were taped closed. In all of the rape incidents, the victims were totally convinced that they were going to die and made mental preparations for death. Mr. Dyer was gainfully employed at the Bremerton Naval Shipyard at the time that the offenses occurred, prior to that he had been in the military for nine years and was given an honorable discharge. He served two tours in Vietnam and received a considerable number of awards for heroism during these tours.

REASONS:

Mr. Dyer is an untreated, convicted rapist who denies his culpability and is therefore not amenable or receptive to treatment. Dr. Jones, in his December 1994 psychological evaluation, diagnoses him as Post Traumatic Stress Disorder and sexual sadism. Dr. Jones states further that without treatment, the risk of reoffense remains high; that the depth of Mr. Dyer's sexual deviancy cannot be assessed because he is uncooperative in that area. We note the sentencing Judge recommended that he not

(continued on next page)

DYER, Richard

DOC #281744

REASONS CONTINUED - PAGE 4

be released until he is no longer a threat to the community. The threat continues to exist, absent treatment. The Board takes into consideration a prior psychological report from March of 1993 authored by Dr. Helmut Riedel, which provides documentation of Mr. Dyer's tendency toward denial and relates that although he denies the physical abuse of women, the record clearly shows that his first wife had a restraining order issued against him and accused him of physical violence. It is believed that until he effectively starts dealing with the conviction behavior, even if it may have been an offshoot of Post Traumatic Stress Disorder, it would be difficult to release this man back into the community.

On the positive side, he has had no infractions since 1988, has been gainfully employed with Redwood Industries, and is not a management problem. He is a leader/facilitator for the Alternatives to Violence program inside of the prison. He is married. His wife and three children reside in Oklahoma, where he intends to reside upon parole.

FACTS RELIED UPON:

The .052 prognosis from the Superintendent is poor. This is based on his lack of remorse for the victims, his denial of the crime, the seriousness of the offenses, the very negative tone of all psychological evaluations available to the Board at this time, and the fact that he is still an untreated predatory rapist, who from all indications has not taken advantage of available resources to address these issues.

GWJ:jas

March 27, 1995

CC: INSTITUTION  
RESIDENT  
FILE



STATE OF WASHINGTON

INDETERMINATE SENTENCE REVIEW BOARD

4317 Sixth Ave., S.E. • P.O. Box 40907 • Olympia, Washington 98504-0907 • (206) 493-9266  
(TDD Relay 1-800-833-6388)

TO: Full Board

DATE: March 31, 1995

FROM: GWJ & JG (Jody)

RE: DYER, Richard  
#281744

This is a DD - Panel recommends:

That Mr. Dyer be found not parolable and 36 months be added to his minimum term.

Next Action:

Schedule a March 1997 <sup>6/25</sup> ~~hearing~~ <sup>Panel Review</sup>

See attached dictation --

AGREE	DISAGREE
<i>JG 4/3/95</i>	<i>6 mos</i>
<i>KB 4/3/95</i>	<i>add 60 months</i>
<i>JG 4/7/95</i>	<i>would agree w/ 60 mo.</i>
	<i>TA table cont</i>





filed  
4/2/93

PSYCHOLOGICAL EVALUATION

RECEIVED

Name: DYER, RICHARD  
Number: 281744  
Date of Birth: 12-20-48  
Date of Evaluation: 3-5-93

APR 12 1993

INDETERMINATE SENTENCE  
REVIEW BOARD

Reason for Referral

The Correctional Program Manager referred Mr. Dyer for psychological evaluation to be used in his .100 hearing scheduled for 12-94 as well as for the determination of appropriateness for camp placement. Specific referral questions included risk of reoffense, depth of sexual deviancy and suitability for less restricted custody status.

Data Base

File review, OBTS infraction list, interview with Mr. Dyer, and Minnesota Multiphasic Personality Inventory (MMPI).

Background According to Records

Instant offense. According to the Legal Face Sheet, Mr. Dyer is serving a Life sentence for two counts of Rape 1st. According to the Criminal History Summary (CHS), Mr. Dyer committed two brutal rapes in which both victims were abducted in a car, tied to a bed, and forced to have intercourse. The Pre-Sentence Investigation (PSI) provided a detailed description of these brutal crimes, which involved beatings. In both cases the victim's clothes were washed and she was made to shower or bathe, according to the CHS.

Previous offenses. The CHS noted no juvenile criminal record or previous adult felony convictions. However, Mr. Dyer volunteered that he received three speeding tickets and also received a ticket in 1969 for negligent driving and disturbing the peace (discharging a firecracker).

Infractions and escape history. Mr. Dyer's record contains an infraction for an attempted escape, as information was received that he and a number of other inmates were planning to escape. The OBTS listed 10 infractions from 1984 (setting a fire) through 1988 (fighting). He received infractions including fighting (twice), assault/hospitalization (once), and escape (once-1987).

Previous evaluations. Mr. Dyer's file contains no previous psychological evaluation. The ISRB's Obert Meyer Redetermination (9-15-86) set the minimum term at 240 months, which is above the SRA guidelines. The ISRB felt that this was justified in light of the brutal nature of the crimes. The ISRB stated, "Today Mr. Dyer presented himself to the Board still in the denial stage. He claims that he did not commit any of the crimes and that the charges five, six and seven were dropped. We advised him that the reason that they were dropped is because the County elected not to re-try those charges. Those charges of Rape were involving his wife." A document entitled "In the Court of Appeals of the State of Washington" (8-14-84) summarized a variety of evidence of Mr. Dyer's guilt in the three rapes. This document explained that the conviction including rape of his wife was overturned on a technicality involving presentation of the occurrence of two prior rapes. His convictions for Unlawful Imprisonment, Rape of his Wife and First degree Burglary were remanded for a new trial. Thus, he was not found innocent.

Behavioral Observations and Interview

Informed consent and initial impressions. Mr. Dyer was explained the purpose of this evaluation, the lack of absolute confidentiality, and his right not to participate. Mr. Dyer presented as a healthy-looking, cooperative, divorced and currently married, 44-year-old, Caucasian man, who said he had three children. He was talkative and cheerful during much of the interview but became appropriately solemn when speaking about painful events from the time he had spent in Vietnam.

Mental health history. He presented no gross symptoms of mood or thought disorder. He denied any history of hallucinations or suicide attempts. He was able to accurately count backwards by sevens and recalled three objects after about five minutes. He stated that a psychiatrist had diagnosed Post-Traumatic Stress Disorder (PTSD) resulting from his Vietnam experiences.

Substance abuse. Mr. Dyer denied any history of substance abuse. He said that he had been evaluated and found not to need a substance abuse program. He stated that he had been a drug counselor in Vietnam and recalled being involved in burning heroin that was found. The evaluation was conducted by a substance abuse counselor at WSR dated 1991.

Skills and goals. Mr. Dyer indicated that he has a high school diploma from the Army as well as some college credits. In addition to his many heroic activities during the war in Vietnam, Mr. Dyer described a number of other accomplishments, e.g., his coordination of a motorcycle show for the Army, teaching mountain climbing, as well as his activity as a nuclear waste foreman working for the Department of Defense as a civilian. He stated that he had received 19 metals from the Army.

He stated he was often callous as a foreman and that he felt regret over having killed soldiers in Vietnam. He stated that his attitude and outlook on life changed about three years ago, when he started working with or participating in Leonard Shaw workshops, anger management program, Alternatives to Violence, and being a facilitator for the Breaking Barriers programs. He is currently the president of the Inmate Toastmasters Club and thus has good speaking skills.

Developmental history. Mr. Dyer described his childhood as being "good" and stated that he had little time to engage in delinquency as he spent most of his free time working. He stated that he did not experience physical or sexual abuse as a child and that he did not know his birth father because his parents separated or divorced when he was about three years old. His mother re-married and he recalls witnessing his step-father beating his mother. However, he stated that his mother successfully fought back.

Inmate's version of offense pattern. As indicated in his file materials, Mr. Dyer consistently denied guilt in the three rapes of the original convictions. He stated that he has been married since 1981 and that the victim of the third alleged rape was his ex-wife. He stated that he had an affair with his second wife (ex-wife) without telling her that he had re-married. He stated that he had sex with her but that it had been voluntary on her part. The PSI indicated that Mr. Dyer had denied being physically abusive in his first marriage, but that documents were found revealing a restraining order filed against him in 1972. In this order, his wife advised that her husband had been physically violent towards her. He indicated willingness to undergo "lie detector" testing as well as physiological testing of his sexual arousal patterns.

Remorse. Mr. Dyer was able to define the word remorse as feeling bad or sorry for something one has done. He stated that he has "tremendous" remorse for the people he has harmed. He referred mainly to his cold-hearted activities as a foreman, in which he would fire individuals from their jobs unnecessarily. He also expressed remorse about killing individuals in Vietnam in situations where he felt it may not have been absolutely necessary. He stated that through Leonard Shaw workshops he had learned empathy and that in the past, he had an explosive temper, "knives on his tongue", was self-centered and had low self-esteem.

Minnesota Multiphasic Personality Inventory (MMPI)

The results of the MMPI need to be viewed with caution due to norms dating back to the 1940s.

Welsh Code: 31564-7982/0: K'-L/F:#?

Mr. Dyer produced a marginally valid MMPI profile according to the validity scales, with the K-Scale significantly elevated. However, it was still in the acceptable range for college educated people, according to Graham. None of the standard clinical scales were significantly elevated above the cut-off point of T=70. Thus, this profile provided no evidence of severe psychopathology. A number of scales approached the cut-off point and these indicate that Mr. Dyer may tend to somatize during periods of stress and tends to be very aware and concerned about others' opinions of him or intentions, which would be consistent with his PTSD.

#### Integration

Disclaimer and overview. This evaluation was conducted in a prison setting under conditions that were not ideal for self-disclosure or psychological testing. Therefore, results from this assessment should be viewed as hypotheses only.

Mr. Dyer presented as a fully oriented, healthy-looking, 44-year-old, Caucasian man. He is currently married to his third wife and stated that he has three children. He presented no obvious symptoms of mood or thought disorder. However, he continues to have residual symptoms of Post-Traumatic Stress Disorder (PTSD) from traumatic experiences in the Vietnam war. He recounted a distinguished military career, both during the war and during civilian activity, and has received 19 medals. He has been a leader in teaching mountain climbing, coordinating motorcycle shows for the military, and is currently the president of the WSR Inmates' Toastmasters Club.

Since his arrest he has consistently claimed to be innocent of all charges and convictions, involving three rape incidences. According to the material in his file, jury convictions, three failed appeals, the fact that all three victims identified him as the perpetrator, similarity of method, leave little doubt that he actually committed the rapes. Nevertheless, he is currently in the process of a fourth appeal and indicated during the interview that for this reason he did not wish to speak about the details of his involvement in the instant offenses.

#### Diagnostic impressions.

Axis I:	309.89	Post-traumatic stress disorder
	302.84	Sexual sadism (provisional)
Axis II:	799.90	Diagnosis deferred on Axis II
Axis III:		Deferred to physician's opinion
Axis IV:		Psychosocial stressors: death of brother (acute event)
		Severity: 4--severe
Axis V:		Current GAF: 71
		Highest GAF past year: 71

His symptoms of PTSD include distressing recollections of Vietnam experiences, distressing dreams, distress when viewing certain movies, avoidance of trauma memories other than in therapy situations, avoidance of certain activities, memory gaps, insomnia, outbursts of anger (decreasing), hypervigilance, exaggerated startle responses, and excessive physiological reactivity. Apparently, he has had these symptoms for a number of years and they have decreased in intensity, especially during the last three years, which he attributes to a large extent to his involvement in Leonard Shaw seminars.

The provisional diagnosis of sexual sadism is based on the assumption that Mr. Dyer actually did commit the three rapes of which he was originally convicted by a jury trial. He maintains that due to one of his appeals one Rape conviction and two other convictions (Burglary and Unlawful Imprisonment) were

over-turned. However, this appears to be due to a technical aspect of the original trial involving "severance." Consequently, the impression is that Mr. Dyer is currently in denial. During the interview, he flatly denied any deviant sexual fantasies involving rape, violence, or children. He stated that his sexual development was essentially normal, that he maintained a relatively loyal relationship with a certain girl during his teenage years and later married her.

An indication that he may have a tendency towards denial is indicated in that he denied any physical abuse of women, although the record shows that his first wife had a restraining order on him and did accuse him of physical violence. Also, the elevation on one of the validity scales on the MMPI was on the high borderline for individuals with college education. A T-score above 70 is considered elevated for this population, while Mr. Dyer obtained a T-score of 70. Elevations on this scale often indicate a defensive test-taking attitude. Additionally, Mr. Dyer's central file contains a number of appeals of infractions for institutional misconduct, in which he also claimed innocence. Furthermore, Mr. Dyer related that as a foreman for the military, much of his successful performance may have been due to his knowledge of military and employment regulations. Thus, it is suspected that Mr. Dyer's knowledge of and facility with rules, regulations, and laws are an advantage in his on-going appeals of his convictions and institutional infractions. Also, due to Mr. Dyer's claims of innocence, he is not currently amenable to sexual deviancy treatment. However, he has stated that he is not opposed to such treatment and has taken advantage of various other treatment options.

Summary responses to referral questions. The following estimates are provisional on the assumption that Mr. Dyer's jury convictions are valid. Risk of reoffense is estimated to be high, based on the assumption that the jury convictions are accurate and that 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. It is possible that specialized sexual deviancy evaluation with the use of physiological measurement of deviant sexual arousal patterns may throw further light on this issue. Mr. Dyer indicated that he is not opposed to such evaluation if required.

Suitability for less restricted custody status is estimated to be low to moderate. Mr. Dyer continues to present symptoms of PTSD and has originally been convicted by a jury of three separate rapes. In addition, he has had a number of infractions involving physical violence and one suspected escape attempt in 1987.

  
\_\_\_\_\_  
Helmut Riedel, Ph.D.  
Psychologist 4  
Washington State Reformatory

HR/ds



## PSYCHOLOGICAL EVALUATION

IDENTIFYING DATA:

NAME: Richard Dyer  
NUMBER: 281744  
DATE OF BIRTH: 12-20-48  
DATE OF REPORT: 12-7-94

REASON FOR REFERRAL:

Mr. Dyer is scheduled for a March, 1995 .100 hearing with the ISRB. He was last seen by the Board on 2-24-94 and deemed not parolable at that time. His present custody status is MI-3. The Legal Face Sheet shows a GTRD of 6-20-95, the maximum expiration date is not shown.

The inmate was last evaluated by Dr. Helmut Riedel on 3-5-93.

CRIMINAL HISTORY:

Prior to the cluster of crimes which constitute his present offenses, Mr. Dyer had no juvenile record and only traffic related misdemeanors, as an adult. He was convicted on the current offenses on 2-19-92; namely, Rape 1st°, Count 2 and Rape 1st°, Count 4 with a 600 month minimum term, later reduced to 240 months under the Obert Meyers ruling. These crimes are described in some detail in the Criminal History Summary of 1-8-90. On appeal, the Court reversed Count 5 (Unlawful Imprisonment), Count 6 (Burglary 1st°) and Count 7 (Rape 1st°), all charges related to his ex-wife. To be more precise, Counts 5, 6, and 7 were dropped because the County elected not to retry those charges.

Mr. Dyer's prison conduct record has been less than perfect showing 10 infractions from 1984 through 1988; however, since that time he has maintained a clean record.

As he has done all along, Mr. Dyer continues steadfast in his claim of innocence to these crimes. He has had ostensibly, good legal representation and has used the appeal process to real advantage. He indicated that he would even be willing to go the SOTP program, but would not be found acceptable due to his position of innocence. Thus, it appears that Mr. Dyer has used all of his legal options at great financial cost and the treatment option is a non-choice.

ASSESSMENT:

Mr. Dyer is a short, stocky, 45-year-old Vietnam veteran who is presently married to his third wife. They have 3 children, though the family is presently living in Oklahoma. Upon interview, Mr. Dyer presented as a calm and collected individual who dressed in a relaxed, but appropriate manner. He is capable of expressing himself well verbally and talked easily about most topics including his war time experiences, yet had almost nothing to say about his

rape offenses. From a mental health perspective, he was found to be alert, fully oriented, and relevant. He showed no signs of anxiousness, agitation or depression and more generally no indications of either a thought or mood disorder. He does freely admit to symptoms of PTSD which may have been initially diagnosed by Dr. Nochlin, a former psychiatric consultant. Presently, Dr. Riedel is working with Mr. Dyer around PTSD related issues. The subject does not have a history of abusive use with alcohol or drugs. Mr. Dyer did mention that Dr. Nochlin had prescribed a medication for his PTSD symptoms, but that it proved to be toxic to him. He claims that "drugs hit me really strong, I could never be a drug user." He suggested that he maybe has been drunk a couple of times in his life.

Mr. Dyer was fully cooperative with the testing procedures. He had, in fact, taken an earlier MMPI for Dr. Riedel which was done on 11-23-94. Unfortunately, this MMPI was invalidated by very high L and K scale scores. Together, these represent a very defensive test taking attitude, though a high L scale also represents persons trying to present themselves in a favorable light; e.g., good, wholesome, honest. Scale 4 Pd was the highest of the clinical scales to be elevated. Two items from the Incomplete Sentence Blank are especially interesting: #15 I would do anything to forget the time "In Vietnam." and #28 My greatest mistake was "going to Vietnam." On another instrument, the Attitudes Scale, item #8 provides an index to one's self-concept. When asked to describe yourself as you really are, Mr. Dyer responded: "Honest, reliable, consistent, fair, understanding. I have a hard time with reading and writing, but will help with a good cause. Willing to learn."

MULTI-AXIAL DIAGNOSES:

Axis I	309.89	Post-traumatic stress disorder
	302.84	Sexual sadism, rape
Axis II		Deferred
Axis III		No major disease or disability reported or observed
Axis IV		Severity of psychosocial stressors, mild
Axis V		Current GAF: 75

COMMUNITY RELEASE PLAN:

Almost no specific planning around release has taken place due to the uncertainty of timing. Mr. Dyer's wife and children are living in Oklahoma and their return to this area is likely near the time of his release. The inmate is confident that finding employment will not be a problem. Prior to his arrest, he had approximately

6 years experience in ship yard work. Mr. Dyer does plan to continue with some type of PTSD support group in the community.

DISCUSSION & RECOMMENDATIONS:

Though the present document represents an updated evaluation, there is little to report in the way of new information. Mr. Dyer maintained a good conduct record over the past year and continues to program effectively, while holding his job at Redwood. His last major infraction was back on 8-4-88, a WAC 505-fighting. In addition to Toast Masters, Hobby Shop, Leonard Shaw Seminars, Breaking Barriers, the Course in Miracles, Dyer also functions as a facilitator for Alternatives to Violence and a new mediation/resolution program. Given his circumstances, he attempts to maintain a very positive attitude.

Mr. Dyer may still have another legal card to play. Until he has absolutely exhausted all legal remedies, he will continue in the denial mode. Obviously, 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. Thus, any estimate of this dimension must be based on the actual number and nature of his sexual offenses. Depending on his release date, his suitability for less restricted custody status is thought to be moderate. His actual conduct record does suggest that his impulse control is improving.

Wm. C. Jones, Ph.D.

WILLIAM C. JONES, PhD.  
SUPERVISOR, MENTAL HEALTH SERVICES  
WASHINGTON STATE REFORMATORY

WCJ/jp





# BOARD COPY

CAMP ASSIGNMENT  
 COMMAND MANAGER  
 DIRECT COMMUNITY SERVICES  
 HCSC  
 CHIEF CLASSIFICATION & TREATMENT  
 NO ACTION REQUIRED

REVIEW PERIOD: 10-12-94 TO 1-5-95 FACILITY / LIVING UNIT WSR 3A Unit

1. REFERRAL AGENT RICHARD HOLCOMB, ACC 3 <del>4</del>	DATE 1-5-95	2. MAXED LIFE PERD: 6-20-95	3. MRO 8-95
4. REVIEW OF CLASSIFICATION FOR:			
<input type="checkbox"/> INITIAL (RC) <input checked="" type="checkbox"/> Camp <input checked="" type="checkbox"/> W/R <input type="checkbox"/> Board <input checked="" type="checkbox"/> Six Month Review <input type="checkbox"/> Ad Seg <input type="checkbox"/> PPR <input type="checkbox"/> Transfer <input checked="" type="checkbox"/> Other (specify) <u>Pre-Release/3-95 .100/.052 Hearing</u>			
5. NARRATIVE			

**PROGRAMMING:** Mr. Dyer continues full-time programming through his employment at Redwood Industries as a floor manager with responsibility for quality control. He is also involved in Toastmaster's, hobby shop, Leonard Shaw Seminars, Course in Miracles, Breaking Barriers, facilitator for the Alternatives to Violence program, and a new program having to do with dispute resolution.

**SERIOUS INFRACTIONS:** No serious infractions during this review period. His most recent serious infraction occurred during 8-88, WAC 505 (fighting).

**MEDICAL:** Mr. Dyer states he has ongoing chronic back problem due to a herniated disk for which surgery has been recommended. However, Mr. Dyer reports that he is delaying the surgery as long as possible. He also reports that he receives medication for rashes related to exposure to agent orange while in the military.

**MENTAL HEALTH:** A psychological evaluation was completed on Mr. Dyer by Dr. Jones on 12-7-94. A copy of that evaluation is attached and made a part of this report. Mr. Dyer also currently meets with Psychologist Dr. Riedel for therapy related to post-traumatic stress syndrome. Dr. Riedel was contacted for comment and stated that he has met with Mr. Dyer on approximately 14 occasions so far on a weekly basis. He reports that Mr. Dyer's post-traumatic stress syndrome appears to be a legitimate problem which he is working on and making significant progress. He reports that Mr. Dyer continues to struggle with dreams and has difficulty sleeping. Additionally, on 11-15-94, Mr. Dyer met with Eileen McCarty, Ph.D., who is associated with Sarah Wing & Associates. Ms. McCarty was contacted on today's date and stated that she is preparing an independent psychological evaluation which is not yet completed, but will be prior to his 3-95 Board hearing.

**COMMUNITY SUPPORT:** Mr. Dyer's wife, Renetta, and their three children reside in Oklahoma and visit approximately once yearly. Mr. Dyer and his family do participate in the Extended Family Visit program. He reports that he also receives telephone calls and letters from other family members and occasional visits from friends.

**COMMUNITY RELEASE PLAN:** Mr. Dyer states that if paroled, his current plan is to reside in Oklahoma with his family.

**EMPLOYMENT/EDUCATION/TRAINING:**

- ED/VOC:** Mr. Dyer received his high school diploma in 1976. He has completed the power sewing program and a vocational janitorial program. He has also completed some college level academic classes.
- CHEMICAL DEPENDENCY:** Mr. Dyer was evaluated for chemical dependency during 4-91, with no recommendation for participation in the DOC program.
- STRESS/ANGER MANAGEMENT:** Completed during 1987.

6. NUMBER	NAME. LAST	FIRST	MIDDLE
281744	DYER	Richard	

CLASSIFICATION REFERRAL CONTINUED



REVIEW PERIOD: 10-12-94 TO 1-5-95 FACILITY/LIVING UNIT: WSR 3A Unit

4. CRIME-RELATED COUNSELING: Mr. Dyer continues to maintain his innocence in the instant offenses and is therefore not eligible for SOTP or other crime-related counseling at WSR. Mr. Dyer has repeatedly requested access to crime-related counseling, but has been denied due to his maintaining of innocence.

COUNSELOR COMMENTS: Mr. Dyer is currently classified MI-3 (community risk and criminal history) per HCSC decision dated 9-22-92. He has maintained full-time programming, and has incurred no serious infractions. Mr. Dyer has continued to involve himself in self-improvement programs with the exception of crime-related counseling due to his denial of the instant offense.

Mr. Dyer is a Board case, currently scheduled for a 3-95 .100 Hearing. He does have a prior infraction for attempted escape (WAC 550) which occurred 5-26-87. He also has a notification detainer from the Department of Human Services (family aid) dated 8-24-92.

6. NUMBER	NAME: LAST	FIRST	MIDDLE
281744	DYER	Richard	

CLASSIFICATION REFERRAL CONTINUED



REVIEW PERIOD: 10-12-94 TO 1-5-95 FACILITY/LIVING UNIT: WSR 3A Unit

UNIT TEAM COMMENTS/RECOMMENDATIONS: Mr. Dyer is being reviewed by Committee this date for a six month review, minimum facility consideration, and .052 recommendation. Dyer has a commendable program and conduct record, but Unit Team notes that he has not participated in a sexual deviancy program. Dyer stated he is willing to participate in the SOTP at TRCC but, as he denies his commitment offenses, he is ineligible.

RECOMMENDATIONS: Custody remains MI-3 (PHD). Prospects for habilitation are poor.

CASE PLAN: Participate in sexual deviancy therapy prior to and after release. Maintain current programming and favorable conduct record.

INMATE COMMENTS: Dyer stated that he was going to consider appealing the Unit Team's recommendation for prospects for habilitation. Dyer was directed to have such an appeal completed within 48 hours if he indeed was going to submit one.

COMMITTEE MEMBERS: Howard Anderson, CUS, Richard Holcomb, ACC 3, N. Chabot, CT 3

Handwritten signature of Howard Anderson and date 1-11-95. Label: Chairperson/Date

Review Committee Recommendations/Action: WD/PL/DC

Custody remains MI-3 (PHD). Deny minimum facility placement due to custody. Prospects for habilitation are poor.

Review Committee Chairperson/Date: Handwritten signature and date 1/17/95

Superintendent Recommendations/Actions: Concur. Superintendent Signature/Date: Handwritten signature and date 1/17/95

Table with 3 columns: 6. NUMBER (281744), NAME: LAST (DYER), FIRST (Richard), MIDDLE





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DECISION AND REASONS

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NAME:	Richard DYER
NUMBER:	281744
INSTITUTION:	Airway Heights Correction Center
TYPE OF MEETING:	.100
DATE:	August 11, 1998
PANEL MEMBERS:	JG & JA

---

BOARD DECISION:

The full Board finds Mr. Dyer not parolable and adds 60 months to his minimum term.

NEXT ACTION:

Schedule an August, 2000 Administrative Progress Review.

HISTORY AND COMMENTS:

Mr. Dyer is under the Board's jurisdiction for two counts of Rape 1<sup>st</sup> Degree. The time start was February 19, 1982, with a maximum of life. The Sentence Reform Act (SRA) guideline range is 67 – 89 months, with an adjusted range of 63 – 85 months. The judge made no recommendation and the prosecutor recommended 600 months. As of today's date Mr. Dyer has served approximately 197 months.

File materials describe the underlying convictions as two separate attacks on two different women approximately 7 months apart. The first rape occurred in January of 1980 when Mr. Dyer and a co-defendant picked up the victim hitchhiking. The assault lasted over the course of time from the evening of one day into the afternoon of the next day. The victim was raped multiple times by Mr. Dyer, beaten severely, causing 13 stitches in her mouth. He bathed

APPENDIX 10



DYER, Richard

DOC #281744

CONTINUED – PAGE 2

her, washed her clothes, and then abandoned her in a deserted area. The second rape occurred in August of 1980 when the victim was forced into the car occupied by Mr. Dyer and a co-defendant. File materials describe the rape as occurring at Mr. Dyer's home, where the victim was tied and again her clothes were washed. She was forced to bathe and was released early the next morning. File materials also note that before releasing the second victim Mr. Dyer gave her a wristwatch that belonged to the first victim.

REASONS:

The Board last saw Mr. Dyer in March of 1995. At that time it was noted that he was in denial of the underlying crimes, as he is today. It also should be noted that Mr. Dyer was eventually arrested when he committed a similar crime against his wife, which was reported to the police. This led to his arrest and conviction.

There is a current psychological from Dr. Lauby dated June of 1998, which rates his risk of re-offense, based on results of the Level of Service Inventory-Revised (LSI-R) and Hare Psychopathy Checklist-Revised (PCL-R), as low to medium. He notes that Mr. Dyer has a moderate likelihood of sexual deviancy based on the Risk Level Classification (RLC).

On the Multiphasic Sex Inventory (MSI) testing, Dr. Lauby noted he failed to acknowledge even normal sexual desires and interests. His replies indicated very little, if any, motivation for treatment. He considered that Mr. Dyer's knowledge of human sexuality is borderline and his general performance may be considered fairly dishonest.

Mr. Dyer has received an infraction in April of 1995 for fighting. It was testified to at the .100 hearing that in March of 1998 there was another incident that involved Mr. Dyer fighting on the unit, which did not result in an infraction but he was transferred to a different unit. His current and past counselor both testified that Mr. Dyer is manipulative and

DYER, Richard

DOC #281744

CONTINUED – PAGE 3

controlling on the unit and has threatened legal action if he is not satisfied with the response he receives from staff. There is a current investigation ongoing with respect to Mr. Dyer dealing with a phone scam at Airway Heights, which apparently is currently under investigation. No additional information was available besides the original incident report dated June of 1998. This investigation was noted, but not considered in today's .100 hearing.

Mr. Dyer is under the Board's jurisdiction for two violent and predatory sex crimes. As previously noted, he is in denial of these crimes, as well as the offense against his wife which led to his arrest. In reviewing Mr. Dyer's file, the psychological from March, 1993 by Dr. Riedel and the December, 1994 psych by Dr. Jones was reviewed. Both of these psychologicals rated Mr. Dyer's risk of re-offense to be high. Dr. Reidel rated his risk of sexual deviancy to be high, while Dr. Jones noted that without the benefit of special treatment for sexual deviancy the risk of re-offense remains high. A review of the underlying criminal behavior reflected a high level of manipulation and sophistication. A review of Mr. Dyer's institutional adjustment and behavior with staff seems to indicate additional manipulation and control. After a careful review of all available file materials, it is the Board's conclusion that the only responsible decision is to continue to find Mr. Dyer not parolable.

#### FACTS RELIED UPON:

The panel relied upon previous Board dictations; the current psychological by Dr. Lauby; a review of the ISRB and DOC files; as well as the face to face interview with Mr. Dyer today. It is noted that subsequent to today's .100 hearing a number of letters of support were submitted on Mr. Dyer's behalf. These were a letter from his attorney Cindy Jordan with attachments; a letter from Leonard Shaw with attachments; and letters from Rennetta Dyer,

DYER, Richard

DOC #281744

CONTINUED - PAGE 4

Stephanie Dyer, Richard Dyer, Robert Shoup and James Reese, III. A letter with supplemental information was also received from attorney Leta Schattauer dated August 28, 1998.

JG:is

August 20, 1998

CC: INSTITUTION  
RESIDENT  
FILE





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**DECISION AND REASONS**

---

NAME: DYER, Richard J.  
NUMBER: 281744  
INSTITUTION: McNeil Island Corrections Center  
TYPE OF MEETING: .100 Hearing  
DATE: December 4, 2001  
PANEL MEMBERS: JA & MM  
FINAL DECISION DATE: January 30, 2002

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BOARD DECISION:

This was a Deferred Decision. The full Board finds Mr. Dyer not parolable and adds 60 months to his minimum term.

NEXT ACTION:

Schedule a December 2003 Administrative Progress Review.

HISTORY/COMMENTS:

Mr. Dyer is under the Board's jurisdiction for two counts of Rape in the First Degree. The time start was February 19, 1982, with a maximum expiration date of Life. The Sentencing Reform Act (SRA) guideline range is 67 to 89 months, adjusted to 63 to 85 months. The Judge made no recommendation and the prosecutor recommended 600 months. As of today's date Mr. Dyer has served approximately 235 months.

File materials describe the underlying convictions as two separate attacks on two different women. One in January of 1980 where the victim stumbled into the police department exhibiting bruises on her jaw, right cheek, and forehead. There were rope burns on her wrists

(continued on next page)

APPENDIX 11



DYER, Richard J.

DOC #281744

HISTORY/COMMENTS CONTINUED - PAGE 2

and some cotton and tape residue on her face. She indicated that two suspects about 2:30 in the morning in downtown Bremerton had given her a ride. The driver she identified as the defendant. She was driven to an isolated location, stripped, raped, and tied. She was offered to the codefendant, who appeared too frightened. She was then taken to a residence, tied to a bed, and gagged. The codefendant started to attack, but again backed out. The defendant ended up raping the victim about eight times. Twice she was forced to bathe, using foam and cream applied to the vaginal area. Her clothes were washed. She was released the next afternoon outside of Bremerton.

On August 24<sup>th</sup>, 1980, a second female victim was found at approximately 10:30 in the morning limping, with scratches on her arms and the left side of her head. She indicated that about 11:00 p.m. on the 23<sup>rd</sup> of August, the night before, she had been walking her dog. She declined a ride, but then the car returned and she was forced into the car. She said she was taken to a residence and tied to a bed with rope, the rope being taped to prevent burns. She indicated the defendant stripped her and then she was raped. She attempted escape when the defendant went to sleep, but the dog wakened and she was retied when she was caught. She also was bathed and the defendant washed her clothes and as she was released she was given a watch, the defendant apologizing and claiming he was drunk. The first victim of the January rape was beaten severely and received 13 stitches in her mouth. Mr. Dyer was tried and convicted by a jury and throughout he maintains his innocence of the charges.

REASONS:

The Board last saw Mr. Dyer in August of 1998. Mr. Dyer's psychological reports consistently indicate low to medium risk. His behavior in the institution is quite good, his

(continued on next page)

DYER, Richard J.

DOC #281744

REASONS CONTINUED - PAGE 3

last infraction was in 1994. He maintains some contact with his wife and children, who now reside in Oklahoma, and with siblings that live in the area. Mr. Dyer has a veteran's disability for Post Traumatic Stress Disorder. He's had carpal tunnel syndrome and gastric distress. He presently works as a gardener in the institution with excellent marks. He is not considered a management problem in the institution.

A central difficulty for the Board is 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. More serious and significant to the Board is that these particular types of rape appear to be in reaction to stress. There is extensive file material concerning Mr. Dyer's childhood, the multiple boyfriends of his mother, and difficulties in the marriage also involving this kind of behavior, which apparently led to the discovery and eventual prosecution in Bremerton. Mr. Dyer shows that he is an orderly person, careful in his work and is able to maintain himself within the institution. The central difficulty for the Board, as discussed with Mr. Dyer and his counsel today, is that's precisely the behavior demonstrated in the crimes. The calculation, the laundering and washing to remove clues and not resorting to deadly force, but releasing the victims, are all consistent with the typology that this particular crime exhibits. In making a decision about Mr. Dyer's rehabilitation and fitness to be released, we consider the crime as proven in a court of law and the appeal process exhausted. Thus Mr. Dyer, for the Board, is an untreated sex offender with behaviors that are apparently motivated when he is in a period of stress. The Board would anticipate that upon release, even at the age of 52, Mr. Dyer would encounter far more stresses than he may

(continued on next page)

DYER, Richard J.

DOC #281744

REASONS CONTINUED - PAGE 4

now, having accommodated to his life in the institution. It's the potential reaction to that stress that is of significant concern to the Board as a trigger to more attacks.

Psychological data in the file from the early 1990s indicated a relatively high reoffense risk. As indicated, this risk appears to have been ameliorated in current psychological tests. Of concern to the Board is the ability to learn how to take psychological tests. As indicated, the underlying criminal behavior reflects a high level of manipulation and sophistication. After full review of all available file materials it is the Board's conclusion the only responsible decision is to continue to incapacitate Mr. Dyer as not rehabilitated and fit to be released.

FACTS RELIED UPON:

The panel relied upon previous Board dictations, file materials of the Department of Corrections and the ISRB, the interview with Mr. Dyer, and arguments of his counsel.

JA:jas

December 17, 2001/February 6, 2002

CC: INSTITUTION  
RESIDENT  
FILE





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DECISION AND REASONS

---

NAME: DYER, Richard J.  
NUMBER: 281744  
INSTITUTION: McNeil Island Corrections Center  
TYPE OF MEETING: .100 Hearing  
DATE: October 18, 2006  
PANEL MEMBERS: JC & DT  
FINAL DECISION DATE: December 5, 2006

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BOARD DECISION:

This was a Deferred Decision. The full Board finds Mr. Dyer not parolable and adds 80 months to his minimum term.

*(Note: Mr. Dyer's PERD is currently 04-08-05; thus adding 80 months is the equivalent of adding 60 months from the date of his hearing. Based on 1/3<sup>rd</sup> good time calculations that means we will see him in person again in about 3 ½ years.)*

NEXT ACTION:

Schedule an October 2008 Administrative Progress Review.

HISTORY/COMMENTS:

Mr. Dyer is currently under the Board's jurisdiction for two counts of Rape First Degree, with a time start of February 19, 1982. The Rape First, Count II, carries a Life maximum and the Rape First, Count IV, also carries a Life maximum. File materials show that the sentencing Judge recommended that Dyer "should be held in custody until the Parole Board is absolutely sure that he will not reoffend or until the end of his natural life," and the prosecutor recommended that Mr. Dyer serve 50

DYER, Richard J.

DOC #281744

HISTORY/COMMENTS CONTINUED - PAGE 2

years (600 months). In 1982, Mr. Dyer's minimum term was set by the Board at 600 months; this was 18 months outside the Sentencing Reform Act (SRA) guideline range. Under requirement to conduct an Obert Meyers Redetermination hearing, on November 14<sup>th</sup>, 1986, the full Board redetermined his minimum term to 240 months. The SRA guideline range for Rape First Degree is 63 to 88 months. The Board justified an aggravated minimum term based on the recommendations of the sentencing Judge and the prosecuting attorney and because the crimes manifested deliberate cruelty. Mr. Dyer has been seen by the Board for in-person parole eligibility hearings four times since then, not including today's hearing. Each time he was found not parolable and additional time was added to his minimum term. In July 2006, the Washington Supreme Court remanded Mr. Dyer's case to the ISRB for a new parolability hearing.

Mr. Dyer was already scheduled to have a .100 parolability hearing on March 22<sup>nd</sup>, 2005; however, his attorney requested in writing that the hearing be postponed until a decision was issued by the Washington Supreme Court. As a result, Mr. Dyer is past his PERD (Parole Eligibility Review Date). Mr. Dyer's attorney, Mr. Zuckerman, requested in writing that at the current hearing, the Board consider a brief he submitted to the Board on October 10<sup>th</sup>, 2006, as well as additional materials that included information from a 2005 psychological evaluation and a 2005 letter from a DOC program unit supervisor.

As of today's date, Mr. Dyer has served approximately 296 months. When Mr. Dyer was received at the DOC under Board jurisdiction February 19<sup>th</sup>, 1982, he also had been convicted of the following counts: Count V, Unlawful Imprisonment (5 years); Count VI, First Degree Burglary (Life), Count VII, First Degree Rape (Life). All sentences were to run concurrent. On August 14<sup>th</sup>, 1984, Mr. Dyer's convictions

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were reversed on Counts V, VI & VII; Counts II and IV, both First Degree Rapes, were affirmed. File materials show, and Mr. Dyer confirmed in his hearing, that the convictions that were reversed related to two incidents involving his former wife. In reversing the three counts on direct appeal, the Court of Appeals held that the trial court abused its discretion by denying Dyer's motion to sever the counts involving the two separate victims in Counts II and IV from the other counts that involved his former wife. The Court of Appeals found that evidence that Dyer forcibly raped the other victims was not admissible to prove that his former wife did not consent to sex; however, the Court held that evidence from the incidents involving his former wife was admissible to help identify Dyer as the rapist in the other two rape counts. The prosecutor never retried Dyer on the counts involving his former wife. Because these convictions were overturned on a technicality, he was not found innocent of them. The Board notes that there are file materials that indicate that in 1982, Dyer admitted to his prison classification counselor that he had "only victimized his wife" and not the two other rape victims. He has since continued to deny that he victimized his ex-wife.

File materials describe the two remaining convictions as two separate attacks on two different women who did not know Mr. Dyer. One occurred on January 27<sup>th</sup>, 1980. The 22 year old victim reported to the police that she had been raped and assaulted by two men. Officers noted that she had numerous bruises on her jaw, right cheek, and forehead. There were rope burns on her wrists and some cotton and tape residue on her face from being blindfolded; her mouth was bloody with a large laceration inside the right cheek and large quantities of dried blood on the front of her jacket. The victim reported that two men offered her a ride at about 2:30 a.m. in downtown Bremerton. She identified the driver as the defendant, Mr. Dyer. She was seated between the two men on the front seat of the vehicle. The victim

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reported that when they did not drop her off at her requested destination and instead headed out of town, she recognized something was amiss and she grabbed the steering wheel and attempted to jam on the brakes of the vehicle. She reported that the driver, later identified as Mr. Dyer, elbowed her in the face, cutting open her cheek inside the mouth. He then stopped the vehicle, threw her into the back seat, jumped into the back seat with her and started punching her with his fist. The second man then started driving. Dyer held her down on the back floorboard. She was driven to an isolated location; Dyer removed all her clothing in the backseat and offered her to the other suspect. The second man reportedly appeared to be very frightened and refused to rape the victim. Dyer then raped her and after the initial rape, she was tied with orange-red nylon rope and left naked. She was shoved back down into the rear floorboard while the second man drove the car again. After about 15 minutes, they arrived at what the victim later believed was Dyer's residence. She described the outside of the residence and then identified some road signs in her police statement. Dyer reportedly put a coat over her head and removed her from the car. He escorted her to a bedroom and tied her on her back to the bed. The victim reported that she was in fear for her life and began screaming loudly. She was then gagged with cotton and they taped cotton over her eyes. File materials indicate that Dyer told the other man to go ahead with her and that the victim reported that shortly after penetration, the second man got off and left the room. Her impression was that he left the residence as she did not see or hear him again. Dyer then raped her vaginally, fell asleep, awoke and raped her again, fell asleep; she reported that this occurred approximately eight times. Twice during the night, the victim was untied and forced to bathe. After each bath she was again tied to the bed and raped. During the daylight hours, Dyer washed the victim's clothes and then he dressed her. Her hands were tied behind her back again and the tape was pulled off her face. More cotton was put over her eyes, held in place

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by a stocking cap. Through the stocking cap, the victim was able to identify the vehicle she was placed in when leaving the residence and some other details about the location. After driving about ten to fifteen minutes, Dyer stopped the vehicle, and took her into the woods where he untied her and uncovered her eyes. She was told to wait and she managed to make it out to the road in time to see the car, a white Comet, speeding off into the distance. She walked to a nearby residence and called police. The victim required 13 sutures for her wounds. The victim positively identified Dyer in a photo lineup and clothing that she described Dyer wearing at the time of the crime was retrieved from Dyer's personal belongings. The investigation also confirmed that Dyer owned a Comet and she positively identified the vehicle.

The second Rape First Degree conviction resulted from a crime that occurred on August 23rd, 1980. When the victim was interviewed by police after reporting the rape, they noted that she was limping and favoring her right leg. Scratches were noted on her arms and the left side of her head. File materials indicate that she reported that she had been walking her dog at about 11:00 p.m. She walked to the downtown area where she met some friends and shortly thereafter she was walking alone when a car containing two white males pulled up and offered her a ride. She declined and the vehicle left. She reported that a few moments later the vehicle returned and she was forced into the car. She was driven to the south end of the county and at some point in the ride was blindfolded. She reported that the vehicle became stuck on two occasions and she had to help free the vehicle. During freeing the vehicle the car rolled into her, injuring her leg. She was then taken to a residence. She was tied to the bed with a rope that was taped to prevent rope burns. The rapist, who she later identified as Dyer, removed all of her clothing and raped her vaginally. He then required her to take a shower with him. She was again tied to the bed and Dyer went to sleep. The victim managed to get loose,

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getting only as far as the bedroom door before a dog awakened Dyer. She was recaptured and retied to the bed. About an hour later she was able to again free herself, but again the dog awoke Dyer before she got to the bedroom door. Finally she was awakened at about 5:30 a.m. and was told to take a bath. While she was bathing, Dyer washed her clothes. He transported her to a park and let her go. He told her he would meet her at the Inn and Out Café the following Friday and he said he had been drunk and he was sorry about everything. File materials show that at some point that morning he gave her a watch that was later positively identified as having been lost by the first victim during her abduction and rape. The second victim identified the abductor's vehicle as a Mercury Capri and the investigation revealed that Dyer had purchased such a car in May of 1980.

It appears that the reason these cases were originally tied with the charges of the alleged crimes against his wife was because of similarities in the use of bondage, repeated rapes while she was tied to the bed, the allegations that she had been abducted and driven to a place in the woods, the allegation that she was forced to shower after being raped, and the timing of the first reports made by his wife on October 25<sup>th</sup>, 1980, and then again on September 2<sup>nd</sup>, 1981. File materials indicate that Dyer alleged the sexual intercourse with his former wife was consensual and that she made up the rest of the "story."

File materials indicate some incest and sexual deviancy among his siblings, but Mr. Dyer has no other sexual offense charges or convictions, other than those noted previously. Mr. Dyer has no other known criminal convictions. File materials describe two divorces that alleged physical violence perpetrated by Dyer against his spouses, but no resulting arrests or convictions are noted, only a 1972 restraining order in which his wife alleged that her husband had been physically violent toward

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her. He married his current wife on August 1<sup>st</sup>, 1981, and she has continued to remain supportive of him throughout his incarceration.

REASONS:

The Board is statutorily required to *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.* (RCW 9.95.009 (3)) Additionally, the Board is statutorily directed to not release a prisoner before the expiration of their maximum term, *unless in its opinion his or her rehabilitation has been complete and he or she is a fit subject for release.* (RCW 9.95.100)

The Board has the duty to thoroughly inform itself as to the facts of the person's crime; therefore all available information is reviewed in consideration of an offender's rehabilitation and risk. In carrying out its statutory duties, the Board conducts a complete review of an inmate's file; reviews all past materials and any newly available psychological evaluations and reports from the DOC, and conducts an in-person hearing with the inmate. The Board notes that Mr. Dyer was represented by legal counsel in the person of David B. Zuckerman at his hearing today.

At this .100 parole eligibility hearing, Mr. Dyer continued to deny any involvement in the crimes for which he was convicted. He has continued to deny these crimes from the very beginning. Despite Mr. Dyer's continued protestations of innocence, however, it is not within this Board's jurisdiction to retry cases or to adjudicate guilt or innocence of those offenders under its jurisdiction. Rather, as set out in RCW 9.95.100, the Board's function is to determine, based upon an amalgam of different factors, whether an offender's rehabilitation is complete and that he or she is a fit

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subject for release. Mr. Dyer has been convicted of these crimes by a court and his convictions for these two counts under our jurisdiction were reaffirmed by a court. RCW 9A.02.030 unequivocally places the burden of proof regarding rehabilitation on the inmate.

File materials indicate that Mr. Dyer had jury convictions involving three rapes, he has had several failed appeals, all three victims identified him as the perpetrator, investigators were able to confirm he owned the vehicles identified by the two stranger victims, and there was similarity of method in all of the rapes. The behaviors demonstrated in the rapes are consistent with Mr. Dyer's personality profile as identified in varying degrees in all of the psychological reports conducted on him. The Board is therefore faced with an inmate who has been convicted of multiple violent sexual assaults, who is an untreated sex offender who has not demonstrated any insight into the criminal behavior that resulted in his convictions.

File materials also indicate that Mr. Dyer has participated in the following programs during his incarceration: Family Dynamics; Restorative Retelling Story Group; Non-Violent Conflict Resolution; Anger/Stress Management; Victim Awareness; Moral Reconciliation Therapy; and Love and Forgiveness Couples Seminar. There was a chemical dependency evaluation conducted on November 16<sup>th</sup>, 2000, that indicated no specific problems. He was interviewed for the Sex Offender Treatment Program (SOTP) in January 1993 and found not amenable for treatment due to his denial of guilt. Mr. Dyer is not enrolled in a vocational program, but does work as a Recreational Assistant and receives class three compensation. Additionally, he runs an outside business which supports his family.

Mr. Dyer's early incarceration history consisted of a number of infractions involving physical violence and one suspected escape attempt in 1987. In recent years, he

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has demonstrated more control of his behavior. His last institutional infraction was in 1999 and his last serious infraction was in 1995.

At the behest of his attorney, Mr. Dyer discussed with the Board today his diagnosis of Post Traumatic Stress Disorder (PTSD). This diagnosis was made after he was incarcerated and was tied to his two tours of duty in Viet Nam. He reports that some of the symptoms were nightmares, inability to sweat, inability to have empathy for other people's reactions. He reported that he was having these nightmares before he was arrested and convicted of the underlying offenses. He reports that he has gone through Gestalt therapy to address and understand his PTSD; he reports that he now perspires, was able to gain empathy for other people's experiences, and has utilized Toastmasters as a way to talk about and work through his military experiences.

While the Board does not base any decision of rehabilitation and assessment of risk solely on psychological evaluations, we none-the-less do consider them in our decision making process. In fact, the Board considers all available information in its deliberations. The Board's file materials in Mr. Dyer's case include psychological evaluations dating from 1993.

- The 1993 psychological evaluation assessed him at high risk for reoffense based on the assumption that the jury convictions were accurate and that Mr. Dyer was currently in a state of denial. The depth of sexual deviancy was also estimated to be high based on the same assumption and that any sexual deviancy had remained essentially untreated. This 1993 report also stated that he continued to demonstrate PTSD symptoms.
- A 1994 report found that his PK scale was at an average elevation, which did not corroborate his claimed PTSD symptoms. This 1994 report indicated impulsivity, poor judgment, aggression and blaming. This report also states that his risk of reoffense remained high and that the depth of sexual deviancy could not truly be assessed with an uncooperative client.

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- The next psychological report in the file is from 1998 and it is more extensive than past reports, consisting of 13 pages. This report indicates that Mr. Dyer was diagnosed with PTSD and Sexual Sadism, as well as Personality Disorder with compulsive, dependent, histrionic, and anti-social features; however, it also notes that his risk of reoffense in the community appears to be low to moderate with a moderate potential for a violent reoffense in the community. Of special interest is this psychological evaluation's notation that Mr. Dyer presented himself as an individual *with an asexual image, failing to acknowledge even normal sexual desires and interests. It further noted that Mr. Dyer's knowledge of human sexuality is borderline and his general performance may be considered frankly dishonest.* Mr. Dyer's scores on a personal preference inventory appear to have been high on the need for order, planning and organization in detail; the need to receive encouragement from others and to have others behave kindly and sympathetically to him; the need to work hard at a task or puzzle until it is solved; and the need to be able to do things better than others. This report summarized his higher scores on the inventory as suggesting the presence of a strong compulsive tendency, while the lower scores suggested low needs to express himself to others in aggressive ways.
- The next psychological report was completed in 2001 and is five pages in length with supporting testing materials included. This report indicates a number of health issues that should be addressed by the medical department. This report utilized some risk assessment instruments and rated him to be low risk for reoffense. However, it is noted that when scoring the MNSOST-R, under length of sexual reoffending history the reviewer scored him as having a sex offending history of less than one year. The personality inventory in this report is substantially shorter than in the 1998 report, but is not markedly different. Notably, the 1998 psychological report identified him as scoring remarkably low on the psychopathy scale.
- The most recent psychological evaluation conducted on Mr. Dyer was completed in February of 2005 by Dr. Monson, who had reviewed and concurred in the 2001 report. Dr. Monson scored Mr. Dyer as a low risk to reoffend sexually; the scoring tools utilized were not provided with this report. On the other hand, Mr. Dyer reportedly scored on one test in a manner characteristic of prisoners who might be referred to as "*psychopathic manipulators*" and the report noted that individuals in this group tend to be brighter than most offenders but lack achievement drive. It further notes that inmates who score as Mr. Dyer did are more likely to be

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diagnosed as psychopathic rather than psychotic. Dr. Monson notes that Mr. Dyer has a strong inclination to behave in an accommodating and compliant manner, to follow rules and regulations faithfully, and to try to be a model prisoner. However, Mr. Dyer's score on the psychopathy checklist appears to be even lower in this report than in the 2001 report.

Mr. Dyer's attorney requested that the Board consider a June 2006 Washington State Institute for Public Policy (WSIPP) paper that compared the five year recidivism rate for 432 participants in the Department of Corrections' Sex Offender Treatment Program (SOTP) and 432 sex offenders who were willing to, but did not, participate in the SOTP. That report concluded that the SOTP does not reduce the recidivism rates of participants; it found a .8 percentage point difference in the felony sex recidivism rate between the two study groups. This paper is one of a whole series of reports on sex offenders done by the WSIPP.

The Board notes that another paper by the WSIPP in June 2006 found that those offenders not willing to participate are significantly different than those willing to participate in the SOTP. They report that some of the largest differences are related to risk for reoffending. *The 340 sex offenders not willing to participate in SOTP have much higher recidivism rates than those willing to participate: 63 percent recidivated with a felony offense, 30 percent with a violent felony, and almost 13 percent with a felony sex offense.*

The key findings in that report are:

- *Offenders who were unwilling to participate in SOTP differ significantly from those who volunteer to participate.*
- *The criminal histories, risk scores, and demographic characteristics are much higher for those who are unwilling to participate.*

Mr. Dyer's decision to not admit guilt necessarily results in an inability to participate in the SOTP; therefore, the paper that Mr. Zuckerman asked us to consider has little applicability to Mr. Dyer.

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The difficulty the Board has with Mr. Dyer's continual denial is that it makes him not amenable to treatment. We do not view sex offender treatment as a cure; what sex offender treatment can do is assist the offender in identifying their sexually deviant beliefs that contribute to their behaviors; it may enable them to identify their offense patterns and provide them with the opportunity to develop tools and skills to intervene in an offense cycle. 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.

Mr. Dyer is to be commended for the self improvement work he has completed while incarcerated and for demonstrating an ability to significantly reduce his infraction behavior. However, without an exploration and understanding of the behaviors that directly resulted in his incarceration, he remains at risk to repeat those behaviors in the community. Therefore, the Board does not find that Mr. Dyer has sufficiently demonstrated that he is completely rehabilitated and a fit subject for release.

FACTS RELIED UPON:

The Board relied upon prior Board dictations, a review of the ISRB and DOC files, and the face-to-face interview with Mr. Dyer and his attorney, as well as several written documents submitted by both Mr. Dyer and his attorney.

JC:jas

November 21, 2006

CC: INSTITUTION  
RESIDENT  
FILE





## SEX OFFENDER SENTENCING IN WASHINGTON STATE: WHO PARTICIPATES IN THE PRISON TREATMENT PROGRAM?

The 2004 Legislature directed the Washington State Institute for Public Policy (Institute) to conduct a comprehensive evaluation of the impact and effectiveness of current sex offender sentencing policies.<sup>1</sup> Because this is an extensive topic, we are publishing a series of reports.

The Washington State Department of Corrections (DOC) has operated a prison-based Sex Offender Treatment Program (SOTP) at the Twin Rivers Corrections Center since 1988. The program has undergone a series of changes since its inception. Since 1996, the program has used a combination of treatment techniques including group therapy, psycho-educational classes, behavioral treatment, and family involvement. The length of treatment has decreased from two years in 1996 to approximately one year currently. Since 2000, sex offenders assessed as having a high likelihood to reoffend, based on their criminal history, are prioritized for program entry.<sup>2</sup>

Offenders selected for the treatment program must meet the following five requirements:

- Sex offense conviction
- Voluntary participation
- Admission of guilt
- One year minimum remaining in prison
- Medium or lower custody classification

Because SOTP accepts only offenders who admit their guilt and voluntarily request treatment, significant differences may exist between those who participate in the program and those who do not. In addition, participation is dependent on the sex offender's custody level, which introduces additional systematic differences between participants and non-participants.

These differences can affect the ability to conduct an outcome evaluation of the program. A valid outcome evaluation must identify a comparison group of sex offenders similar to SOTP participants who did not participate in the program. Once this group is identified, we can examine whether the program reduces the recidivism rates of participants.

### SUMMARY

The Washington State Department of Corrections (DOC) has operated a prison-based Sex Offender Treatment Program (SOTP) at the Twin Rivers Corrections Center since 1988.

This report examines trends in SOTP participation as a first step in identifying a valid comparison group to evaluate the impact of this program on participants' recidivism. We compare the characteristics of SOTP participants with sex offenders who did not participate in the program.

Since the program's content and format was significantly changed in 1996, we looked at sex offenders released from Washington prisons since that time. Decision patterns have changed in this 10-year period. Following are the key findings:

- Offenders who were unwilling to participate in SOTP differ significantly from those who volunteered to participate.
- The criminal histories, risk scores, and demographic characteristics are much higher for those who were unwilling to participate.

The Institute's next paper will analyze SOTP's effect on recidivism. The comparison group will include only sex offenders who indicated a willingness to participate in the program at some point, but did not.

**This report examines trends in SOTP participation as a first step in identifying a valid comparison group needed to evaluate the impact of SOTP on recidivism.**

The study sample consists of all sex offenders released from prison between 1996 and 2005 after serving at least one year.

<sup>1</sup> ESHB 2400, Chapter 176, Laws of 2004.

<sup>2</sup> The SOTP uses three risk for sexual reoffense assessments: MnSOST-R, RRASOR, and Static 99.

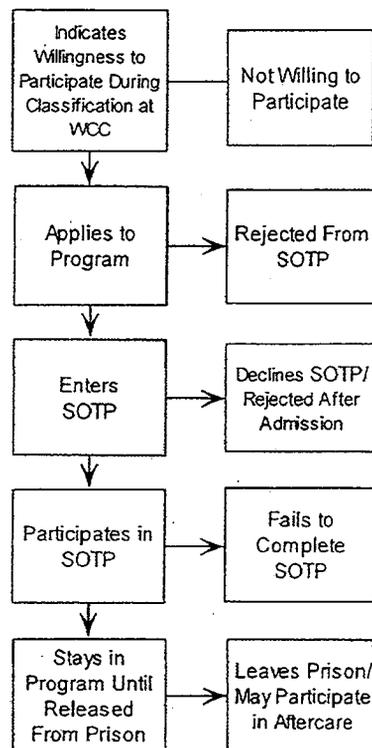
Exhibit 1 shows the process sex offenders follow to participate in SOTP.

- When sex offenders with sentences of less than five years are going through classification at the Washington Corrections Center (WCC), they are asked whether they are *willing* to participate in SOTP. (Offenders with sentences longer than five years may apply at a later date.)
- During the sex offender's stay in prison, DOC records when the offender *applies* to participate in the program.
- SOTP may *reject* applicants because they are appealing a conviction or deny the offense.
- A sex offender can *decline* to participate in SOTP at any time.
- In this analysis, all sex offenders who enter SOTP are *participants* regardless of their program completion. Participants can be voluntarily or involuntarily terminated.
- After release from prison, participants can continue with DOC-sponsored treatment groups.

Since 2000, SOTP has prioritized volunteers based on their risk to reoffend with sex crimes.<sup>3</sup>

Exhibit 2 displays the last SOTP-related event for sex offenders released from prison since 1996 after serving at least one year.<sup>4</sup> The number of sex offenders released from prison has grown from 445 in 1996 to 583 in

Exhibit 1  
SOTP Participation Process



2005. The number of SOTP participants who stayed in the program and were released from prison peaked at 192 in 2000; 131 SOTP participants were released in 2005.

Exhibit 2  
Last Recorded Event in SOTP Process for  
Sex Offenders Released From Prison Since 1996

Prison Release Year	Total Sex Offenders	Not Willing	Willing But Not SOTP Participant				SOTP Participant		
			Willing	Applied	Later Declined	Rejected	Terminated		Stayed in Program
							Involuntary	Voluntary	
1996	445	81	32	2	181	20	15	30	84
1997	470	70	39	3	172	34	7	15	130
1998	521	87	16	6	158	81	13	8	152
1999	537	102	22	3	149	65	8	11	177
2000	644	105	21	12	178	117	10	9	192
2001	557	108	18	22	113	149	8	4	135
2002	586	107	35	19	107	180	6	8	124
2003	606	140	25	24	108	183	6	5	115
2004	565	110	45	24	101	171	7	2	105
2005	583	125	20	6	116	174	7	4	131

<sup>3</sup> The SOTP uses three risk for sexual reoffense assessments: MnSOST-R, RRASOR, and Static 99.

<sup>4</sup> Data for this study are from DOC's Offender Based Tracking System, which began tracking progression in the SOTP process in 1993. Offenders in the "willing" and "applied" groups did not have subsequent records indicating whether they "declined" or were "rejected."

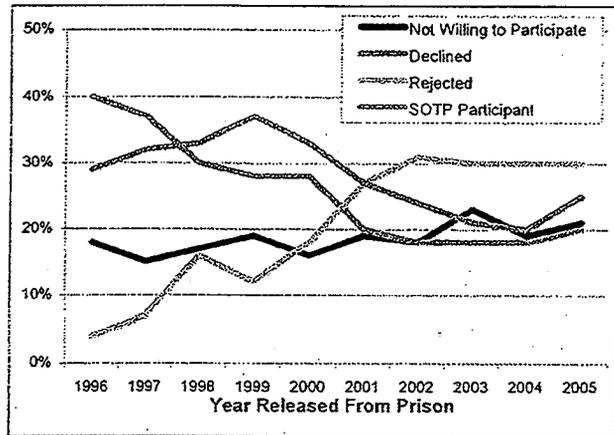
Exhibit 3 displays the percentage of sex offenders released each year by the following groups: (1) not willing to participate in SOTP, (2) declined to participate, (3) rejected by SOTP, and (4) SOTP participant.<sup>5</sup> These percentages have changed considerably in 10 years.

- In 1996, 40 percent declined to participate, 30 percent participated, 18 percent were not willing to participate, and less than 5 percent were rejected.
- In 2005, 20 percent declined to participate, 25 percent participated, 20 percent were not willing, and 30 percent were rejected.

These participation patterns may be influenced by changes in laws and policies regarding sex offenders. For example, the full implementation of community notification laws (public release of information related to sex offenders leaving prison) may cause more sex offenders to seek treatment and, thus, potentially decrease their notification level. On the other hand, the law authorizing civil commitment of sexually violent offenders (RCW 79.09) could motivate some sex offenders to decline participation because revelations during their treatment about additional victims or violence could later be used as reasons for the state to file a Sexually Violent Predator petition.

We next examine whether the characteristics of the sex offenders in these groups have also changed over time.

**Exhibit 3**  
Trends in SOTP Participation for Sex Offenders Released From Prison Since 1996



**Summary of Trends for Sex Offenders Released From Prison and SOTP Participation**

- The number of sex offenders released from prison has grown from 445 in 1996 to 583 in 2005.
- The number of SOTP participants released from prison peaked at 192 in 2000; 131 SOTP participants were released in 2005.

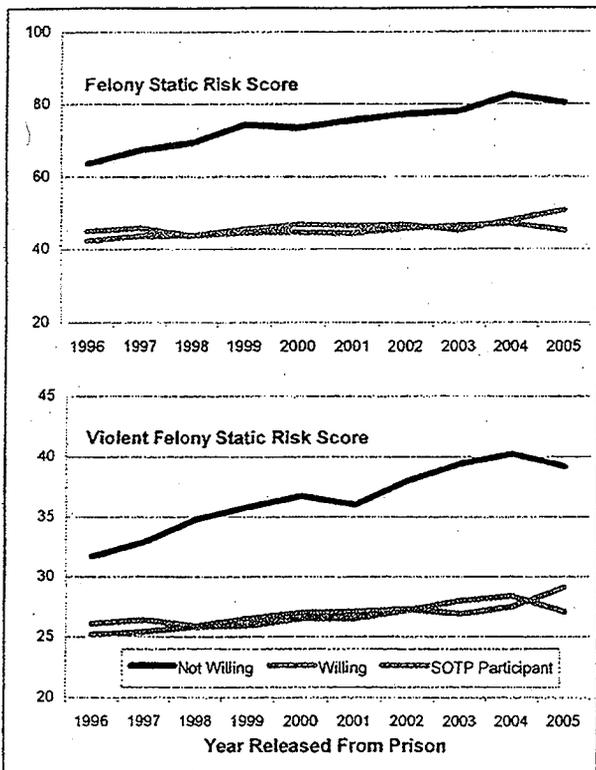
<sup>5</sup> The percentages for each year add to approximately 90 percent, not 100 percent, because approximately 10 percent of the offenders are in the "willing" and "applied" groups, which are excluded from the exhibit for simplicity.

Exhibit 4 displays trends in the characteristics of three groups of incarcerated sex offenders: those not willing to participate in SOTP, those willing but not participating,<sup>6</sup> and those participating.

We first examine risk-for-reoffense scores. These scores measure an offender's propensity to recidivate with a felony or violent felony offense—a higher score indicates a greater likelihood of reoffending. The risk scores are calculated using an actuarially based static risk assessment tool being developed by the Institute for DOC.<sup>7</sup>

**Felony and Violent Static Risk Scores.** Those not willing to participate in SOTP consistently have higher felony and violent felony risk scores, and these scores have been increasing. The felony and violent felony risk scores for the other two groups are nearly identical and have not increased since 1996. That is, sex offenders who were willing but did not participate in SOTP have the same level of risk as those who participated in the program.

**Exhibit 4**  
Trends in Static Risk Scores



<sup>6</sup> This group includes all incarcerated sex offenders who indicated a willingness to participate but did not (willing, applied, declined, and rejected).

<sup>7</sup> There is no static risk score for felony sexual reoffending because criminal history alone does not adequately predict sexual reoffending.

Exhibit 5 displays the trends for two key offender characteristics.

**Repeat Sex Offenders.** The SOTP group includes a higher percentage of sex offenders with more than one sentence involving a felony sex conviction, that is, repeat sex offenders. This pattern is especially true since 2000. Nearly 15 percent of SOTP participants released in 2005 are repeat sex offenders.

The percentage of repeat sex offenders in the other two groups has been gradually declining. About 10 percent of the offenders released in 2005 have a prior sex offense conviction.

**Child Sex Conviction.** SOTP participants consistently have the highest percentage of prior convictions for child sex offenses among the three groups throughout the 10-year period. Slightly more than 60 percent of SOTP participants have been convicted of a child sex offense. The percentages for those willing but not participating have increased from about 40 percent to as high as 60 percent. The percentage for those not willing to participate has remained near 25 percent.

**Exhibit 5**  
Prior Sex Offense Convictions

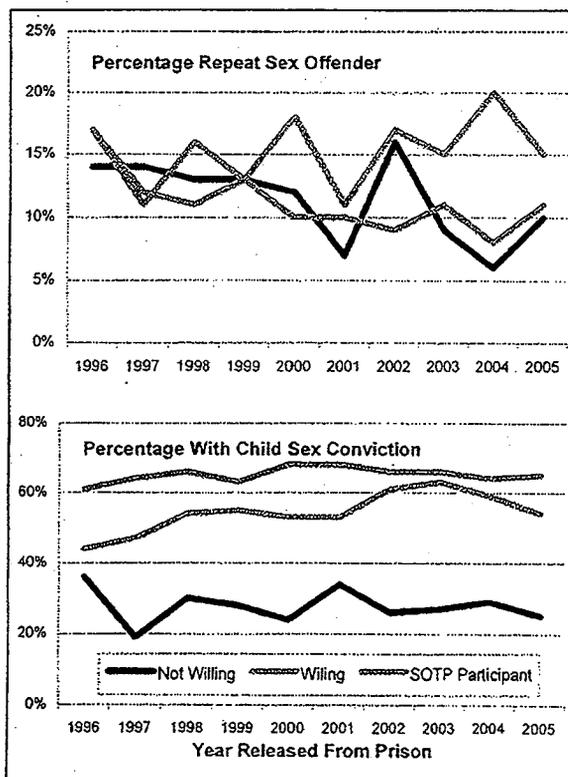


Exhibit 6 displays two additional trends: the average years sex offenders spend in prison and their average age at release.

**Average Years in Prison.** Compared to those not willing to participate, SOTP participants and those willing but not participating consistently served longer prison terms, and their average years in prison have been increasing. Those not willing to participate have the shortest prison stays; their years in prison are declining slightly.

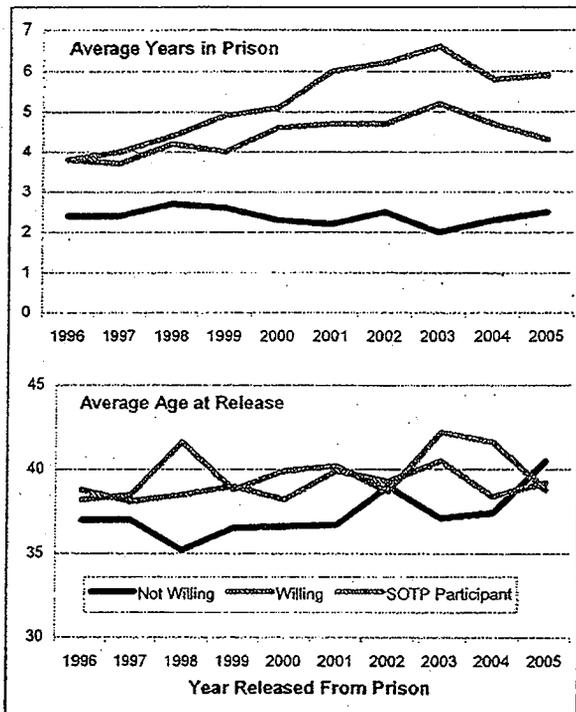
**Age at Release.** Those willing but not participating are the same average age at release as SOTP participants. Those not willing to participate are the youngest group. On average, those not willing to participate are about two years younger than SOTP participants; however, their average age is increasing.

Exhibit 7 displays sex offender race and ethnicity characteristics between 1996 and 2005.

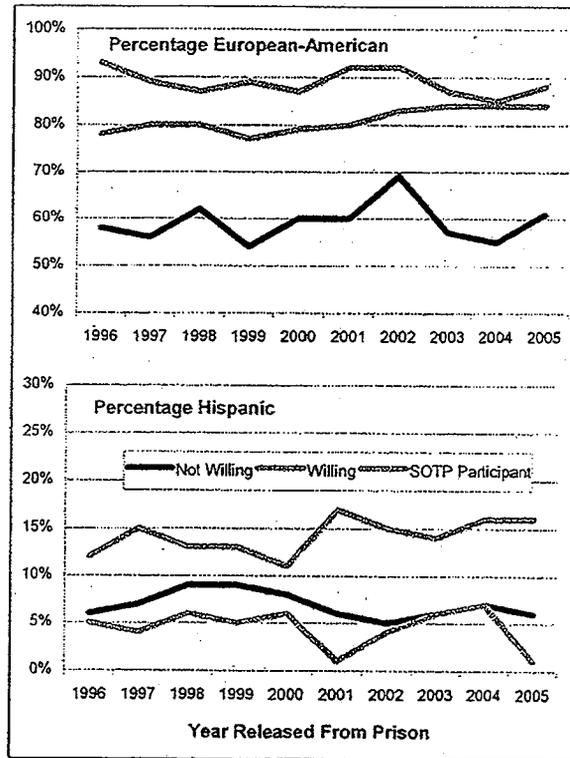
**European-American.** This chart simplifies the description of the ethnic/racial identity by displaying the percentage of European-American sex offenders.<sup>8</sup> Approximately 90 percent of SOTP participants are European-American; slightly more than 80 percent of those willing but not participating in 2005 are European-American. About 60 percent of sex offenders not willing to participate are European-American.

**Hispanic.** Hispanics comprise only 5 percent of the participants, between 5 and 10 percent of those not willing to participate, and 15 percent of those willing but not participating in SOTP.

**Exhibit 6**  
Trends in Sex Offender Characteristics



**Exhibit 7**  
Trends in Race and Ethnicity Characteristics



**Summary of Trends in Characteristics of the Three Groups of Sex Offenders**

- The trends of those willing, but not participating in SOTP, are similar to the program's participants.
- Those not willing to participate in SOTP are most dissimilar from the other groups: increasingly higher risk for reoffense, fewer child sex convictions, shorter prison terms, and fewer European-Americans.

<sup>8</sup> The four ethnic groups recorded by DOC include European, African, Asian, and Native American.

**Exhibit 8** summarizes the characteristics of the three groups of sex offenders released between 1996 and 1999. This time period was selected because it corresponds to the study period that will be used in the SOTP recidivism outcome evaluation. The exhibit supports the previous conclusion that those offenders not willing to participate are significantly different than those willing to participate in SOTP. Some of the largest differences are related to risk for reoffending. The five-year recidivism rates displayed in the next exhibit reinforce this perspective.

**Exhibit 8**  
**Characteristics of Sex Offenders**  
**Released From Prison Between 1996 and 1999**

Sex Offender Characteristic	Not Willing	Willing	SOTP
Percentage Distribution	17.0%	50.0%	33.0%
Average Felony Risk Score	69.0	44.8	43.5
Average Violent Felony Risk Score	33.9	26.2	25.6
Percentage With Two or More Felony Sex Sentences	13.2%	12.9%	14.0%
Percentage With Child Sex Conviction	28.5%	50.3%	63.8%
Average Years in Prison	2.5	3.9	4.3
Average Age at Release	38.4	40.5	39.6
Race/Ethnicity:			
European-American	57.4%	78.8%	89.2%
African-American	39.1%	13.8%	7.9%
Native-American	2.9%	3.4%	2.1%
Asian-American	0.3%	3.1%	0.8%
Hispanic Origin	7.9%	13.1%	5.0%

**Exhibit 9** presents the five-year recidivism rates for the three groups of sex offenders released between 1996 and 1999. The 340 sex offenders not willing to participate in SOTP have much higher recidivism rates than those willing to participate: 63 percent recidivated with a felony offense, 30 percent with a violent felony, and almost 13 percent with a felony sex offense.

**Exhibit 9**  
**Five-Year Felony Recidivism Rates**

SOTP Final Status	Number of Sex Offenders	Five-Year Recidivism		
		Any Felony	Violent Felony	Felony Sex
Not Willing	340	63.2%	30.0%	12.6%
Willing	984	15.3%	5.7%	0.6%
Participant	655	12.5%	6.0%	1.8%
Total	1,979	22.6%	10.0%	3.1%

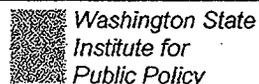
**Conclusion**

Based on the differences in offender characteristics and recidivism rates, the SOTP evaluation must exclude those offenders who were not willing to participate in the program. The comparison group will be derived from those with similar custody levels who were recorded as willing to participate in SOTP but never entered the program.

The Institute's next report will evaluate SOTP outcomes.

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