

RECEIVED  
 SUPREME COURT  
 STATE OF WASHINGTON  
 2010 DEC 14 AM 8:08  
 BY: RONALD R. CARPENTER  
 CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of: ) No. 85091-7  
 )  
 RICHARD JAMES DYER, ) REPLY OF MR. DYER  
 )  
 Petitioner Pro Se. )

---

Richard James Dyer, Petitioner Pro Se, respectfully submits this reply to the Response filed by the Attorney General; pursuant to the Rules of Appellate Procedure 16.9.

ARGUMENT<sup>1</sup>

1. The Attorney General's claim that it "Did Not Enter Into A Contract With [Mr.] Dyer 24 Years Ago"; is contrary not only to the evidence presented to this Court in support of Mr. Dyer's opening Petition; but, also the applicable laws regarding contracts.

The Attorney General essentially argues that it did not enter into a contract with Mr. Dyer back in 1986; rather, it only agreed to grant the relief sought in Mr. Dyer's 1986 petition. (See A.G.'s Response at 44 & 45)

---

<sup>1</sup> In the instant reply brief, Mr. Dyer argues the 'contract issue' first; as, should this Court agree with Mr. Dyer's position, the remaining issues would be moot.

Generally, a plaintiff in a contract action must prove a valid contract between the parties, a breach, and resulting damage. Lehrer v. DSHS, 101 Wash. App. 509, 516, 5 P.3d 722, review denied 142 Wn.2d 1014, 16 P.3d 1263 (2000). A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law recognized as a duty. Corbit v. J. I. Case Company, 70 Wn.2d 522, 531, 424 P.2d 290 (1967).

To be valid a promise must set forth an express undertaking that is both specific in purpose and with a definable result. A promise is considered illusory if it is so indefinite that it cannot be enforced, or if its performance is optional or discretionary on the part of the claimed promisor. Cascade Auto Glass Inc., v. Progressive Cas. Ins. Co., 135 Wash. App. 760, 145 P.3d 1253 (2006). An illusory promise creates no obligation on the promisor. Lane v. Wahl, 101 Wash. App. 878, 6 P.3d 621 (2000). Thus, a promise must be precise and, when coupled with other elements of a contract, must be identifiable so it is specific enough to enforce. Goodpaster v. Pfizer, Inc., 35 Wash. App. 100, 665 P.2d 414 (1983).

A promise is defined under the Contract Clause of both the State and Federal Constitutions as a manifestation of an intention to act or to refrain from acting in a specified way, so made to justify a promise in understanding that a commitment has been made. Swanson v. Liquid Air Corp., 118 Wn.2d 512, 826 P.2d 664 (1992); Brady v. Daily World, 105 Wn.2d 770, 718 P.2d 785 (1986).

A promise is an undertaking, however expressed, either that

something shall happen, or that something shall not happen in the future. Plumbing Shop Inc. v. Pitts, 67 Wn.2d 514, 408 P.2d 382 (1965). A promise, in the sense of commitment, must be distinguished from a description of a future event. Hansen v. Virginia Mason Medical Center, 113 Wash. App. 199, 53 P.3d 60 (2002).

The law of contracts have developed so that rules now exist which bind parties to their promises, giving effect to the words used and imposing obligations on the promisors. See Multicare Medical Center v. State Dept. of Social and Health Services, 114 Wn.2d 572, 790 P.2d 124 (1990).

The issue before this court is simple. In 1986 Mr. Dyer filed a Personal Restraint Petition, wherein he requested the following relief:<sup>2</sup>

REQUEST FOR RELIEF: Petitioner seeks an order directing the Board of Prison Terms and Paroles to re-set his minimum term based upon only the convictions remaining, and in a manner reasonably consistent with the standards and ranges contained in the Sentencing Reform Act of 1981. (RCW 9.94A)

and;

REQUEST FOR RELIEF/CONCLUSION

The Court should order a Board hearing in which the board is directed to set a minimum term consistent with the reduced number of convictions, and reasonably consistent with the provisions of the SRA. If Petitioner has served sufficient time to meet that minimum, he should be released immediately.

In the alternative, Petitioner should be re-sentenced by the sentencing court on the basis of the reduced number of convictions. That sentencing should be done in accordance with the SRA. (Emphasis Added)

While the Attorney General claims that a contract or promise was

---

<sup>2</sup> On 9/15/1986 the Board re-set Mr. Dyer's minimum term to 240 Months; accordingly, Mr. Dyer should have been released immediately following the expiration of that term. Please note that to date, Mr. Dyer has served more than 560 Months.

not entered, wherein it agreed to the above relief; we find in the response filed by the A.G.'s Office regarding Mr. Dyer's 1986 petition, the following language:

Based on the above, as respondent will provide all relief requested by petitioner, respondent respectfully requests petitioner's personal restraint petition to be dismissed with prejudice as petitioner's petition is moot.

The Attorney General argues that the above does not constitute a contract. But, a contract is just a legally enforceable promise or set of promises. Corbit v. J. I. Case Company, 70 Wn.2d 522, 531, 424 P.2d 290 (1967). There is just no other way to take the words of the Attorney General; other than as a promise to provide all relief requested by petitioner.

Although, the Attorney General does not concede that a contract/promise was made; it argues that "the Board's statement that it "will provide all relief requested by petitioner" referred only to the primary relief sought in Dyer's personal restraint petition: that an order be issued directing the Board to reset his minimum term based upon only the convictions remaining, in a manner reasonably consistent with the standards and ranges of the SRA." (See A.G.'s response at 45)

The Attorney General's attempt to essentially pick and choose what relief the Board agreed to provide back in 1986, is frivolous; as again the Board agreed to "provide all relief requested by petitioner". It is noteworthy however, that the Board did not state in its 1986 response, that it would provide all the primary relief requested by petitioner in his Personal Restraint Petition; but, not

any of the relief set forth in his memorandum in support thereof, as the A.G. now claims; rather, simply stated, "respondent will provide "all" relief requested by petitioner..."

As such, this court should reject the Attorney General's argument and order the Board to honor its 1985 promise and grant Mr. Dyer the relief he was promised; i.e., order the immediate release of Mr. Dyer as he has served way above and beyond the 240 Month minimum term set by the board following their contractual agreement.

2. Contrary to the Attorney General's claim, the Board abused its discretion in finding Mr. Dyer not parolable as its decision rested upon mere Speculation, Conjecture, Erroneous Evidence, and Outdated Recommendations by both the County Prosecutor and Sentencing Judge.

Courts review parole eligibility decisions to ensure the ISRB exercises its discretion in accordance with the applicable statutes and rules. The ISRB abuses its discretion when it fails to follow its own procedural rules for parolability hearings or acts without consideration of and in disregard of the facts. In re Pers. Restraint of Addleman, 151 Wn.2d 769, 776-77, 92 P.3d 221 (2004).

As previously noted, the Legislature requires the ISRB to "attempt to make decisions reasonably consistent with [the SRA] ranges, standards, purposes, and recommendations [of the Sentencing Judge and Prosecuting Attorney]" and "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." R.C.W. 9.95.009 (2) & (3).

Though the ISRB is not bound to the duty of consistency, the

legislature nevertheless bound the ISRB to the duty of providing "adequate written reasons whenever a minimum term or parole release decision is made which is outside the sentencing ranges adopted" under the SRA. R.C.W. 9.95.009 (2). The ISRB's "reasons for an exceptional sentence must be apparent from the record and not chosen 'out of thin air'". In re Pers. Restraint of Locklear, 118 Wn.2d 409, 417, 823 P.2d 1078, (1992) (quoting In re Pers. Restraint of Robles, 63 Wn. App. 208, 218, 817 P.2d 419 (1991)); see also Pers. Restraint of Myers, 105 Wn.2d 257, 266, 714 P.2d 303 (1986), (Holding "imposition of a 48 Month (exceptional) sentence in the absence of adequate reasons constituted an abuse of discretion.")

In other words, "absent exceptional circumstances and written reasons justifying departure, the Board's minimum term decisions under section .009 (2) must conform to the SRA. In re Pers. Restraint of Powell, 117 Wn.2d 175, 187, 814 P.2d 635 (1991), (citing Addelman v. Board of Prison Terms & Paroles, 107 Wn.2d 503, 511, 730 P.2d 1327 (1986)).

Furthermore, the length of the exceptional sentence must be proportionate to the reasons given by the ISRB. Locklear, 118 Wn.2d at 417. These requirements ensure sufficient oversight of ISRB decisions. Id. at 418; Myers, 105 Wn.2d at 262 (observing the clear limitation imposed on the Board's discretion by R.C.W. 9.95.009 (2)).

In this case, the Board has cited essentially the same reasons to justify each subsequent enlargement of Mr. Dyer's term of imprisonment. (See Exhibits H through O attached to Mr. Dyer's opening

petition.) All of which deny Mr. Dyer the ability of parole based upon: 1) the fact that he is an untreated sex offender, who continues to deny his involvement in the crimes for which he was convicted; and, 2) the facts surrounding his convictions of record. Based thereupon, the Board has enlarged Mr. Dyer's term of imprisonment five times, for a total of approximately 300 Months above and beyond the already exceptional minimum term of 240 Months set by the Board back in 1986, following the Obert Myer hearing held pursuant to the contractual promise made pursuant to his 1986 Personal Restraint Petition.

Even though the ISRB may not release a prisoner until in its opinion the prisoner is rehabilitated, its opinion is not sacrosanct, and the more the minimum sentence departs from the SRA standard the more justification is required.

While it is true that the ISRB may base its decision to deny parole, in part, upon the fact that the offender refuses<sup>3</sup> treatment that requires him or her to take responsibility for criminal behavior. In re Pers. Restraint of Ecklund, 139 Wn.2d 166, 177, 985 P.2d 342 (1999) This cannot be the sole basis for the denial.

Likewise, the Board cannot continue to deny parole based upon the facts surrounding the convictions. See Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010), where the 9th Circuit Court of Appeals held en banc, that the aggravated nature of the crime does not in and of itself provide some evidence of current dangerousness to the public

---

<sup>3</sup> Mr. Dyer does not refuse to participate in treatment; rather, he is not amenable as Mr. Dyer retains his stand of innocence.

unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety. Hayward, 603 F.3d at 562.

In sum, a reviewing court must consider whether the identified facts are probative to the central issue of current dangerousness when considered in light of the full record before the Board. There is nothing in Mr. Dyer's history which would lead one to this conclusion.

In regards to the lack of SOTP treatment, it is important to note that Mr. Dyer does not refuse treatment as suggested by the Attorney General; rather, he is not amenable to treatment because he refuses to admit guilt to a crime he did not commit. The A.G. characterizes this simply as a choice which Mr. Dyer must face the consequences for. However, for a truly innocent man, this is not a choice; rather, the dreaded reality of the circumstances dealt in Mr. Dyer's life.

The Attorney General suggests of course that Mr. Dyer could not possibly be innocent because of the evidence of a Timex watch. As it points out, the second rape victim identified a Timex watch that the rapist had given her. The first rape victim testified that the watch was hers and had been lost during her struggles in the backseat of the rapist's car. At most, however, that evidence tends to show that the same person raped both victims. There was no evidence tying that watch to Mr. Dyer. See A.G.'s brief at 30; and Dyer's PRP at 14.

Interestingly however, the Attorney General fails to point to any of the evidence that sheds light into the holes within this case. For example, the first rape victim was absolutely positive that the man who raped her drove a White Mercury Comet. During her testimony, she described remembering reading the letters, C.O.M.E.T. on the back of the white car as it drove away. Mr. Dyer did not drive a White Comet; he drove a Beige Mercury Meator. This evidence speaks volumes towards the innocence of Mr. Dyer. (See Mr. Dyer's opening brief at page 12 for citations to the record.)

The only new evidence the Board presents that may begin to form a basis for a finding of current dangerousness to the public, is the most recent psychological report conducted by Dr. Pereira. That report however, as shown in Mr. Dyer's opening petition contains numerous errors and misrepresentations of fact. Furthermore, Dr. Pereira's scoring on the various risk assessment tools she utilized are simply wrong. See the report of Dr. Trowbridge at Exhibit Q, @ 19(a), attached to Mr. Dyer's opening Petition.

In an attempt to give weight to Dr. Pereira's report the Attorney General argues at page 32 of its brief that Mr. Dyer was found to be a high risk of re-offense twice before. He fails however to mention that these reports were filed back in 1993 and 1994, seventeen and sixteen years ago, respectively. Nevertheless, those reports actually give considerable weight to Mr. Dyer's claim that Dr. Pereira's report is faulty.

When looking over the history of all the psychological reports that have been done in Mr. Dyer's case, a pattern quickly arises.

- \* The 1993 psychological evaluation conducted by Dr. Riedel assessed Mr. Dyer as **high risk for reoffense**.
- \* Then in 1994 Mr. Dyer was evaluated by Dr. Jones who found that his **risk of reoffense remained high**.
- \* Then in 1998 another psychological evaluation was conducted by Dr. Lauby whose report indicated that Mr. Dyer's **risk of reoffense in the community appears to be low to moderate** with the moderate potential for a violent reoffense in the community.
- \* The next psychological report was completed in 2001 by Dr. Carter. Dr. Carter in his five page analyses concluded Mr. Dyer to be a **low risk for reoffense**.
- \* In 2005 Dr. Monson, also assessed Mr. Dyer as a **low risk to reoffend**.

The pattern that arises is clear. Initially, Mr. Dyer was assessed to be at a high risk to reoffend, then as time went on, Mr. Dyer's risk of reoffense plummeted to the point where he was consistently being assessed at a low risk to reoffend. It cannot be disputed that Dr. Pereira's report is at odds with this pattern; a pattern that has developed over the past seventeen years, in reports done by Department appointed psychologists; whereas, the report and findings of Dr. Trowbridge are completely in line with this pattern.

The Attorney General attempts to characterize the problems with Dr. Pereira's report as a mere disagreement between her and Dr. Trowbridge, who was retained by Mr. Dyer. In fact however, Dr. Pereira's report is also radically different from those of the two DOC psychologists who performed the previous two evaluations of Mr. Dyer. See Mr. Dyer's opening Petition at page(s) 29 - 34.

The differences are not merely a matter of personal opinion, but are the result of blatant factual errors in Dr. Pereira's report.

Mr. Dyer encourages this Court to review Exhibit Q @ 23, attached to his opening petition which shows how Dr. Pereira refused to review any of the documentation he had regarding his background and personal history; which is supposed to be based on objective, verifiable data.

Further, the court can easily see for itself that Dr. Trowbridge's scoring of the static-99 is unquestionably correct, while Dr. Pereira's is unquestionably wrong. Likewise, the court can easily see for itself that the scores of psychologists Carter and Monson on the PCL-R (5 and 3 respectively) are consistent with Mr. Dyer's personal history, whereas Dr. Pereira's score of 27 is not.

The Board gives great weight to the report prepared by Dr. Pereira. See the Board's decision at page 8, where the Board states:

We recognize that Dr. Pereira's scoring on some scales is at odds with previous evaluations. We cannot however, ignore the results of this most recent evaluation.

It is important to note, that Dr. Pereira's report was based upon nothing more than speculation, conjecture and erroneous evidence. Please refer to Mr. Dyer's opening Petition at page(s) 29 through 34, as well as Exhibit Q attached thereto. Surely giving such weight to such a blatantly erroneous report is clear evidence of the Boards failure to conduct any type of meaningful consideration for parole, as mandated by statute, and thus an abuse of its discretion.

In an attempt to minimize Dr. Trowbridge's findings and in the hopes of justifying the Boards heavy reliance upon Dr. Pereira's report, the Attorney General claims that because Dr. Trowbridge did not

personally evaluate Mr. Dyer, his opinions should be given little weight. That argument fails.

While it is true that Dr. Trowbridge could not give a precise score on the PCL-R because he did not personally interview Mr. Dyer. That had absolutely no bearing on his ability to evaluate the scoring of the remaining risk assessment tools used by Dr. Pereira, like for example the Static-99.

Further, as Mr. Dyer's attorney explained at the Board hearing, it did not seem necessary to have Dr. Trowbridge personally examine Mr. Dyer because Mr. Dyer had been personally interviewed by two DOC psychologists in recent years. Furthermore, Dr. Trowbridge was able to explain why Dr. Pereira's scoring could not possibly be in the correct ballpark, whereas Dr. Carter's and Dr. Monson's scores were. Also, when one of the Board members questioned why Dr. Trowbridge had not personally interviewed Mr. Dyer, Mr. Dyer's counsel offered to have him do so if the Board wished. The Board declined. See Exhibit N @ page 14.

The Attorney General also relies on WAC 381-60-160(5), which states that the Board should consider 'evidence that an inmate presents a substantial danger to the community if released.' The Board's only evidence of danger is the report of Dr. Pereira (discussed above) and its conclusion that Mr. Dyer is an untreated sex offender. There is no evidence, however, that Mr. Dyer's lack of treatment makes him dangerous. In fact, as Mr. Dyer pointed out to the Board, and in his PRP at page 41; a careful study by the Washington State Institute for

Public Policy has shown that DOC's sex offender treatment program does not make prisoners any safer to be released. In fact, the Institute for Public Policy found that those prisoners who engaged in the program were slightly **more likely** to re-offend than those who were willing to engage in the program, like Mr. Dyer, but were not able to.

As stated above, Mr. Dyer is more than willing to enroll in the SOTP treatment program. However, he remains unamenable as the program requires admission of guilt; something Mr. Dyer is unable to do as a result of his stand of innocence; a stand Mr. Dyer has consistently maintained for the past thirty years.

It is noteworthy that the Attorney General does not comment on the inappropriateness of the Board's reliance on the archaic recommendations of Mr. Dyer's Sentencing Judge and Prosecutor. As noted in his opening brief at page 25, these recommendations were based upon five counts of conviction. Three of those were subsequently overturned following direct appeal. As such, they should either have been replaced with up to date recommendations based solely upon the surviving convictions, or not used at all. We can only conclude based upon its silence regarding this claim that the Attorney General agrees with this position.

Based upon the foregoing, it is clear that the Board abused its discretion in again finding Mr. Dyer not parolable, as it continues to base its denial upon the same factors, which are based upon nothing more than speculation, conjecture, erroneous evidence and the outdated recommendations of the sentencing judge and prosecuting attorney,

without any new evidence regarding Mr. Dyer's alleged lack of rehabilitation.

3. Despite the Attorney General's protestations, the Board failed to comply with the requirements of R.C.W. 9.95.009(2) when it added an additional 60 Months to Mr. Dyer's already Excessive Minimum Term.

R.C.W. 9.95.009(2) states in pertinent part: the board shall consider the purposes, standards, and sentencing ranges adopted pursuant to R.C.W. 9.94A.850 the minimum term recommendations of the sentencing judge and prosecuting attorney, and shall attempt to make its decision reasonably consistent with those ranges, standards, purposes, and recommendations: PROVIDED, that the board and its successors shall give adequate written reasons whenever a minimum term or parole release decision is made which is outside the sentencing ranges adopted pursuant to R.C.W. 9.94A.850.

The Attorney General is correct that the Board's decisions need not mirror the SRA standards. See A.G.'s brief at 36. However, when setting a minimum term, the Board's decision must again be reasonably consistent with the ranges, standards, and purposes" of the SRA. See R.C.W. 9.95.009(2) Furthermore, to comply with 9.95.009(2), the Board must provide adequate written reasons justifying the imposition of an exceptional minimum term, and the departure from the standard sentencing range must be proportionate to its reasoning.

The Attorney General claims that this requirement was met in this case as the Board noted the SRA range for Mr. Dyer's conviction; the length of his initial minimum term; his reset minimum term; the

recommendations of the sentencing judge and the prosecuting attorney; and, they noted [albeit, incorrectly] that Mr. Dyer had served 259 Months in prison.<sup>4</sup>

As argued herein above and in Mr. Dyer's initial petition the recommendations of both the sentencing judge and prosecuting attorney should have been disregarded as they were based upon the conviction of five felonies; three of which were overturned on direct appeal. New recommendations have never been provided to the Board; nor has the Board ever solicited updated recommendations from either the Sentencing Judge or Prosecuting Attorney. It cannot be disputed that the recommendations for two felony convictions would greatly differ from those for five felony convictions.

Further, in the Board's purported review of the factors cited by the Attorney General in its brief at 37, the Board did not even consider the correct amount of time Mr. Dyer has served in confinement. Based thereupon, how could it have possibly made an accurate determination as required under R.C.W. 9.95.009(2)?

In addition, as argued hereinabove, the reasons the Board set forth in support of their fifth consecutive increase to Mr. Dyer's already exorbitant minimum term have ultimately remained unchanged. It only makes sense that the more the minimum sentence departs from the SRA the more justification would be required.

Here, essentially every fact the Board relies upon in its most

---

<sup>4</sup> Mr. Dyer has actually served upwards of 336 Months in confinement, as of February 2010.

recent decision, [short of Dr. Pereira's unconscionable recent psychological examination] remains the same. Essentially every fact has been before the board since the first time the Board saw Mr. Dyer back in the early eighties. The only documented change that has taken place is Mr. Dyer's risk of reoffense; which has gone from high; too medium/low; too low, and that change is favorable to Mr. Dyer's position.

Despite this, the Board continues to inflate Mr. Dyer's minimum term of imprisonment, again based consistently on the fact that 'Mr. Dyer remains an untreated sex offender'. Note, there is not one shred of evidence that the lack of such treatment in any way raises Mr. Dyer's risk to reoffend. To the contrary however, the studies show, the Department's sex offender treatment program does not make prisoners any safer to be released. What they do show, is that those offender's, like Mr. Dyer, who are willing, but unable to participate in treatment are slightly less likely to reoffend than those who actually participate in the program. As such, it defies all logic to continue to deny Mr. Dyer parole based upon something that studies done by the Washington State Institute for Public Policy say will do nothing more than increase his risk of reoffense, even if only slightly.

It is also noteworthy that the Attorney General does not contest Mr. Dyer's argument that the requirement for the Board to base its decision upon adequate written reasons creates a liberty interest in parole. That argument is based upon the recent decision in Cooke v. Solis, \_\_\_ F.3d \_\_\_, slip opinion attached to Mr. Dyer's opening brief

at Exhibit X. The Cooke Court essentially held that the "some evidence" rule under the California system created a liberty interest in parole. The California "some evidence" rule is directly in line with this State's "adequate written reasons" rule. As such, the same protections would seemingly follow.

In addition, the circumstances in the Cooke case are remarkably similar to those in Mr. Dyer's. See Mr. Dyer's opening petition at 39 through 40.

The Attorney General's only other argument regarding the Board's adherence to R.C.W. 9.95.009(2) was based upon Mr. Dyer being recently assessed at a high risk to reoffend. However, as previously shown the report which concluded Mr. Dyer to be a high risk to reoffend is clearly erroneous.

Thus, while the Board did correctly note the SRA range for Mr. Dyer's convictions; the length of his initial minimum term; his newly reset term: it incorrectly calculated the appropriate amount of time Mr. Dyer had served in confinement; as well as improperly considered the recommendations of both the sentencing judge and prosecuting attorney.

The ISRB abuses its discretion when it fails to follow its own rules for parolability hearings or **acts without consideration of and in disregard of the facts.** In re Pers. Restraint of Addleman, 151 Wn.2d 769, 776-77, 92 P.3d 221 (2004). The decision of the Board in this case was clearly based upon conclusions which can only be described as being made without proper consideration of and in complete

disregard of the facts; something which should be found to be shocking to the judicial conscious.

The test for whether a particular action shocks the judicial conscience must be appropriately tailored to the factual context at hand and "must be determined by balancing ... liberty interests against the relevant state interests. Yongberg v. Romeo, 457 U.S. 307, 321, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). In order to preserve "constitutional proportions of substantive due process," a court must undertake "an exact analysis of circumstances before any abuse of power is condemned as conscience shocking. County of Sacramento v. Lewis, 523 U.S. 833, 850, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

In this matter, not one of the four Board members was familiar enough with Mr. Dyer's case to properly calculate the time Mr. Dyer spent incarcerated. Further, they knowingly based their decision, in part, upon recommendations made during Mr. Dyer's initial sentencing hearing, when he stood convicted of five felony counts. Ultimately, three of those convictions were overturned: again updated recommendations were never given.

In addition to the above factors, the Board continues in its stand that Mr. Dyer must admit guilt and undergo sex offender treatment before it will consider him for parole. The concern here is two fold. First, should this court condone the requirement that a factually innocent prisoner lie to garner favor with the ISRB; and, second, should this court likewise condone the promise of a reward for a factually guilty prisoner's insincere expression of guilt. Distinguishing between these

two groups requires a more nuanced approach than the Board has shown, especially in light of the overwhelming evidence of Mr. Dyer's rehabilitation.

Further the ISRB's reasoning presents an admitted catch-22: as a factually innocent person would be forced to admit guilt to a crime in order to gain the favor from his government; which in turn would foreclose any opportunity the factually innocent prisoner would have of ever clearing his name.

In this case, these factors in conjunction with Mr. Dyer's well documented rehabilitation; low recidivism risk, model prison behavior, and continued maintenance of his responsibilities; both financially and emotionally to his wife and children: only enhance the shocking nature of the Boards conduct in this case.

Based upon the foregoing, this Court is requested to find that the Board failed to comply with R.C.W. 9.95.009(2) in its most recent decision; and, that its decision be found to shock the judicial conscious.

4. Despite the Attorney General's attempt to argue otherwise, the Boards decision violates the 'Doctrine of Unconstitutional Conditions'.

In apposition to Mr. Dyer's claim that the Board's decision violates the Doctrine of Unconstitutional Conditions, the Attorney General quotes the following excerpt from this Court in In re Dyer, 164 at 287-88:

In short, the ISRB was "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. Id at 8. The ISRB commended Dyer for his "selfimprovement work" but stated, "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." Id. at 12. Therefore, in consideration of all the evidence presented, the ISRB based its paroleability decision upon the objective fact that Dyer is an untreated sex offender.

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

It is unclear if the Attorney General was under the impression that the foregoing ruling took into account the applicability of the Doctrine of Unconstitutional Conditions or not. But a simple review of this Court's decision in that case, shows that it did not. See In re Dyer, 164 Wn.2d at \_\_\_\_, attached at Exhibit F of Mr. Dyer's opening petition, where this court stated, 'Only the dissent raises this novel constitutional argument. It was not briefed or argued by the parties. The issue is not properly before the court'.

Now, the issue is properly before the court, and Mr. Dyer is asking that this Court consider the applicability of the Doctrine of Unconstitutional Conditions in conjunction with Board's insistence that Mr. Dyer confess in order to glean its favor.

It has been a long standing understanding in our Country that a state may not indirectly produce a result which it could not command directly. Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

It has also been held that, "[T]he power of the state in that [ability to deny a privilege or benefit altogether] is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence. Frost & Frost Trucking Co. v. R.R. Comm'n of Cal., 271 U.S. 583, 593-94, 46 S.Ct. 605, 70 L.Ed. 1101 (1926).

This question was before the Montana Supreme Court in State v. Imlay, 249 Mont. 82, 813 P.2d 979 (1991), it was their reasoning in that case, that "Even though the defendant has already been convicted of the crime that he denies, our system still provides, [as noted in Thomas v. United States, 368 F.2d 941 (5th Cir. 1966)], for opportunities to challenge that conviction. For example, the defendant still had the right to challenge his conviction, based on newly discovered evidence, or by collateral attack. These are important rights guaranteed to every defendant under our criminal justice system, but would be rendered meaningless if the defendant could be compelled to admit guilt as a condition of his continued freedom.

As pointed out in Mr. Dyer's opening petition at page 44, the question in Imlay is remarkably similar to the one here. Can Mr. Dyer, like Imlay, be compelled to admit guilt as a prerequisite to admission in SOIP treatment; in order to gain the favor of the ISRB? The Montana Supreme Court found that such a requirement would be a clear violation of the Fifth Amendment right, without a grant of immunity. This Court should rule likewise.

The Board in its most recent decision compounded this issue when it requested that Mr. Dyer be screened for civil commitment prior to his next Board hearing. As such, should Mr. Dyer chose at this point to fabricate a confession in order to spend his last remaining days with his grandchildren; any defenses he may have at said Civil Commitment hearing would be utterly worthless.

Based thereupon, this court is respectfully being requested to hold that the Boards mandate that Mr. Dyer confess in order to gain its favor, violates the Doctrine of Unconstitutional Conditions.

5. Based upon this Court's recent decisions in regards to this matter, this Court is in the best position to hear these issues and make a determination of the merits thereto.

RAP 16.5 (b)(1) states that a PRP filed in the Supreme Court will ordinarily be transferred to the Court of Appeals. However, this Court just recently had this case before it in July of 2009; and, as such is familiar with the facts and circumstances surrounding this complex case. Further, this Court still retains the entire file in regards to this matter.

Another reason this Court should retain the instant PRP is the Court of Appeals may have difficulty reconciling the reasoning in Dyer I with that in Dyer II, since the two decisions appear to reach different results on essentially the same facts.

Based thereupon, and in the interest of justice, Mr. Dyer respectfully requests that this Court retain this Personal Restraint Petition.

#### CONCLUSION

1. As Mr. Dyer waived his right to a judicial determination regarding his 1986 PRP banking upon the clear and precise promise of the Board to grant "all relief requested by petitioner"; this Court should hold the Board to strict enforcement of its contractual promise and order the immediate release of Mr. Dyer.

It should be remembered that a contract is a meeting of the minds; and that is what occurred in this case. It is important to note that the contractual promise was before the Court in 1986, and the Court at that time did not object, nor find any error with that promise; as such, Mr. Dyer should be released immediately as he has completed the minimum term of 240 Months set by the Board following its 1986 promise to grant "all relief requested by petitioner".

Please see Exhibit C, attached to Mr. Dyer's Opening Petition, where Mr. Dyer requested the following relief:

Petitioner seeks an order directing the Board of Prison Terms and Paroles to re-set his minimum term based upon only

the convictions remaining, and in a manner reasonably consistent with the standards and ranges contained in the Sentencing Reform Act of 1981 (RCW 9.94A)

and;

The Court should order a Board hearing in which the Board is directed to set a new minimum term consistent with the reduced number of convictions, and reasonably consistent with the provisions of the SRA. If Petitioner has served sufficient time to meet that minimum, he should be released immediately.

In the alternative, Petitioner should be re-sentenced by the sentencing Court on the basis of the reduced number of convictions. That sentencing should be done in accordance with the SRA.

Now please see Exhibit D, attached to Mr. Dyer's opening Petition where the Board agreed to provide all the above relief, by stating the following:

Based on the above, as respondent will provide all relief requested by petitioner, respondent respectfully requests petitioner's personal restraint petition to be dismissed with prejudice as petitioner's petition is moot.

There is only one conclusion that can be reached. The Board promised the relief, it was a meeting of the minds, both parties agreed. The Board benefited by not having to defend the petition through the Courts, and Mr. Dyer was supposed to have benefited by receiving the relief he requested. As such, this Court should grant said relief, and order Mr. Dyer's immediate release.

2. Also, based upon the foregoing arguments and legal authority, Mr. Dyer respectfully requests that this Court find that the Board abused its discretion in finding Mr. Dyer not parolable.
3. This Court should also find that the Board's decision failed to meet the requirements articulated under RCW 9.95.009(2), as

1) the Board failed to accurately determine the actual time Mr. Dyer has been incarcerated; and 2) erred in relying on the archaic recommendations of both the sentencing judge and prosecuting attorney: recommendations which were based upon five counts of conviction; whereas, Mr. Dyer is only under confinement for conviction of two counts. This should also be found to shock the Judicial Conscious.

4. Furthermore, the mandate of the Board requiring Mr. Dyer to confess before it will grant its favor is clearly in violation of the clearly established Doctrine of Unconstitutional Conditions, and thus this Court is requested to hold likewise.

5. Based upon all the foregoing, Mr. Dyer respectfully requests that this Court retain this Petition and grant all relief sought herein by ordering Mr. Dyer's immediate release from confinement.

Respectfully Submitted on this 12 day of Dec, 2010.



Richard James Dyer  
D.O.C.#281744/H1A08L  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98388

IN THE WASHINGTON STATE SUPREME COURT

IN RE THE PERSONAL RESTRAINT OF:	)	Case No. 85091-7
	)	
RICHARD JAMES DYER,	)	
	)	CERTIFICATE OF SERVICE
Petitioner Pro Se.	)	
	)	
	)	

CERTIFICATE OF SERVICE

I, Richard James Dyer, hereby certify that I caused a true and correct copy of the attached 'Reply of Mr. Dyer' to be served upon all parties listed herein below, in the manner indicated;

(X) Mr. Gregory Rosen  
 Assistant Attorney General  
 Criminal Justice Division  
 P.O. BOX 40116  
 Olympia, WA 98504-0116

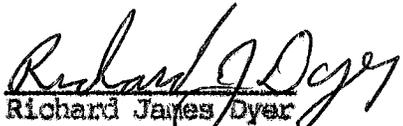
(X) First Class Mail  
 Postage Prepaid  
 ( ) Personal Service  
 ( ) Other: \_\_\_\_\_

(X) WASHINGTON STATE SUPREME COURT  
 415 12th Ave S.W.  
 P.O. BOX# 40929  
 Olympia, WA 98504-0929

(X) First Class Mail  
 Postage Prepaid  
 ( ) Personal Service  
 ( ) Other: \_\_\_\_\_

I, Richard James Dyer, hereby certify that the above statements are true and correct to the best of my knowledge and belief.

Respectfully Submitted on this 12 day of Dec, 2010.

  
 Richard James Dyer  
 Petitioner Pro Se  
 D.O.C.# 281744/H1A08L  
 Stafford Creek Corrections Center  
 191 Constantine Way  
 Aberdeen, WA 98520