NO. 85091-7

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

COMES NOW the Respondent, INDETERMINATE SENTENCE REVIEW BOARD (ISRB or Board) by and through its attorneys, ROBERT M. MCKENNA, Attorney General and GREGORY J. ROSEN Assistant Attorney General, and respectfully submits this response to Mr. Dyer's Personal Restraint Petition, pursuant to Rules of Appellate Procedure (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. Exhibit 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. Exhibit 1 at 2 and 4. The sentences were ordered to run concurrently. *Id.*

II. STATEMENT OF THE CASE

A. Factual History

The Washington Court of Appeals summarized the facts of Dyer's two first-degree rape convictions when that court adjudicated his direct appeal:

> 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.
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> 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.
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> 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.**

Exhibit 2, Unpublished Opinion, *State v. Dyer*, Washington Court of Appeals Cause No. 6162-7-II, at 2-3 (emphasis added).

B. Board Procedural History

When Dyer was initially warranted to the Department of Corrections' (DOC) custody and Board jurisdiction, the Board fixed his original minimum terms for the two first-degree rape convictions at 600 months each. Exhibit 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. Exhibit 4, Decisions and Reasons re Richard Dyer dated September 15, 1986. 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. Exhibit 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 Dyer's 1995 parole eligibility review date. After reviewing the facts of 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. Exhibit 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 Rennetta 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.

Exhibit 5 at 3-4 (emphasis added).

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The Board again conducted an in-person parolability hearing with Dyer on March 8, 1995, his parole eligibility review date.[1] *See* Exhibit 6, Decision and Reasons re Richard Dyer dated March 8, 1995. After considering Dr. Riedel's 1993 psychological evaluation, the 1994 psychological evaluation of Dr. William Jones (Psychological Evaluation re Richard Dyer dated December 7, 1994 by William C Jones, Ph.D.), a DOC report (Exhibit 7, 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. Exhibit 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 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

[1] 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.

> 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.

Exhibit 6 at 3-4.

On August 11, 1998, the Board conducted an in-person parolability hearing with 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 Dyer, coupled with receiving a number of letters of support submitted on Dyer's behalf, the Board found him to be not parolable and added 60 months to his minimum term. Exhibit 8, 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.

Exhibit 8 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 he was not parolable and added 60 months to his minimum term. Exhibit 9, 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.

Exhibit 9 at 2-4 (emphasis added).

On December 5, 2006, following this Court's decision in *In re Dyer*, 157 Wn.2d 358 (2006) that Dyer's case be remanded for another parolability hearing, the Board entered another decision and reasons in which it found him to be not parolable and added 80 months to his minimum term. Exhibit 10, 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 decision, in pertinent part:

> 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.
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> 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 Reconation Therapy and Love and Forgiveness Couples Seminar. There was a chemical dependency evaluation conducted on November 16th 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.

...

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.

...

- 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 tent 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.

Exhibit 10 at 7-12 (emphasis added).

On March 15, 2010, the Board issued its most recent decision in Dyer's case in which it again found him not parolable and added 60 months to his minimum term. *See* Exhibit 11, Decision and Reasons of March 15, 2010, Richard Dyer, DOC #281744. The Board's written reasons were as follows:

> Little has changed since the Board last saw Mr. Dyer. While he initially demonstrated significant behavior problems during his incarceration, he has remained infraction free for over 10 years.

Mr. Dyer continues to deny his offenses, both adjudicated and unadjudicated. As indicated in our previous Decision, however, Mr. Dyer stands before the Board as a convicted sex offender whose crimes involve considerable violence and cruelty toward his victims. The record provides considerable evidence to support his convictions. **To date he remains an untreated sex offender.**

Dr. Pereira's evaluation reports that individuals with Mr. Dyer's profile "may act out in a sexual or aggressive manner with little apparent attention to or understanding of what they are doing." She further states that "When confronted with the realities of their behavior, they may act surprised and feel resentful and persecuted." She reports that the MMPI-2 indicates that underneath a veneer of control is a suppressed anger and resentment that with the right trigger could cause an explosion into a highly rationalized outburst." **She scores Mr. Dyer as high on the psychopathy scale and assesses him as a high risk for violence and re-offending.**[2]

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. In addition, on his 2005 evaluation, the Board, notes that Mr. Dyer reportedly scored on one test in a manner characteristic of prisoners who might be referred to as "*psychopathic manipulators*" [Emphasis added.] His 1994 evaluation indicated impulsivity, poor judgment, aggression and blaming. **This report also stated that his risk of re-offense remained high and that the depth of sexual deviancy could not truly be assessed with an uncooperative client.**

As we have pointed out in the past, the Board is statutorily required to give public safety considerations the highest priority when making all discretionary decisions on the

[2] Mr. Zuckerman calls her scoring "unconscionable;" however, he provided no new alternative scoring to counter her assessment. We do note, however, that she places his age at the top of her report at 51 rather than his actual age of 61. [Footnote by the Board.]

> 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) In this case, the nature of Mr. Dyer's offenses coupled with his lack of treatment and indications of high psychopathy create considerable concerns about public safety should he be released.
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> In finding Mr. Dyer not parolable once again, we are cognizant of variations in his scores on a number of psychological testing scales over the years. The Board has not been furnished with the scoring tools utilized in these various evaluations. Prior to his next .100 hearing, the Board would request that he receive a forensic psychological evaluation to determine whether he meets the criteria for civil commitment under Chapter 71.05 RCW. Such an evaluation would be extremely helpful in determining whether Mr. Dyer continues to present a danger to the community. We would further request that the actual scoring for Mr. Dyer on the various risk assessment tools be included with the evaluation report so that the Board and counsel can review them.

See Exhibit 11 at 7-9 (emphasis added).

III. ISSUES

Dyer presents the following grounds for relief in his current personal restraint petition:

1. The Board abused its discretion in finding Mr. Dyer not parolable, as its decision relies upon speculation and conjecture; erroneous evidence; and, outdated recommendations.

Further, the addition of an additional 60 Months to Mr. Dyer's already exasperating minimum term is not based upon sufficient written reasons.

2. The ISRB's decision violates the 'Doctrine of Unconstitutional Conditions' as Mr. Dyer is being forced into a position to forego a constitutional right in order to gain the favor of his government.

3. The ISRB violated the terms of a mutual agreement to provide "all relief requested" in a PRP filed by Mr. Dyer in 1986, in violation of the Contract Clause of the State and Federal Constitution.

See Personal Restraint Petition of Dyer, at i.

IV. STANDARD OF REVIEW

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).

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.

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." *See In re Whitesel*, 111 Wn.2d 621, 628, 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, 656, 585 P.2d 136 (1978).

V. ARGUMENT

A. The Board Did Not Abuse Its Discretion When Finding That Dyer Was Not Parolable, As Its Decision Did Not Rely Upon Speculation or Conjecture, Erroneous Evidence or Outdated Recommendations

In Dyer's first ground for relief, he contends that the Board abused its discretion when finding he was not parolable, and that its decision relied upon speculation and conjecture, erroneous evidence, and archaic recommendations of both the Prosecuting Attorney and Sentencing Judge. *See* Personal Restraint Petition (PRP) of Dyer at 21. Dyer further

contends that the addition of 60 months to his "already excessive minimum term is not based upon sufficient written reasons." *See id.* Dyer's first ground for relief lacks merit.

In the Board's most recent decision in Dyer's case, the Board found him not parolable and added 60 months to his minimum term. *See* Exhibit 11, Decisions and Reasons of March 15, 2010. The written reasons set out in the Board's decision to deny Dyer parole noted the most recent psychological evaluation in his case that was performed by Dr. Patricia Pereira, Ph.D., who scored Dyer as high on the psychopathy scale and assessed him as a high risk for violence and re-offending. *See* Exhibit 11, at 8. The Board's written reasons noted that Dyer stood before the Board as a convicted sex offender whose crimes involved considerable violence and cruelty towards his victims, although he continued to deny his offenses. *See id.* at 7. Of great significance, the Board's decision noted that "[T]o date, **he remains an untreated sex offender**." *Id.* (Emphasis added.)

The Board noted that Dr. Pereira's evaluation scoring on some scale was at odds with previous psychological evaluations. *See id.* at 8. The Board noted, however, that it could not ignore the results of Dr. Pereira's evaluation, which was the most recent in Mr. Dyer's case. *Id.* The Board's written reasons acknowledged that it was 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, citing RCW 9.95.009(3). *Id.* The Board also noted its statutory responsibility not to release a prisoner before the expiration of the prisoner's maximum term, unless in its opinion the prisoner's rehabilitation had been complete and that the prisoner was a fit subject for release, citing RCW 9.95.100. *Id.* The Board found that the nature of Dyer's offenses, coupled with his lack of treatment and indications of high psychopathy, create considerable concerns about public safety should he be released. *Id.* The Board's decision also noted that in Dyer's case, little had changed since the Board last saw Dyer. *See id.* at 7. The Board also acknowledged that Dyer has remained infraction free for over 10 years. *Id.*

In his personal restraint petition, Dyer makes the following statements:

> As already recognized and pointed out by this Court, Mr. Dyer does not actively refuse to participate in available programs or resources designed to assist him in reducing his risk of reoffense. Rather, [Mr.] Dyer participated in several offender change programs. He does not actively refuse to participate in the sex offender treatment program; rather he is ineligible for treatment in that program because he denies guilt.

See PRP of Dyer at 23. Dyer's statements above appear to be lifted from the Washington Supreme Court's decision in *In re Dyer* at 157 Wn.2d 358, 364, 139 P.3d 320 (2006). Dyer, however, ignores the Washington Supreme Court's subsequent decision in *In re Dyer* at 164 Wn.2d 274, 286-288, 189 P.3d 759 (2008) in which this Court held as follows:

> Dyer argues the ISRB abused its discretion by basing its decision upon the fact that Dyer has not completed the SOTP. Participation in the SOTP requires an inmate to admit his or her guilt in order to participate. However, Dyer is unable to participate because he maintains he is innocent of the crimes for which he was convicted. Dyer claims this court prohibited the ISRB from basing its decision upon his lack of treatment. This is an inaccurate statement of our holding in *Dyer* I.
>
> In *Dyer* I, we faulted the ISRB for justifying its decision with "speculation and conjecture."[3] 157 Wn.2d at 369. Specifically, we assigned error to the ISRB's reliance upon "unsupported notions that Dyer manipulated the psychological evaluations and poses a high risk of reoffense because of his good behavior in prison and the nature of his crimes." *Id.* We ordered the ISRB to conduct a new parolability hearing and base its decision on the evidence and testimony presented. We did not preclude the

[3] The dissent misstates our previous holding from *Dyer* I to reach its unprecedented position that this court should substitute its judgment for the ISRB's and release an untreated sex offender. Dissent at 297-98, 310. Contrary to the dissent's assertion, the court did not reverse the ISRB ruling in *Dyer* I based on a finding that Dyer met his burden to prove his rehabilitation. Dissent at 297. Rather, the court reversed the ISRB's decision because it was improperly supported by speculation and conjecture. *Dyer* I, 157 Wn.2d at 369 ("We instead remand to the ISRB for a new parolability hearing during which the ISRB must make its determination based on the evidence and testimony presented, and not on speculation and conjecture."). Even if the evidence suggested Dyer had met his burden of proving his rehabilitation. *Dyer* I did not restrict the ISRB from exercising its own judgment in rendering its parolability decision. *Id.* The dissent's erroneous understanding of *Dyer* I, however, naturally compels it to disregard the abuse of discretion standard of review and usurp the role of the ISRB. [Footnote by the Court.]

ISRB from considering the fact that Dyer has not gone through the SOTP.

. . .

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 "self-improvement 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 parolability 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 offender's recognition that he was at fault.'" *Ecklund*, 139 Wn.2d at 176 (quoting *Gollaher v. United States*, 419 F.2d 520, 530 (9th Cir. 1969)). Accordingly, **the ISRB may base its decision to deny parole, in part, upon the fact that the offender refuses treatment that requires him or her to take responsibility for criminal behavior.**[4] *Id.* at 177. Similarly here, Dyer

[4] Contrary to the dissent's assertion (dissent at 302 n.16), the facts under which this court decided *Ecklund* are similar to the facts at present. Like Dyer, the petitioner in *Ecklund* exhibited exemplary behavior in prison and did not take responsibility for his crimes. 139 Wn.2d at 183. Justice Sanders voiced the dissenting view, arguing the ISRB abused its discretion by basing its parolability decision, in part, on whether Ecklund confessed to his crimes. *Id.; cf.* dissent at 302. Notwithstanding these considerations, the

> 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.

See In re Dyer, 164 Wn.2d at 286-288 (emphasis added).

While Dyer castigates the Board for stating that "little has changed" since the Board last saw him, it is actually Dyer's refusal to accept responsibility for raping two women that has not changed. His refusal to admit committing the two rapes, which resulted in his two first-degree rape convictions, makes him unamenable to sex offender treatment in the Sex Offender Treatment Program (SOTP). *See* PRP of Dyer at 24 and Exhibit 11 at 7. Without sex offender treatment, Mr. Dyer will be unable to identify the sexual deviant beliefs that contribute to his behaviors with the ultimate goal of such treatment that the offender will not reoffend. Yet, it is Dyer's burden as a prospective parolee to demonstrate that he meets the standard for parolability under RCW 9.95.100. If nothing has changed in Dyer's case, that is because Dyer has continued his choice to believe that he is actually innocent, despite his convictions, for two counts of first-degree rape. He is certainly free to

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court held the ISRB did not abuse its discretion by imposing an exceptional minimum term where Ecklund refused to admit his guilt because it prevented him from obtaining the necessary, rehabilitative treatment. *Ecklund*, 139 Wn.2d at 177. **Dyer, like Ecklund, refuses to admit his guilt, which also prevents him from obtaining the necessary rehabilitative treatment**. Under *Ecklund*, the ISRB acted within its discretion to extend Dyer's minimum term. [Footnote by the Court.] (Emphasis added.)

make that choice. However, with that choice follows the consequence that Dyer renders himself unamenable for treatment, because he refuses to admit guilt or accept responsibility for his crimes. Therefore, although Dyer attempts to blame the Board for his situation, in actuality, it is Dyer who is denying himself an opportunity to potentially obtain parole because his refusal to accept responsibility renders him incapable of participation in the SOTP – which, in turn, prevents Dyer from even beginning the process of meeting the standard for parole: becoming completely rehabilitated and a fit subject for release. *See* RCW 9.95.100. In Dyer's view, the Board is the party at fault – yet Dyer refuses to look to his own choice to decline responsibility for viciously raping two women nearly 30 years ago – rapes for which a jury unanimously determined he was guilty at trial, that were upheld on appeal, and have long been convictions of record. *See* Exhibit 2.

Moreover, despite his long-held protestations of innocence, the Washington Court of Appeals noted that Dyer's second rape victim **identified a Timex watch that the rapist had given her. Dyer's first rape victim testified that the watch was hers and had been lost during her struggles in the back seat**. *See* Exhibit 2 at 2. This finding by the Court of Appeals, even if standing alone, speaks volumes about Dyer's purported innocence as to having committed those two first-degree rapes.

Although Dyer castigates the Board for its decision not to parole him, it is Dyer 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. The Board is statutorily **prohibited** from releasing an offender ("the Board **shall not**") unless the offender meets that demanding standard. *Id.* (Emphasis added).

Dyer remains an untreated sex offender. *See* Exhibit 11 at 7. Because he is irrefutably an untreated sex offender, he remains unrehabilitated. Because he is unrehabilitated, he cannot show that his rehabilitation is complete in order to qualify for parole. *See* RCW 9.95.100. Similarly, because he is an untreated sex offender, he cannot show that he is a fit subject for release. *See id.* The Board's decision to find Dyer not parolable cannot have been an abuse of its discretion --- that no reasonable person could have made the same decision, or that the Board acted for untenable reasons.

B. Dyer's Arguments Regarding Dr. Pereira's Recent Psychological Evaluation Lack Merit

In his petition, Dyer finds fault with Dr. Pereira's scoring within her psychological evaluation of Dyer. *See* PRP of Dyer at 29-34. Mr. Dyer's petition notes that he retained psychologist and attorney Brett Trowbridge to review his psychological evaluations, including Dr.

Pereira's most recent evaluation in his case. *See* PRP of Dyer at 29 and Dyer's Appendix Q at Exhibit 19.

Dr. Trowbridge notes in his letter to Dyer's former attorney David Zuckerman that "*I cannot score Mr. Dyer myself on the PCL-R without personally examining him*, but in my opinion the huge discrepancy between the low scores assigned by Mr. Carter and Dr. Monson and the high score assigned by Dr. Pereira suggests that Dr. Pereira's scoring is faulty." *See id.* at 3 (emphasis added). It is unclear whether Dr. Trowbridge was also given copies of Dr. Riedel and Dr. Jones' earlier psychological evaluations which found that Dyer had a high risk of re-offense. *See* Exhibits 5 and 6. (Dyer's current petition does not appear to address Dr. Riedel or Dr. Jones' earlier evaluations.) As noted, Dr. Trowbridge concedes he did not personally examine Dyer. *See* Dyer's Appendix Q, Exhibit 19, at 3. Therefore, Dr. Trowbridge's opinions were formulated solely based upon a review of records, in the absence of a personal examination of Dyer. As a result, his opinions should be given little weight.

Essentially, Dyer's approach is simply to attack Dr. Pereira's overall competence and challenge various aspects of her scoring and conclusions in her evaluation. PRP of Dyer at 29-34. For example, Dyer asserts that Dr. Pereira's evaluation in his case is erroneous, as shown by

what Dyer asserts is another erroneous evaluation performed by Dr. Periera as to a different inmate, which Dyer has appended to his petition. *See* Dyer's PRP at 34 and his Exhibit P. Dyer contends "[T]his evaluation was corrected" by Dr. Trowbridge." *Id.* It is unclear in what manner Dr. Trowbridge "corrected" Dr. Perieira's evaluation. Dyer then argues that based on Dr. Perieira's other "erroneous" evaluation, she "has a pattern of performing incorrect assessments." PRP of Dyer at 34. Dyer's attempt to attack Dr. Pereira's competence because he does not agree with her scoring in his evaluation, and suggests there she has a "pattern" of performing incorrect assessments based on two evaluations of two inmates who challenge her conclusions, is meritless. Although Dr. Pereira's recent assessment of Dyer as presenting a high risk of re-offense is at odds with Dr. Monson and Mr. Carter's assessments that he presented a low risk of re-offense, her assessment was consistent with Dr Riedel and Dr. Jones' earlier assessments that Dyer presented a high risk of re-offense. *See* Exhibits 5, 6, 8 and 10.

Irrespective of Dyer and Dr. Trowbridge's attacks on Dr. Pereira's scoring and conclusions, however, it is undisputed that because Dyer remains an untreated sex offender, he is unrehabilitated, and thus is currently unparolable. *See In re Dyer*, 164 Wn.2d at 286-288.

In his petition, Dyer states that "the Board should have considered the report of Dr. Trowbridge, provided to the Board by Dyer's counsel...." *See* PRP of Dyer at 34. In the Board's decision in Exhibit 11, however, the Board noted that the evidence it considered in preparation for Dyer's hearing and its decision in his case included a review of Dyer's DOC and ISRB files, as well as Dr. Pereira's recent psychological evaluation, Dyer's previous psychological evaluations, coupled with numerous other materials, *including materials provided by Dyer and his counsel. See* Exhibit 11 at 7 (emphasis added). It is unclear if Dyer is now alleging that the Board did not consider or review Dr. Trowbridge's letter to Mr. Zuckerman.

C. The Board Fully Complied with WAC 381-60-160 When Denying Dyer Parole

Dyer cites Washington Administrative Code (WAC) 381-60-160 in support of his argument that none of the examples of adequate reasons for a finding of nonparolability apply to his 2010 parole eligibility. *See* PRP of Dyer at 22-23. Dyer is incorrect. WAC 381-60-160(5) states "[E]vidence that an inmate presents a substantial danger to the community if released." The Board correctly found that Dyer, convicted of two vicious, predatory first-degree rapes of two different women, "remains an untreated sex offender." Exhibit 11 at 7. The Board cited Dr. Pereira's

evaluation assessed Dyer as high risk for violence and re-offense. *Id.* at 8. In light of such evidence, it is clear that WAC 381-60-160(5) applies to Dyer's case. As the Board determined:

> In this case, the nature of Mr. Dyer's offenses coupled with his lack of treatment and indications of high psychopathy create considerable concerns about public safety should he be released.

Exhibit 11 at 8.

RCW 9.95.100 presumes that an inmate under the ISRB's jurisdiction will serve their maximum sentence unless the prospective parolee can demonstrate to the Board that he is completely rehabilitated and a fit subject for release. *Id.* Dyer's maximum sentence on both of his rape convictions is life. *See* Exhibit 1. Dyer's status as an untreated sex offender with two first-degree rape convictions, coupled with a recent psychological evaluation which assessed him as having a high risk for violence and re-offense, demonstrates that the Board's decision to deny parole in his case was not an abuse of its discretion. Based on the evidence before it when making its most recent decision in Dyer's case, when viewed in conjunction with RCW 9.95.100 and RCW 9.95.009(3), the Board arguably would have abused its discretion if it had found Dyer paroleable.

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 at 628; *In re Myers*, 105 Wn.2d at 264. The Board's written reasons were adequate in its March 2010 decision when denying Dyer parole.

Finally, based on the information and evidence before the Board in Dyer's case, the Board fully complied with RCW 9.95.009(3), given that the Board is statutorily directed to give public safety considerations the highest priority when making discretionary decisions regarding parole release. The Board neither abused its discretion nor deviated from the express statutory direction of RCW 9.95.100 and RCW 9.95.009(3) when it denied parole in Dyer's case. Therefore, Dyer's first ground for relief should be denied.

D. The Board Complied With RCW 9.95.009(2) When It Added 60 Months To Dyer's Minimum Term

In his second ground for relief, Dyer contends that the Board failed to comply with RCW 9.95.009(2). *See* PRP of Dyer at 35-41. This claim lacks merit.

As the Board's written decision in Exhibit 11 reflects, Mr. Dyer remains an untreated sex offender who was assessed in his most recent psychological evaluation as having a high risk of violence and re-offense. *See id.* at 8.

In Exhibit 11, it noted the standard SRA range for Dyer's convictions, as well as the length of his initial minimum term and his re-set minimum term. *See* Exhibit 11 at 2. The Board noted the recommendations of the sentencing judge and the prosecuting attorney. *Id.* The Board also noted (incorrectly) that Dyer had served 259 months in prison.[5] *Id.* RCW 9.95.009(2) states the following:

> (2) After July 1, 1984, the board shall continue its functions with respect to persons convicted of crimes committed prior to July 1, 1984, and committed to the department of corrections. When making decisions on duration of confinement, including those relating to persons committed under a mandatory life sentence, and parole release under RCW 9.95.100 and 9.95.110, the board shall consider the purposes, standards, and sentencing ranges adopted pursuant to RCW 9.94.A.850 the minimum term recommendations of the sentencing judge and prosecuting attorney, and shall attempt to make decisions 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 RCW 9.94A.850. In making such decisions, the board and its successors shall consider the different charging and

[5] Dyer's PRP asserts that he has actually served 336 months as of February 2010. That assertion appears to be correct. *See* PRP of Dyer at 25.

> disposition practices under the indeterminate sentencing system.

As the Washington Supreme Court held in *In re Locklear*, the Board's written reasons need not mirror the SRA's standards:

> 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.

In re Locklear, 118 Wn.2d at 413-414.

RCW 9.95.009(3), however states:

> (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 on the remaining indeterminate population regarding the ability for parole, parole release, and conditions of parole.

Moreover, as the Washington Supreme Court stated in *In re Addleman*, 151 Wn.2d 769, 774-775, 92 P.3d 221 (2004):

> Addleman essentially argues his restraint is unlawful because his sentence is significantly longer than the standard range provided for in the Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW. To determine whether he is correct, we must balance two duties placed on the ISRB. The ISRB "shall attempt to make decisions reasonably consistent" with the SRA. RCW 9.95.009(2).[6] However, that duty must be balanced with the fact that prisoners serving indeterminate sentences are not resentenced under the SRA. In fact, the ISRB "shall not, however, until his or her maximum term expires, release a prisoner, *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 (emphasis added).
>
> **We conclude that between a statutory requirement that a prisoner is not to be released until rehabilitation is complete and a duty to attempt consistency with the SRA, the statutory requirement trumps the duty to attempt.** The two duties, however, are not mutually exclusive but can be exercised in harmony with each another. The ISRB must make reasonable attempts to set its minimum sentences consistent with the SRA **but has no duty to parole an unrehabilitated prisoner.**

In re Addleman, 151 Wn.2d at 774-775 (emphasis added). As noted above, the Board provided adequate written reasons when it added 60 months to Dyer's minimum term. *See* Exhibit 11. The Board also fully complied with RCW 9.95.009(3), which this Court held above trumps the requirement under RCW 9.95.009(2) for consistency under the SRA. *Id.*

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[6] More than 15 years ago, the ISRB reviewed all indeterminate sentences in light of the SRA and adjusted about 40 percent of the sentences. INDETERMINATE SENTENCE REVIEW BOARD, REPORT TO WASHINGTON STATE SENATE HUMAN SERVICES AND CORRECTIONS COMMITTEE (Nov. 6, 1987) (attach. to Amicus Curiae Br. Wash. Ass'n of Criminal Defense Lawyers). Addleman has not shown that the ISRB failed to "attempt" to make his sentence consistent with the SRA at that time. [Footnote by Court.]

Consequently, Dyer's claim that the Board did not comply with RCW 9.95.009(2) fails.

E. The Board's Decision Did Not Violate The Doctrine Of Unconstitutional Conditions

In this ground for relief, Dyer argues that the Board's decision violates the doctrine of unconstitutional conditions. Dyer contends he is being placed in a position where he must waive a constitutional right in order to gain the favor of his government. *See* PRP of Dyer at 43. This claim is meritless.

Dyer appears to have lifted this claim directly from Justice Sanders' dissent in the Washington Supreme Court's decision in *In re Dyer*, 164 Wn.2d at 308-310. Unfortunately for Dyer, the majority's opinion in that same case noted the Washington Supreme Court's prior decision in *In re Ecklund*, 139 Wn.2d at 176, in which this Court found the following:

> 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 "self-improvement 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 parolability 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 offender's recognition that he was at fault.'" *Ecklund*, 139 Wn.2d at 176 (quoting *Gollaher v. United States,* 419 F.2d 520, 530 (9th Cir. 1969)). Accordingly, **the ISRB may base its decision to deny parole, in part, upon the fact that the offender refuses treatment that requires him or her to take responsibility for criminal behavior.**[7] ***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.**

See In re Dyer, 164 Wn.2d at 287-88 (emphasis added).

In his current petition, cites *State v. Imlay*, 249 Mont. 82, 813 P.2d 979 (1991). *See* PRP of Dyer at 44. The Washington Supreme Court's holding as discussed above in *In re Ecklund*, however, above controls in

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[7] Contrary to the dissent's assertion (dissent at 302 n.16), the facts under which this court decided *Ecklund* are similar to the facts at present. Like Dyer, the petitioner in *Ecklund* exhibited exemplary behavior in prison and did not take responsibility for his crimes. 139 Wn.2d at 183. Justice Sanders voiced the dissenting view, arguing the ISRB abused its discretion by basing its parolability decision, in part, on whether Ecklund confessed to his crimes. *Id.; cf.* dissent at 302. Notwithstanding these considerations, the court held the ISRB did not abuse its discretion by imposing an exceptional minimum term where Ecklund refused to admit his guilt because it prevented him from obtaining the necessary, rehabilitative treatment. *Ecklund*, 139 Wn.2d at 177. Dyer, like Ecklund, refuses to admit his guilt, which also prevents him from obtaining the necessary rehabilitative treatment. Under *Ecklund*, the ISRB acted within its discretion to extend Dyer's minimum term. [Footnote by the Court.]

Dyer's case. Therefore, his reliance on the doctrine of unconstitutional conditions is unavailing, and should be rejected.

F. Because The ISRB Did Not Enter Into A Contract With Dyer 24 Years Ago As To The Resolution Of His 1986 Personal Restraint Petition, His Claim That The Board Violated Such An Agreement Or Contract Is Utterly Meritless

In his petition, Dyer references a personal restraint petition he filed in June 1986 in which the Board indicated that it would provide all the relief requested by Dyer and asked that his petition be dismissed as moot. *See* PRP of Dyer at 46-47. Dyer's 1986 personal restraint petition, which he has appended to his current petition as Exhibit C, set out the following request for relief:

> 4. 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)

See Dyer's Exhibit C at 2. Dyer's memorandum in support of that personal restraint petition stated the following in its conclusion:

> 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.

See Petitioner's Memorandum in Support of Personal Restraint Petition, *In re Dyer*, at 11. The Board's response to Dyer's petition in memorandum in support stated the following, in pertinent part:

> Petitioner essentially argues that his minimum duration of confinement must be remanded to the Parole Board to take into consideration the reversal of three convictions under Kitsap County cause number 81-1-00398-1 and also the Sentencing Reform Act of 1981 as a redetermination is necessary after July 1, 1984.
>
> Although respondent does not agree with petitioner's equal protection and due process arguments, the Board believes it is appropriate to rescore petitioner's minimum duration of confinement in view of the purposes, standards, and sentencing ranges adopted pursuant to RCW 9.94A.040 and the minimum term recommendations of the sentencing judge and prosecuting attorney, and will attempt to make a decision reasonably consistent therewith.
>
> IV. CONCLUSION
>
> Based on the above, as the 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.

See Dyer's Exhibit D, at 2-3.

On July 7, 1982, the Board of Prison Terms and Paroles (now ISRB) initially set Dyer's minimum term at 600 months. *See* Dyer's Exhibit C at 1. Dyer's 1986 petition correctly noted that the Washington

Court of Appeals reversed three of his five convictions and that the charges were not refiled by the prosecuting attorney. *See id.* Consequently, Dyer's 1986 petition sought an order directing the Board to reset his minimum term based only upon the convictions remaining, in a manner reasonably consistent with the standards and ranges of the Sentencing Reform Act. *See* Appendix C at 2. In its response, the Board noted that it did not agree with Dyer's equal protection and due process arguments, but believed it was appropriate to rescore Dyer's minimum duration of confinement in view of the purposes, standards and sentencing ranges of the SRA as well as the minimum term recommendations of the sentencing judge and prosecuting attorney and would attempt to make a decision reasonably consistent therewith. *See* Dyer's Exhibit D at 2-3. Subsequently, the Board reset Dyer's minimum term at 240 months.

Dyer now argues that the statement made in the Conclusion of the Board's response that it would provide all the relief requested by Dyer in his 1986 petition somehow constituted an agreement or a contract, based on Dyer's request that he be released immediately upon completion of his 240 month minimum term, is utterly meritless.

First, the State's 1986 concession to rescore Dyer's minimum duration of confinement so as to conform to the SRA's purposes and ranges did not in any way constitute a contract between Dyer and the

Board. Dyer presents no case law in his current petition which applies to the Board's 1986 concession in its response brief to Dyer's 1986 petition. The Board made no promises to Dyer, nor did it enter into any sort of contract with him, either express or implied. The Board represented to the Washington Court of Appeals in 1986 that it would rescore Dyer's minimum duration of confinement in view of the SRA's ranges, and the Board did so when it reset his minimum term at 240 months. *See* Exhibit 4.

Second, the Board's statement that it "will provide all relief requested by petitioner" referred 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* Exhibit C at 2. The Board did in fact re-set his minimum term. *See* Exhibit 4. Although Dyer's memorandum in support of his petition sought additional and alternative relief that requested that he be released immediately if he had served sufficient time to meet the new minimum term, the Board's concession meant only it would re-set his minimum term. The Board did so. The Board's concession did not include agreeing to Dyer's additional request in his memorandum, as opposed to the relief sought in his petition, that he be released immediately. Nor did the

Board's concession somehow evolve into an agreement or implied contract with Dyer for his release.

Third, Dyer's maximum term for his two first-degree rape convictions is Life, as set by the superior court. *See* Exhibit 1. Given that he cannot be released unless and until he meets the standard for parolability under RCW 9.95.100, his additional request in his 1986 memorandum that he be immediately released if he had already served his re-set minimum term of 240 months could not have been granted by the Washington Court of Appeals. As this Court held in *In re Cashaw*, 123 Wn.2d 138, 143, 866 P.2d 8 (1994):

> **An inmate is not automatically released upon serving the minimum sentence, less good-time credits. The Board cannot release an inmate, regardless of the status of the minimum term, until either the Board determines the inmate has been rehabilitated (and is otherwise fit for release) of the maximum sentence has been served. RCW 9.95.100**. If the Board determines the inmate is not rehabilitated, it redetermines the inmate's minimum term, staying within the bounds of the maximum term. RCW 9.95.052, .100. Accordingly, the minimum term carries with it no guaranty of release; it only establishes a date when the inmate becomes eligible to be *considered* for parole. *See* WAC 381-40-100; *In re Powell*, 117 Wn.2d 175, 186 n.1., 814 P.2d 635 (1991).

Cashaw, 123 Wn.2d at 143 (italics in the original) (bold emphasis added).

In sum, there was no contract, either express or implied, between the Board and Dyer for Dyer's immediate release following the State's

concession to rescoring his case and re-setting his minimum term. Dyer's contract theory is meritless, and this claim should be denied as such.

G. Dyer's Motion For This Court To Retain His Personal Restraint Petition Should Be Denied

Dyer has also filed a motion for this Court to retain his personal restraint petition. The Respondent respectfully requests that this Court deny Dyer's motion.

Dyer's current personal restraint petition should be transferred to the Washington Court of Appeals pursuant to RAP 16.5(b)(1). Dyer's motion correctly points out that RAP 16.5(b)(1) states that a personal restraint petition filed in the Washington Supreme Court will "ordinarily" be transferred to the Washington Court of Appeals. *See* Motion to Retain PRP at 1; *see also* RAP 16.5(b)(1). Dyer contends, however, that his is "not an ordinary case." *Id.* Although this Court has adjudicated several of Dyer's prior personal restraint petitions, his current petition is unremarkable.

The Board most recently denied Dyer parole because he remains an untreated sex offender convicted of two predatory, vicious rapes, and because his most recent psychological evaluation assessed him as a high risk for violence and re-offending. *See* Exhibit 11 at 8. When these facts are applied to the parolability standard in RCW 9.95.100, which states that

the Board shall not release an offender prior to serving the maximum sentence unless the offender can show he is completely rehabilitated and a fit subject for release, Dyer simply cannot show that the Board's decision to deny parole was an abuse of its discretion.

RAP 16.5(b)(1) should be followed. Dyer's motion for this Court to retain his PRP should be denied.

VI. CONCLUSION

For the above stated reasons, Respondent respectfully requests that this Court deny Mr. Dyer's personal restraint petition with prejudice, and deny his motion for this Court to retain his petition.

RESPECTFULLY SUBMITTED this 17 day of November, 2010.

ROBERT M. MCKENNA
Attorney General

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

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing RESPONSE OF THE INDETERMINATE SENTENCE REVIEW BOARD 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:

RICHARD J. DYER, DOC #281744
STAFFORD CREEK CORRECTION CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

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

EXECUTED this 17th day of November, 2010 at Olympia, WA.

Karen Thompson
KAREN THOMPSON

EXHIBIT 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, -vs- RICHARD JAMES DYER Defendant.	NO. 81-1-00398-1 AMENDED JUDGMENT AND SENTENCE

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

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Prosecuting Attorney
Kitsap County
614 Division Street
Port Orchard, WA. 98366
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Prosecuting Attorney for Kitsap County; the defendant being asked at the original sentencing if there was any legal cause why judgment should not be pronounced and no legal cause was shown at which time the Court entered a judgment of guilty to the crimes of (1) Count II - FIRST DEGREE RAPE, (2) Count IV - FIRST DEGREE RAPE, (3) Count V - UNLAWFUL IMPRISONMENT, (4) Count VI - FIRST DEGREE BURGLARY, and (5) Count VII - FIRST DEGREE RAPE; and it appearing that at said sentencing hearing the Court ordered the defendant sentenced as follows;

The defendant is sentenced to a maximum term of:

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

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

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

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

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

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

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

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

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

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

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

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

ORDERED, ADJUDGED, AND DECREED that the defendant shall pay costs in this matter of $3,111.90; and is further

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

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

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

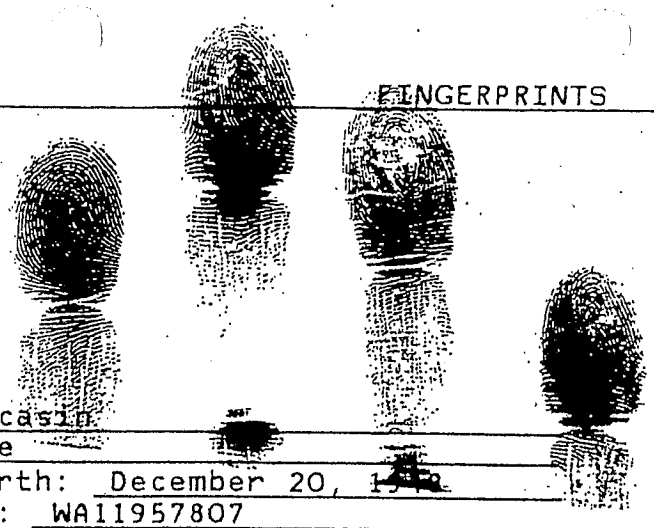
The defendant is remanded into the custody of the Sheriff of Kitsap County to be detained and delivered back into the custody of the proper officers for transportation to and confinement in the appropriate facility.

DATED THIS 9th day of December, 1986.

KAREN B. CONOLEY, JUDGE

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, 19[redacted]
SID Number: WA11957807

DATED this _____ day of December, 19 86.

FINGERPRINTS ATTESTED BY:

ROBERT L. FREUDENSTEIN
CLERK

By: Mary Dodeward
DEPUTY CLERK

PRESENTED BY:

C. DANNY CLEM
Prosecuting Attorney

APPROVED FOR ENTRY:

~~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 19 86

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

BY Gloria Masters D.C.

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EXHIBIT 2

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

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

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

EXHIBIT 2

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[1] 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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[1] 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 1 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).[2]

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.

---

[2] 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.

WE CONCUR:

Worswick, A.C.J.

Petrie, J.

EXHIBIT 3

PB 302-468

STATE OF WASHINGTON
BOARD OF PRISON TERMS AND PAROLES

q

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 (type) *hearing for the above-named 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

3

EXHIBIT 4

STATE OF WASHINGTON
INDETERMINATE SENTENCE REVIEW BOARD

OLYMPIA, WASHINGTON

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

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 CRUETLY 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

EXHIBIT 4

STATE OF WASHINGTON
INDETERMINATE SENTENCE REVIEW BOARD

OLYMPIA, WASHINGTON

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

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

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

EXHIBIT 5

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)

EXHIBIT 5

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)

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)

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

EXHIBIT 6

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)

OBTS UPDATED
4/1/95 jgs

EXHIBIT 6

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)

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)

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

EXHIBIT 7

DEPARTMENT OF CORRECTIONS

CLASSIFICATION REFERI

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	DATE	2. MX ED	3. NRD
RICHARD HOLCOMB, ACC 3	1-5-95	LIFE PERD: 6-20-95	8-95

4. REVIEW OF CLASSIFICATION FOR:

[ ] INITIAL (RC) [XX] Camp [XX] W/R [ ] Board
[XX] Six Month Review [ ] Ad Seg [ ] PPR [ ] Transfer
[XX] Other (specify) Pre-Release/3-95 .100/.052 Hearing

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:

1. 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.

2. CHEMICAL DEPENDENCY: Mr. Dyer was evaluated for chemical dependency during 4-91, with no recommendation for participation in the DOC program.

3. STRESS/ANGER MANAGEMENT: Completed during 1987.

6. NUMBER	NAME: LAST	FIRST	MIDDLE
281744	DYER	Richard	

EXHIBIT 7

DEPARTMENT OF CORRECTIONS

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	

DEPARTMENT OF CORRECTIONS

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

Chairperson/Date 1-11-95

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: 1/11/95

Superintendent Recommendations/Actions:

Concur

Superintendent Signature/Date: 1/17/95

6. NUMBER	NAME: LAST	FIRST	MIDDLE
281744	DYER	Richard	

EXHIBIT 8

STATE OF WASHINGTON

INDETERMINATE SENTENCE REVIEW BOARD

4317 Sixth Ave., S.E. • P.O. Box 40907 • Olympia, Washington 98504-0907 • (360) 493-9266
(TDD Relay 1-800-833-6388)

DECISION AND REASONS

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 1st 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

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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

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,

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

EXHIBIT 9

STATE OF WASHINGTON

INDETERMINATE SENTENCE REVIEW BOARD

4317 Sixth Ave., S.E. • P.O. Box 40907 • Olympia, Washington 98504-0907 • (360) 493-9266
(TDD Relay 1-800-833-6388)

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

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)

EXHIBIT 9

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 24th, 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 23rd 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

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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

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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

EXHIBIT 10

STATE OF WASHINGTON

INDETERMINATE SENTENCE REVIEW BOARD

*4317 Sixth Ave., S.E. * P.O. Box 40907 * Olympia, Washington 98504-0907 * (360) 493-9266*

(TDD Relay 1-800-833-6388)

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

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 1/3rd 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

EXHIBIT 10

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 14th, 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 22nd, 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 10th, 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 19th, 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 14th, 1984, Mr. Dyer's convictions

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 27th, 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

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

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,

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 25th, 1980, and then again on September 2nd, 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

her. He married his current wife on August 1st, 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

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 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 Reconation Therapy; and Love and Forgiveness Couples Seminar. There was a chemical dependency evaluation conducted on November 16th, 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 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.

- 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

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.

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

EXHIBIT 11

STATE OF WASHINGTON

INDETERMINATE SENTENCE REVIEW BOARD

*4317 Sixth Ave., S.E. * P.O. Box 40907 * Olympia, Washington 98504-0907 * (360) 493-9266*

(TDD Relay 1-800-833-6388)

DECISION AND REASONS

NAME:	DYER, Richard
NUMBER:	281744
INSTITUTION:	McNeil Island Corrections Center (MICC)
TYPE OF MEETING:	.100 Hearing
DATE:	January 13, 2010
PANEL MEMBERS:	BH, TS, LD & DT
FINAL DECISION DATE:	March 15, 2010

This matter came before Betsy Hollingsworth, Thomas Sahlberg, Lynne DeLano and Dennis Thaut, who are members of the Indeterminate Sentence Review Board (ISRB or the Board), on the above date for a release hearing in accordance with the provisions of RCW 9.95.100. Mr. Dyer appeared in person and was represented by attorney David Zuckerman. Testimony was provided by Department of Corrections (DOC) Classification Counselor (CC) Houston Wimberly and Mr. Dyer. Others present at the hearing were: ISRB staff.

BOARD DECISION:

This was a Deferred Decision. Based on the requirements of RCW 9.95.009(3) and RCW 9.95.100 and the totality of evidence and information considered by the Board, the Board finds that Mr. Dyer is not parolable and adds 60 months to his minimum term.

NEXT ACTION:

Schedule .100 hearing for Mr. Dyer 120 days prior to his next Parole Eligibility Date (PERD).

JURISDICTION:

Richard Dyer is under the jurisdiction of the Board on a February 12, 1982 conviction in Kitsap County Cause Number #81-1-00398-1 for two counts of Rape in the First Degree (Counts II & IV). The time start is February 19, 1982. The standard SRA range is 63 to 88 months. The maximum term is Life. 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 14th, 1986, the full Board re-determined his minimum term at 240 months. The Board justified an aggravated minimum term based on the recommendations of the sentencing Judge, who 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, who recommended that Mr. Dyer serve 50 years. Mr. Dyer has served approximately 259 months in prison. His current PERD is November 30, 2009. This hearing is being held past his current PERD due to requests for continuance by Mr. Dyer's counsel.

NATURE OF INDEX OFFENSE(S):

File materials describe the index convictions as separate attacks on two different women who did not know Mr. Dyer. One occurred on January 27th, 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 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. 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 the woman down on the back floorboard.

She was driven to an isolated location. Mr. 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. Mr. 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 Mr. Dyer's residence. She described the outside of the residence and then identified some road signs in her police statement. Mr. 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 Mr. Dyer told the other man to go ahead with her, and 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. Mr. Dyer then raped her vaginally, fell asleep, awoke and raped her again, then fell asleep; she reported that this cycle 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, Mr. 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 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, Mr. 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 Mr. Dyer in a photo lineup and clothing that she described Mr. Dyer wearing at the time of the crime was retrieved from Dyer's personal belongings. The investigation also confirmed that Mr. 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, whom she later identified as Mr. 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 Mr. Dyer went to sleep. The victim managed to get loose,

getting only as far as the bedroom door before a dog awakened Mr. Dyer. She was recaptured and retied to the bed. About an hour later, she was able to again free herself. Again the dog awoke Mr. 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, Mr. 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. He said he had been drunk, and he was sorry about everything. File materials show that at some point that morning Mr. Dyer gave this victim 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.

OTHER CRIMINAL CONDUCT:

When Mr. Dyer was received at the DOC under Board jurisdiction February 19th, 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 14th, 1984, Mr. Dyer's convictions 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 chose not to re-try Mr. Dyer on the counts involving his former wife. Because these convictions were overturned on a technicality, he was not exonerated 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.

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 25th, 1980, and then again on September 2nd, 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."

HISTORY/COMMENTS:

Mr. Dyer has appeared before the Board on six previous occasions. Each time the Board has found him not parolable and added time to his minimum term. His last hearing was held on October 18, 2006.

Mr. Dyer continues to work for the Recreation Department, and he has received superior evaluations in all categories. He has received no infractions since his last hearing. He has participated in numerous offender change programs over the years, as outlined in previous Board Decisions; however, he has not programmed since his last hearing.

Another psychological evaluation was performed by Dr. Patricia Pereira in June of 2009. Our previous Decision and Reasons from October, 2006 provides an extensive review of

Mr. Dyer's history within the institution and the results of his previous psychological evaluations. We include this by reference.

EVIDENCE CONSIDERED:

In preparation for Mr. Dyer's hearing and its decision in this case, the Board completed a review of Mr. Dyer's Department of Corrections (DOC) and ISRB files. The Board considered all information contained in those files, including but not limited to: the most recent DOC facility plan; information regarding institutional behavior and programming; any letters of support and/or concerns sent to the Board; the Pre-Sentence Investigation report; the most recent psychological evaluation prepared by Patricia Pereira, PhD; previous psychological evaluations; previous Board Decisions; and materials provided by Mr. Dyer and his counsel. The Board also considered the testimony of the witnesses listed above.

REASONS:

Little has changed since the Board last saw Mr. Dyer. While he initially demonstrated significant behavior problems during his incarceration, he has remained infraction free for over 10 years.

Mr. Dyer continues to deny his offenses, both adjudicated and unadjudicated. As indicated in our previous Decision, however, Mr. Dyer stands before the Board as a convicted sex offender whose crimes involve considerable violence and cruelty toward his victims. The record provides considerable evidence to support his convictions. To date he remains an untreated sex offender.

Dr. Pereira's evaluation reports that individuals with Mr. Dyer's profile "may act out in a sexual or aggressive manner with little apparent attention to or understanding of what they are doing." She further states that "When confronted with the realities of their

behavior, they may act surprised and feel resentful and persecuted." She reports that the MMPI-2 indicates that underneath a veneer of control is a suppressed anger and resentment that with the right trigger could cause an explosion "into a highly rationalized outburst." She scores Mr. Dyer as high on the psychopathy scale and assesses him as a high risk for violence and re-offending.1

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. In addition, on his 2005 evaluation, the Board notes that Mr. Dyer reportedly scored on one test in a manner characteristic of prisoners who might be referred to as *"psychopathic manipulators."* [Emphasis added.] His 1994 evaluation indicated impulsivity, poor judgment, aggression and blaming. This report also stated that his risk of re-offense remained high and that the depth of sexual deviancy could not truly be assessed with an uncooperative client.

As we have pointed out in the past, 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) In this case, the nature of Mr. Dyer's offenses coupled with his lack of treatment and indications of high psychopathy create considerable concerns about public safety should he be released.

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1 Mr. Zuckerman calls her scoring "unconscionable;" however, he provided no new alternative scoring to counter her assessment. We do note, however, that she places his age at the top of her report at 51 rather than his actual age of 61.

In finding Mr. Dyer not parolable once again, we are cognizant of variations in his scores on a number of psychological testing scales over the years. The Board has not been furnished with the scoring tools utilized in these various evaluations. Prior to his next .100 hearing, the Board would request that he receive a forensic psychological evaluation to determine to determine whether he meets the criteria for civil commitment under Chapter 71.05 RCW. Such an evaluation would be extremely helpful in determining whether Mr. Dyer continues to present a danger to the community. We would further request that the actual scoring for Mr. Dyer on the various risk assessment tools be included with the evaluation report so that the Board and counsel can review them.

BH:

CC: Institution
Richard Dyer
File
Attorney for Mr. Dyer