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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 3**

PERSONAL RESTRAINT) Case No.: 30349-7-III
PETITION OF:)
JERRY LAIN) PETITIONER'S REPLY

87109-4

**LAIN WAS COOPERATIVE WITH THE ISRB AND THE BOARD
RECOGNIZED AND COMMENDED LAIN'S REHABILITATION**

In its Response, the State argues that, according to the ISRB, Lain was noncooperative and failed to complete suggested programming (Response p. 4-5). The State suggests that the ultimate decision to parole Lain to Iowa was not based on "any improvement in Lain." Id. at 5. That statement ignores the fact that the ISRB, throughout the parole process, recognized Lain's rehabilitation over the years. The Board initially found Lain parolable on 8/25/09 (PRP Exhibit 3, Decision and Reasons). In its decision, dated 8/25/09, the Board addressed his

rehabilitation: “Many of his first years in prison involved multiple violations and infraction behavior.” The board then complimented his rehabilitation efforts: “He has used his time well, learning work skills and job skills including upholstery, farm work welding, and some computer classes.” Also, the board recognized his diligent efforts to set up programming while on parole: “[he] has contacted an AA coordinator in the county in which his parents reside in Iowa, realizing that he may be required to participate in an AA program if he were to be released to the community.” The Board also referenced the favorable psychological evaluation: “In his March 2009 psychological evaluation Dr. Colby provided a very thorough report.” Finally, the board, again, recognized Lain’s rehabilitation efforts over a long period of time: “File materials indicate that Mr. Lain self admits that for many years he has had an anger problem for many years, which he has attempted to address in prison. It appears from his demeanor today that Mr. Lain has done a relatively good job of maintaining control over his anger. His classification counselor reports that he is a stabilizing factor on the unit and gets along well with others.” *Id.* After the next hearing, held 3/16/10, the Board continued to find Lain parolable, although it acknowledged his “concerns about the difficulty of [transition plans]” PRP, Exhibit 4. However, the board conducted a frank and thorough discussion with Lain and described the productive discussion: “Mr. Lain testified that he would be willing to develop and abide by a MRP¹ that included transition to the community. Recognizing his efforts to rehabilitate himself over

¹ Mutual Transition Plan

the years through a variety of programming previously documented, and his continued positive behavior in the institution, the Board determined [Lain] was still releasable on conditional parole.” Id. As the State notes, the conditional release decision was amended to direct parole to Iowa due to no fault or behavior on the part of Mr. Lain. Response at 5. The Board describes the events leading up to direct parole in the following way: “[Lain] indicated a willingness to participate [in a MRP] as required. Unfortunately, it became apparent during the summer that a transition through a MRP to work release was not feasible in Washington State due to a recent spate of murders and/or serious assaults of law enforcement officers in the region...” Id.

The State suggests that Lain was rigid and resisted the Board and lacked any sort of improvement. Response at 4-5. That simply was not the case. The board, in face to face meetings with Lain, conducted productive discussions at the 7/23/09 and 3/16/10 hearings and continued to recognize his rehabilitation. The Board (unlike the governor) recognized his demeanor and heard the favorable report of the counselor.

The governor’s parolability finding/cancellation order only occurred after media and public pressure was applied several days prior to Lain’s release.

THE LEGISLATURE GAVE THE BOARD THE SOLE AUTHORITY TO MAKE A PAROLEABILITY DECISION AND ORDER PAROLE. THE GOVERNOR IS AUTHORIZED ONLY TO CANCEL PAROLE AND NOT TO RESCIND THE BOARD’S ORDER TO PAROLE AFTER A RELEASE DATE HAS BEEN SET.

The State argues that RCW 9.95 is unambiguous, uses the terms “revoke’ and “revocation” to refer to rescinding parole after release from prison and upon violations (Response at 12). The State also argues that to avoid rendering the term “cancel” superfluous, “cancel” must be construed to authorize canceling parole prior to release. Response at 12. Also, the State argues that RCW 9.95.160 gives the governor express authority to “cancel” the ISRB’s “decision to grant” parole prior to release.

The Board was created by the legislature in 1935 (1935 Wash. Laws c.114), hereinafter (“ACT”)² The Board is “created ...to administer the provisions of this act.” Id. at § 1(“Creation of Board”) The ACT gives the board the duty to “thoroughly inform itself as to the facts of [each inmate’s] crime ...and personality. (§ 3 “Full Information required”) Sec. 4 (“May Parole”) states that “[the board] may permit [an inmate] to leave [prison] on parole”; gives the board the “power to establish rules and regulations under which the [inmate] may be allowed to leave the [prison].” Id. The board is also given the “power to return [the inmate] to [prison] at its discretion.” Id. The board may also impose conditions. Id. Earned credits shall be forfeited “in the event that [paroled inmate] shall break...parole or violate any law or prison rules. § 4 (“Violation of Parole”)

² Sections of the ACT are long and paragraphs unnumbered; where possible, the heading for paragraphs as appearing in the session laws will be referenced following the quote or paraphrase.

The ACT specifically refers to the written order of the board in the context of a parole violation: “The written order of the [board] shall be sufficient warrant for [law enforcement] to take into custody any [offender on parole] and return such person [to the prison]. § 4 at “Written order of board Sufficient.”

The “written Order” of the board shall be executed by law enforcement “in the same manner as any ordinary criminal process” *Id.* (“Execution of Order Mandatory”). This means that execution of a board order, to return an offender to custody, is handled by law enforcement.

The ACT does not limit the previously vested constitutional power of the governor to grant commutations or pardons. (§ 4 “Governor’s Powers not Limited by ACT”) However,, the ACT created (“hereby authorizes”) a new statutory power allowing the governor to “cancel and revoke *parole*” by written order. (*Id.* emphasis added). The governor’s order shall have the same force and effect as “an *order* of the [board] and [shall] be *executed* in like manner as an order of the board.” *Id.* (emphasis added) This is a clear reference to execution by law enforcement of an order to return an offender to custody. In fact, the very next paragraph (entitled, “Fugitive from Justice”) in §4 provides that from and after the suspension, *cancellation* or revocation of the parole [of the offender] and until his return to custody he shall be deemed [a fugitive]” *Id.* (emphasis added), current RCW 9.95.130. Thus, the ACT gave the governor new power to cancel parole while the offender was outside the prison, and the governor’s order would be executed by law enforcement to return the offender to custody.

If “cancel” only authorizes the governor to rescind an *order* of the Board to parole an inmate prior to release, then RCW 9.95.130 cannot be harmonized with the rest of RCW 9.95, because there is clear referral to cancellation of parole after the offender has been released (see Response at 10, citing State v. Thorne (citation omitted)).

One court has differentiated “Cancel” and “revoke” by stating that the statute provides that parole can be “revoked at the discretion of the board or cancelled at the will of the governor.” (see Pierce v. Smith, 31 Wn.2d 52, 56, 195 P.2d 112 (1948), (PRP at 16)³

Rather than interpret “cancel” as pertaining to pre-release and “revoke” to post-release, another interpretation would be, as in Pierce, that “revoke” implies discretion, with a hearing, and “cancel” means at-will, without a hearing. There is no contradiction. This interpretation is bolstered by the inclusion of “cancellation” in RCW 9.95.130.

The governor can only cancel “parole”, not the “order” to parole an offender. “Parole” is that portion of a sentence served outside of prison. The State argues that the definition of “parole” was added by the legislature in 2001 (Response at 11); however, “parole”, as it appeared in the ACT, at all times referred to post-release: “[inmate] may be allowed to *leave the confines of [prison]* on parole, and “return [inmate] to the confines...from which he or she was paroled” ACT at §4 “Shall establish Rules.” (emphasis added) See also, “..leave the buildings and

³ Cancellation at-will of parole is unconstitutional, as argued in the PRP and *infra*.

enclosures [of the prison] on parole.” Id. (“May Parole”) The nature and definition of parole has not changed since the creation of the board. In order for the governor to cancel “parole”, the offender must be outside the confines of the prison.

THE GOVERNOR’S CANCELLATION ORDER VIOLATED DUE PROCESS BECAUSE A PROTECTED LIBERTY INTEREST WAS CREATED WHEN THE BOARD FOUND LAIN PAROLABLE, ISSUED A PAROLE-RELEASE ORDER AND SET A FIXED DATE FOR CONDITIONAL RELEASE.

The State argues that the cancellation of Lain’s fixed parole date does not raise due process issues because there is “no constitutionally protected right to receive parole.” (Response at 13) The Response places heavy reliance on In re Cashaw, and a line of state cases including In re Bush, In re McCarthy and In re Mattson (Response at 12-13, citations omitted). These cases address situations where the offender was still incarcerated and addressed the issue of whether due process applies to the release decision by the Board (and, in Mattson, release policies of Department of Corrections)

In this petition, Lain is not arguing that he was denied due process in the making of a parole or release decision. Rather, he claims that the governor’s action to cancel parole occurred after the parolability and release decision had been made and a release date fixed. Any due process analysis would therefore have to address a liberty interest that attaches after the inmate had been found parolable and been given a release date with conditions of parole.

In In re McCarthy, 161 Wn.2d 234, 164 P.3d 1283 (2007) the issue was whether the provisions of RCW 9.95.420 created a liberty interest to which constitutional due process would apply.⁴ The court indicated that the first step is to determine whether a liberty interest is at stake. The court found that the release statute created a presumption of release and therefore, under Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 12, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), the inmate was entitled to some due process. McCarthy at 241. The court indicated that .420 release hearings are more analogous to parole release than to parole revocation hearings, the latter of which have a more significant liberty interest. McCarthy had argued that the presumption of release in RCW 9.95.420, created a liberty interest; however the court stated, “There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires.” McCarthy at fn 4, citing Greenholtz, 442 U.S. at 9, 99 S.Ct. 2100. In Lain’s case, he has already been found parolable with conditions; therefore, unlike in McCarthy and Greenholtz, Lain’s liberty interest had attached and therefore the parole revocation case, Morrissey, rather than Greenholtz, would apply.

The State argues that In re Bush does not help Lain, because Lain had not yet been released. Response at 24, fn 2. In In re Bush, 164 Wn.2d 697, 193 P.3d 103 (2008), the issue involved whether an offender whose sentence had been

⁴ The statute at issue, RCW 9.95.420 provides, “[the board] *shall* order the offender released [under appropriate conditions] *unless* the board determines by a preponderance of the evidence that...it is more likely than not that the offender will commit sex offenses if released.” In re McCarthy 161 Wn.2d 234, 239-40

conditionally commuted by the governor, was entitled to due process. The court held that the offender had a liberty interest in avoiding revocation of his conditional commutation. Bush at 704. The court explained that “where parole decisions are wholly discretionary, there is no liberty interest in receiving parole, Bush, citing Greenholtz at 10-11. However, “the [U.S. Supreme] Court has recognized a liberty interest in avoiding revocation of both parole and probation.” Id. citing Morrissey v. Brewer, 408 U.S.471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 781-82, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) . Bush further elaborated that, “Morrissey made it clear that the conditions placed on the particular parolee and the implicit promises those conditions, not the initial entitlement to parole, create the liberty interest.” Bush at 703-04, citing Morrissey at 480, Gagnon at 781-2. The Bush court went on to analogize parolees and probationers to commutees. Bush at 704

In Bush, the court determined whether due process attached based on the liberty interest. In Bush’s case, the liberty interest attached because the governor’s commutation included conditions and therefore, Bush “legitimately expected that he would retain the commutation unless he violated the conditions.” Bush at 703 The court compared the commuttee’s liberty interest with that of a parolee, stating that, “[Morrissey] explained that the liberty interest in avoiding revocation of parole arises from the parolee’s justifiable reliance on the conditions of parole.” Bush at 703-04

The court, in Bush, recognized that it “...had never before decided if due process attaches to revocation of conditional commutations...” Id. at fn 2. The State argued (and cited cases) that the governor had the state constitutional and statutory power to revoke commutation at will, but the court countered that none of the cited cases “resolve due process questions.” Id. Just as in Bush, where due process applies to constitutional and statutory gubernatorial powers, due process must also apply to the governor’s power to cancel/revoke parole at will. Id. at 704-5

Lain’s case involves revocation of parole or certainly a situation that is more analogous to revocation of parole than to parole release, because the Board had found him parolable and set a definite release date with conditions.

The State also argues that the U.S. Supreme Court, in Swarthout v. Cooke, 131 S.Ct. 859, 178 L.Ed.2d 732, (2011) rejected an identical claim to Lain’s. Response at 17. Swarthout does not apply to Lain’s case, because it addresses a release decision that was not yet final when the governor reversed the parole board’s decision.

Swarthout addresses the decision of the California governor under California law to review and then reverse or modify the parole board’s decision to parole the inmate. Swarthout is a pre-release case to which Greenholtz applies. It is not a revocation of parole case to which Morrissey applies. The court does not cite Morrissey.

In Swarthout, the offender was found releasable by the California parole board, but, before the parole decision became final, the governor exercised his state constitutional and statutory authority to review the case and reversed the decision. Swarthout, 131 S.Ct at 861, citing Cal. Const., Art 5, §8(b)⁵ and Cal. Penal Code §3041.2⁶.

The court analyzed the case as one where the “liberty interest is the interest in *receiving parole* when the California standards for parole have been met...” Swarthout at 862 (emphasis added) The court accepted the Ninth Circuit’s opinion that the California law, like the Nebraska parole statute at issue in Greenholtz, created a limited liberty interest and then applied the due process requirements as elaborated in In re Greenholtz (opportunity to be heard and a

⁵ (b) No decision of the parole authority of this State with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder **shall become effective for a period of 30 days**, during which the **Governor may review** the decision subject to procedures provided by statute. The **Governor may only affirm, modify, or reverse the decision of the parole authority** on the basis of the same factors which the parole authority is required to consider. The Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action. (emphasis added)

⁶ (a) **During the 30 days following the granting, denial, revocation, or suspension by a parole authority** of the parole of a person sentenced to an indeterminate prison term based upon a conviction of murder, the Governor, when reviewing the authority's decision pursuant to subdivision (b) of Section 8 of Article V of the Constitution, shall review materials provided by the parole authority.

(b) If the Governor decides to reverse or modify a parole decision of a parole authority pursuant to subdivision (b) of Section 8 of Article V of the Constitution, he or she shall send a written statement to the inmate specifying the reasons for his or her decision. (emphasis added)

statement of the reasons why parole was denied). Swarthout at 862. In the concurring opinion, Justice Ginsburg stated that “The Ninth circuit, however, has determined that for California’s Parole system, as for Nebraska’s, Greenholtz is the controlling precedent.” Id at 863.

In Lain’s case, the issue is not whether the statute for parole eligibility created liberty interests. The issue is whether Lain was deprived of constitutional due process as a parolee whose parole had been revoked. Morrissey, not Greenholtz should be the controlling precedent. This becomes more apparent when reviewing In re Arafiles, which the Response relies on. Response at 19-20

In California the state constitution and penal code provide that the parole decision, for a specific class of inmates⁷, is not final until the expiration of 30 days, during which time the governor is authorized to review the board decision to release and is authorized to affirm, modify or reverse it. (see PRP fn 18 and Reply, supra, at fn 3 and 4)

The State argues that in Arafiles, 6 Cal.App.4th 1467, 8 Cal.Rptr.2d 492 (1992) “the California board had granted parole to Arafiles, but the governor reviewed the case and cancelled parole.” Response at 19. This is not correct. As stated in Arafiles, the California Penal Code provides that, “no decision of the board with respect to the granting....of parole shall become effective for a period of 30 days, during which the governor may review the decision subject to procedures provided by statute.” Arafiles, 6 Cal.App. at 1474. In other words,

⁷ “person[s] sentenced to an indeterminate term upon conviction of murder.” (supra,p. 11, fn 5 and 6)

under California law, a parole board decision does not become final for 30 days, during which the decision is essentially on review, much like a trial court decision in Washington that does not become final until the appellate process is completed.⁸ In Arafiles, the court found that the governor's direct review was timely. The inmate argued that due process was required under Morrissey; however, the court stated that "Morrissey has never been extended to Board proceedings to fix terms of prisoners or to determine whether to grant parole." Id. at 1480 The court concluded that a hearing with the governor was not required to satisfy due process, because, "in this case the petitioner did not have an effective parole date because the review process was *not yet exhausted*." Id. at 1480 (emphasis added)

The Arafiles court cites In re Prewitt, 105 Cal.Rptr. 318, 503 P.2d 1326 (1992) a case that holds: "an inmate is entitled to a hearing which substantially conforms to Morrissey procedures on the question whether an order granting parole should be rescinded as improvidently granted." Arafiles, Cal.App.4th at 1480, citing In re Prewitt, 8 Cal.3d 470 at 473-75 In fact, the court in Prewitt states that, "we can perceive no significant distinction between the deprivation of the right to conditional liberty enjoyed by a parolee after release and the deprivation of the right to achieve such liberty after a grant thereof but before the

⁸ For example, in Washington, for the purposes of collateral attack a judgment becomes final on the last of the following dates.....

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; ... RCW 10.73.090

date fixed for release.” Prewitt, 8 Cal.3d at 474. Prewitt held that due process applies to post- Morrissey rescission of parole grants. Id.

In Arafiles, the court was addressing a situation where the parole decision had not become final and that is why Morrissey, a parole revocation case, did not apply. In Lain’s case, under the Washington statute, the parole decision had become final, yet the governor justified her action based on Swarthout and the California cases and California law (see letter from governor, PRP Exhibit 25)⁹. Swarthout held that a second hearing was not necessary prior to the governor’s reversal of a parole decision, because the California parole statute was similar to the Nebraska parole statute addressed in Greenholtz and, under Greenholtz, minimal due process did not require a second hearing.¹⁰ Swarthout, 131 S.Ct. at 862. The California statute applied to a specific class of offenders (murderers) and unambiguously stated that the parole process was not final until the governor reviewed the case. Supra, fn 5 and 6; Arafiles, supra p.12 In Lain’s case, the Washington law the governor applied is a parole revocation statute. The parole decision had become final and therefore, there was no similarity between the statute in Lain’s case and the statute addressed in Greenholtz and the California statute.

⁹ In the governor’s letter, her counsel relied on Arafiles as authority for her actions (PRP Exhibit 25 at p. 2-3) and , in fact, stated that, “[T]he governor’s review of the order of parole was identical to the type of review conducted in the cases of Swarthout and Arafiles.” Id. At 2

¹⁰ The Greenholtz court reviewed a Nebraska parole statute that contained a presumption of release (similar to the release statute in In re McCarthy, supra) and held that a limited liberty interest was created and therefore minimal due process applied. In re McCarthy, 161 Wn.2d at 241

The Response also cites Styre v. Adams, 645 F.3d 1106, 1108 (9th Cir. 2011). That case does not apply to Lain, because the issue there is whether the governor must conduct a “second parole hearing before reversing a board’s favorable decision.” Id. at 1109. Styre addresses California’s parole statutes and indicates that, Swarthout holds that, “responsibility for assuring that the constitutionally adequate procedures governing California’s parole system are properly applied rests with California courts and is no part of the Ninth Circuit’s business.” Id. at 1108. The court holds that the “due process clause does not require that the governor hold a second suitability hearing before reversing a parole decision.” Id. But Styre differs from Lain’s case in that it concerns a parole release decision and not cancellation or revocation of parole after the board’s decision has become final and a release date set. In Swarthout, the “liberty interest at issue...is the interest in receiving parole when the California standards for parole have been met and the minimum procedures adequate for due process protection of that interest are those set forth in Greenholtz.” Swarthout at 862

Contrary to Swarthout, Styre and the California cases cited and relied on by the State, Lain’s case falls under precedent set by Morrissey for revocation after the parole decision has become final and conditions for release have been set.

The State argues that Monahan v. Burdman, 84 Wn.2d 922, 530 P.2d 334 (1975) does not apply. Response at 21. Monahan is more analogous to Lain’s case than Cashaw, Swarthout and the other cases relied on by the State.

The precise issue in Monahan is, “whether the right of minimal due process hearings, as guaranteed under Scarpelli and Morrissey,¹¹ should be accorded to proceedings leading up to the cancellation of a previously established, tentative parole release date for reasons other than inability to develop an acceptable parole rehabilitation plan.” Monahan, 84 Wn.2d at 926. In Monahan, the inmate had had a hearing with the board and was granted parole with a set release date. Although the cancellation resulted from the inmate’s behavior while on furlough, the court stressed that due process attached “because we are satisfied such a result flows from the U.S. Supreme Court decisions in Morrissey and Gagnon.” Monahan at 927. The court stated that, “the underlying reasoning is that revocation does result in a loss of conditional liberty and minimum due process standards must be met....The critical inquiry here is whether the potential conditional liberty established by the fixing of a tentative release date has created such a right or anticipation of liberty, that denial of it or continued incarceration beyond the tentative date for causes other than failure to provide an adequate rehabilitation plan, would warrant a due process determination of the reasons for cancellation of the tentatively fixed date.” Id. at 927-8. The court also stated that, “...the prospective parolee enjoys a unique status and is deserving of minimal due process safeguards before cancellation of that date...” Id. at 929, citing, among other cases, In re Prewitt, *supra*. p.14

¹¹ U.S. Supreme Court Parole and probation revocation cases, *supra* p.9

Although Lain's case does not involve a violation, the governor's cancellation was for cause and therefore, given Lain's expectation of liberty, the case should fall under Morrissey as did the inmate's case in Monahan. Monahan holds expressly that an inmate is deserving of minimal due process before cancellation of a parole date. Id. at 929-930.

Unlike the inmates in the Swarthout and Arafiles cases, Lain's parole decision was final. He had a set release date with conditions and therefore, he had an expectation of release. The governor's cancellation deprived him of his liberty.

The State argues that Monahan does not apply, because in Monahan it was the board that cancelled its own decision. Response at 21. However, due process depends on the liberty interest that is created, not the actors involved. "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss...The question is not merely the weight of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the fourteenth amendment." Morrissey 408 U.S. at 481

The State argues that the Bush "Court specifically distinguished that situation from the current situation where the prisoner had not yet been released." Response at 21 However, Bush states that there is no liberty interest in receiving parole (citing Greenholtz), but conditions placed on a parolee and the implicit promise those conditions confer, not the initial entitlement to parole, create the

liberty interest.” Bush at 703-4 (citing Morrissey at 482). Since Lain was found parolable, he has a liberty interest.

THE GOVERNOR’S FINDING OF NON – PAROLABILITY CONSTITUTES AN ABUSE OF DISCRETION, BECAUSE SHE RELIES EXCLUSIVELY ON UNCHANGEABLE HISTORICAL FACTORS AND DISREGARDS THE FAVORABLE EVIDENCE PRESENTED AT THE HEARING AND CONTAINED IN THE DOC REPORTS.

The State argues that in reviewing the governor’s and Board’s parolability decisions, this court cannot act as a super parole board and cannot interfere with its decisions absent an abuse of discretion, which occurs “only where it can be said no reasonable [person] would take the view adopted...” Response at 23. However, the board or governor also abuses its discretion when it makes a decision “without consideration of and disregard of the facts.” In re Dyer, 157 Wn.2d 358, 363, 139 P.3d 320 (2006), citing In re Addleman 151 Wn.2d 769, 776-77, 92 P.3d 221 (2004).

The state also argues that the fact that courts have stated that parole decisions involve “subjective appraisals and discretionary assessment of a multiplicity of imponderables,” gives the governor and board permission to use speculative reasoning in making parole decisions. Response at 24, citing In re Cashaw, 123 Wn.2d at 146. Lain agrees that a parole decision involves subjective reasoning; however, “[the board and governor] cannot ignore the evidence presented at the hearing nor rely on mere conjecture in making its decisions.” In re Dyer, 157 Wn.2d at 369.

The State also argues that the governor's almost exclusive reliance on Lain's prior criminal history, all occurring well over thirty years ago, prior to his incarceration, constitutes adequate reasons for the decision to find Lain not parolable. Response at 25. However, as the court stated in In re Dyer, "The ISRB's reliance on the nature of [petitioner's] crimes and disregard of evidence of [petitioner's] rehabilitation conflicts with its statutory responsibility to consider the evidence presented in determining whether a prisoner has established that he is rehabilitated." Id. at 368.

The State additionally argues that the governor's reliance on a request for reconsideration of a Board decision on parolability from 2002 is not an abuse of discretion. (Response at 25-6).

As argued in the petition, It is an abuse of discretion for the board (in this case, the governor in making a parolability decision) to emphasize the facts of the crimes (In re Dyer at 360). It is also an abuse of discretion for the governor to support a parolability decision based on speculation and conjecture and to rely on the unchangeable circumstances of the same facts that justified imposition of the original sentence. Id. The Board (and governor) cannot disregard favorable psychological evidence. It is also an abuse of discretion for the Board (and governor) to speculate about potential reaction to stress. Id. at 368.

There is no dispute that the governor stressed the unchangeable nature of, and circumstances surrounding, the crime and that she engaged in speculation

regarding potential problems with law enforcement. (PRP Exhibit 9, Cancellation Order at 1-2).

THE GOVERNOR DISREGARDED FAVORABLE EVIDENCE CONTAINED IN THE PSYCHOLOGICAL REPORT AND ONLY CONSIDERED THE DISCREDITED AND UNRELIABLE ACTUARIAL TEST RESULTS

The State argues that the governor's reliance on the psychological and forensic risk evaluations of Lain is not an abuse of discretion. Response at 26. However, the author of the psychological report expressly disclaims the value of the actuarial tests. In fact, the Washington Supreme court has questioned the value of the actuarial testing: "It may well be that the tests relied upon by the ISRB are unreliable..." In re Addleman, 151 Wn.2d 769, 778, 92 P.3d 221 (2004)¹² In the subsequent case, In re Dyer, supra at p. 18, the Supreme Court indicated that there is no rule or regulation requiring the board to consider psychological evaluations, but "the ISRB consistently obtains reports and relies on them for its decisions on prisoners' parolability." Id. 157 Wn.2d at 365. This court should address the issue of the governor's reliance on expressly disclaimed factors in making a decision on parolability, especially when the Board had previously read the entire report and found Lain parolable and when the only justification for relying on the evaluation is "the ISRB consistently obtains reports." Id.

On pg. 11 and 12 of the report, Dr. Colby disclaims the actuarial tests, concluding that he "would be unwilling to vouch for any decision regarding

¹² The court went on to say that it would not reach that issue in Addleman.

release or change in custody status that was based solely upon the offender's scores on any or all of these instruments, separately or in combination." PRP Exhibit 13. As the report itself indicates, the actuarial tests are speculative at best as to Lain's individual risk to the community and have no bearing on his rehabilitation. The governor stressed the actuarial scores in the cancellation order.

In addition to relying on the discredited actuarial tests, the governor totally disregarded the favorable evidence in, and conclusion of, the psychological report. In Dr. Colby's summary, he expresses positive comments on Lain's remorse and chances for success on parole. (PRP, Exhibit 13 at 13-15)

The 2009 psychological report was a nuanced and favorable report stressing recommendations on how to manage release, but the governor condensed it to one disclaimed, problematic portion – the actuarial tests – to find that Lain is not parolable.

In addition, the governor ignored the information in the board files that showed that Lain was following the recommendation of the psychological report for a strong release plan. PRP, Exhibit 13 and Exhibit 7 (Offender Release Plan) Just as the Board did in In re Dyer, the governor disregarded a thorough and favorable psychological report. She also ignored a well thought out and approved parole plan that closely followed the release recommendations of the psychological report.

THE BOARD ABUSED ITS DISCRETION IN SETTING 36 MONTH MINIMUM TERM

The State argues that the Board necessarily had to extend Lain's minimum term after the governor found him "not parolable"¹³ (citing In re Ecklund, Response at 27); however, the board must give adequate reasons for the length of the minimum term when it exceeds the presumptive SRA standard range In re Obert Myers, 105 Wn.2d 257,264-5, 714 P.2d 303 (1986) (inadequate reasons for setting minimum at 5 times greater than SRA standard range). See also, In re Locklear, 118 Wn.2d 409, 823 P.2d 1078 (1992) ("There must be some written indication that the board exercised its discretion in accordance with the applicable statutes and rules"¹⁴ [in setting a new minimum term]" Id. at 420-1 In addition, the State cites In re Bolduc, 51 Wn.App. 622, 732 P.2d 166 (1987) for the proposition that previous violations on parole and risk of re-offense were adequate reasons (Response at 27); however, in Bolduc the offender had multiple paroles, violations and convictions during a short time span in the recent past. In re Bolduc, 51 Wn.App. at 226-7. The offender during that period "appears to be completely out of control" Id. at 227. These violations occurred just a few years leading up to the date of the board's decision and the Board pointed to his, "lack of respect for the court's authority, of his lack of meritorious effort at rehabilitation, and of his inclination to continue to reoffend." Id.

¹³ The State admits that the governor made a "parolability" decision rather than exercising her authority to "cancel" parole.

¹⁴ There are no ISRB rules for a minimum term hearing upon the governor's remand (See WAC 381). In its own words, the board conducted this hearing "as the next logical step" after the remand. (PRP Exhibit 10 at 5)

In Lain's case, unlike in Bolduc and Rolston¹⁵ ("numerous and flagrant probation violations" over a 4 year span) , Lain has been incarcerated for over 28 years, has had one infraction in 15 years, the last one being in 2003. His SRA range was 105 to 135 months he had served a total of 340 months. (PRP Exhibit 10, ISRB Decision and Reasons) In no way can the board contend that he has constant violations. In addition, the Board files contained reference letters from 31 inmates indicating his rehabilitative efforts, his positive influence on the unit (supporting the testimony of Lain's counselor at all Board hearings covered in this petition) (PRP Exhibits, 3, 4 and 10) and his changes over the period of his incarceration. PRP Exhibit 24, Letters. The Board had previously found Lain parolable, but the governor's decision, in the board's words, "effectively precluded [the board] from making its own release determination...therefore, based [on the remand], the board conducted as the logical next step... [A minimum term hearing]. PRP, Exhibit 10.

No existing rules or regulations applied to the governor's action and to the Board's hearing. As argued in the petition, the Board had the discretion to add no time¹⁶. If the board had to add time by necessity; it had the discretion to add less than 36 months. By ignoring its prior decision of parolability and blindly

¹⁵ 46 Wn.App. 622, 732 P.2d 166 (1987), cited in Response at 24

¹⁶ The only rule that might apply, by analogy, states: "...In parolability hearings, actions may range from no change in the length of sentence to redetermination of the original sentence and imposition of an extension of the term not to exceed the maximum term. Good time credits will not be addressed inasmuch as there are no allegations of rule infractions." WAC 381-60-160(5)

following the governor's own parolability decision, the board exercised no discretion in setting a 36 month minimum term.

THE GOVERNOR'S AND BOARD'S ACTION CANCELLING LAIN'S PAROLE VIOLATES SUBSTANTIVE DUE PROCESS

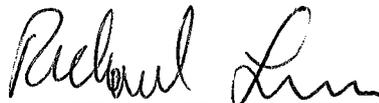
The State argues that the governor had legitimate reasons for determining that Lain was not rehabilitated and that her action did not shock the conscience. Response at 29, citing In re Bush, 164 Wn.2d at 707. In Bush, the governor reviewed a commuttee's violation of conditions, including police reports about the violation incident and she legitimately concluded that the commutation should no longer be effective. Bush at 707.

In Lain's case, the governor was approached by a television station asking for a review (PRP, Exhibit 15), and used a parole cancellation statute (RCW 9.95.160) that had not been used in almost 30 years to conduct a private parolability hearing which the ISRB is solely authorized to conduct. (PRP, Exhibit 18) In conducting the "parolability hearing" the governor retaliated against Lain for submitting a request for reconsideration of a Board decision 8 years earlier (PRP at p. 27-30); relied on a discredited portion of the most recent psychological report and ignored the rest of the report; speculated about potential risk and glossed over Lain's programming covering a period of 28 years. When questioned about her application of the statute, the governor's counsel admitted that the governor was conducting a California parole statute type review. (PRP, Exhibit 25)

After the governor's parole decision, the ISRB, having previously twice met with Lain, finding him parolable, added 36 months based solely on the governor's decision and, in the process, ignored all the positive factors and reports and testimony that had caused it to make parolability decisions twice within the previous two years.

Clearly, the government action in Lain's case differs from the government action in Bush's case, is arbitrary and capricious and shocks the conscience, thereby violating Lain's guarantee of substantive due process.

DATED THIS 6th day of February, 2012



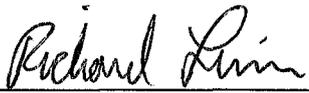
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on the date stated below, I mailed by United States Postal Service, a copy of "Petitioner's Reply" to the the following participant:

John Samsom
Assistant Attorney General
Attorney General's Office
Corrections Division
P.O. Box 40116
Olympia, WA 98504-0116

Dated this 6th day of February, 2012 at Bellevue, WA



RICHARD LINN



Law Office of Richard Linn, PLLC

12501 Bel-Red Road, Suite 209, Bellevue, WA 98005
425-646-6017

February 6, 2012

Court Clerk
Court of Appeals Division III
500 N. Cedar St.
Spokane, WA 99201

Re: In re PRP of Jerry Lain No. 30349-7-III

Dear Court Clerk:

Enclosed for filing is the Petitioner's Reply (and certificate of service) for the above cited case.

Please stamp and conform the enclosed front page and return in the self-addressed stamped envelope. Thank you..

Sincerely,

A handwritten signature in black ink that reads "Richard Linn". The signature is written in a cursive style.

Richard Linn
Attorney for Petitioner

FILED

FEB 08 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____