

FILED
January 6, 2012
Court of Appeals
Division III
State of Washington

NO. 30349-7-III

IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON, DIVISION III

871109-4

In re the Personal Restraint Petition of:

JERRY DALE LAIN,

Petitioner.

RESPONSE TO
PERSONAL
RESTRAINT PETITION

I. BASIS FOR CUSTODY

Lain is currently imprisoned pursuant to his conviction for assault in the first degree. Exhibit 1.¹ The superior court sentenced Lain on November 4, 1982 to a term of life imprisonment. Exhibit 1, at 1. The superior court committed Lain to the custody of the Department of Corrections. Exhibit 1, at 2.

II. STATEMENT OF THE CASE

This Court previously summarized the facts underlying Lain's crime as follows:

¹ Lain submitted with his personal restraint petition the exhibits relevant to the resolution of this petition. To avoid needless duplication of documents, Respondent cites to Lain's exhibits.

Shortly before midnight on September 7, 1982, Officer Fitzpatrick of the Richland police department responded to a report of a car prowling in progress. While he was waiting near the scene for another officer to arrive, the suspect started to run. Officer Fitzpatrick chased the suspect into a field where the suspect attacked him. During the ensuing struggle, the suspect stabbed at the officer's protective vest and arm with a knife. Somehow the suspect managed to get the officer's gun, placed it under the officer's vest and pulled the trigger. He shot the officer a second time in the face and then ran. The following morning Mr. Lain was arrested at a nearby campground. There was blood on him and his bloody jeans and shirt were found nearby. The officer's gun was found under his sleeping bag.

Exhibit 2, at 1-2.

The jury convicted Lain of first degree assault and vehicle prowling. Exhibit 2, at 2. The superior court sentenced Lain to concurrent terms of life imprisonment for the assault, and one-year imprisonment for the vehicle prowling. Exhibit 1, at 1. The superior court committed Lain to the custody of the Department of Corrections. Exhibit 1, at 2. This Court affirmed Lain's judgment and sentence on appeal. Exhibit 2.

The Indeterminate Sentence Review Board (ISRB) set Lain's minimum term at 240 months. See Exhibit 3, at 2. The ISRB apparently reviewed Lain's status in 1999, 2002, and 2006, each time finding him not parolable. See Exhibit 3, at 3; Exhibit 26, at 2. In finding him not parolable in 1999, the ISRB "dictation noted that Mr. Lain's history is extremely violent in and out of custody." Exhibit 26, at 2. In finding him

not parolable in 2002, the ISRB noted a 2002 psychological evaluation expressed "concern in his reliance on substances, his problem solving skills, lack of empathy and experience in successfully living in the community." Exhibit 26, at 2. The ISRB concluded "[t]he Board is in the same position as they were before regarding Mr. Lain and his parolability to the community. The same concerns remain. The Board at this time believes that Mr. Lain continues to be an unreasonable risk to be released to the community." Exhibit 26, at 2. The ISRB again found Lain not parolable in 2006. Exhibit 3, at 2.

In 2009, the ISRB found Lain "is conditionally parolable to a MRP (Mutual Reentry Plan), and adds 24 months to his minimum term to allow for programming." Exhibit 3, at 1. The ISRB determined Lain needed to complete a program "that would allow him to learn community and cognitive skills that would assist him in being successful in the community." Exhibit 3, at 1. The ISRB noted the facts of Lain's underlying crime, including that Lain shot Officer Fitzpatrick in the face after Officer Fitzpatrick had fallen to the ground, and that the crime caused "severe and permanent disabling and disfiguring injuries to the victim." Exhibit 3, at 2. The ISRB also noted that if Lain had succeeded in killing the officer, the crime would have constituted first degree murder. Exhibit 3, at 3.

The ISRB also noted the following facts regarding Lain's prior criminal history:

As a teenager he was discharged from military school at age 15, after nine months. This discharge was because he stabbed two students, one of whom had swung a chair at him. This was not prosecuted; however, Mr. Lain has admitted this incident during a previous .100 hearing. In 1976 Mr. Lain stabbed a man in a knife fight in Iowa and was sent to prison. During that incarceration he permanently blinded an inmate by throwing acid in his face while working in the photo shop. Shortly before that particular incident he had attacked another inmate with a claw hammer. Mr. Lain was paroled on those incidents from Iowa and absconded from Iowa supervision while there were several charges pending, one of which was a parole violation. The current offense for which Mr. Lain is under the jurisdiction of the Board occurred approximately five months after he was released from prison while he was on abscond status from Iowa on his parole supervision.

Exhibit 3, at 3.

In April 2010, the ISRB issued a decision, finding Lain was still conditionally parolable to a "Mutual Reentry Plan." Exhibit 4, at 1. Although the ISRB had in 2009 determined that Lain should complete a program to learn community and cognitive skills to assist him in being successful in the community, *see* Exhibit 3, at 1, Lain apparently did not complete such a program. *See* Exhibit 4, at 3. Instead, Lain believed such a program "would not be beneficial to him and also indicated referral to work release would be counterproductive since he had heard 'no one' gets approved for a MRP through work release." Exhibit 4, at 3. The ISRB

indicated that Lain “seemed to be very rigid in his thinking and had preconceived notions about some specific programs. He appeared to convey resistance to the Board’s direction and a sense of entitlement that he did not require a transitional release.” Exhibit 4, at 4.

Despite Lain’s failure to complete the suggested programming, the ISRB “determined Mr. Lain was still releasable on conditional parole.” Exhibit 4, at 4. Although Lain wanted to parole directly to Iowa, the ISRB discussed with Lain “the need for a transitional release and that an out-of-state parole prior to transition in this state is unlikely.” Exhibit 4, at 4. The ISRB directed Lain to submit a plan that included work release, but excluded release to eastern Washington. Exhibit 4, at 2. Despite this determination, the ISRB subsequently amended its decision, and the ISRB in June 2010 found Lain parolable to Iowa. Exhibit 5. The decision was not based upon any improvement in Lain, but instead simply on “Difficulty for work release approval to either King or Pierce counties due to current tension surrounding high profile cases.” Exhibit 5.

In November 2010, the ISRB approved Lain’s release to Iowa. Exhibit 6, at 1. Lain would not transition through work release. Instead, under the release plan, Lain would reside at his parent’s house in Iowa until Lain was able to support himself. Exhibit 7. Lain would report to an Iowa community corrections officer. Exhibits 6 and 7.

On December 16, 2010, acting under RCW 9.95.160, the Governor cancelled Lain's parole. Exhibit 9. The Governor considered Lain's current crime, his criminal history, his numerous prison infractions, his psychological evaluation, and his prison programming. Exhibit 9, at 1-2. The Governor was concerned by a "forensic risk evaluation that places Mr. Lain in the group of offenders at a risk of recidivism for both general and violent crimes in the range of medium to high risk." Exhibit 9, at 2.

The Governor also expressed concern "based on a number of additional factors specific to the circumstances of this case as reflected in the ISRB record. These include the nature and gravity of the crime for which he is incarcerated; his behavior and verbalization of threats during incarceration; and his statements to the ISRB and others that reflect resistance to the ISRB's direction and a sense of entitlement to release." Exhibit 9, at 2. The Governor noted that when previously paroled, Lain had escaped from parole, and "stated that he decided to fight instead of going back to prison when he was approached by a police officer while on parole from Iowa." Exhibit 9, at 2. The Governor noted that Lain asserts an "entitlement" to release, and "has stated his view that it is unfair that he is incarcerated." Exhibit 9, at 2. The Governor also noted that Lain has resisted the directions of the ISRB based upon his sense of entitlement. Exhibit 9, at 3. In cancelling the parole, the Governor concluded,

This information indicates to me that Mr. Lain would pose an unreasonable risk to public safety if released from prison at this time. My concern would be the same whether the risk assessment were moderate or high. I am particularly concerned that the potential for violence would be escalated in any future contact with law enforcement officers that could lead to revocation of his parole release. At age 53, after being incarcerated for more than 28 years, Mr. Lain has made creditable gains. Nonetheless, after carefully considering the record before the ISRB and the factors in chapter 9.95 RCW, I conclude his rehabilitation is not complete and he is not a fit subject for release from prison. Based on the provisions in chapter 9.95 RCW and the totality of the evidence and information in the ISRB files, I conclude Mr. Lain would pose an unreasonable risk of danger to public safety at this time.

Exhibit 9, at 3.

Exercising her authority under RCW 9.95.160, the Governor cancelled Lain's parole prior to his release. Exhibit 9. The ISRB subsequently set a new minimum term of 36 months. Exhibit 10.

III. STANDARD FOR REVIEW

To obtain relief in a personal restraint petition proceeding, the petitioner must show a present restraint as defined in RAP 16.4(b), and must show the restraint is unlawful for one or more of the reasons set forth in RAP 16.4(c). See RAP 16.4(a); *In re Cashaw*, 123 Wn.2d 138, 149, 866 P.2d 8 (1994); *In re Dalluge*, 162 Wn.2d 814, 817, 177 P.3d 675 (2008). Decisions regarding the denial of parole are reviewed for an abuse of discretion. *In re Locklear*, 118 Wn.2d 409, 418, 823 P.2d 1078 (1992).

IV. ARGUMENT

A. **The Governor Had Express Authority Under RCW 9.95.160 To Cancel Lain's Parole Prior To His Actual Release**

Lain argues the Governor lacked authority to cancel his parole. Lain does not dispute the wording of RCW 9.95.160, but he contends the Governor's authority to cancel parole exists only after his release from prison. This argument conflicts with the plain language of RCW 9.95.160.

Absent a grant of clemency, or a statutorily authorized early release, the law presumes all prisoners will serve the maximum sentence. *Honore v. Washington State Board of Prison Terms & Paroles*, 77 Wn.2d 697, 700, 466 P.2d 505 (1970); *see also State v. Rogers*, 112 Wn.2d 180, 183, 770 P.2d 180 (1989) (a prisoner may obtain early release under the Sentencing Reform Act only under the statutory exceptions); *In re Mattson*, 166 Wn.2d 730, 214 P.3d 141 (2009) (sex offender has no protected interest in obtaining early release to community custody). Under the indeterminate sentencing scheme in chapter 9.95 RCW, the prison superintendent must confine the prisoner "until released under the provisions of this chapter, under RCW 9.95.420, upon the completion of the statutory maximum sentence, or through the action of the governor." RCW 9.95.020. Here, the court sentenced Lain to life imprisonment. Exhibit 1. Having been sentenced to life, Lain must serve that sentence absent parole or pardon.

Chapter 9.95 RCW does establish a system of parole for offenders, like Lain, who are sentenced to life. *See* RCW 9.95.115. Under this parole system, the Legislature gave the ISRB broad discretion to determine when to grant parole. However, as part of the same system, the Legislature also gave the Governor express authority to cancel the ISRB's decision to grant parole prior to release, or to revoke parole after a prisoner is released. RCW 9.95.160. The statute expressly provides:

This chapter shall not limit or circumscribe the powers of the governor to commute the sentence of, or grant a pardon to, any convicted person, and the governor may cancel or revoke the parole granted to any convicted person by the board. The written order of the governor canceling or revoking such parole shall have the same force and effect and be executed in like manner as an order of the board.

RCW 9.95.160.

Lain argues that the Governor lacked authority to cancel his parole under the statute until after he was released from prison. But the statute expressly provides "the governor may cancel or revoke the parole granted to any convicted person by the board." RCW 9.95.160. The statute contains no language indicating the cancellation may occur only after the prisoner is released from prison on parole. Lain's proposed construction of the statute improperly seeks to add a limitation that does not exist in the statute. Lain's argument that the Governor lacked authority to cancel his parole prior to his release fails under the unambiguous language of the statute.

Lain argues the absence of a published opinion authorizing the cancellation of parole prior to release shows the Governor lacked such authority. Lain contends that because *Pierce v. Smith*, 31 Wn.2d 52, 195 P.2d 112 (1948), involved the revocation of parole after the prisoner's release from the penitentiary, the statute did not authorize the cancellation of his parole prior to release. But *Pierce* did not hold the Governor lacked such authority, and the absence of case law does not mean the Governor lacks the authority granted to her under the express language of the statute. Rather, it simply means that this issue has not been previously presented to this Court.

The goal of statutory construction is to ascertain and give effect to the Legislature's intent. *Skagit Surveyors v. Friends*, 135 Wn.2d 542, 564, 958 P.2d 962 (1998); *In re Eaton*, 100 Wn.2d 892, 757 P.2d 961 (1988). The Court looks to the language of the statute as a whole, interpreting all provisions in relation to each other, and giving effect to all of the language used. *Skagit Surveyors*, 135 Wn.2d at 564. Each provision must be viewed in relation to other provisions and harmonized, if at all possible, to ensure proper construction. *State v. Thorne*, 129 Wn.2d 736, 761, 921 P.2d 514 (1996). Courts must examine all applicable statutes and harmonize any ambiguous or conflicting provisions. *State v. Fagalde*, 85 Wn.2d 730, 736, 539 P.2d 86 (1975); *State v. Johnson*, 119 Wn.2d 167, 172, 829 P.2d 1082 (1992). Statutes should be read as a whole and

interpreted to avoid unlikely, strange, or absurd consequences that could result from a literal reading of portions of a statute. *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).

Lain argues the statute did not provide authority to cancel his parole prior to his release from prison because parole is defined as “that portion of a person’s sentence committed before July 1, 1984, served on conditional release in the community. . . .” RCW 9.95.0001(5). But this definition was added in 2001 when the Legislature enacted a new provision for the sentencing of sex offenders. 2001 Wash. Laws 2nd sp. s. c 12, § 317. The definition of parole was added not to limit the Governor’s authority under RCW 9.95.160. Instead, the definition explains the meanings of “parole” and “community custody” as those terms are used in chapter 9.95 RCW, distinguishing the term “parole” from the term “community custody” (“community custody” is the form of supervision for offenders under the jurisdiction of the ISRB for sex crimes committed on or after July 1, 2011, *see* RCW 9.95.420; RCW 9.95.900).

Moreover, Lain’s argument ignores the Legislature’s use of the phrase “cancel or revoke” in RCW 9.95.160. The use of the phrase “cancel or revoke” indicates the Legislature intended the Governor to have the power not just to “revoke” an offender who has already been paroled to the community, but also the power to cancel the parole before it occurs.

In chapter 9.95 RCW, the Legislature consistently uses the terms “revoke” and “revocation” to refer to the rescinding of parole after the offender has been released from prison and has violated the conditions of parole. For example, RCW 9.95.120 authorizes the arrest of a parolee for violations “pending a determination by the board whether the parole of such convicted person shall be revoked.” Similarly, RCW 9.95.121 through 9.95.126 use the word “revocation” when referring to hearing the ISRB uses in determining whether to revoke parole. Even RCW 9.95.080, which authorizes the ISRB to retroactively revoke a previous order concerning the length of imprisonment, uses the word “revoke” retrospectively, allowing the ISRB to invalidate an order it issued in the past. On the other hand, the word “cancel” indicates authority to invalidate an order before it takes effect.

This consistent use of the words “revoke” and “revocation” indicate the Legislature intended different meanings for the words “cancel” and “revoke.” The logical construction is that the Legislature intended to give the Governor authority to both cancel an order of parole prior to the prisoner’s release, and to revoke parole after an offender is released. To construe the words “cancel” and “revoke” to mean the same action, termination of parole following release, would render one of the words superfluous. To avoid rendering it superfluous, the word “cancel” must be construed to authorize the Governor to cancel parole prior to release.

B. The Governor's Cancellation Of Parole Under The Statute Did Not Violate Due Process Because It Did Not Deprive Lain Of A Protected Liberty Interest

Lain's second and third grounds for relief allege a violation of procedural due process. But offenders confined in prison have no constitutionally protected right to receive parole. There is no due process violation because the cancellation of parole under the statute did not deprive Lain of a protected interest.

Due process protects against the deprivation of life, liberty or property. *In re Cashaw*, 123 Wn.2d at 143. "The threshold question in any due process challenge is whether the challenger has been deprived of a protected interest in life, liberty or property." *Id.* Liberty interests may arise from either the Due Process Clause or state laws. *Id.* at 144.

While the Supreme Court has recognized a liberty interest in avoiding revocation of parole after an offender is released to the community, "there is no liberty interest in *receiving* parole." *In re Bush*, 164 Wn.2d 697, 703, 193 P.3d 103 (2008) (citing *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 10-11, 60 L. Ed. 2d 668, 99 S. Ct. 2100 (1979)). It is well settled that the Constitution does not provide an inmate with a liberty interest in being released prior to serving the maximum sentence. *Cashaw*, 123 Wn.2d at 144. Consequently, such a liberty interest may exist only if created by state laws. *Id.*

“For a state law to create a liberty interest, it must contain ‘substantive predicates’ to the exercise of discretion and ‘specific directives to the decisionmaker that if the regulations’ substantive predicates are present, a particular outcome must follow.” *Cashaw*, 123 Wn.2d at 144 (quoting *Kentucky Dep’t. of Corrections v. Thompson*, 490 U.S. 454, 463, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989)). Under this standard, only substantive laws can create these interests. “[S]tate regulations that establish only the procedures for official decisionmaking, such as those creating a particular type of hearing, do not by themselves create liberty interests.” *Cashaw*, 123 Wn.2d at 145.

In *Cashaw*, the Supreme Court considered whether the ISRB’s procedural regulations for parolability hearings created a liberty interest. The regulations called for an in-person parolability hearing and detailed written notice as to the substance and procedures involved in that hearing. *Cashaw*, 123 Wn.2d at 144-45. The ISRB was also required to make parolability decisions “reasonably consistent” with the ranges, standards and purposes of the Sentencing Reform Act. *Id.* at 146. While the ISRB’s discretion had been reduced, the Court found no state created liberty interest. “The adoption of guidelines to structure the exercise of discretion does not necessarily create a liberty interest.” *Id.* (quoting *Toussaint v. McCarthy*, 801 F.2d 1080, 1089 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)).

Decisions about parolability are not guided by “‘substantive predicates’ and ‘specific directives’ from which ‘a particular outcome must follow’”. *Cashaw*, 123 Wn.2d at 146. In fact, given the subjective nature of determining an offender’s potential risk, a particular set of facts cannot result in a particular outcome. “Rather, these decisions concern the degree to which an inmate has become rehabilitated, and thus involve ‘subjective appraisals’ and ‘discretionary assessment of a multiplicity of imponderables.’” *Id.*

As the Court determined in *Cashaw*, the regulations governing the grant of parole do not create a liberty interest. *Cashaw*, 123 Wn.2d. at 147. Because there is no liberty interest, there is no due process violation. *See also In re Mattson*, 166 Wn.2d 730, 214 P.3d 141 (2009) (statute created no due process right for sex offenders to transfer to community custody). Here, like the regulations at issue in *Cashaw*, the statute provides no substantive restriction on the Governor’s authority to cancel parole. The statute does not create any liberty interest. As Lain had no liberty interest in parole, he had no right to due process prior to the Governor’s cancellation of parole.

Lain cites to *In re McCarthy*, 161 Wn.2d 234, 164 P.3d 1283 (2007), where the Court held an offender serving an indeterminate sentence as a non-persistent sex offender under RCW 9.94A.712 had a liberty interest in release. However, the statute at issue in *McCarthy* contained a presumption of release from confinement at the end of the

minimum term unless the ISRB determined by a preponderance of the evidence that it is more likely than not that he will commit sex offenses if released. *McCarthy*, 161 Wn.2d at 239-40 (construing RCW 9.95.420(3)). The Court held that, “[p]ursuant to *Greenholtz*, RCW 9.95.420(3) creates a limited liberty interest by restricting the Board’s discretion and establishing a presumption that offenders will be released to community custody upon the expiration of their minimum sentence.” *McCarthy*, 161 Wn.2d at 241. Unlike the statute at issue in *McCarthy*, the statute here does not create any presumption of release, or place any substantive predicates on the Governor’s authority to cancel parole. This case and the statute at issue are akin to *Cashaw*, where no liberty interest was found, and not *McCarthy*, where the restrictions on the ISRB’s discretion and statutory presumption of release established a limited liberty interest.

Moreover, even assuming Lain had a protected interest in receiving parole after the ISRB found him parolable, the Governor’s cancellation of the parole did not violate due process. Lain received any process due him when he was provided notice and a hearing before the ISRB, and the Governor’s decision was based upon the record developed before the ISRB.

The essentials of due process are “notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case.” *In re Whitesel*, 111 Wn.2d 621, 630, 763

P.2d 199 (1988) (quoting *In re Sinka*, 92 Wn.2d 555, 565, 599 P.2d 1275 (1979)). The Supreme Court has emphasized that due process is flexible and calls for procedural protections that the given situation demands. *Whitesel*, 111 Wn.2d at 630. Because decisions regarding minimum terms and parole are not part of the criminal prosecution, the full panoply of rights due a criminal defendant do not apply. *Id.* at 630-31.

In *Swarthout v. Cooke*, 562 U.S. ___, 178 L. Ed. 2d 732, 131 S. Ct. 859 (2011), the Supreme Court rejected a claim identical to Lain's claims. The California parole board had ordered the parole of a prisoner, Clay, from his sentence for first degree murder. *Id.* at 861. The California Governor, exercising his statutory authority, reviewed the matter and found Clay unsuitable for parole. *Id.* The California Governor cancelled the scheduled parole after concluding that Clay posed a risk of re-offense. *Id.* Like the Governor here, the California Governor cited factors such as the gravity of Clay's crime, his criminal history, and his failure to participate fully in self-help programs. *Id.* Clay then filed for habeas corpus relief. *Id.* The federal district court granted relief and the Ninth Circuit affirmed the grant of relief, finding the Governor's cancellation of parole had violated Clay's right to due process. *Id.* Without requiring oral argument, the Supreme Court unanimously and summarily reversed the decisions of the lower federal courts. *Id.* at 861-63.

The Supreme Court concluded the Governor's cancellation of parole did not violate due process. *Swarthout*, 131 S. Ct. at 861-62. Without determining whether Clay had a liberty interest in release, the Supreme Court noted that "[w]hatever liberty interest exists is, of course, a state interest created by California law." *Id.* at 862 (emphasis in original). "There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners." *Id.* The Court then noted that if a liberty interest triggering due process did exist, "[i]n the context of parole, the procedures required are minimal." *Id.* "In *Greenholtz*, we found that a prisoner subject to a parole statute similar to California's received adequate process when he was allowed an opportunity to be heard and was provided a statement of the reasons why parole was denied." *Id.* (citing *Greenholtz*, 442 U.S. at 16).

The Supreme Court held Clay received any process due when he was afforded access to his records, was allowed to appear and contest evidence at the hearing before the parole board, and was notified of the reasons why the Governor cancelled parole. *Swarthout*, 131 S. Ct. at 862. Having already received this process, the California Governor's later cancellation of Clay's parole without further notice or a hearing did not violate due process. *Id.*

Prior to *Swarthout*, the California Court of Appeals also rejected a similar due process challenge to the cancellation of an order of parole. See *In re Johnny Arafiles*, 6 Cal. App.4th 1467, 8 Cal. Rptr.2d 492 (1992). In that case, the California parole board had granted parole to Arafiles, but the Governor reviewed the case and cancelled the parole. *Id.* at 1472-73. At the hearing before the parole board, Arafiles had been “given notice and an opportunity to be heard, including the right to be present at the hearing, to ask and answer questions, and to speak on his own behalf.” *Id.* at 1479. At the parole board hearing, Arafiles also had the right to representation, and to receive a written statement concerning the board’s decision and reasoning. *Id.* at 1480. However, Arafiles was not given any additional hearing when the Governor reviewed the parole board’s decision and cancelled the parole. *Id.* at 1479.

Citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), Arafiles alleged the absence of any additional notice and hearing violated his right to procedural due process. *Arafiles*, 6 Cal. App.4th at 1479. Reaching the same conclusion as the *Swarthout* Court, the California Court of Appeals rejected Arafiles’s claim. *Id.* at 1480-81. The California court determined that the procedures afforded by the parole board provided the process constitutionally due, and that further procedures were not required when the Governor cancelled the parole. *Id.*

The California court noted that, other than receiving a written statement from the Governor specifying the reasons for cancelling the order of parole, none of the procedures available at the parole board hearing are “available to a prisoner during the Governor’s review of a decision regarding parole release.” *Arafiles*, 6 Cal. App.4th at 1481. But the California court concluded, “It does not follow, however, that petitioner was thereby deprived of procedural due process.” *Id.* The Governor’s review was limited to the record before the parole board, and the Governor applied the same criteria considered by the parole board in making a parole decision. *Id.* “The procedures surrounding the parole release determination of the BPT provided petitioner the process which was his constitutional due. We perceive no unfairness to petitioner in not extending these procedures to the Governor’s limited review of that decision.” *Id.* The California Court of Appeals, and the Ninth Circuit have subsequently reaffirmed this legal reasoning in later cases. *See, e.g., In re Morrall*, 102 Cal. App.4th 280, 304, 125 Cal. Rptr.2d 391 (2002); *Styre v. Adams*, 645 F.3d 1106, 1108 (9th Cir. 2011). As the Ninth Circuit recently held, “the Due Process Clause does not require that the Governor hold a second suitability hearing before reversing a parole decision.” *Styre*, 645 F.3d at 1108. Thus, contrary to Lain’s argument, he received any process due to him prior to the cancellation of parole.

Lain relies on *Monohan v. Burdman*, 84 Wn.2d 922, 530 P.2d 334 (1975), but *Monohan* involved a distinctly different situation from the one here. *Monohan* did not involve the Governor's review under RCW 9.95.160 of the ISRB's decision to grant parole. Rather, *Monohan* involved the ISRB's own revocation of parole after Monohan subsequently engaged in misconduct while furloughed to the community.² *Id.* at 923-24. The ISRB revoked parole after determining Monohan had violated his furlough conditions. *Id.* The Washington Supreme Court determined that the revocation of parole based upon the violation of furlough conditions was analogous to a revocation of parole for a violation of conditions of parole. *Id.* at 926-28. The Court determined the ISRB's action involved the retrospective factual determination of whether conditions had been violated, and the determination of whether parole should be revoked in light of the violation. *Id.* at 928. The Court determined that, under the circumstances of that case, the ISRB was required to provide notice and an adjudicatory hearing prior to revocation of Monohan's parole.

² *In re Bush*, 164 Wn.2d 697, 193 P.3d 103 (2008) also does not aid Lain. *Bush* involved the revocation of a pardon, after the prisoner had been released to the community, based upon the violation of a condition of the pardon. The Court in *Bush* found a prisoner possessed a liberty interest in avoiding revocation following his release to the community, but the Court specifically distinguished that situation from the current situation where the prisoner had not yet been released.

This matter is unlike the situation in *Monohan*. The Governor did not cancel the order of parole based upon subsequent misconduct by Lain after he was released. The Governor did not make a retrospective factual determination of whether Lain had violated any conditions. Instead, the Governor's review of the order of parole was identical to the type of review conducted in the cases of *Swarthout* and *Arafiles*. As in *Swarthout* and *Arafiles*, the Governor reviewed the record before the ISRB and applied the same criteria the ISRB would apply in determining whether a prisoner is suitable for parole. The Governor considered the record before the ISRB, including the facts underlying Lain's current conviction and sentence, Lain's prior criminal history, and his prior institutional history. The record included a prior psychological evaluation and risk evaluation showing a medium to high risk of re-offense. Applying the criteria established in chapter 9.95 RCW, the Governor reviewed this record and determined Lain was not a proper subject for parole. As the Governor stated in her order, "after carefully considering the record before the ISRB and the factors in chapter 9.95 RCW, I conclude his rehabilitation is not complete and he is not a fit subject for release from prison. Based on the provisions in chapter 9.95 RCW and the totality of evidence and information in the ISRB files, I conclude Mr. Lain would pose an unreasonable risk of danger to public safety at this time." Exhibit 9, at 3.

Assuming, *arguendo*, that Lain had any protected interest in parole, he received any process due him through the hearings conducted by the Board. The Governor's written order provided detailed the reasons for the decision to cancel parole. The Governor's cancellation of parole did not violate Lain's right to due process.

C. The Governor Properly Exercised Her Discretion In Deciding To Cancel The Parole, And The ISRB Properly Exercised Its Discretion In Setting A New Minimum Term

Lain's fourth and fifth grounds for relief allege the Governor's decision to cancel parole, and the ISRB's setting of a new minimum term, were both an abuse of discretion. Although Lain disagrees with the two executive actions, he does not show an abuse of discretion.

The Court reviews decisions concerning the denial of parole under the abuse of discretion standard. *In re Ecklund*, 139 Wn.2d 166, 170 985 P.2d 342 (1999); *In re Locklear*, 118 Wn.2d 409, 418, 823 P.2d 1078 (1992). The Court does not operate as a "super parole board," and the Court should not interfere with a decision concerning parole absent an abuse of discretion. *In re Eckman*, 117 Wn.2d 687, 695, 818 P.2d 1350 (1991). Where the record reveals a basis for the exercise of discretion, a court should find "the discretion is abused only where it can be said no reasonable [person] would take the view adopted" *In re Myers*, 105 Wn.2d 257, 265, 714 P.2d 303 (1986) (quoting *State v. Hurst*, 5 Wn. App. 146, 486 P.2d 1136 (1971)).

RCW 9.95.160 places no substantive restrictions on the Governor's authority to cancel parole. RCW 9.95.100, however, expressly provides that a prisoner shall not be released on parole unless "his rehabilitation has been complete and he is a fit subject for release. *See also In re Bolduc*, 51 Wn. App. 225, 229, 753 P.2d 983 (1988); *In re Rolston*, 46 Wn. App. 622, 626, 732 P.2d 166 (1987). In addition, RCW 9.95.009(3) requires that when making decisions on parole, public safety considerations must be given the highest priority. Although Lain complains the Governor's reasoning was speculative, the Supreme Court recognized in *Cashaw* that determinations concerning rehabilitation, fitness for release, and risk of re-offense are necessarily highly subjective. Decisions about parolability are not guided by "'substantive predicates' and 'specific directives' from which 'a particular outcome must follow'". *Cashaw*, 123 Wn.2d at 146. In fact, given the subjective nature of determining an offender's potential risk, a particular set of facts cannot result in a particular outcome. "Rather, these decisions concern the degree to which an inmate has become rehabilitated, and thus involve 'subjective appraisals' and 'discretionary assessment of a multiplicity of imponderables.'" *Id.*

The Governor reasonably determined that Lain was not yet rehabilitated, and posed an unacceptable risk if released. Lain fails to show the Governor's decision was an abuse of discretion.

The Governor considered the violent nature of Lain's underlying crime, an aggressive assault on a police officer that resulted in severe and permanent disability and disfigurement of the victim. Exhibit 9, at 1. The Governor considered the fact that Lain had committed this crime while on parole from Iowa. Exhibit 9, at 2. The Governor considered the fact that Lain intended to kill the officer, committing the assault to avoid arrest after absconding from parole. Exhibit 9, at 1-2. The Governor considered that Lain was willing to commit this violent attack instead of going to prison for his parole violations. Exhibit 9, at 2. The Governor could reasonably determine that a prisoner, having already once absconded from parole and after doing so committed a violent offense to try avoiding recapture, would not be a suitable candidate for parole.

The Governor also considered Lain's prior criminal and institutional history. Exhibit 9, at 2. The Governor considered that in addition to stabbing and shooting the police officer, Lain had a history of stabbing and attacking other individuals, both in and out of prison. Exhibit 9, at 2. Lain had stabbed fellow students at school, permanently blinded an inmate, and attacked another inmate with a claw hammer. Exhibit 9, at 2. The Governor also considered the fact that Lain had threatened to harm prison staff, including once threatening to attack staff following his release from prison. Exhibit 9, at 2.

The Governor also considered the psychological and forensic risk evaluations of Lain. Exhibit 9, at 2. The Governor reasonably expressed concern that Lain had a medium to high risk of recidivism for both general and violent crimes. Exhibit 9, at 2. The Governor was highly concerned about Lain's risk of re-offense, especially where Lain had already reoffended after being paroled from Iowa. Exhibit 9, at 2.

Lain complains that the Governor improperly considered his past objections to the prior decisions of the ISRB, contending this violated his First Amendment rights. But the Governor did not cancel parole because Lain made such prior objections. Instead, the Governor simply, and correctly, recognized that Lain was resistive to the ISRB's directions aimed at aiding him in successfully transitioning to the community. Exhibit 9, at 2-3. The Governor correctly noted that Lain expressed a sense of entitlement, was rigid in his thinking, and failed to complete suggested programming that would have improved his chance at a successful transition to the community. Exhibit 9, at 3. The Governor was not punishing Lain for any prior communication. Instead, the Governor was reasonably concerned that Lain, already having a history of violence on parole, still showed a lack of rehabilitation by holding a sense of entitlement to unconditional release and failing to accept direction on how to improve his chance for successful release. Exhibit 9, at 3.

The Governor reasonably determined that Lain was not yet rehabilitated, and still posed an unreasonable risk to public safety if released at this time. Exhibit 9, at 3. The lack of rehabilitation and risk to public safety constitute legitimate reasons to deny parole. RCW 9.95.100; RCW 9.95.009(3). The Governor did not abuse her discretion in cancelling the parole.

Similarly, after the Governor determined Lain was not rehabilitated and posed a risk to public safety, the ISRB properly exercised its discretion by setting the new minimum term at 36 months. In making decisions regarding parole, the Board is endowed with a "high degree of discretion." *Ecklund*, 139 Wn.2d at 174. "Lack of rehabilitation is a permissible reason to impose a minimum sentence considered exceptional under the SRA guidelines." *In re Dyer*, 164 Wn.2d 274, 288, 189 P.3d 759 (2008). After the Governor found Lain not parolable, the ISRB necessarily had to extend his minimum term. *Id.*; *Ecklund*, 139 Wn.2d at 174. Moreover, both the fact that Lain previously committed violations on parole, and his risk of re-offense were adequate reasons to impose the new minimum term. *Bolduc*, 51 Wn. App. at 229; *Rolston*, 46 Wn. App. at 626. In addition, the ISRB properly determined that Lain could benefit from further programming. Exhibit 10, at 7. The ISRB therefore did not abuse its discretion by setting the new minimum term at 36 months.

D. Lain Fails To Show A Violation Of Substantive Due Process

Lain's final claim alleges the Governor's cancellation of parole violated his right to substantive due process. But as discussed above, the Governor's action was a reasonable exercise of her discretion. Lain therefore fails to show a substantive due process violation.

"The substantive component of the due process clause protects against certain government actions 'regardless of the fairness of the procedures used to implement them.'" *In re Bush*, 164 Wn.2d at 706 (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986)). "In the context of executive action, the United States Supreme Court has emphasized that 'only the most egregious official conduct can be said to be "arbitrary in the constitutional sense."'" *Bush*, 164 Wn.2d at 707 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1988) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992))). "Only executive action that "shocks the conscience" is cognizable under the due process clause." *Bush*, 164 Wn.2d at 707; see also *In re Dyer*, 164 Wn.2d at 298; *Braam v. State*, 150 Wn.2d 689, 700, 81 P.3d 851 (2004). In this case, Lain fails to show the Governor's decision to cancel his parole "shocks the conscience."

The Governor had legitimate reasons for determining that Lain was not rehabilitated and posed an unacceptable risk of re-offense if released. *See* Exhibit 9. The Governor's action was not an abuse of discretion, and was not arbitrary and capricious. The Governor's action did not "shock the conscience." *Bush*, 164 Wn.2d at 707. The Governor's cancellation of Lain's parole did not violate the right to substantive due process. *See Styre*, 645 F.3d at 1108 (California Governor's cancellation of the parole did not violate any right of substantive due process); *Robertis v. Hartley*, 640 F.3d 1042, 1046 (9th Cir. 2011) (same).

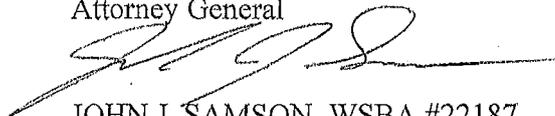
V. CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Court deny the personal restraint petition.

DATED this 6th day of January, 2012.

Respectfully submitted,

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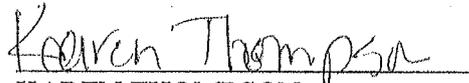
CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed the foregoing document with the Clerk of the Court and certify that I have mailed by United States Postal Service the document to the following participant:

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EXECUTED this 6th day of January, 2012, at Olympia, WA.


KAREN THOMPSON

WASHINGTON STATE ATTORNEY GENERAL

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