

FILED
SUPREME COURT
STATE OF WASHINGTON
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BY SUSAN L. CARLSON
CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition
of GAIL BRASHEAR,
Petitioner.

NO. 96695-8

RESPONSE TO MOTION FOR
DISCRETIONARY REVIEW

RESPONSE

Introduction

Gail Brashear committed a murder when she was 15 years old. After serving 20 years in prison, she petitioned the ISRB for early release pursuant to RCW 9.94A.730. At her parole hearing, a psychological evaluation concluded Brashear's likelihood to reoffend was low to very low. In addition, the uncontested evidence established an overwhelmingly positive "behavioral turn around" in prison when Brashear was in her mid-20's. Nevertheless, the ISRB denied Ms. Brashear's release reasoning she had served only a "small portion" of her sentence; the prosecutor opposed release; and her crime left lasting impacts on the victims.

Finding insufficient evidence that Ms. Brashear was likely to reoffend and that the ISRB instead denied release for non-statutory reasons, the lower court concluded that the ISRB abused its discretion and reversed and

1 remanded to the ISRB to “order Brashear released and to determine
2 appropriate release conditions.” *Matter of Brashear*, __ Wn.App. __, 430
3 P.3d 710, 716 (2018).

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5 The ISRB seeks review by this Court. It asserts two reasons why
6 review is warranted: (1) the lower court exceeded its authority when it found
7 insufficient evidence that Ms. Brashear was more likely than not to reoffend
8 and directed her release; and (2) its decision improperly limited the scope of
9 evidence that the ISRB can consider when making a release decision.
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13 This Court should deny discretionary review because the decision
14 below breaks no new ground; is consistent with prior precedent; and does not
15 present an issue of substantial interest.
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17 *The Lower Court Correctly Concluded that There was Insufficient*
18 *Evidence That Brashear Was Likely to Reoffend*

19 Sufficiency of the evidence review breaks no new ground. *State v.*
20 *Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980). Here, the lower court
21 correctly determined there was insufficient evidence to overcome the
22 presumption of release. This Court should not disturb that well-founded
23 ruling.
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27 Early release under RCW 9.94A.730(3) is “presumptive” unless the
28 ISRB determines that, despite conditions, “it is more likely than not that a
29 person will reoffend.” Here, the lower court concluded that the evidence did
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1 not meet the requisite standard. Therefore, the presumption of release must
2 be applied.
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4 The ISRB argues that a reviewing court must simply remand for a new
5 parole hearing even when there is insufficient evidence of a likelihood of
6 release. According to the ISRB, insufficient evidence only results in a new
7 parole hearing. Relying on *In re Personal Restraint of Whitesel*, 111 Wash.2d
8 621, 763 P.2d 199 (1988), it argues that it is not the role of a reviewing court
9 to consider whether the evidence supports the required statutory standard.
10 In *Whitesel*, this Court noted that “the courts are not a super Indeterminate
11 Sentencing Review Board and will not interfere with a Board determination
12 in this area unless the Board is first shown to have abused its discretion in
13 setting a prisoner’s discretionary minimum term.” *Id.* at 628.
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19 The lower court held:

20 We see no reason that a different standard should apply to evaluation
21 of the ISRB in the context of juveniles petitioning under RCW
22 9.94A.730. But, here, the ISRB was not exercising its very broad
23 discretion in setting a prisoner’s minimum term. An abuse of
24 discretion in that context will usually require remand for another
25 opportunity to exercise that discretion. In the context of an early
26 release determination pursuant to RCW 9.94A.730, where the record
27 does not establish a likelihood to reoffend, the statute requires a
28 release on appropriate conditions, not a second bite at the apple. RCW
29 9.94A.730(3).

30 *Brashear*, 430 P.3d at 716. The lower court further noted:

This statute differs from parolability decisions under RCW 9.95.100.
RCW 9.94A.730(3) directs the ISRB to order a person released unless

1 it determines by a preponderance of the evidence that, despite
2 conditions, the person is more likely than not to reoffend. In contrast,
3 when the ISRB makes a parolability decision under RCW 9.95.100,
4 “[t]he board cannot grant parole until it determines the inmate has
5 been rehabilitated and is a fit subject for release.” *In re Pers. Restraint*
6 *of Lain*, 179 Wash.2d 1, 11, 315 P.3d 455 (2013). “An offender is not
7 entitled to parole” under RCW 9.95.100. *Id.* at 12, 315 P.3d 455. “The
8 decision of whether to parole a prisoner ‘may be made for a variety of
9 reasons and often involve[s] no more than informed predictions as to
10 what would best serve [correctional purposes] or the safety and welfare
11 of the inmate.’ ” *In re Pers. Restraint of Dyer*, 157 Wash.2d 358, 363,
12 139 P.3d 320 (2006) (*Dyer I*) (alterations in original) (internal
13 quotation marks omitted) (*quoting Meachum v. Fano*, 427 U.S. 215,
225 (1976)). Thus, whereas parole is not presumptive under RCW
9.95.100, early release is presumptive under RCW 9.94A.730(3) unless
the ISRB determines that the petitioner is more likely than not to
reoffend.

14 *Id.* at 712, n. 2.

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16 The evidence in the record that assesses Brashear’s likelihood to
17 reoffend is Dr. Wentworth’s psychological evaluation. It suggests her
18 likelihood to reoffend is low or very low. Brashear’s behavioral turn around
19 compared to her first decade in prison is probative of the maturation of a
20 juvenile offender that the statute intended to identify, not probative that
21 Brashear is likely to reoffend. The ISRB also failed to discuss any conditions
22 associated with her release and why, despite appropriate conditions, she
23 would be likely to reoffend. *Brashear*, 430 P.3d at 714–15.

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28 Because there was no evidence in the record upon to support a finding
29 that Ms. Brasher was more likely than not to reoffend, the lower court
30 correctly concluded that she is entitled to be released.

1 *The Lower Court Did Not Preclude Consideration of Facts Related to*
2 *the Crime. However, Those Facts Must Be Relevant to the Risk of*
3 *Reoffense.*

4 Rather than focusing on “the statutory presumption of release, her
5 awareness of her crimes, her changed behavior, her assessed low risk to
6 reoffend, and appropriate release conditions, the court found that the “ISRB
7 relied on Brashear’s underlying crimes, the impact of those crimes, and the
8 small portion of her sentence served in denying her petition. These are not
9 factors that guide the ISRB’s decision under RCW 9.94A.730(3).” *Id.* at 715.
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11 Instead of discussing DOC psychologist Dr. Wentworth’s finding that
12 Brashear is at a low risk to reoffend or its own acknowledgment that
13 Brashear made a complete shift in her behavior, instead, the ISRB cited
14 Brashear’s role in the crimes she committed, the lasting impacts those
15 crimes had on others, the “relatively small portion” of the sentence she has
16 served on each count, and Prosecutor Roe’s letter opposing her release.
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18 For example, the ISRB mischaracterized the sentence imposed by the
19 trial judge as a “minimum” sentence. Instead, it is the maximum term she
20 can be required to serve. More importantly, the statute expressly commands
21 that no juvenile offender will serve more than 20 years of their sentence
22 unless they are likely to reoffend. RCW 9.94A.730(3). The ISRB is not
23 permitted to deny release because it believes the offender deserves to serve
24 more than 20 years for the crime.
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ALSEPT & ELLIS

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Transmittal Information

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