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NO. 96695-8

(Court of Appeals Cause No. 77047-7-I)

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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Personal Restraint Petition of:

GAIL BRASHEAR,

Petitioner.

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**REPLY TO RESPONSE TO MOTION FOR DISCRETIONARY  
REVIEW**

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## I. INTRODUCTION

The Court should grant the Motion for Discretionary Review and decide the two important issues presented by this case: (1) whether the Court of Appeals erred when it ordered the Indeterminate Sentence Review Board to release an offender; and (2) whether the Court of Appeals erred in making broad statements that will deny the Board's discretion to consider the nature and impacts of Brashear's crimes, information from prosecutor and victims, or the portion of the sentence served, when the Board decides if an offender such as Ms. Brashear meets the statutory criteria for release. Ms. Brashear's response fails to dispel the Board's showing that the decision below creates a significant conflict by ordering a remand. Nor does she undercut the importance of deciding whether RCW 9.94A.730 should be construed to allow the court to make the ultimate decision about whether an offender should be released. Brashear implicitly agrees that it is important that the Board be able to consider all information relevant to predicting if an individual is likely to commit future crimes. Therefore, the Motion for Discretionary Review should be granted.

### A. **This Court Should Decide Whether Error by the Indeterminate Sentence Review Board Allows a Reviewing Court to Order an Offender's Release**

Brashear's main argument claims that review is unwarranted because the Court of Appeals "breaks no new ground." Answer at 2. But

that argument depends on sidestepping the issue presented. Brashear claims the issue is whether “the lower court exceeded its authority when it found insufficient evidence that Ms. Brashear was more likely than not to reoffend and directed her release.” Answer at 2. Not so. The Motion never argues that a court cannot find that the Board erred if insufficient evidence or reasoning supports a Board finding that an offender is likely to reoffend. Rather, the issue is narrowly concerned with what a court does if it finds error by the Board. Specifically, can a court conclude that as a matter of law an offender is unlikely to commit crimes and thus must be released?

By ordering Brashear released, the Court of Appeals clearly broke new ground. Brashear, however, makes little attempt to distinguish the numerous cases where courts order remand after finding that the Board erred in a decision denying release. For example, in *In re Dyer*, 157 Wn.2d 358, 139 P.3d 320 (2006), this Court ordered “remand to the ISRB for a new parolability hearing during which the ISRB must make its determination based on the evidence and testimony presented, and not on speculation and conjecture,” and ordered a remand *even though* “review of the evidence and testimony presented at the parolability hearing suggests Dyer met his burden” to obtain release. *Id.* at 369. *See also* Motion at 10-13 (citing ten cases remanding to the Board rather than ordering release). Brashear fails to dispel the conflict between the decision below and these

cases and she cites no case where a court mandates release upon review of a Board decision.

Brashear attempts to distinguish her case by reciting the Court of Appeals' reasons for ordering release. Answer at 3-4. She points out that the statute applicable to Brashear provides for early release unless the Board finds that an offender is more likely than not to reoffend. *Id.* That standard for early release, however, is not so different from other release standards applied by the Board that it justifies abandoning the approach where courts remand to the Board.

For example, in *In re Ayers*, 105 Wn.2d 161, 165-66, 713 P.2d 88 (1986), this Court explained how parole-release "is more subtle and depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release." In *In re Sinka*, 92 Wn.2d 555, 564-65, 599 P.2d 1275 (1979), the Court recognized the Board's expertise in assessing readiness for release to the community and described the Board's function as "retrospective factual determination that a prisoner's past behavior differentiates him or her from other similarly-situated inmates." *Id.* In that case, the Board's expertise in setting a minimum term "is not purely factual, but also predictive and discretionary." *Id.*

Although the statute for juvenile offenders differs from other parole statutes, it still depends on the Board applying its expertise and predictive skill to determine if circumstances exist to warrant an offender's release and, if so, under what conditions. That statutory intent is plain on the face of the statute and confirmed by the history and composition of the Board. The Board is made up of members empowered to independently investigate an offender's crime and the offender's personality. RCW 9.95.0002(8); RCW 9.95.170.<sup>1</sup> The Department of Corrections provides the Board with all investigations, and any file or other record about an offender. RCW 9.95.170. The Board then reviews offenders using all available information in order to fulfill its responsibility to limit release to a person who can, with appropriate conditions, refrain from future criminal behavior. *Id.* Those processes and that type of decision are not available to a reviewing court.

Nonetheless, Brashear asks this Court to deny review by pointing out that the Court of Appeals cited a psychological report assessing Brashear's likelihood to reoffend and drew inferences about Brashear's personality, and based on that record, took responsibility to conclude

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<sup>1</sup> Under RCW 9.95.003, the Governor appoints a Board, with consent of the Senate, comprised of a Chair and four other members. The Board is created within the Department of Corrections and is required to meet at correctional institutions to complete a "full and complete study of the cases of all convicted persons whose durations of confinement are to be determined by it; whose community custody supervision is under the board's authority; or whose applications for parole come before it." *See* RCW 9.95.005.

Brashear had no likelihood of engaging in future crimes. Answer at 3-4. But Brashear's argument, like the Court of Appeals ruling, bypasses the Board's processes and expertise and undermines the statutory scheme that unambiguously assigns that responsibility to the Board.

This Court should grant review to decide whether a court may, based on textual differences between RCW 9.94A.730(3) and other parolability statutes, compel the release of an offender based on a conclusion that the Board had insufficient evidence to deny release.<sup>2</sup>

**B. The Court Should Grant Review to Address the Scope of the Board's Discretion to Examine Information Recognized by the Statute as Potentially Relevant**

In concluding that the Board abused its discretion in denying release to Brashear, the Court of Appeals' opinion categorically bars the Board from considering matters that could very well be relevant to the statutory criteria for release and conditions for public safety. Specifically, it held that considering the facts and impact of an offender's crimes, information

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<sup>2</sup> A recent Court of Appeals Division II decision further illustrates the need for this Court's review of the new early release statute. *See In re Pugh*, No. 50055-8-II, 2019 WL 350612 (Wash. Ct. App. January 29, 2019). In *Pugh*, the Board decided that an offender was not likely to commit future crimes but made that decision in the context of requiring the offender to comply with a set of conditions involving progressively less restrictive confinement and work-release. During those conditions, the Board held another hearing and found that the offender was likely to commit future crimes. Two members of the *Pugh* court ruled that the Board had erred in how it conditionally denied release, and suggested that it could have ordered release but for the Board's later finding that the offender is likely to commit crimes. But a dissenting judge opined that the statute should be read to compel immediate release of the offender based on the original conditional decision, regardless of the later finding that Pugh was likely to commit crimes.

received from prosecutors or victims, or the portion of the sentence served “conflicts with” the statute. *See* Motion Appendix A at 9-10. Whether the statute forbids consideration of such information is a critical issue that will affect innumerable future cases.

Brashear does not defend the Court of Appeals’ overstatement that would bar such information; she agrees the Board can consider information with “a nexus to the risk of re-offense” but claims the court merely held that the information in this case did not meet that “nexus” text. Answer at 6. That is not what the Court of Appeals said. The Court of Appeals made broad statements that, if not corrected, will interfere with the Board’s future exercise of judgment regarding whether offenders should be released. Review should be granted so that this Court can affirm the Board’s discretion to evaluate all information that may be relevant to whether an individual’s future conduct is likely to be criminal and under what conditions that person can be appropriately released.

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## II. CONCLUSION

The Motion for Discretionary Review should be granted.

RESPECTFULLY SUBMITTED this 6th day of February, 2019.

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**CERTIFICATE OF SERVICE**

I certify that on the date below I caused to be electronically filed the foregoing REPLY TO RESPONSE TO MOTION FOR DISCRETIONARY REVIEW with the Clerk of the Court using the electronic filing system and I hereby certify that I have served the document to the following case participants as indicated below:

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

EXECUTED this 6th day of February, 2019, at Olympia, Washington.

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