

FILED
SUPREME COURT
STATE OF WASHINGTON
7/29/2019 1:09 PM
BY SUSAN L. CARLSON
CLERK

No. 96695-8

This was filed as
Petitioner's
Supplemental Brief, is
actually
Respondent's
Supplemental Brief

IN THE SUPREME COURT OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF:

GAIL BRASHEAR,

PETITIONER.

**PETITIONER'S SUPPLEMENTAL BRIEF
RESPONDENT'S**

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I. INTRODUCTION

The evidence at Gail Brashear's parole hearing did not establish that she was more likely than not to commit new crimes if conditionally released. To the contrary, the psychologist who used accepted risk assessment instruments as required by the statute concluded that Ms. Brashear was at most "a low risk to reoffend; and was a "very low" risk considering her "improved functioning and maturation over time." See *Wentworth Evaluation* at 10 (attached to PRP). The psychologist did not identify any necessary change or alteration in Ms. Brashear's behavior and/or thinking necessary to reduce her risk of reoffense to a statutory acceptable level.

The Indeterminate Sentence Review Board (ISRB) did not challenge this finding. Instead, the ISRB acknowledged that "Ms. Brashear is at a low risk to reoffend" and that over a decade ago she "made a complete shift in her behavior;" striving for rehabilitation "so that she does not commit another crime if back in the community." *ISRB Decision* at 6.

Nevertheless, the ISRB denied Ms. Brashear's release for reasons unrelated and/or contrary to the statutory criteria. While the ISRB decision begins by parroting the statutory

language, it makes no findings of fact to support the conclusion that Ms. Brashear is likely to reoffend if released. Instead, the three reasons cited by the ISRB were that Brashear committed “horrible crimes;” “has served a relatively small portion” of her sentence; and because the prosecutor made a “strong recommendation” against release. *Id.* at 6. And, although the ISRB may now argue that certain aspects of Ms. Brashear’s crime or her poor behavior during her first decade in prison justify the ISRB’s denial of parole, the ISRB did not find any nexus between either the crime or her prison infractions and a current likelihood of reoffense.

The ISRB simply concluded that 20 years was an insufficient sentence for Ms. Brashear. The ISRB was not invested with the authority to make such a determination. As the Court of Appeals explained, the ISRB relied on factors “not probative of her likelihood to reoffend,” while ignoring the risk evaluation which found Brashear’s “likelihood to reoffend is low or very low.” *Matter of Brashear*, 6 Wn.App. 2d 279, 430 P.3d 710, 715 (2018).

Because the ISRB did not find facts to support the conclusion that Ms. Brashear was more likely than not to

reoffend if conditionally released, RCW 9.94A.730 (3) commanded that she be released. Ms. Brashear has now been imprisoned more than two years since her parole hearing (April 21, 2107) where the facts did not show a likelihood of reoffense.¹

Because the evidence was legally insufficient, the Court of Appeals remanded with directions “to order Brashear released and to determine appropriate release conditions.” *Id.* at 290. This Court should affirm the decision of the Court of Appeals. As that court correctly noted: “In the context of an early release determination pursuant to RCW 9.94A.730, where the record does not establish a likelihood to reoffend, the statute requires a release on appropriate conditions, not a second bite at the apple.” *Id.* at 290.

II. FACTS

The Crime

In 1996 when she was 15 years old, Gail Brashear killed a man during a carjacking near Granite Falls. Brashear later pleaded guilty to first-degree murder, assault, and burglary. On May 7, 1997, she was sentenced to 614 months in prison. After

¹The ISRB has set a new parole hearing for Ms. Brashear the day before oral argument is scheduled in this case—September 11, 2019. It is not expected that the ISRB will have reached a decision by September 12th.

serving the required 20 years in prison, Ms. Brashear petitioned the ISRB for release pursuant to RCW 9.94A.730.

The Psychological Evaluation/Risk Assessment

Prior to her parole hearing, Ms. Brashear participated in an evaluation with DOC psychologist Dr. Deborah Wentworth. The evaluation assessed Ms. Brashear's risk of reoffense using accepted predictive instruments, including an instrument specially developed for women offenders. That evaluation was accepted by the ISRB without any criticism.

Ms. Brashear's Background and Personal History

Growing up, Ms. Brashear was the repeated victim of abuse. As a result, she developed negative symptoms, including "suffocating anxiety." In school, she "always felt like an outsider and other children were mean to her." She moved frequently.

Wentworth Evaluation at 4.

At age 14, she "fell in" with a small group which included a man who was 27. He sexually abused her. Nevertheless, she began thinking of this group as a "family." *Id.* at 4. She committed the instant crime with this group, which also included a 20-year old man and another young female. The psychological evaluation notes that Ms. Brashear "openly and transparently

describes the instant offense with no distortions or denials about her role in killing the victim.” *Id.* at 4.

Ms. Brashear’s Prison Record

Ms. Brashear’s behavior in prison took a dramatic turn-around age 26. For the first decade, she committed numerous serious infractions. “Ms. Brashear has incurred a total of 107 infractions of which all but six are serious.” However, “she desisted serious infractions in 2008”—over a decade ago. *Id.* at 5. Her last general infraction occurred on August 1, 2014.

The psychological evaluation was able to identify several reasons for Ms. Brashear’s changed behavior. At first, Ms. Brashear felt abandoned by her family, angry, alone, and without a core personality which led her to feel “very crazy.” “She figured she would never get out with her sentence structure. Her behavior reflected these beliefs and involved frequent verbal defiance of authority, refusing to comply, a suicide attempt, drug/alcohol and assaults.” *Id.* at 10. However, Ms. Brashear matured, took therapy, reconciled with her family, and participated in every program and educational opportunity available to her. She has earned her GED (1997) and many college credits and is close to achieving a college degree. “She is

proud of the fact that she has not had any serious infractions in eight years.” *Id.* at 10.

The Future Risk Assessment

The psychological evaluation included a risk assessment using accepted instruments used in the prediction of future behavior. The results uniformly concluded that Ms. Brashear was a low to very low risk to reoffend. The DOC psychologist “carefully scored” Ms. Brashear on the Hare Psychopathy Checklist (PCL-R) “giving consideration to women's issues.” *Id.* at 8. Ms. Brashear “scored in the lowest quartile of the PCL-R which means there is no sign of psychopathy and little evidence of an Antisocial Personality disorder at this time.” *Id.* On the Historical-Clinical-Risk Management with Female Additional Manual “(h)er total score is judged to be low risk to reoffend.” *Id.* at 8. The DOC psychologist then used the Structured Assessment of Protective Factors, so that Ms. Brashear’s evaluation was not based entirely on historical factors. Ms. Brashear “scores at a high level of protective factors from violence risk.” “Her factors are evenly distributed over Internal, Motivational, and External Factors and bode well for lowering

her overall risk to recidivate over the next twelve months.” *Id.* at

9. The evaluation added:

Other significant mitigating factors that indicate possible reduction in risk include: increasing age which at age 35 is applicable to her, decreased frequency of institutional misbehavior-having no serious infractions for more than eight years, and participation in criminogenic related cognitive behavioral programming. She has several cognitive-behavioral treatments completed. These factors plus a high score on the SAPROF give a strong indication that Ms. Brashear possesses the attitude and skills needed to make succeed in the community.

Id. at 9.

As a result, the evaluation concluded that Ms. Brashear’s risk of reoffense “could be viewed as more in the ‘very low’ range,” adding: “Ms. Brashear appears to be a reasonable candidate for transitioning to a less restrictive setting.” *Id.* at 11. And, while Ms. Brashear “would benefit from continued involvement in therapy for stress and anger issues, especially concerning those that may stem from possible reintegration into the community,” these conditions were seen as further reducing Ms. Brashear’s risk level. *Id.* at 11. As for Ms. Brashear’s motivation, the evaluation noted she “states she would seek help and support without hesitation during transition and when released and she has demonstrated good help-seeking skills in the past.” *Id.* at 5.

Dr. Wentworth's Conclusions

Dr. Wentworth concluded that Ms. Brashear “is bright, motivated to achieve her educational goals and is making significant progress.” “She has learned important pro-social coping skills. She has no current medical or mental health concerns that would impede her ability to succeed in the community and has demonstrated excellent help seeking skills if she were to need assistance in the future. She is highly motivated and prepared with good work skills. She has a committed family support system.” *Id.* at 6. Dr. Wentworth listed Brashear’s sole weakness as “never having worked or lived in the community as an adult.” *Id.*

Counselor Jessica Poston also provided a positive assessment of Ms. Brashear. “She stated she has been a model inmate since she made her turnaround in 2008 at which time, she had her last serious infraction.” *ISRB Decision* at 4.

Additional Facts Considered by the ISRB

In addition, the ISRB considered letters submitted by the county prosecutor and various family and friends of the victim objecting to Ms. Brashear’s release. The prosecutor wrote: “Releasing her when she hasn't even served close to half that

sentence completely ignores the ferocity of actions. Twenty years is not even close to adequate, despite the A's she gets in classes, or what a lovely person her family and friends say she is now.”

Roe Letter (attached to PRP). Various family members and friends of the victim also wrote urging the ISRB not to “reduce” Ms. Brashear’s sentence. None of the letters contained or referenced any facts relevant to Ms. Brashear’s risk of reoffense.

The Reasons Given by the ISRB for Its Decision

In the section entitled “Reasons,” the ISRB begin by listing three factors favoring release. First, the ISRB accepted the psychological evaluation/risk assessment and its contents:

In her most recent psychological evaluation completed in September 2016 by Dr. Wentworth, it was noted Ms. Brashear was open and transparently described the index offense with no distortions or denials about her role in killing the victim. Dr. Wentworth also stated that Ms. Brashear received mental health therapy after she returned to Washington State. Ms. Brashear stated this therapy was helpful in giving her significant insight, and reported it as having been very helpful. Dr. Wentworth noted Ms. Brashear has been stable, and has not required mental health treatment since September 2013. Dr. Wentworth also notes that “Overall, the results of this evaluation suggest that Ms. Brashear is at a low risk to reoffend.”

ISRB Decision at 6.

The second factor listed by the ISRB was Brashear's behavior in prison. The ISRB noted Ms. Brashear's behavior during her first decade incarceration was highly concerning, but ultimately found (consistent with the psychological evaluation), "(s)ince that time, Ms. Brashear appears to have made a complete shift in her behavior and subsequent programming." "Ms. Brashear acknowledges her role in her crimes and has participated in a variety of programs to assist her in understanding the 'why' of her behavior so that she does not commit another crime if back in the community." *Id.* at 6. The ISRB did not list any "reason" to conclude that Brashear's behavioral shift was either illusory or transitory.

Third, the ISRB noted "Ms. Brashear acknowledges her role in her crimes and has participated in a variety of programs to assist her in understanding the 'why' of her behavior so that she does not commit another crime if back in the community." *Id.* at 6.

The ISRB then gave three reasons why, notwithstanding this evidence, it denied parole:

1. Ms. Brashear has committed horrible crimes that have left lasting impacts to many of the survivors of her victims;

2. Ms. Brashear has served a relatively small portion of what the minimum sentence is on all counts as well as the SRA minimum/maximum; and
3. The Board has received a strong recommendation from the Snohomish Prosecutor that requests the Board to not release Ms. Brashear.

Id. at 6.

Consistent with the reasoning that Ms. Brashear had not served enough time for her crime, the ISRB concluded that it “would like to see Ms. Brashear continue to demonstrate that her past behaviors are truly in her past.” *Id.*

III. ARGUMENT

The facts presented at Ms. Brashear’s parole hearing inescapably lead to the conclusion that she is not likely to reoffend if conditionally released. There are two problems with the ISRB’s decision: (1) it denies relief by relying on facts unrelated to Ms. Brashear’s risk to reoffend; and (2) despite the lack of any evidence establishing that Ms. Brashear is more likely than not to reoffend if conditionally released.

A. The ISRB Denied Release Based on Factors Unrelated to Ms. Brashear’s Risk of Reoffense.

The ISRB concluded that 20 years was an insufficient sentence for Ms. Brashear’s crime, despite the lack of evidence

suggesting she was likely to reoffend. That conclusion is contrary to the legislative judgment contained in RCW 9.94A.730. The ISRB was not entitled to ignore the statutory directive.

The ISRB “abuses its discretion” when it fails to follow the statutory criteria and/or acts without consideration of and in disregard of the facts. *In re Dyer*, 157 Wash. 2d 358, 363, 139 P.3d 320 (2006); *In re Pers. Restraint of Addleman*, 151 Wash.2d 769, 776–77, 92 P.3d 221 (2004). The ISRB must base its decision on the evidence presented at the hearing. *Dyer*, 157 Wash. 2d at 365.

RCW 9.94A.730 is much different than the pre-SRA parole statute, RCW 9.95.100. For juveniles sentenced in adult court like Ms. Brashear, RCW 9.94A.730(3) establishes a presumption of release (“shall order the person released”) which can be overcome only by facts supporting the conclusion that the prospective parolee “will commit new criminal law violations if released.” The finding of a likelihood of recidivism must be made by “incorporating methodologies that are recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the person will engage in future criminal behavior if released on conditions to be set by the board.” *Id.*

Here, the ISRB cited three reasons for denying parole: (1) the impact of the crime on the victims; (2) the length of the original sentence; and (3) the objection of the county prosecutor. *ISRB Decision* at 6. While the ISRB was certainly entitled to consider these facts, none constitute a reason to deny parole.

The facts of the crime of conviction—standing alone—do not support the denial of parole. Instead, the ISRB must find a nexus between the crime and the potential parolee’s current risk of reoffense. Here, the ISRB did not even attempt to draw a connection between the crime and Ms. Brashear’s current risk of reoffense. Instead, the ISRB bluntly stated it was denying parole because Ms. Brashear had “served a relatively small portion” of the previously-imposed sentence—a sentence imposed well before the constitutional recognition that “children are different.” *Id.* at 6. The ISRB was not empowered to substitute its judgment for the legislative judgment expressed in RCW 9.94A.730.

The ISRB will likely argue that it was entitled to consider Ms. Brashear’s infraction history, despite her decade of infraction-free incarceration. Brashear does not disagree. However, the ISRB did not find Brashear’s infractions as proof of her current likelihood to reoffend. Instead, the ISRB decision

makes it clear in its “reasons,” that it concluded that Brasher has “made a complete shift in her behavior and subsequent programming.” *Id.* at 6. Instead, the ISRB doubled back to its conclusion that 20 years was an insufficient term of imprisonment for the crime stating it “would like to see Ms. Brashear *continue to demonstrate* that her past behaviors are truly in her past.” *Id.* at 6 (emphasis added).

Because the ISRB’s denial of parole stands on improper grounds, this Court should reverse. Because the ISRB did not find any facts supporting the conclusion that Ms. Brashear was more likely than not to reoffend, this Court should reverse with directions to grant parole.

B. Viewed in the Light Most Favorable to the ISRB’s Decision, the Evidence Fails to Establish that Ms. Brashear is More Likely Than Not to Reoffend If Conditionally Released.

Ms. Brashear starts with the statute. At a juvenile-board hearing, the prospective parolee has an expectation that she will be granted parole unless the ISRB finds facts supporting the conclusion that she is likely to reoffend. Here, the record lacks some evidence—even a modicum of permissibly considered evidence—to support the denial of parole.

The statute mandates a risk assessment that incorporates “methodologies that are recognized by experts in the prediction of dangerousness.” The DOC psychologist who administered the risk assessment concluded that Ms. Brashear was a low to very low risk of reoffense. The ISRB endorsed the DOC psychologist’s evaluation:

In her most recent psychological evaluation completed in September 2016 by Dr. Wentworth, it was noted Ms. Brashear was open and transparently described the index offense with no distortions or denials about her role in killing the victim. Dr. Wentworth also stated that Ms. Brashear received mental health therapy after she returned to Washington State. Ms. Brashear stated this therapy was helpful in giving her significant insight, and reported it as having been very helpful. Dr. Wentworth noted Ms. Brashear has been stable, and has not required mental health treatment since September 2013. Dr. Wentworth also notes that “Overall, the results of this evaluation suggest that Ms. Brashear is at a low risk to reoffend.” If returned to the community Dr. Wentworth pointed out that Ms. Brashear will need continued support and structure to manage her levels of anxiety as she transitions into the community.

ISRB Decision at 6.

Ms. Brashear acknowledges the gravity of her crime. However, the question before the parole board was whether that crime, committed when she was a juvenile, reflects unfortunate yet transient immaturity. The ISRB did not find otherwise.

If the ISRB now attempts to argue that Ms. Brashear's record of infractions, either considered in isolation or in combination with the crime, reflects current incorrigibility that is a switch in time because that finding was not made by the ISRB. Instead, the ISRB reached the conclusion that a decade ago Ms. Brashear "made a complete shift in her behavior." *Id.* at 6. This Court should reject any attempt now to rewrite what the ISRB found.

Based on the ISRB findings as expressed in its decision, there was no evidence upon which the conclusion that she was more likely than not to reoffend. The lower court correctly concluded:

Brashear's behavioral turn around compared to her first 10 to 11 years in prison is probative of the maturation of a juvenile offender that the statute intended to identify, not probative that Brashear is likely to reoffend. The other direct evidence in the record that assesses Brashear's likelihood to reoffend is Dr. Wentworth's psychological evaluation. It suggests her likelihood to reoffend is low or very low. The ISRB abused its discretion by denying Brashear's release and not determining appropriate release conditions.

Matter of Brashear, 6 Wash.App.2d at 289.

C. Where There is Insufficient Evidence of a Likelihood of Reoffense, Remand with Directions to Grant Parole and Set Conditions is the Required Relief.

A petitioner is entitled to a constitutionally adequate and meaningful review of a parole decision, because an inmate's due process right cannot exist in any practical sense without a remedy against its abrogation. The Court of Appeals held: “In the context of an early release determination pursuant to RCW 9.94A.730, where the record does not establish a likelihood to reoffend, the statute requires a release on appropriate conditions, not a second bite at the apple. RCW 9.94A.730(3).” *Brashear*, 430 P.3d at 716. *See also In re Martinez*, 210 Cal. App. 4th 800, 828, 148 Cal. Rptr. 3d 657, 679 (2012) (directing parole board to release petitioner subject to whatever conditions it deems appropriate). This is consistent with the longstanding rule that when a statute places a burden of proof on a party and the evidence is insufficient as a matter of law, the remedy is reversal and a new hearing or trial is “unequivocally prohibited” and dismissal is the remedy. *State v. Hickman*, 135 Wash. 2d 97, 103, 954 P.2d 900, 903 (1998).

The review of whether a juvenile parolee is likely to reoffend is not a purely subjective determination. Instead, the

statutory directive requires the ISRB to rely on accepted risk assessment instruments. This is in stark contrast to pre-SRA parole hearings which involve significant and largely unbounded discretion. For example, *In re Personal Restraint of Whitesel*, 111 Wash.2d 621, 763 P.2d 199 (1988), reviewed a pre-SRA parole decision and held that it is not the role of this court to substitute its discretion for that of the ISRB. However, the ISRB's decision in *Whitesel* was discretionary. The decision in this case was required to be based on objective factors.²

Where a due process liberty interest in parole is at stake—the separation of powers doctrine does not preclude the judiciary's review of the executive's exercise of discretion. The United States Supreme Court explained that a State creates a protected liberty interest when it places substantive limitations on official discretion. *Hewitt v. Helms*, 459 U.S. 460, 466 (1983). Accord *Matter of Cashaw*, 123 Wash. 2d 138, 144, 866 P.2d 8 (1994).

² In addition to the statutory directive, this Court has explained that when the ISRB sits in a juvenile parole case the ISRB fulfills the constitution obligation that ordinarily applies at sentencing. *State v. Scott*, 190 Wash. 2d 586, 597, 416 P.3d 1182, 1187 (2018). So, while the ISRB is part of the executive branch, it also acts in at least a quasi-judicial role.

Ms. Brashear is not asking this Court to determine whether Ms. Brashear currently poses an unreasonable risk of reoffense. She is not seeking to empower this Court to reweigh the evidence. Instead, she asks this Court to view the facts found by the ISRB in a light favorable to the ISRB's decision and conclude whether those fact are sufficient to meet the statutory requisite standard. If not, then the presumption of release controls. Put another way, when the statutory factor is not supported by some evidence in the record and thus is devoid of a factual basis, a reviewing court should grant the prisoner's petition and should order the ISRB to vacate its decision denying parole. Otherwise, the ISRB can subvert the due process of law without any meaningful remedy.

IV. CONCLUSION

This case is similar to *Trantino v. New Jersey State Parole Bd.*, 166 N.J. 113, 197, 764 A.2d 940, 990, *modified*, 167 N.J. 619, 772 A.2d 926 (2001), where the New Jersey Supreme Court reversed a parole board decision and ordered release: "It is the absence of that proof that entitles Trantino to parole, not sympathy or compassion for him. No matter how much we may

abhor the admitted killing of those two officers, the law must apply.” The same is true here.

Here, the Legislature established that 20 years constitutes the punitive aspect of Ms. Brashear’s sentence—regardless of the term imposed by the sentencing judge. Because she has served that portion, the ISRB abused its discretion by finding otherwise and by failing to consider the facts relevant to her risk of reoffense, which established that she was not more likely to reoffend.

DATED this 28th day of July 2019.

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July 29, 2019 - 1:09 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96695-8
Appellate Court Case Title: Personal Restraint Petition of Gail Ann Brashear
Superior Court Case Number: 96-1-01273-9

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