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NO. 97973-1

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF

ADAM BETANCOURT

Petitioner,

**SUPPLEMENTAL BRIEF OF
THE INDETERMINATE SENTENCE REVIEW BOARD**

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I. INTRODUCTION

Petitioner Adam Betancourt and a codefendant murdered an elderly couple—Homer and Vada Smithson—in the couple’s home in 1997. Betancourt, who was 16 years old at the time, ultimately pleaded guilty to two counts of first-degree murder. Just over 20 years later, Betancourt petitioned the Indeterminate Sentence Review Board (Board) for early release. In the intervening time, the Legislature had enacted RCW 9.94A.730, a provision that provides an opportunity for people convicted of felonies committed prior to their eighteenth birthday to petition for release after serving 20 years of total confinement. After reviewing Betancourt’s prison records and conducting an in-person hearing, the Board concluded by a preponderance of the evidence that Betancourt was more likely than not to commit a new criminal law violation if released. Although the Board recognized that Betancourt’s behavior had improved, his institutional history also showed that he had used and sold drugs while in prison, failed to participate in recommended sober support groups, and participated in gang activity for a number of years. All of these things are associated with risk factors related to his original crime. Given that evidence, the Board correctly concluded that release was not appropriate at that time.

Betancourt challenges the Board’s decision and requests that the Court order his release. But Betancourt would merely have this Court reweigh the evidence presented to the Board and, after giving greater weight to the evidence that he believes warrants release, reach a different determination. Such a reweighing of the evidence is inconsistent with abuse

of discretion review. Furthermore, Betancourt's proposed remedy of automatic release, instead of remanding for another hearing, asks this Court to discard its prior precedent and ignore the Legislature's policy choice to vest release decisions with the Board. Because Betancourt has not shown he is entitled to such relief, his Personal Restraint Petition must be denied.

II. STATEMENT OF THE ISSUES

1. Considering a range of factors, including his failure to participate in recommended sober support groups, the Board determined by a preponderance of the evidence that Betancourt was more likely than not to commit a new crime based on Betancourt's behavior while incarcerated. Was the Board's decision not to release Betancourt at this time based on such factors an abuse of discretion?

2. RCW 9.94A.730 vests the Board with the discretion to make release decisions. Even when a court concludes that the Board abused its discretion, is an incarcerated individual entitled to automatic release, rather than a new hearing?

III. STATEMENT OF THE CASE

A. Betancourt Murders Two People and Pleads Guilty to Avoid Aggravated Murder Convictions

In 1997, Homer Smithson and Vada Smithson were murdered in their home in rural Grant County, Washington, by 16-year-old Adam Betancourt and 15-year-old Donald Lambert. *Lambert v. Blodgett*, 393 F.3d 943, 949 (9th Cir. 2004). After stealing ammunition from the Smithsons' garage, Betancourt and Lambert entered the Smithsons' house. *Id.* With

Betancourt taking the lead, they entered the couple's bedroom where they encountered the Smithsons asleep in their bed. Tr. at 24-24. Betancourt and Lambert both fired multiple bullets at the Smithsons while they were lying in bed, left the house, reloaded their weapons, reentered the house, and fired additional bullets at Vada, who had run to the phone to call for help. *Lambert*, 393 F.3d at 949. When police officers responded, they found Vada dead. *Id.* Homer was alive but died after being rushed to a hospital. *Id.*

The police investigation revealed that Betancourt and Lambert, along with two other teenagers, had devised a plan to rob the Smithsons. *Lambert*, 393 F.3d at 950. The teenagers planned to shoot Mr. Smithson, and then force Mrs. Smithson to show them the valuables in the house. *Id.* The teens were aware the Smithsons might likely die. *Id.* Lambert later told police that after they fled, Betancourt returned to the house, found Vada still alive, and stabbed her with his knife. *Id.*

The prosecution charged Betancourt and the other three individuals involved with aggravated murder. *Lambert*, 393 F.3d at 950-51. To avoid a sentence of life without parole, Betancourt pleaded guilty to two counts of first degree murder. *Id.* at 951. The superior court sentenced Betancourt to 600 months total confinement. ISRB Resp., Ex. 1. At the time of the crime, Betancourt was heavily involved in gang activity and was using alcohol and methamphetamine on a regular basis. ISRB Resp., Ex. 3 Board Decision, at 3 & Ex. 4, at 6.

B. Legislature Passes *Miller-Fix* and Vests Board with Discretion to Make Release Determinations

In 2014, in response to *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the Legislature passed the *Miller-fix*. Laws of 2014, ch. 130. In addition to providing resentencing for those juveniles sentenced to life without parole and most directly impacted by *Miller*, the Legislature also provided an avenue for those individuals who committed crimes as juveniles and were serving lengthy sentences to petition the Board for release after twenty years. RCW 9.94A.730. That statute does not prohibit the Board from considering any factors in deciding whether someone is releasable, but it does mandate that the Board consider certain information. *Id.* The Board must consider statements provided by the victims or survivors of the victims, and it must obtain an expert evaluation. RCW 9.94A.730(2) & (4). With this information, the Board conducts a hearing to determine whether it is more likely than not that the person will commit new criminal law violations if released. RCW 9.94A.730(3), (4). In making its ultimate decision, the Board must give public safety considerations the highest priority. RCW 9.94A.730(3).

C. Exercising Its Discretion, the Board Denies Betancourt Release Based on Its Determination That It Is More Likely Than Not He Will Commit Another Crime

In June 2018, after Betancourt petitioned for release, the Board conducted a hearing with Betancourt present at the Airway Heights Corrections Center. With four Board members physically present, the Board heard testimony about Betancourt's programming and infraction history from a Department of Corrections (DOC) classification counselor. The

counselor provided information about Betancourt's behavior observation entries.¹ Tr. 3-7. The Board also heard that Betancourt had received thirty-two serious infractions between his entry into prison and 2009, including infractions for assault and positive drug tests. Tr. 5.

The Board also asked Betancourt a number of questions. Betancourt was asked about his failure to participate in sober support groups to address his drug and alcohol addiction after completing intensive outpatient drug treatment. Tr. 15. Betancourt indicated that he was too busy with other programming. Tr. 15. Betancourt was asked specifically about a 2009 incident where he overdosed and received an infraction. Tr. 8. Betancourt explained that he had been using and selling drugs in prison at the time. Tr. 8-9. Betancourt indicated that he was not criminally charged because DOC could not prove at the time that he had been selling the drugs.² Tr. at 8-9. Betancourt was asked about his infractions for staff assaults and for sexual harassment of staff. Tr. 11-13. Betancourt did not remember one of the staff assaults but described a prior incident where he assaulted a staff person because this person had asked Betancourt to put his hands behind his back.

¹ A behavior observation entry is a tool used by DOC staff to document off-baseline behaviors. See DOC Policy 300.100, available at <https://doc.wa.gov/information/policies/default.aspx?show=300>. Staff document the behavior in an electronic database and classify the behavior as positive, negative, or neutral. *Id.*

² A conviction under RCW 9.94.041(1) would have rendered Betancourt ineligible for early release under RCW 9.94A.730(1). Of course, at that time, the Legislature had not yet passed the *Miller*-fix and Betancourt was serving a six hundred month sentence.

Betancourt suggested that the sexual harassment infraction was based on a misunderstanding by staff. Tr. 11-13.

The Board also asked Betancourt about his gang affiliation. Tr. 11-12. Betancourt indicated that he had stopped participating in gang activity in 2010 and officially dropped out in 2015. Tr. 11. Betancourt discussed his seven-year marriage to a woman he met through his cellmate. According to Betancourt, his wife was a criminal and into using drugs. Tr. 41-42. Betancourt subsequently divorced his wife in 2016, and he is now engaged to another woman whom he met through another cellmate in 2015. Tr. 42. In response to questions about his original crimes, Betancourt stated that he had not planned on killing the Smithsons and that Lambert had told him that no one was home. Tr. 23-24. Betancourt indicated that he and Lambert had broken into 30 homes in the month before the murder and had never encountered anyone. Tr. 28-29. When he entered the bedroom and saw the Smithsons, he panicked and started shooting. Tr. 30. Although Betancourt did state that he was remorseful for what he had done, he stated that his primary concern at the time was not getting caught. Tr. 30, 35, & 51.

After conducting the hearing and reviewing Betancourt's institutional record, the Board denied release because it found by a preponderance of the evidence that he was more likely than not to commit a new crime. The Board identified six reasons for its determination. Specifically, Betancourt had: (1) not attended the recommended sober support groups; (2) used drugs throughout the majority of his incarceration; (3) actually introduced drugs into the prison in 2009; (4) served less than

half his original sentence; (5) received thirty-two serious infractions; and (6) continued to incur negative behavior observations. ISRB Resp., Ex. 3, at 2. The Board's written decision also discussed the psychological evaluation performed by Dr. Wentworth. The Board noted that Betancourt scored low on one tool in terms of his risk to reoffend but that he also scored moderate on a different risk tool, one that specifically predicted risk of violence. ISRB Resp., Ex. 3, at 6. Betancourt then filed this PRP seeking an order directing the Board to release him.

IV. ARGUMENT

A. **The Board Did Not Abuse Its Discretion in Determining That Betancourt Should Not Be Released at This Time**

Courts review the Board's decision to deny a person release for abuse of discretion. *In re Dyer (Dyer II)*, 164 Wn.2d 274, 286, 189 P.3d 759 (2008). This deferential standard of review recognizes that the Legislature has entrusted the Board with the power to make the ultimate decision of release. Release decisions naturally require the Board to weigh a multiplicity of imponderables and make an informed prediction as to "what a man is and what he may become rather than simply what he has done." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 10, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979). There is no mathematical formula to make this decision, and "there is no set of facts, which, if shown, mandate a decision favorable to the individual." *Id.* Given the Legislature's choice to vest release decisions with the Board and the Board's expertise in making such decisions, this Court has said that courts should generally avoid

substituting their judgments for the Board and not act as a super Indeterminate Sentencing Review Board. *In re Whitesel*, 111 Wn.2d 621, 628, 763 P.2d 199 (1988).

Courts will only find an abuse of discretion if the Board fails to follow its own procedural rules or acts without consideration or in disregard of the facts. *In re Addleman*, 151 Wn.2d 769, 776-77, 92 P.3d 221 (2004). Betancourt does not argue that the Board failed to follow its procedural rules, but argues that its ultimate decision was an abuse of discretion. In making such a challenge, Betancourt must show that the Board's decision is one that no reasonable person would make. *See In re Myers*, 105 Wn.2d 257, 265, 714 P.2d 303 (1986). This is a high burden. Indeed, in the only decision by this Court finding an abuse of discretion on such a basis, *In re Dyer (Dyer I)*, 157 Wn.2d 358, 139 P.3d 320 (2006), the Court subsequently twice affirmed the Board's discretionary decision to deny Dyer parole. *See Dyer II*, 164 Wn.2d at 297; *In re Dyer (Dyer III)*, 175 Wn.2d 186, 205, 283 P.3d 1103 (2012). Given the Board's legitimate concerns about Betancourt's drug use and failure to participate in recommended programming to address that issue, the Board appropriately denied release.

1. The Board Appropriately Denied Betancourt Release in Light of His Institutional Behavior and Failure to Adequately Address His Drug Addiction

Betancourt fails to show that no reasonable person would have reached the conclusion to deny Betancourt release. After conducting an in-person hearing, considering a psychological evaluation, and reviewing Betancourt's criminal and institutional history, the Board determined by a

preponderance of the evidence that it was more likely than not that Betancourt would commit new criminal law violations if released based on six factors. ISRB Resp., Ex. 3, at 2. The Board's decision addressed two areas that are closely related to Betancourt's criminal conduct: his drug use and involvement in gang activity. For over a decade, Betancourt used drugs in prison. Betancourt admitted at the hearing that he was actually selling drugs in 2009 when he overdosed due to a balloon of heroin and methamphetamine exploding in his stomach. Tr. at 8-9. Although Betancourt has not been infracted for a positive drug test or caught with drugs since that time, the Board noted that he had failed to participate in recommended sober support groups and that he had still used drugs for the majority of his incarceration. ISRB Resp, Ex. 3, at 2.

Although Betancourt claims that there is no evidence to support a decision that he is likely to reoffend, he does not dispute the information about his infraction history, his failure to participate in sober support groups, or his drug use. Betancourt's assertions that he has not been infracted for a positive drug test or drug use since 2009 are insufficient to overcome the Board's legitimate concerns. Betancourt's failure to participate in recommended treatment to address his prior criminal behavior is itself a permissible basis to deny release. *See Dyer II*, 164 Wn.2d at 288. Additionally, an extended period of sobriety in the carefully controlled environment of a prison does not automatically ensure that such sobriety will continue upon release. This is particularly true when a person does not have other tools in place, such as sober support groups, to address the

challenges of reintroduction into the community. Reentry of any individual can be challenging, but that is particularly true for someone, like Betancourt, who has been incarcerated for a significant period of time and has never lived as an adult outside of a prison setting. There is no mathematical formula to decide when a person is ready to confront such challenges. Given the Board's concerns, its decision was not an abuse of discretion.

2. Betancourt's Arguments Ask the Court to Disregard or Reweigh Certain Pieces of Evidence; Such an Approach Is Contrary to Abuse of Discretion Review

A review for abuse of discretion is typically a deferential review that does not permit reweighing the evidence. *State v. Ramos*, 187 Wn.2d 420, 453, 387 P.3d 650 (2017); *In re Lain*, 179 Wn.2d 1, 22, 315 P.3d 455 (2013); *In re Eckmann*, 117 Wn.2d 678, 695, 818 P.2d 1350 (1991). However, Betancourt's PRP is premised entirely on his argument that the Board should not have considered some factors and should have given other factors greater weight. The former argument is flawed because RCW 9.94A.730 contains no limitation on the evidence that the Board can consider in making a release decision. This Court should not categorically bar the Board from considering certain information. And Betancourt's primary argument that the Board should have given more weight to things that he views as favorable to him merely illustrates that Betancourt is asking the Court to reweigh the evidence that was presented to the Board—an approach inconsistent with abuse of discretion review.

At various points, Betancourt asserts that the Board inappropriately considered the underlying crime—the premeditated murder of two vulnerable, elderly persons—and the length of the original sentence. *See, e.g.,* Pet’rs Reply, at 3. Betancourt, however, does not point to anything in the statute that completely precludes consideration of specific factors as long as they have some relationship to the question of whether someone is likely to reoffend. Both the initial offense and the length of a sentence reflect the seriousness of the crime. In combination with other factors, both can be relevant to show a person’s likelihood to reoffend.

Outside of the *Miller*-fix context, the Legislature has required the Board to consider sentencing ranges in the Sentencing Reform Act as part of its release decisions. RCW 9.95.009(2). Although the Legislature did not explicitly extend those requirements to decisions under RCW 9.94A.730 and the denial of release based solely on the length of the original sentence would not be appropriate, nothing suggests that the Board’s consideration of the length of Betancourt’s original sentence was so wholly inappropriate that it nullified the other factors that support its decision to deny release. Given the other factors considered, Betancourt’s critique of this singular aspect of the Board’s decision does not demonstrate an abuse of discretion.

Similarly, there is nothing that precludes the Board from considering the nature of the crime. In Betancourt’s case, the Board did not actually mention the nature of the crime in its reasons for concluding he is likely to reoffend. To the extent that the Board did consider the nature of Betancourt’s crime as a basis of denying release, the Board was entitled to

consider such information. The nature of the crime, and more importantly, the insight of the individual into the crime are important factors. As the Board explained, part of the reason for inquiring into the details of the crime is for determining Betancourt's own insight into the crime and the reasons that he committed the crime. Tr. 25; *see also* RCW 9.95.170 (requiring the Board to inform itself of the history of individuals under its jurisdiction). Although the nature of the crime will almost always not be determinative and is not the only factor that should be considered, it certainly is a relevant factor. *See In re Ecklund*, 139 Wn.2d 166, 175-77, 985 P.2d 342 (1999). Such consideration, to the extent that it influenced the Board's decision here, would not be a basis for concluding the Board abused its discretion.

Betancourt also challenges the Board's reference to the Grant County prosecutor's letter opposing release. Contrary to Betancourt's implication, the Board did not identify this letter as a basis for denying release. Moreover, Betancourt does not explain why the Board is categorically precluded from considering such information. Indeed, after 2016, the Board is required to notify the prosecuting attorney and the sentencing court of a petition for release under RCW 9.94A.730. *See* RCW 9.95.422. The Board received a statement from Grant County, and its decision summarizes that statement. Similarly, the Board must give victims and their families an opportunity to provide statements and the Board's decision referred to those statements. Just as the Board considered statements from Grant County and the victims' families, the Board also appropriately considered statements of support provided by Betancourt. Tr.

52-53. The references to such feedback in the Board's decision does not demonstrate an abuse of discretion.

Betancourt also takes issue with the Board's reference to a prior instance of him introducing methamphetamine and heroin into a DOC facility with the intent to sell the drugs to other prisoners, as something that could have resulted in criminal charges. Betancourt asserts that the fact such behavior could have resulted in criminal charges is not relevant to his risk of re-offense. Pet'rs Reply, at 4 (citing RCW 9.94A.730(1)). Although Betancourt is correct that this conduct does not automatically disqualify him from early release under RCW 9.94A.730(1), Betancourt's suggestion that such serious criminal conduct is not relevant to his risk of re-offense is incorrect. Nothing prohibits the Board from considering such facts.³ Nor does Betancourt seriously contest that introduction of heroin and methamphetamine into a prison is a crime, and it cannot reasonably be questioned that engaging in criminal conduct while incarcerated is relevant to whether someone would reoffend if released. This Court should reject Betancourt's various attempts to identify factors that the Board is prohibited from considering.⁴

³ This argument is particularly strange given that part of the reason that Betancourt was not charged was because he successfully concealed his involvement in the selling of drugs. Tr. at 9.

⁴ Betancourt also claims that the Board's conclusion regarding behavior observation entries was "affirmatively negated by the record." Pet'rs Brief, at 13. However, the portion of the record cited by Betancourt does not discuss behavior observation entries and the Board's finding is directly supported by the prison counselor's testimony. Tr. at 6.

In reality, Betancourt's dispute with the Board's decision is not that its specific findings were unsupported but that he believes the Board did not give adequate weight to certain factors he asserts were more favorable to him. For example, Betancourt emphasizes that the psychological evaluation found him a low risk using the PCL-R (the Hare Psychopathy Check List-Revised). It is true that Betancourt scored very low in terms of psychopathy and was evaluated as a low risk based on this assessment. ISRB Resp., Ex. 4, at 10. However, the evaluator, also used the VRAG-R (Violence Risk Appraisal Guide Revised)—a tool specifically designed to predict violent recidivism. Using that tool, Betancourt scored at a moderate risk to reoffend and was in the 60th percentile. *Id.*; see *In re Haynes*, 100 Wn. App. 366, 373-74, 996 P.2d 637 (2000) (concluding moderate risk of re-offense together with other factors is sufficient for Board to deny release of sex offender). Furthermore, the existence of a single positive assessment has never been dispositive of the question of likelihood to reoffend. See *Dyer III*, 175 Wn.2d at 200-01 (conflicting evaluations did not warrant release). Although Betancourt has shown some signs of positive behavior, he failed to participate in recommended programming and continued to incur negative behavior observation entries. The existence of some evidence that supports a change in behavior or a low risk of likelihood to reoffend does not illustrate an abuse of discretion, especially in the context of release decisions that are inherently predictive in nature and benefit from the Board's specialized expertise. Rather, as the Board was required to do, it

weighed all of the evidence and reached a reasonable conclusion that Betancourt should not be released at this time.

Betancourt attempts to analogize this case to the Court of Appeals decision in *In re Brashear*, 6 Wn. App. 2d 279, 430 P.3d 710 (2018), review granted 193 Wn.2d 1025 (2019).⁵ The factual circumstances in *Brashear* differ from Betancourt's situation. Unlike *Brashear*, one assessment of risk places Betancourt in the moderate risk (60th percentile) to reoffend. Unlike *Brashear*, Betancourt failed to complete all recommended programming. And unlike *Brashear*, there was evidence that Betancourt had been engaged in criminal activity while incarcerated.

Furthermore, *Brashear* created an inappropriately high bar for a Board's decision to decline to release under RCW 9.94A.730. Among other things, *Brashear* appeared to focus on "direct evidence" of an individual's likelihood to reoffend. *See Brashear*, 6 Wn. App. 2d at 287. This Court has never required the Board to rely upon "direct evidence" of a person's likelihood to reoffend in a release decision, and the decisions that affirm the denial of parole without such direct evidence strongly suggest that such evidence is not required. *See, e.g., Dyer II*, 164 Wn.2d at 288; *Ecklund*, 139 Wn.2d at 176-77. Similarly, the *Brashear* court evaluated the Board's decision by identifying evidence that it believed was more probative of the ultimate decision while determining that other factors were completely

⁵ This Court granted the Board's motion for discretionary review in *Brashear*, but the case was subsequently dismissed as moot at *Brashear's* request after she had been released.

irrelevant to the assessment of the risk to reoffend. This analysis, though, involves the kind of reweighing the evidence that this Court has rejected in past review of Board's decisions. *Dyer II*, 164 Wn.2d at 288. Because the Board's decision denying Betancourt release was supported by a number of relevant factors, the Court should not engage in the reweighing of evidence requested by Betancourt or conducted by the Court of Appeals in *Brashear*.

B. The Appropriate Remedy for Any Abuse of the Board's Discretion Is Not Automatic Release But Rather Remand

For all of the reasons discussed above, the Board did not abuse its broad discretion in denying Betancourt early release. But even if the Court were to disagree, the proper remedy would be to remand to the Board to conduct another hearing, not automatic release. When a court finds an abuse of discretion on a release decision, remand to the Board is the appropriate remedy. To the extent that the Court of Appeals held otherwise in *Brashear*, this Court should overrule it.

Remand is the appropriate remedy for three reasons. First, remand is the remedy embraced in this Court's past case law. *See In re Dyer (Dyer I)*, 157 Wn.2d 358, 369, 139 P.3d 320 (2006); *In re Addleman*, 139 Wn.2d 751, 755-56, 991 P.2d 1123 (2000); *In re Shepard*, 127 Wn.2d 185, 192-93, 898 P.2d 828 (1995); *In re Cashaw*, 123 Wn.2d 138, 150, 866 P.2d 8 (1994) (indicating proper remedy was remand but noting petitioner had been released); *In re Locklear*, 118 Wn.2d 409, 421, 823 P.2d 1078 (1992); *In re Ayers*, 105 Wn.2d 161, 168, 713 P.2d 88 (1986). Most recently, in *Dyer I*, this Court rejected Dyer's request to order him paroled because the Court

determined that it could not make that decision in the first instance. *Dyer I*, 157 Wn.2d at 369. Similarly, the remedy in instances where the Board failed to follow its procedural rules is remand, not automatic release. *Cashaw*, 123 Wn.2d at 150. Indeed, there do not appear to be any instances where this Court has ordered an individual to be released without a new hearing after concluding the Board abused its discretion.

Other states that have considered the question have reached similar conclusions in terms of the appropriate remedy. *See Diatchenko v. Dist. Attorney for Suffolk Dist.*, 471 Mass. 12, 31, 27 N.E.3d 349 (2015) (“A judge may not reverse a decision by the board denying a juvenile homicide offender parole and require that parole be granted”); *Wallman v. Travis*, 18 A.D.3d 304, 311, 794 N.Y.S.2d 381 (2005) (presumptive release statute); *Hopkins v. Mich. Parole Bd.*, 237 Mich. App. 629, 646-48, 604 N.W.2d 686 (1999). Although such decisions are naturally based on different statutory schemes, these decisions recognize that a court’s role in reviewing a parole decision, even when it finds an error, is not to dictate a particular outcome.

Second, when a court finds an abuse of discretion in other areas of the law, the remedy typically is remand. This is true in the context of criminal sentencing. *State v. Delbosque*, 195 Wn.2d 106, 116, 456 P.3d 806 (2020); *State v. O’Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015); *In re Vandervlugt*, 120 Wn.2d 427, 437, 842 P.2d 950 (1992). This is also true in the context of other administrative decisions by public agencies. *See Brunson v. Pierce Cnty.*, 149 Wn. App. 855, 861, 205 P.3d 963 (2009); *Skokomish Indian Tribe v. Fitzsimmons*, 97 Wn. App. 84, 97, 982 P.2d 1179

(1999). Betancourt does not adequately explain why a different rule should apply here.

Finally, a remand to the Board respects the policy choices made by the Legislature. In enacting the *Miller*-fix statute, the Legislature addressed two different issues: individuals who had been sentenced to life without parole as a result of an aggravated murder conviction and individuals who were sentenced to lengthy terms of incarceration for crimes committed as juveniles. For the first group of individuals, the Legislature enacted changes that required resentencing by the court. RCW 10.95.035. But for the second group of individuals, the remedy was an avenue to petition the Board for release. RCW 9.94A.730. In making this decision, the Legislature made the conscious choice to vest the authority for granting release to the Board. Because the Legislature has vested the Executive Branch with the authority to make these release decisions, an order directing the Board to reach a particular result would not only contravene the Legislature's decision but would also create separation of power concerns. The recognition that the Board is vested with wide discretion in deciding issues related to an individual's parole has a well-established, long history in this state. *State ex. rel. January v. Porter*, 75 Wn.2d 768, 773-74, 453 P.2d 876 (1969); *Butler v. Cranor*, 38 Wn.2d 471, 473-74, 230 P.2d 306 (1951); *State ex rel. Linden v. Bunge*, 192 Wn. 245, 251, 73 P.2d 516 (1937). For that reason, once an individual who is serving an indeterminate sentence is sentenced by the Court, the power over such a person is transferred to the executive branch. *January*, 75 Wn.2d at 773-74. Other courts across the country have

noted such separation of powers concerns. *See In re Prather*, 50 Cal. 4th 238, 254, 234 P.3d 541, 121 Cal. Rptr. 3d 291 (2010); *Hopkins*, 237 Mich. App. at 646-48. Given these concerns, prior case law, and the plain language of RCW 9.94A.730, remand to the Board is the remedy for any abuse of discretion.

Betancourt argues that this Court should adopt the logic in *Brashear* where Court of Appeals declined to remand after finding the Board abused its discretion during a release hearing under RCW 9.94A.730. *Brashear*, 6 Wn. App. 2d at 279. The Court of Appeals recognized prior case law and that an abuse of discretion in the context of setting a minimum term would usually require remand for the Board to exercise its discretion again. Yet, the Court of Appeals concluded that this context is different because it does not involve setting a minimum term and that “where the record does not establish a likelihood to reoffend, [RCW 9.94A.730] requires a release on appropriate conditions, not a second bite at the apple.” *Brashear*, 6 Wn. App. 2d at 290. This analysis was flawed and should be rejected. The *Brashear* decision ignored this Court’s *Dyer I* decision and this Court’s decisions in the analogous context of criminal sentencing. Moreover, to the extent that RCW 9.94A.730 provides any guidance, the statute reflects the Legislature’s decision to place the discretion to make these decisions in the hands of the Board, not the courts.

Although the *Brashear* decision expressed a desire not to give the Board another “bite at the apple” and appeared focused on the “presumptive” nature of release, this perspective ignores that Board

hearings are non-adversarial and the Board is not a party opposing release. In terms of the presumptive nature of release, *Brashear* appeared to overstate the nature of this presumption by implying that the Board, like a party in a lawsuit, must “prove” that release is not warranted. However, the statute merely requires that the Board find a risk to reoffend—a finding that it made here. As such, another hearing to determine if someone is releasable is not giving the Board another bite at the apple. Therefore, this Court should reject this portion of *Brashear* and conclude that remand is the remedy when a court finds an abuse of discretion by the Board.

V. CONCLUSION

The Court should deny Betancourt’s PRP because he has failed to show that the Board abused its discretion. In the event that the Court disagrees, it should reject Betancourt’s argument that he is automatically entitled to release and remand to the Board in light of this Court’s decision.

RESPECTFULLY SUBMITTED this 31st day of August, 2020.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the foregoing SUPPLEMENTAL BRIEF OF THE INDETERMINATE SENTENCE REVIEW BOARD with the Clerk of the Court using the electronic filing system which will serve the following electronic filing participant:

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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.

DATED this 31st day of August 2020, at Olympia, Washington.

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