

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

In the Matter of the Personal	)	
Restraint of	)	No. 79872-9
	)	
	)	
RICHARD J. DYER,	)	EN BANC
	)	
Petitioner.	)	Filed August 7, 2008
_____	)	

FAIRHURST, J. — In 2006, this court directed the Indeterminate Sentence Review Board (ISRB) to redetermine the parolability of Richard J. Dyer after we concluded the ISRB supported its previous decision with speculation and conjecture. We ordered the ISRB to support its decision with objective facts. After the rehearing, the ISRB again determined Dyer was unparolable because he remained an untreated sex offender. We now consider Dyer’s personal restraint petition (PRP) alleging the ISRB again abused its discretion and violated his

constitutional rights. We hold the ISRB based its decision upon the objective fact that Dyer is an untreated sex offender and therefore did not abuse its discretion nor violate Dyer's constitutional rights. We affirm the ISRB.

## I. FACTUAL AND PROCEDURAL HISTORY

A jury convicted Dyer on two counts of first degree rape against two women, *Ms. A* and *Ms. B*. On January 27, 1980, *Ms. A* accepted a ride from two men in downtown Bremerton at 2:30 a.m. *Ms. A* sat in the front seat between the driver, who she later identified as Dyer, and a second man. When she realized Dyer was not driving to the designated destination, she attempted to grab the wheel and stomp on the brakes. Dyer forced her into the backseat where he subdued her with punches to the stomach. The second man drove the car to a remote location where Dyer undressed *Ms. A*. After the second man declined, Dyer raped *Ms. A*. Dyer then bound *Ms. A* with rope and held her to the rear floorboard while she was still naked.

The second man drove to a residence. Once inside, Dyer led *Ms. A* to a bedroom where he tied her to a bed on her back. Dyer gagged her with cotton. The men also taped cotton over her eyes. The second man quickly raped *Ms. A* and was not seen or heard by her thereafter. Dyer applied contraceptive foam to

*Ms. A* and proceeded to rape her eight times throughout the night. At one point, Dyer flipped her from her back to her stomach and raped her in the new position. Twice she was untied and forced to bathe. In the morning, Dyer washed *Ms. A's* clothes, bathed, and dressed her. After rebinding her, Dyer drove *Ms. A* into the woods and released her.

Later that year, two men offered a ride to another woman, *Ms. B*, in downtown Bremerton around 11:00 p.m. *Ms. B* twice refused the offer while walking her dog. The car left but shortly reappeared and *Ms. B* was forced inside. En route to their destination, the driver who *Ms. B* later identified as Dyer paused to tape cotton balls over *Ms. B's* eyes.

The two men took *Ms. B* to a residence. Once inside, *Ms. B* was undressed and tied to a bed. After the second man left, Dyer applied contraceptive foam to *Ms. B* and raped her repeatedly. At one point, Dyer flipped her from her back to her stomach and raped her in the new position. Dyer forced *Ms. B* to shower with him. In the morning, he washed *Ms. B's* clothes, bathed, and dressed her. He then drove *Ms. B* to a park and released her. Prior to leaving, Dyer gave *Ms. B* a wristwatch that was later identified as the wristwatch *Ms. A* lost during her struggle in Dyer's car.

Based on these incidents, Dyer was convicted of two counts of first degree rape. In 1982, the court sentenced Dyer to two maximum terms of life imprisonment to run concurrently. By letter, the sentencing judge recommended Dyer ““should be held in custody until the Parole Board is absolutely sure that he will not reoffend or until the end of his natural life.”” App. to PRP, App. P at 1. The prosecuting attorney recommended a 50 year sentence. The ISRB designated Dyer’s original minimum term at 600 months. However, in light of the adoption of the Sentencing Reform Act of 1981 (SRA) guidelines, chapter 9.94A RCW, the ISRB reduced Dyer’s minimum sentence to 240 months. This adjusted minimum exceeded the standard range of 63 to 88 months. However, the ISRB justified its deviation with the recommendations of the sentencing judge and the prosecuting attorney and the deliberate cruelty manifest in the underlying crimes.

Since his incarceration, the ISRB has determined Dyer not parolable five times. In 1994, the ISRB found Dyer not parolable based, in part, on a 1993 psychological evaluation that found Dyer’s risk of reoffense was “very high” and his depth of sexual deviancy was “high.” Resp. of the ISRB to PRP, App. 5, at 3. In 1995, the ISRB found Dyer not parolable and added 60 months to his minimum term. The ISRB based its decision in part on a 1994 psychological evaluation

diagnosing Dyer with posttraumatic stress disorder (PTSD) and sexual sadism. It concluded, “without treatment, the risk of reoffense remains high.” *Id.* App. 6, at 3. The ISRB noted that “Mr. Dyer is an untreated, convicted rapist who denies his culpability and is therefore not amenable or receptive to treatment.” *Id.* In 1998, the ISRB again found Dyer not parolable and added 60 months to his minimum term.

Prior to Dyer’s 2002 parole hearing, licensed mental health counselor Carson Carter conducted a new psychological evaluation of Dyer. On both the Minnesota Sex Offender Screening Tool - Revised and the Rapid Risk Assessment for Sexual Offense Recidivism, Dyer received low scores, which Carter described as “typical of sex offenders who present a low risk to reoffend.” App. to PRP, App. C at 3. On the Hare Psychopath Checklist – Revised, Dyer received a very low score, indicating a low risk of committing another violent offense within six months after release from custody. Carter concluded that Dyer “could be considered for community supervision with less concern for the community than many of the offenders who are released into society.” *Id.* at 4. Dyer’s 2001 Department of Corrections (DOC) classification referral states that he completed several offender change programs, including anger/stress management, victim awareness, and

nonviolent conflict resolution.

In 2002, the ISRB again found Dyer not parolable and added 60 months to his minimum term. The ISRB stated, “[a] central difficulty for the Board is that Mr. Dyer remains an untreated sex offender.” Resp. of the ISRB to PRP, App. 11, at 3. The ISRB noted that DOC’s sex offender treatment program (SOTP) requires “full candor” and Dyer was not eligible for SOTP because he continued to maintain his innocence. *Id.*

However, the ISRB identified Dyer’s potential to react poorly to stress the more “serious and significant” factor in its decision. *Id.* at 3. The ISRB considered evidence that Dyer was “an orderly person, careful in his work” but also acknowledged that “calculation” was “precisely the behavior demonstrated in the crimes.” *Id.* The ISRB anticipated that, upon release, Dyer would face stress leading to a “potential reaction” acting as a “trigger to more attacks.” *Id.* at 3-4. The ISRB also recognized that the risk of reoffense “appears to have been ameliorated in current psychological tests” but cited a concern that Dyer might have learned how to take psychological tests. *Id.* at 4. Based upon these concerns, the ISRB found that Dyer was “not rehabilitated” and therefore not parolable. *Id.*

Following the 2002 decision, Dyer filed a PRP that we transferred to the

Court of Appeals. The Court of Appeals dismissed it, determining the ISRB had not abused its discretion nor violated Dyer's constitutional rights. Dyer filed a motion for discretionary review in this court, which the commissioner denied in an order dated April 13, 2005. Dyer filed a motion to modify the commissioner's ruling, and we subsequently granted that motion and Dyer's motion for discretionary review.

We determined the ISRB abused its discretion by supporting its parolability decision with "speculation and conjecture." *In re Pers. Restraint of Dyer*, 157 Wn.2d 358, 369, 139 P.3d 320 (2006) (*Dyer I*). We found the ISRB ignored the evidence favoring parole and "based its decision on unsupported notions that Dyer manipulated the psychological evaluations and poses a high risk of reoffense because of his good behavior in prison and the nature of his crimes." *Id.* at 368-69. We remanded the matter back to the ISRB with the mandate to make a decision based upon the "evidence and testimony" presented at the hearing. *Id.* at 369.

In October 2006, the ISRB conducted a new parolability hearing. Dyer reported that, as a result of therapy, many of his PTSD symptoms had diminished. The ISRB reviewed Dyer's psychological evaluations dating back to 1993. It highlighted the most recent evaluation dated February 2005 that assessed Dyer as a

“low risk to reoffend sexually.” App. to PRP, App. P at 10. However, the ISRB also observed that “the scoring tools utilized were not provided” with the psychological report. *Id.* The ISRB also considered two policy papers by the Washington State Institute for Public Policy. The first policy paper showed that the SOTP did not reduce participants’ recidivism rates. The second policy paper showed that offenders who willingly participate in the program have lower recidivism rates than those who unwillingly participate in the program. The ISRB found that these reports had little applicability to Dyer since his “decision to not admit guilt necessarily results in an inability to participate in the SOTP.” *Id.* at 11.

Based upon the evidence before it, the ISRB found Dyer unparolable because he is an untreated sex offender. “[W]ithout an exploration and understanding of the behaviors that directly resulted in his incarceration, he remains at risk to repeat those behaviors in the community.” *Id.* at 12. The ISRB added 80 months to his minimum sentence raising it to 500 months.<sup>1</sup>

In March 2007, Dyer filed a PRP alleging the ISRB abused its discretion and violated his constitutional rights. We granted Dyer’s motion to retain the PRP.

## II. ISSUES

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<sup>1</sup>In its decision, the ISRB noted that the 80 month increase to Dyer’s minimum sentence was the functional equivalent to adding 60 months given that the hearing was deferred from April 2005 to October 2006.

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- A. Whether the ISRB abused its discretion by finding Dyer not parolable.
- B. Whether the ISRB decision violated Dyer's constitutional rights.

### III. ANALYSIS

A petitioner must show he is under unlawful restraint to succeed on a PRP challenge of an ISRB decision. RAP 16.4(b), (c); *In re Pers. Restraint of Addleman*, 151 Wn.2d 769, 774, 92 P.3d 221 (2004) (citing *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994)). Dyer argues the ISRB's abuse of discretion and constitutional violations create unlawful restraints.

#### A. Whether the ISRB abused its discretion by finding Dyer not parolable

The burden rests with the petitioner to prove the ISRB abused its discretion. *Addleman*, 151 Wn.2d at 776. Dyer alleges the ISRB abused its discretion in three ways.

##### 1. *Whether the ISRB may deny parole due to failure to complete the SOTP*

The ISRB abuses its discretion when it “fails to follow its own procedural rules for parolability hearings or acts without consideration of and in disregard of the facts.” *Dyer I*, 157 Wn.2d at 363 (citing *Addleman*, 151 Wn.2d at 776-77). Reliance upon “speculation and conjecture” with disregard of the evidence also constitutes an abuse of discretion. *Id.* at 369. We must find the ISRB acted willfully and unreasonably to support a determination that the parolability decision is arbitrary and capricious. *Ben-Neth v. Indeterminate Sentence Review Bd.*, 49

Wn. App. 39, 42, 740 P.2d 855 (1987) (citing *In re Buffelen Lumber & Mfg. Co.*, 32 Wn.2d 205, 209, 201 P.2d 194 (1948)), *overruled on other grounds by Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep't*, 120 Wn.2d 394, 842 P.2d 938 (1992).

Dyer argues the ISRB abused its discretion by basing its decision upon the fact that Dyer has not completed the SOTP. Participation in the SOTP requires an inmate to admit his or her guilt in order to participate. However, Dyer is unable to participate because he maintains he is innocent of the crimes for which he was convicted. Dyer claims this court prohibited the ISRB from basing its decision upon his lack of treatment. This is an inaccurate statement of our holding in *Dyer I*.

In *Dyer I*, we faulted the ISRB for justifying its decision with “speculation and conjecture.”<sup>2</sup> 157 Wn.2d at 369. Specifically, we assigned error to the ISRB’s

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<sup>2</sup>The dissent misstates our previous holding from *Dyer I* to reach its unprecedented position that this court should substitute its judgment for the ISRB’s and release an untreated sex offender. Dissent at 1, 17. Contrary to the dissent’s assertion, the court did not reverse the ISRB ruling in *Dyer I* based on a finding that Dyer met his burden to prove his rehabilitation. Dissent at 1. Rather, the court reversed the ISRB’s decision because it was improperly supported by speculation and conjecture. *Dyer I*, 157 Wn.2d at 369 (“We instead 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.”). Even if the evidence suggested Dyer had met his burden of proving his rehabilitation, *Dyer I* did not restrict the ISRB from exercising its own judgment in rendering its parolability decision. *Id.* The dissent’s erroneous understanding of *Dyer I*, however, naturally compels it to disregard the abuse of discretion standard of review and usurp the role of the ISRB.

reliance upon “unsupported notions that Dyer manipulated the psychological evaluations and poses a high risk of reoffense because of his good behavior in prison and the nature of his crimes.” *Id.* We ordered the ISRB to conduct a new parolability hearing and base its decision on the evidence and testimony presented. We did not preclude the ISRB from considering the fact that Dyer has not gone through the SOTP.

The question remaining from *Dyer I* is whether the ISRB supported its decision with objective facts and in consideration of the evidence before it. *Id.* The ISRB decision shows it considered Dyer’s psychological evaluations including the most recent 2005 evaluation that assessed Dyer as a “low risk to reoffend sexually.” App. to PRP, App. P at 10. However, the ISRB noted the evaluation did not provide the “scoring tools utilized.” *Id.* The ISRB also considered policy papers<sup>3</sup> showing that participation in the SOTP was not correlated to lower rates of recidivism. The ISRB discounted the applicability of these findings given that Dyer’s “decision to not admit guilt necessarily results in an inability to participate in the SOTP.” *Id.* at 11.

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<sup>3</sup>The dissent asserts the ISRB relied on the policy papers to reach its determination. Dissent at 6-7. This is not true. The ISRB concluded the findings from the policy papers had little applicability to Dyer’s factual circumstances. App. to PRP, App. P at 11.

In short, the ISRB was “faced with an inmate who has been convicted of multiple violent sexual assaults, who is an untreated sex offender who has not demonstrated any insight into the criminal behavior that resulted in his convictions.”

*Id.* at 8. The ISRB commended Dyer for his “self-improvement work” but stated, “without an exploration and understanding of the behaviors that directly resulted in his incarceration, he remains at risk to repeat those behaviors in the community.”

*Id.* at 12. Therefore, in consideration of all the evidence presented, the ISRB based its parolability decision upon the objective fact that Dyer is an untreated sex offender.

Furthermore, settled law establishes that the ISRB may consider the offender’s failure to obtain treatment. Lack of rehabilitation is a permissible reason to impose a minimum sentence considered exceptional under the SRA guidelines. *In re Pers. Restraint of Ecklund*, 139 Wn.2d 166, 176, 985 P.2d 342 (1999). By statute, the ISRB must deny parole if the inmate is unrehabilitated or otherwise unfit for release. RCW 9.95.100. We have adopted the position that “the first step toward rehabilitation is ‘the offender’s recognition that he was at fault.’” *Ecklund*, 139 Wn.2d at 176 (quoting *Gollaher v. United States*, 419 F.2d 520, 530 (9th Cir. 1969)). Accordingly, the ISRB may base its decision to deny parole, in part, upon

the fact that the offender refuses treatment that requires him or her to take responsibility for criminal behavior.<sup>4</sup> *Id.* at 177. Similarly here, Dyer has not taken responsibility for his crimes which prevents him from obtaining the treatment the ISRB deems necessary for his full rehabilitation. Therefore the ISRB acted within its discretion to deny Dyer parole.

2. *Whether Dyer's sentence was excessive*

Dyer next argues the ISRB abused its discretion by failing to make his sentence reasonably consistent with the standard ranges set forth in the SRA. The ISRB may abuse its discretion if it fails to consider the sentencing ranges delineated in the SRA. *Addleman*, 151 Wn.2d at 776-77 (citing *In re Pers. Restraint of Locklear*, 118 Wn.2d 409, 418, 823 P.2d 1078 (1992)). However, the expiration of an inmate's minimum term does not compel his release but, rather, designates a date certain whereby the ISRB will reevaluate the inmate's parolability. *Cashaw*, 123

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<sup>4</sup>Contrary to the dissent's assertion (dissent at 7 n.8), the facts under which this court decided *Ecklund* are similar to the facts at present. Like Dyer, the petitioner in *Ecklund* exhibited exemplary behavior in prison and did not take responsibility for his crimes. 139 Wn.2d at 183. Justice Sanders voiced the dissenting view arguing the ISRB abused its discretion by basing its parolability decision, in part, on whether Ecklund confessed to his crimes. *Id.*; *cf.* dissent at 8. Notwithstanding these considerations, the court held the ISRB did not abuse its discretion by imposing an exceptional minimum term where Ecklund refused to admit his guilt because it prevented him from obtaining the necessary, rehabilitative treatment. 139 Wn.2d at 177. Dyer, like Ecklund, refuses to admit his guilt, which also prevents him from obtaining the necessary, rehabilitative treatment. Under *Ecklund*, the ISRB acted within its discretion to extend Dyer's minimum term.

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Wn.2d at 143 (citing *In re Pers. Restraint of Powell*, 117 Wn.2d 175, 186 n.1, 814 P.2d 635 (1991)); WAC 381-40-100.

Dyer claims that the ISRB's actions contradict this court's construction of RCW 9.95.009(2) in *Addleman*. RCW 9.95.009(2) provides the ISRB must "consider the purposes, standards, and sentencing ranges" outlined in the SRA as well as the "minimum term recommendations of the sentencing judge and prosecuting attorney." The ISRB must also "attempt to make decisions reasonably consistent with those ranges, standards, purposes, and recommendations" and provide an adequate written explanation when it deviates from the SRA guidelines. *Id.*

RCW 9.95.100, however, also requires the ISRB to not release a prisoner until he or she is fully rehabilitated. The ISRB "shall not, however, until his or her maximum term expires, release a prisoner, unless in its opinion his or her rehabilitation has been complete and he or she is a fit subject for release." *Id.* Weighing the import of these statutory provisions, the *Addleman* court determined the ISRB's duty to not release an unrehabilitated prisoner "trumps" its duty to attempt reasonable consistency with the SRA. 151 Wn.2d at 775.

The ISRB noted in its recent decision it was "statutorily required to *give*

*public safety considerations the highest priority.*” App. to PRP, App. P at 7 (citing RCW 9.95.009(3)).<sup>5</sup> Consonant with *Addleman*, the ISRB stated it was not allowed to release a prisoner “before the expiration of their maximum term, *unless in its opinion his or her rehabilitation has been complete.*” *Id.* (citing RCW 9.95.100). As discussed earlier, the ISRB concluded Dyer failed to demonstrate complete rehabilitation as he remained an untreated sex offender. Based on these facts, we hold the ISRB followed its statutory mandate to consider public safety and properly declined to release Dyer.

The ISRB must also make its minimum sentences reasonably consistent with the recommendations of the sentencing judge and prosecuting attorney. RCW 9.95.009(2). As noted in the ISRB decision, the sentencing judge recommended Dyer “should be held in custody until the Parole Board is absolutely sure that he will not reoffend or until the end of his natural life” while the prosecuting attorney recommended a 50 year (600 month) minimum sentence. App. to PRP, App. P at 1-2 (internal quotation marks omitted). In 2006, the ISRB added 80 months to Dyer’s sentence raising his minimum term to a total of 500 months.<sup>6</sup> While this term is

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<sup>5</sup>“Notwithstanding the provisions of subsection (2) of this section, the indeterminate sentence review board shall give public safety considerations the highest priority when making all discretionary decisions on the remaining indeterminate population regarding the ability for parole, parole release, and conditions of parole.” RCW 9.95.009(3).

<sup>6</sup>Dyer’s minimum sentence was set by the ISRB at 240 months. The ISRB denied Dyer

significantly above the SRA standard range for first degree rape, it does fall within the ranges recommended by the sentencing judge and prosecuting attorney.

Given that the ISRB deviated from the SRA, the court must determine whether the ISRB supplied “adequate written reasons.” RCW 9.95.009(2). “Adequate written reasons” implies the ISRB first consulted the SRA standard ranges, found them inappropriate, and recorded its reasoning. *Locklear*, 118 Wn.2d at 419. In *Locklear*, the court found the ISRB did not provide adequate written reasons to support its denial of parole where it made no indication it consulted the SRA ranges or the recommendation from the sentencing judge but only referred to the prosecuting attorney’s recommendation. *Id.* In *Ecklund*, the court found the ISRB provided adequate written reasons to support its imposition of what would be considered an exceptional minimum term under the SRA when it considered and articulated factors for why Ecklund was not rehabilitated. 139 Wn.2d at 177 n.10. Specifically, the court approved of the ISRB’s consideration of Ecklund’s failure to admit his guilt given that it prevented him from obtaining appropriate rehabilitative treatment. *Id.* at 177.

Here, the ISRB referenced the SRA standard range sentence for first degree

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parole in 1994, 1998, and 2002, adding 60 months to his minimum term each time. In 2006, the ISRB increased his minimum sentence by 80 months for a total of 500 months.

rape as well as the recommendations of the sentencing judge and prosecuting attorney. The ISRB also observed that Dyer maintains his innocence which prevents him from participating in the SOTP. Consequently, the ISRB found Dyer was not rehabilitated because “without an exploration and understanding of the behaviors that directly resulted in his incarceration, he remains at risk to repeat those behaviors in the community.” App. to PRP, App. P at 12. Under both *Locklear* and *Ecklund*, the ISRB provided adequate written reasons to support its imposition of an exceptional minimum sentence.

3. *Whether the ISRB improperly considered Dyer’s convictions*

Dyer argues that the ISRB abused its discretion by considering the facts underlying his convictions. In *Dyer I*, the ISRB erroneously relied upon the nature of Dyer’s crimes to assess his recidivism risk. 157 Wn.2d at 368 (“[T]he ISRB dismissed evidence of Dyer’s rehabilitation in prison evidently based on the facts of his underlying crimes.”). Here, the ISRB did not base its parolability decision on the nature of Dyer’s crimes. Rather, it discussed the fact that Dyer was convicted to explain why it cannot use his denial of culpability to establish parolability. “Despite Mr. Dyer’s protestations of innocence, however, it is not within this Board’s jurisdiction to retry cases or to adjudicate guilt or innocence of those offenders

under its jurisdiction.” App. to PRP, App. P at 7. Unlike its previous decision, the ISRB did not inappropriately consider the facts underlying his convictions to predict his likelihood to reoffend.

4. *Remedy*

Dyer argues that, if this court were to find the ISRB abused its discretion, the court should reverse the ISRB’s decision and order his parole. However, we do not find that the ISRB abused its discretion and therefore we do not reach this issue.

B. Whether the ISRB violated Dyer’s constitutional rights

Dyer claims the ISRB violated his federal constitutional rights under the ex post facto clause, equal protection clause, due process clause, and Eighth Amendment’s prohibition against cruel and unusual punishment. To succeed on these challenges, Dyer must demonstrate that constitutional error caused him actual harm by a preponderance of the evidence. *In re Pers. Restraint of Stanphill*, 134 Wn.2d 165, 169, 949 P.2d 365 (1998) (citing *Powell* 117 Wn.2d at 184).

1. *Ex post facto*

Dyer claims that the ISRB’s reliance upon RCW 9.95.009(2) and (3) violates the ex post facto clause of the United States Constitution. This clause prohibits the State from enacting laws that retroactively increase the punishment associated with

a crime after its commission. *State v. Pillatos*, 159 Wn.2d 459, 475, 150 P.3d 1130 (2007); U.S. Const. art. I, § 10, cl. 1. The ex post facto clause is rooted in the individual's right to fair notice, not a right to less punishment. *Pillatos*, 159 Wn.2d at 475 (citing *Powell*, 117 Wn.2d at 184-85 (citing *Weaver v. Graham*, 450 U.S. 24, 30, 1001 S. Ct. 960, 67 L. Ed. 2d 17 (1981))).

That new procedures could result in a higher sentence for a prisoner does not establish an ex post facto violation. *Id.* at 476 (citing *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 505, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995)). Instead, the court assesses whether the new law ““(1) is substantive [or] merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it.”” *Id.* (alteration in original) (quoting *Powell*, 117 Wn.2d at 185). In the criminal context, ““disadvantage”” means ““the statute alters the standard of punishment which existed under the prior law.”” *Id.* (quoting *State v. Schmidt*, 143 Wn.2d 658, 673, 23 P.3d 462 (2001)). Dyer contends he is disadvantaged by the ISRB's application of RCW 9.95.009(2) and (3).

Dyer asserts, “[i]f the Board is permitted to repeatedly deny parole based on the facts of the crime, however, then RCW 9.95.009(2) works only to the detriment

of prisoners.” PRP at 46. However, on balance, RCW 9.95.009(2) works to the advantage of offenders by guaranteeing a parole hearing upon the expiration of his or her minimum term. *Powell*, 117 Wn.2d at 191. In addition, the statute worked to the advantage of Dyer when the ISRB adjusted his original minimum term from 600 months to 240 months.

Furthermore, a petitioner must definitively show that the change in law resulted in a harsher sentence. *Stanphill*, 134 Wn.2d at 173. Speculative assertions do not satisfy the petitioner’s burden. *Id.* Dyer fails to show with any certainty that RCW 9.95.009(2) led to a harsher sentence, and we reject his ex post facto argument regarding RCW 9.95.009(2).

Dyer next argues the ISRB’s reliance upon RCW 9.95.009(3) is an ex post facto violation. He claims the statute increased the weight assigned to public safety considerations which created a substantial risk that offenders will serve longer sentences. He urges the court to reject *In re Personal Restraint of Haynes*, 100 Wn. App. 366, 996 P.2d 637 (2000), which held RCW 9.95.009(3) was not an ex post facto law as applied to Haynes. *Id.* at 378. The Court of Appeals reasoned under previous law, RCW 9.95.100, the ISRB was allowed to emphasize public safety considerations in its decision making. *Id.* We agree.

The purpose of the ex post facto clause is to provide fair warning. *Pillatos*, 159 Wn.2d at 475. RCW 9.95.009(3) is not an ex post facto law since public safety considerations have always constrained the ISRB's parolability determinations. Dyer had fair notice of this parolability factor, and therefore his ex post facto argument fails.

2. *Equal protection*

Dyer next argues the ISRB violated the federal equal protection clause in two respects. First, he claims the ISRB's failure to make his sentence reasonably consistent with the SRA under RCW 9.95.009(2) constitutes unlawful discrimination as a pre-SRA offender. However, it is well settled "[t]here is no denial of equal protection in having persons sentenced under one system for crimes committed before July 1, 1984 and another class of prisoners sentenced under a different system." *Foster v. Wash. State Bd. of Prison Terms & Parole*, 878 F.2d 1233, 1235 (9th Cir. 1989); *Addleman*, 151 Wn.2d at 774. Furthermore, as previously discussed, we find the ISRB fully complied with RCW 9.95.009(2), and therefore Dyer's argument fails.

Second, Dyer asserts the ISRB denied him equal treatment by conditioning his parolability upon a factor beyond his control--his eligibility to participate in the SOTP.<sup>7</sup> He cites *Ohlinger v. Watson*, 652 F.2d 775 (9th Cir. 1980), for the

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<sup>7</sup>The dissent reaches its conclusion that the ISRB denied Dyer equal protection by completely reformulating Dyer's argument. Dissent at 12. Dyer argues the ISRB denied him equal protection by conditioning parole on an unavailable program. PRP at 45 ("Here, the Board has acknowledged that it will not release Dyer unless he completes the SOTP program, yet that program is not available to Dyer."). The dissent, however, constructs its equal protection argument around the inadequacy of the SOTP as an effective form of treatment. The dissent concludes, "[c]lassifying Dyer as unrehabilitated based on the fulfillment of treatment whose participants have a projected *higher* recidivism rate than those who are willing but unable to participate is not rationally related to the legitimate state objective of requiring rehabilitation." Dissent at 14. In addition, the dissent relies on the policy papers the ISRB determined to have

proposition that the ISRB may not deny parole based on programs the inmate cannot obtain. Dyer's circumstances are factually distinguishable from *Ohlinger*.

*Ohlinger* held persons given indeterminate sentences "on the basis of a *mental illness*" have a constitutional right to adequate treatment for their mental infirmity. 652 F.2d at 777 n.5 (emphasis added). Dyer, however, was not incarcerated due to a mental illness and the SOTP is available to Dyer if he takes responsibility for his crimes. Dyer's equal protection argument fails.

3. *Void for vagueness*

Dyer next argues that RCW 9.95.009(2) as applied to him is void for vagueness because his sentence is not reasonably consistent with the SRA standard range. Mere uncertainty regarding the application of the statute to purportedly prohibited conduct does not establish vagueness. *State v. Watson*, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). Rather, "[t]he test is whether men of reasonable understanding are required to guess at the meaning of the statute." *In re Pers. Restraint of Myers*, 105 Wn.2d 257, 267, 714 P.2d 303 (1986) (citing *City of Seattle v. Rice*, 93 Wn.2d 728, 731, 612 P.2d 792 (1980)).

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little applicability to Dyer's factual circumstances to reach its conclusion. *Id.*; PRP App. P at 11. Accordingly, the dissent's novel equal protection argument lacks foundation and, therefore, fails.

The dissent also argues the ISRB violated Dyer's constitutional rights under the doctrine of unconstitutional conditions. Dissent at 15. Only the dissent raises this novel constitutional argument. It was not briefed or argued by the parties. The issue is not properly before the court.

Dyer acknowledges this court has already rejected a vagueness challenge regarding RCW 9.95.009(2). In *Myers* we found “[t]he Legislature intended that the Board consider and impose sentences reasonably consistent with the SRA. Reasonable persons need not guess at the meaning of the challenged provision.” 105 Wn.2d at 268. Accordingly, we held RCW 9.95.009(2) was not void for vagueness. *Id.*

Furthermore, we assess vagueness in light of other statutes, which are “[p]resumptively available to all citizens’.” *Watson*, 160 Wn.2d at 8 (alteration in original) (internal quotation marks omitted) (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990)). RCW 9.95.009(3) and .100 make it clear the ISRB may not release an inmate unless it finds him or her completely rehabilitated notwithstanding its obligations under RCW 9.95.009(2).<sup>8</sup> The ISRB determined Dyer is not rehabilitated and, therefore, in accord with its statutory mandate, denied Dyer parole. As applied to Dyer, RCW 9.95.009(2) is not unconstitutionally vague.

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<sup>8</sup>“Notwithstanding the provisions of subsection (2) of this section, the indeterminate sentence review board shall give public safety considerations the highest priority when making all discretionary decisions on the remaining indeterminate population regarding the ability for parole, parole release, and conditions of parole.” RCW 9.95.009(3).

“The Board shall not, however, until his or her maximum term expires, release a prisoner, unless in its opinion his or her rehabilitation has been complete and he or she is a fit subject for release.” RCW 9.95.100.

4. *Substantive due process*

Executive action that shocks the court's conscience violates substantive due process. *Braam v. State*, 150 Wn.2d 689, 700, 81 P.3d 851 (2003). Dyer contends that the ISRB's repeated denials of parole "shock the conscience" in violation of substantive due process under the federal constitution. PRP at 47 (citing *Hunterson v. DiSabato*, 308 F.3d 236, 248 (3d Cir. 2002)). He asserts "there is absolutely nothing he can do to be paroled." PRP at 48. The ISRB decision does not support Dyer's contention. The ISRB did not indicate Dyer was powerless to gain release but rather declined to release an untreated sex offender. This reasoning does not shock the conscience, and therefore we reject Dyer's substantive due process argument.

5. *Cruel and unusual punishment*

Dyer claims it is cruel and unusual punishment under the Eighth Amendment to the United States Constitution and under article I, section 14 of the state constitution to give him false hope of parole every five years when the ISRB intends to deny his parole every time. The record does not support Dyer's assessment. The ISRB did not state it intended to hold Dyer indefinitely, and we are not in a position to predict the ISRB's future decisions. We decline to review this issue where the

evidence in the record does not support Dyer’s conclusory argument. *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 364, 759 P.2d 436 (1988) (holding that petitioner’s constitutional arguments failed where they are not grounded in facts and are merely conclusory allegations).

IV. CONCLUSION

The burden rests with the inmate to prove he is a fit subject for release. We hold Dyer failed to demonstrate his complete rehabilitation, and the ISRB did not abuse its discretion by adding 80 months to his minimum term. We also hold the ISRB properly adhered to its statutory mandate to make public safety its paramount consideration and did not violate Dyer’s constitutional rights.

We affirm the decision of the ISRB.

AUTHOR:

Justice Mary E. Fairhurst

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WE CONCUR:

Justice Susan Owens

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Justice Barbara A. Madsen

Justice James M. Johnson

Bobbe J. Bridge, Justice Pro Tem.

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