

**FILED**  
**Jul 14, 2022**  
Court of Appeals  
Division III  
State of Washington

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

<b>In the Matter of the Personal Restraint</b>	)	<b>No. 38461-6-III</b>
<b>of:</b>	)	
	)	
<b>MI'CHEAL JEFFERSON,</b>	)	<b>ORDER DISMISSING PERSONAL</b>
	)	<b>RESTRAINT PETITION</b>
	)	
<b>Petitioner.</b>	)	

Mi'Cheal Jefferson seeks relief from personal restraint imposed for his 2005 Spokane County superior court conviction for first degree rape. He challenges the Indeterminate Sentencing Review Board's (ISRB) determination that he was releasable. For the reasons set forth below, this court concludes that Mr. Jefferson fails to demonstrate that he is under unlawful restraint or entitled to relief.

*Background*

On July 9, 2003, Mr. Jefferson sexually assaulted a 68-year-old woman who was previously unknown to him. On that evening, the victim found Mr. Jefferson standing in her doorway. He raped the victim, took money from her purse, tied up her hands and feet with a telephone cord, and threatened to kill her if she reported what happened.

Investigators found a blood stain at the crime scene, and other blood samples throughout the house. A forensic scientist lifted several fingerprints from the scene, many of which matched Mr. Jefferson's fingerprints on record.<sup>1</sup> Mr. Jefferson denied having anything to do with the crime and later claimed his convictions were the result of a conspiracy against him by the judges of Spokane County.

In April 2005, a jury convicted Mr. Jefferson of one count of first degree rape, one count of first degree burglary, one count of first degree robbery, and one count of first degree kidnapping. The court sentenced Mr. Jefferson to an indeterminate term of 171 months to life on the first degree rape count pursuant to former RCW 9.94A.712, and concurrent determinate terms on the remaining counts.

Prior to sentencing, the Department of Corrections (DOC) prepared a sex offender presentence investigation report. That report noted that in September 2002, Mr. Jefferson allegedly raped an 18-year-old acquaintance in Kootenai County, Idaho. The woman reported that she woke up with Mr. Jefferson on top of her, he forcibly removed her clothing and raped her, and that he later threatened her for reporting the rape. Mr. Jefferson told the police that the sex was consensual, and no charges were filed.

Pursuant to RCW 9.95.420, Mr. Jefferson's first releasability hearing was set for July 2016. Prior to the hearing, the End of Sentence Review Committee (ESRC)

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<sup>1</sup> In 2010, the Washington State Patrol Crime Lab re-tested blood on a tissue found on the crime scene and the lab's analysis concluded that Mr. Jefferson's DNA was

reviewed Mr. Jefferson's case and conducted actuarial risk assessments to determine his risk of sexual recidivism. The State-99R rated Mr. Jefferson as a Moderate-High risk and the MnSOST-R rated him as low risk. The ESRC also recommended a Level III community notification if Mr. Jefferson were to be released, which was an aggravation from a Level II risk classification "due to a pattern of behavior that increases risk for sexual re-offense and predatory behavior." Response, Ex. 1, Att C. at 1. The information supporting the ESRC's recommendation included a discussion of the facts surrounding the 2003 rape, the alleged rape from 2002, and an incident from May 2003, where Spokane police responded to a 19-year-old woman's report of being harassed by Mr. Jefferson in her apartment complex. The woman reported that Mr. Jefferson had been watching her in the hallways for two months, and that on the date of the incident he followed her for several blocks, trying to contact her. Mr. Jefferson was not arrested and denied the incident when questioned by law enforcement.

At the first releasability hearing, Mr. Jefferson denied any involvement with his crimes of conviction. As a result of his unwillingness to acknowledge his behavior, he was not eligible to participate in the Department of Corrections' (DOC) Sex Offender Treatment Program (SOTAP). The ISRB found that Mr. Jefferson was an untreated sex offender who was more likely than not to commit a sex offense if released on conditions and added 60 months to his minimum sentence.

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present on the bloody tissue.

The ISRB conducted a second releasability hearing in 2021. A letter dated November 10, 2020, indicates that the Law Enforcement Notification Program reviewed Mr. Jefferson's case again in preparation for the February 2021 hearing. The prior actuarial risk assessments conducted by the ESRC in 2015 were reviewed and no changes were made, and the ESRC's prior recommendation of a Level III community notification remained unchanged. The letter also noted that on November 5, 2020, Mr. Jefferson was screened for the SOTAP program, and deemed unamenable due to his inability to admit to committing a sex offense.

The hearing records indicate that at the beginning of the hearing on January 13, 2021, Mr. Jefferson stated he was not provided adequate opportunity to review his Sinka<sup>2</sup> packet prior to the hearing. Mr. Jefferson and his Classification Counselor (CC) William Lane disputed whether Mr. Jefferson had been provided the proper Sinka packet, with Mr. Jefferson indicating that he was asked to sign off that he received the packet before having a chance to review it, and that CC Lane provided a different packet after Mr. Jefferson refused to sign off on the first one. The ISRB granted Mr. Jefferson's request to reschedule the hearing to allow him time to review the packet.

The rescheduled hearing occurred on February 9, 2021. Prior to hearing

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<sup>2</sup> "Sinka packet" refers to all current and previous End of Sentence Review Committee (ESRC) reports and supporting documents, provided to an inmate prior to a releasability hearing pursuant to *In re Pers. Restraint of Sinka*, 92 Wn.2d 555, 566, 599 P.2d 1275 (1979).

testimony, the ISRB asked Mr. Jefferson whether he was able to review his Sinka packet. He stated that he was, but he did not believe it was the complete packet and he refused to sign the acknowledgment form. The ISRB confirmed with CC Lane and clarified with Mr. Jefferson that the packet provided was the appropriate materials for the hearing, and Mr. Jefferson confirmed he was prepared to continue with the hearing. During the hearing, Mr. Jefferson again denied any wrongdoing, and when asked why his fingerprints were found at the scene of the crime, he stated no fingerprints were found at the scene.

The ISRB found by a preponderance of the evidence that Mr. Jefferson was more likely than not to commit a sex offense if released on conditions, and denied conditional release pursuant to RCW 9.95.420(3). The ISRB specifically found Mr. Jefferson was not releasable based on:

- End of Sentence Review Committee Risk Level III, aggravated from II due to a pattern of behavior that increases risk for sexual re-offense and predatory behavior;
- He has yet to complete the SOTAP program or any other programming that would mitigate his risk. He was screened for the program and was found non-amenable as he denies committing any sex offense.
- He continues to make statements indicating he is not responsible for his offending behavior to include "I was at the wrong place at the wrong time".
- He has multiple sex offense allegations, with different victims.

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Response to Personal Restraint Petition (“PRP Response”), Ex. 1, Attach. H at 3. The ISRB added 48 months to Mr. Jefferson’s minimum term, and recommended that he access any programming to assist with insight into what lead to his conviction, successfully complete the Moving Forward program if available, and continue to remain infraction free and focus on positive behavior.

The record indicates that prior to the hearing on February 9, 2021, Mr. Jefferson raised concerns with the Office of Corrections Ombuds (OCO) regarding staff misconduct and staff interference in his ISRB hearing. A letter from the OCO, dated March 10, 2021, indicates that the OCO could substantiate Mr. Jefferson’s concern regarding his prior counselor, and noted that “[d]ue to the history of a complicated relationship, grievances, complaints, and your final request to have him removed as your counselor, him having part in your ISRB hearing court prove problematic. We did however reach out on your behalf regarding these issues with your previous counselor.” Personal Restraint Petition at 6. The letter noted that there would be no way to account for whether the Sinka packet was changed or altered any of the times Mr. Jefferson’s CC presented it to him, and further noted that the OCO cannot change ISRB decisions. However, the letter observed that ISRB decisions can be appealed by filing a personal restraint petition.

Mr. Jefferson subsequently filed this petition, and later filed an amended petition accepted by this court.

*Analysis*

A petitioner who challenges a decision from which he has had "no previous or alternative avenue for obtaining state judicial review" must show that he is under restraint and the restraint is unlawful. *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994); RAP 16.4(a), (c). Under RAP 16.4, a petitioner may obtain relief by showing either a constitutional violation or a violation of state law. RAP 16.4(c)(2), (6); *see Cashaw*, at 148.

A petition presenting conclusory allegations unsupported by "any facts or evidence" fails to meet the evidentiary threshold required to warrant collateral review on the merits. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990). "A petitioner must present evidence that is more than speculation, conjecture, or inadmissible hearsay." *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 396, 978 P.2d 1083 (1999).

Under RCW 9.95.100, the ISRB shall not release a prisoner prior to expiration of his maximum term, "unless in its opinion his [...] rehabilitation has been complete and he [...] is a fit subject for release." WAC 381-60-160 identifies examples of adequate reasons for a finding of nonparolability, including "active refusal to participate in available program or resources designed to assist an offender to reduce the risk of re-offense," and "evidence that an inmate presents a substantial danger to the community if released." WAC 381-60-160(1), (5). With respect to sex offenders, the ISRB shall order

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the offender released “unless the [ISRB] determines by a preponderance of the evidence that, [...] it is more likely than not that the offender will commit sex offenses if released.” RCW 9.95.420(3)(a).

Inmates have no constitutional right to release prior to the expiration of a valid sentence, to include an indeterminate life sentence imposed under former RCW 9.94A.712. *State v. Clarke*, 156 Wn.2d 880, 890, 134 P.3d 188 (2006). A Board decision made under RCW 9.95.420 is reviewed for an abuse of discretion. *See In re Pers. Restraint of Dyer*, 175 Wn.2d 186, 196, 283 P.3d 1103 (2012). Under this deferential standard of review, courts do not function as “a super [ISRB]” and “will not substitute their discretion for that of the [ISRB].” *Dyer*, 175 Wn.2d at 196. The burden rests with the petitioner to establish that the Board abused its discretion. *Id.* The Board abuses its discretion if it “fails to follow its own procedural rules for parolability hearings or where the ISRB bases its decision on speculation and conjecture only.” *Id.*

Mr. Jefferson raises a number of claims that this court addresses in turn. He initially claims the ISRB relied on “fraudulent information” to deny his conditional release. Specifically, he claims “it was discovered that the ISRDB [sic] depended on fraudulent information produced by the assned [sic] classification counselor Lane whom has been under investigation.” Amended Petition at 2. As noted above, Mr. Jefferson apparently had previous conflicts with CC Lane, and the letter from the OCO notes that given their complicated relationship and history of grievances, having CC Lane involved



in the hearing process could prove problematic.

However, Mr. Jefferson does not specify which information provided by CC Lane was fraudulent, nor does he provide any evidence that CC Lane actually provided fraudulent information at the hearing. Moreover, he does not demonstrate that the ISRB relied on the fraudulent information in making its determination that Mr. Jefferson was not releasable. Mr. Jefferson fails to satisfy his burden as to this ground for relief.<sup>3</sup>

Mr. Jefferson also contends that the ISRB infringed on his rights by requiring him to admit guilt to the crimes of conviction, citing federal case law for the proposition that a parole board may not condition an inmate's release on an admission of guilt.

The record indicates that the ISRB considered Mr. Jefferson's unwillingness to accept responsibility for his crimes (and his inability to participate in SOTAP based on that unwillingness) in making its determination that he was not releasable. Washington courts have recognized that the ISRB may consider an inmate's refusal to take responsibility for his crimes and his failure to participate in treatment when making a

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<sup>3</sup> In his reply, Mr. Jefferson asserted for the first time that CC Lane provided false information regarding the Sinka packet he provided to Mr. Jefferson, and that CC Lane falsely stated that Mr. Jefferson was not in any programs and not holding a job, and that the ISRB denied parole based on this false testimony. This court will not consider arguments made for the first time in a reply brief. *See e.g., Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any event, Mr. Jefferson provides no evidence demonstrating he received the wrong Sinka packet. Moreover, the ISRB decision clearly notes that since 2016, Mr. Jefferson has continued to be employed with positive work evaluations, and the decision does not identify Mr. Jefferson's lack of employment or participation in programs outside of SOTAP as grounds for denying

releasability determination. In *In re Personal Restraint of Dyer*, 164 Wn.2d 274, 189 P.3d 759 (2008), the petitioner argued that the ISRB abused its discretion by basing its decision not to release him on the fact that he had not completed sex offender treatment, which required an inmate to admit his guilt in order to participate. The Supreme Court held that the ISRB properly based its parolability decision upon the objective fact that the petitioner was an untreated sex offender. *Id.* at 287-88. The court noted that:

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 Wash.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 Wash.2d at 176, 985 P.2d 342 (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, 985 P.2d 342. 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.

*Id.* at 288. In light of *Dyer*, Mr. Jefferson fails to demonstrate the ISRB abused its discretion by considering his refusal to accept responsibility and inability to engage in SOTAP when determining whether he was releasable.

Moreover, the ISRB’s decision relied on additional facts beyond Mr. Jefferson’s

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refusal to accept responsibility for his crimes. It also considered the ESRC's assessment that Mr. Jefferson posed a high risk of sexual re-offense. The ISRB was required to consider the ESRC's assessment under RCW 9.95.420(3)(a) and WAC 381-90-050(1)(a), and that assessment supported the ISRB's determination that Mr. Jefferson was not releasable. He fails to demonstrate the ISRB abused its discretion on this ground.

Mr. Jefferson's third ground for relief asserts that no evidence supports the ISRB's first stated finding for denying his condition release, that "End of Sentence Review Committee Risk Level III, aggravated from II due to a pattern of behavior that increases risk for sexual re-offense and predatory behavior." As part of this argument, he notes that he had no prison disciplinary actions or behaviors involving any violence or infractions for sexual misconduct or predatory behaviors, but in fact has been a model citizen while incarcerated. He further notes that the typical factors which tend to show unsuitability, including: an especially heinous, atrocious or cruel commitment offense, a previous record of violent behaviors, sadistic sexual offenses that are charge and proven, or serious misconduct while incarcerated, do not exist here.

RCW 72.09.345(6) provides that "The [ESRC] shall classify as risk level III those offenders whose risk assessments indicate they are at a high risk to sexually reoffend within the community at large." Prior to the 2016 releasability hearing, the ESRC conducted two actuarial risk assessments to determine Mr. Jefferson's risk of sexual recidivism. The Static-99R rated him as Moderate-High risk, while the MnSOST-R rated

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him as low risk. The ESRC recommended an aggravation from a Level II risk classification to a Level III, “as his pattern of behavior increases risk for sexual re-offense and his behavior is predatory.” PRP Response, Ex. 1, Att. C at 5-6.

Although the ESRC report does not specify what pattern of behavior the risk assessment level was based on, it appears the ESRC considered Mr. Jefferson’s reported history, including the 2003 conviction for first degree rape as well as the alleged rape in 2002 and the 2003 allegations of harassment of Mr. Jefferson’s neighbor. The behavior ascribed to Mr. Jefferson during these incidents, particularly the 2003 rape which involved a home invasion of a woman who was a stranger to Mr. Jefferson, could certainly be characterized as predatory.

Contrary to Mr. Jefferson’s assertions, the ISRB was not limited to considering to his infraction history while incarcerated. As WAC 381-90-140 notes, “All relevant information” is admissible in ISRB releasability proceedings. The ISRB was expressly required to consider the ESRC’s report as part of its decision making-process pursuant to RCW 9.95.420(3)(a); WAC 381-90-050(1)(a). The ESRC’s assessment and report supports the ISRB’s first finding in support of denying releasability, and Mr. Jefferson thus fails to demonstrate the ISRB abused its discretion.

Mr. Jefferson next claims the ISRB improperly “used records which are sealed to justify their reason to deny parole. Such records are inadmissible [sic] in an administrative hearing such as the ISRB without the courts [sic] permission.” Amended

Petition at 3.<sup>4</sup>

Mr. Jefferson does not specify which sealed records the ISRB relied on. However, it appears he is referring to the 2005 presentence investigation report which was filed under seal in his criminal case prior to sentencing, and discussed the prior incidents where he was implicated but never charged. Other than asserting the records were sealed, Mr. Jefferson provides no legal basis to support his assertion that the ISRB could not consider these records. RCW 72.09.345(4) authorizes the ESRC to obtain these type of presentence reports as part of its review prepared for the ISRB, providing that in part that, “Notwithstanding any other provision of law, the committee shall have access to all relevant records and information in the possession of public agencies relating to the offenders under review, including... presentence investigations and reports....”). *See also Matter of Sinka*, 92 Wn.2d 555, 566, 599 P.2d 1275 (1979) (recognizing that presentence reports are a part of ISRB parole files). Moreover, as noted above, “all relevant information” is admissible in ISRB releasability proceedings. WAC 381-90-140.

Mr. Jefferson fails to demonstrate that the ISRB abused its discretion by considering the ESRC’s full report, including the pre-sentence report and evidence of other incidents where Mr. Jefferson was implicated but never charged or convicted. Accordingly, he fails to meet his burden to demonstrate he is entitled to relief on this

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<sup>4</sup> In his reply, Mr. Jefferson further argues that the ISRB could not properly consider evidence of other alleged crimes or incidents where he was never arrested or

ground.

Finally, Mr. Jefferson asserts that he has satisfied the entire confinement time imposed by the SRA determinate sentence, and thus the only time remaining to serve is the lifetime term of community custody. However, it appears Mr. Jefferson misapprehends how the indeterminate sentencing scheme operates as to his conviction for first degree rape.<sup>5</sup>

Mr. Jefferson was sentenced under former RCW 9.94A.712(3),<sup>6</sup> which required the court to “impose a sentence to a maximum term consisting of the statutory maximum sentence for the offense and a minimum term either within the standard range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.390, if the offender is otherwise eligible for such a sentence.” Under the sentencing scheme, the offender is required to serve up to the maximum term, unless and until the ISRB determines he is appropriate for conditional release. Former RCW 9.94A.712(4)-(5) (2001); RCW 9.95.420(3). Here, the sentencing court imposed an indeterminate sentence for the first degree rape conviction, with a minimum standard range sentence of 171

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convicted.

<sup>5</sup> For the first time in his reply, Mr. Jefferson asserts that a lifetime maximum sentence constitutes an exceptional sentence and therefore a court may not impose such a sentence without a determination by a jury pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). As noted already, this court will not consider arguments raised for the first time in a reply. *Cowiche Canyon Conservancy*, 118 Wn.2d at 809.

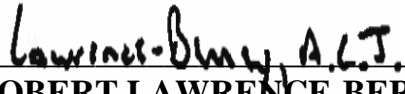
<sup>6</sup> This statute is now codified as RCW 9.94A.507 pursuant to 2008 c 231 § 56

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months, and a maximum sentence of life in prison (the statutory maximum term for first degree rape). Accordingly, although Mr. Jefferson is now eligible for conditional release, he will be required to serve up to the maximum term of life imprisonment until the ISRB determines he is releasable. He fails to demonstrate that he has satisfied the entire confinement time on his sentence or that he is entitled to release to community custody at this time.

Mr. Jefferson fails to demonstrate that the ISRB abused its discretion or that he is otherwise under illegal restraint, and therefore fails to demonstrate that he is entitled to relief. The petition is dismissed pursuant to RAP 16.11(b).

  
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**ROBERT LAWRENCE-BERREY**  
**ACTING CHIEF JUDGE**

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(effective August 1, 2009).