SUPREME COURT NO. 100543-1
COA NO. 37719-9-III

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD RICHARDSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Julie M. McKay, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Richard Richardson asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Richardson requests review of the decision in State v. Richard John Richardson, Court of Appeals No. 37719-9-III (slip op. filed December 9, 2021), attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

Richardson had the right not to testify. He also had the right to allocution, which permits a defendant to provide information to the court to mitigate the sentence. In considering Richardson's request for an exceptional sentence downward, the court did not find a factual basis for the mitigating circumstance of duress, threat or coercion because the testimony at trial did not support it. Did the court err in (a) overlooking evidence produced at trial that supported the mitigator; (b) misapprehending the purpose of allocution in disregarding the

information Richardson supplied at sentencing; and (c) effectively penalizing Richardson for exercising his right not to testify, in violation of due process?

D. STATEMENT OF THE CASE

Isaiah Freeman beat and then strangled Damien Stewart to death during a robbery inside Stewart's apartment. RP[1] 306-16, 411-14, 450-51, 528, 552, 566, 594-98. Richardson, along with two others, took part in the robbery and assault, including handing a frying pan to Freeman that was used to hit Stewart. RP 298-302, 306-07, 411-13, 597-98. Richardson told police that Freeman threatened him before and after the event. Ex. 117 at 15, 17-18, 60, 72. A jury found Richardson guilty of first degree felony murder while armed with a deadly weapon and conspiracy to commit first degree robbery. CP 153-55.

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[1] The verbatim report of proceedings in the prior appeal under 36035-1-III is cited using this format: RP (page number). RP encompasses six consecutively paginated volumes for 10/27/17, 2/9/18, 3/6/18, 3/7/18, 3/8/18, 3/12/18, 3/13/18, 3/14/18, 3/15/18, 4/20/18.

The defense argued for an exceptional sentence downward based on various mitigating factors, including that the victim initiated the incident, Richardson did not have a predisposition to commit the crime, the offense was committed under duress, threat or coercion, and the offense was principally accomplished by another. CP 161-63; RP 1035-40. The defense also argued a standard range punishment with a 20-year mandatory minimum was cruel and unusual punishment, "particularly in light of its application to the felony murder statute and the facts of this case." CP 163; RP 1040-41.

In allocution, Richardson said he knew there was a plan to rob Stewart but not to kill him. RP 1043-44. He went inside the apartment to find out what was going on. RP 1044. He maintained "I had a knife pointed at me, you know, him threatening me. I told him to get the frying pan himself, he demanded me to do it with the knife." RP 1044. Richardson continued: "I couldn't leave because they shut the door on me and had me in there until we left. You know, I felt my life

threatened. If I didn't do what they said, my life, you know, I figured they would – I would have been the next one on the floor." RP 1045.

The court denied the request for an exceptional sentence downward. RP 1047-50. The court did not find Stewart "initiated this, that he willingly participated in either the robbery or the murder, or that he provoked the incident." RP 1048. Nor did it find that Richardson committed the offense under duress, threat or coercion: "Now your position is once inside, a knife was pointed at you and you were contained or kept within the apartment. I do not recall or view the facts that were testified to obviously along the same lines that you do and will not make that finding here today." RP 1048.

The court did find that Richardson was induced to participate, "but that was a choice that you made on that particular couple of days leading up to that incident." RP 1048. The court also found Freeman principally accomplished the crime, but others made bad choices. RP 1049.

The court imposed the low end of the standard range sentence plus the weapons enhancement for a total of 285 months in confinement. CP 21; RP 1050-51.

On appeal, the Court of Appeals reversed the robbery conviction due to instructional error and remanded for further proceedings. State v. Richardson, 12 Wn. App. 2d 657, 659, 459 P.3d 330 (2020).

On remand, the State opted not to retry Richardson on the reversed robbery count. RP[2] 3 (8/10/20). A resentencing hearing took place, at which the State requested that the court impose the low end of the standard range for the murder conviction based on the reduced offender score. Id. at 4.

When it came time for defense counsel's presentation, counsel began by asking for the low end of the standard range consisting of 240 months confinement on the base charge plus 24 months for the deadly weapon enhancement for a total of

[2] This is the transcript for the resentencing, which took place on 8/10/20.

264 months. Id. at 6. Counsel, however, did not stop there. Counsel also referenced the original sentencing hearing, wherein counsel argued the mandatory minimum sentence of 20 years was unconstitutional. Id. Counsel then went on to argue "there are mitigating factors in this case," which were advanced at the original sentencing. Id. at 6-7. Counsel finished up by returning to the argument that the sentence was unconstitutional. Id. at 7.

The court imposed the low end of the standard range sentence, consisting of the 20-year base sentence plus the 24-month deadly weapon enhancement for a total of 264 months in prison. Id. at 9; CP 86-87. The court ruled:

> Defense counsel has restated their request for a mitigated sentence finding the previous sentencing to be unconstitutional, and at that point in time, I did rule against the defense, and I am going to rule against that request at this point in time as well, not finding any mitigating factors and finding this to be a constitutional sentencing for purposes of this case here today. So with that, I will incorporate what I previously said on the record. RP (8/10/20) 10.

On appeal from resentencing, Richardson raised two issues: (1) the court misapplied the law in denying an exceptional sentence; and (2) the sentence constituted unconstitutionally cruel punishment. The Court of Appeals rejected those arguments and affirmed. Slip op. at 1.

E. WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT VIOLATED DUE PROCESS AND THE RIGHT TO ALLOCUTION IN DETERMINING WHETHER AN EXCEPTIONAL SENTENCE DOWNWARD WAS APPROPRIATE.

Richardson did not testify at trial, as was his constitutional right. He sought an exceptional mitigated sentence on the basis that he committed the crime under duress, coercion, threat, or compulsion. The court did not find a factual basis for this mitigating factor because no one testified to the fact at trial. In so doing, the court overlooked evidence produced at trial that supplied a factual basis for the mitigator. The court also violated Richardson's right to allocution in refusing to consider information presented by Richardson in

support of a mitigated sentence. Further, the court, in effect, penalized Richardson for exercising his right not to testify, in violation of due process. U.S. Const. amend. XIV. Richardson seeks review under RAP 13.4(b)(3) and (4).

a. The right to allocution enabled Richardson to supply information in support of a mitigated sentence and the court violated that right, and the right to due process, in refusing to consider that information.

A court "may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of [the Sentencing Reform Act], that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. One statutory mitigating factor is that "[t]he defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct." RCW 9.94A.535(1)(c).

Defense counsel relied on this factor in arguing for an exceptional sentence downward. RP 1037; RP (8/10/20) 6; CP

161-62. Richardson, in allocution, provided a factual basis for it. RP 1044-45. Freeman pointed a knife at Richardson in the apartment, threatening him. RP 1044. When Richardson initially declined to get the frying pan for Freeman, "he demanded me to do it with the knife." RP 1044. Richardson couldn't leave and felt his lie was threatened. RP 1045. "If I didn't do what they said, my life, you know, I figured they would – I would have been the next one on the floor." RP 1045.

The court, though, did not find that Richardson committed the offense under duress, threat, coercion, or compulsion: "Now your position is once inside, a knife was pointed at you and you were contained or kept within the apartment. I do not recall or view the facts that were testified to obviously along the same lines that you do and will not make that finding here today." RP 1048.

The court, in resentencing Richardson, incorporated what it said at the original sentencing hearing. RP (8/10/20) 10. Thus, in considering whether to impose a mitigated sentence,

the court dismissed what Richardson had to say in allocution about being threatened on the basis that no one testified to it at trial. This was error.

First, there was evidence in the record that Richardson was threatened by Freeman, not only after the homicide took place but before as well. That evidence came from Richardson's interview with the police, which was admitted into evidence. Ex. 117 at 60; RP 613-14. The court overlooked this piece of evidence in deciding Richardson's sentence. That itself was error. There was trial evidence that supplied a factual basis for the mitigating circumstance.

Second, even if there were no evidence produced at trial to supply the factual basis for the mitigator, the court still erred in requiring a factual basis for a mitigating factor to be supplied by witness testimony. Allocution can fulfill that function. The right to allocution is separate from and in addition to the right to present testimony. State v. Happy, 94 Wn.2d 791, 793, 620 P.2d 97 (1980).

Richardson had two rights: the right not to testify at trial and the right to allocate at sentencing. The interplay of those two rights, in conjunction with the court's refusal to find a factual basis for the mitigating factor due to lack of trial testimony on the issue, resulted in a due process violation as well as a violation of the right to allocution.

The Fifth Amendment commands no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Under the Fifth Amendment privilege against self-incrimination, a defendant has a constitutional right not to testify. Malloy v. Hogan, 378 U.S. 1, 3, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); State v. Wilcoxon, 185 Wn.2d 324, 329, 373 P.3d 224 (2016). A defendant like Richardson who exercises this unequivocal constitutional right should not be penalized at the sentencing stage for failing to provide testimony at trial that could provide a factual basis to impose a mitigated sentence.

Exercise of the right to allocution is the procedural vehicle by which a defendant who elects not to testify at trial can nevertheless provide information to the court in support of a mitigated sentence. Under the SRA, "[t]he court shall . . . allow arguments from . . . the offender . . . as to the sentence to be imposed." RCW 9.94A.500(1).

Allocution "is the right of a criminal defendant to make a personal argument or statement to the court before the pronouncement of sentence. It is the defendant's opportunity to plead for mercy *and present any information in mitigation of sentence*." State v. Canfield, 154 Wn.2d 698, 701, 116 P.3d 391 (2005) (emphasis added).

The right of allocution is "a significant aspect of the sentencing process." In re Pers. Restraint of Echeverria, 141 Wn.2d 323, 337, 6 P.3d 573 (2000). "It is at the sentencing hearing that the judge must decide whether or not to sentence the defendant to prison and, if so, what the appropriate duration of such confinement should be. It is at the sentencing hearing

that the right of the accused to make a personal statement is vital." Canfield, 154 Wn.2d at 705. Allocution gives the defendant an opportunity to personally present his plea in mitigation: "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Happy, 94 Wn.2d at 793-94 (quoting Green v. United States, 365 U.S. 301, 304, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961)).

Allocution "is not intended to advance or dispute facts," and doing so in allocution subjects the defendant to cross-examination. State v. Lord, 117 Wn.2d 829, 897, 900, 822 P.2d 177 (1991). At the same time, though, one purpose of allocution is to "present any information in mitigation of sentence." Id. at 897 (quoting Black's Law Dictionary 76 (6th ed. 1990)).

Richardson, in telling the court that Freeman had threatened him with a knife, was giving information to the court in mitigation of his sentence. In addressing being threatened by

Freeman with a knife, Richardson was not trying to relitigate contrary evidence. And he was not disputing any fact presented at trial. There was no testimony one way or the other on whether Freeman threatened Richardson with a knife. RP 305-07, 411-13. Richardson's allocution on the point filled a gap in the trial record.

It would be a curious rule of law that permitted a defendant to present any information in mitigation of his sentence but simultaneously permitted the trial court to disregard that information in deciding whether to impose a mitigated sentence.

The trial court misapplied the law on allocution when it refused to consider the information supplied by Richardson in support of a mitigated sentence on the ground that it was not reflected in the trial testimony. That approach subverts one of the purposes of allocution, which is to provide information to the trial court to mitigate the sentence. Canfield, 154 Wn.2d at

701. In this respect, the court turned allocution into a hollow right.

There is undeniable tension between being able to "present any information in mitigation of sentence" in allocution, Canfield, 154 Wn.2d at 701, versus not being able to "advance or dispute facts" in allocution, Lord, 117 Wn.2d at 897. Information offered in mitigation of the sentence will often, at minimum, advance facts. Presenting information devoid of facts would be worthless to a court in making its sentencing decision.

The tension can be reconciled by recognizing a defendant should be allowed to advance facts in allocution when those facts are relevant to a request for a mitigated sentence. The trial court should consider whatever the defendant has to offer on the point and weigh it accordingly. If a contrary rule prevailed, a defendant in Richardson's position would be forced to give up his constitutional right against self-incrimination by testifying

at trial in order to present facts to support a later request for an exceptional sentence downward.

As Richardson exercised his right not to testify, allocution was his only opportunity to given information to the court in support of a mitigated sentence. The court, by requiring trial testimony to establish a basis for the mitigating factor, effectively penalized Richardson for exercising his right not to testify at trial, where such facts in support of the mitigator could have been produced.

"The imposition of a penalty for the exercise of a defendant's legal rights violates due process." State v. Sandefer, 79 Wn. App. 178, 181, 900 P.2d 1132 (1995). "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" United States v. Goodwin, 457 U.S. 368, 372, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)). The trial court's rejection of a mitigated sentence RCW

9.94A.535(1)(c) was the punishment inflicted on Richardson for failing to testify at trial. The remedy is remand for resentencing.

b. The Court of Appeals' resolution of the issue is flawed.

The Court of Appeals held Richardson's argument was not properly before the court on review because he did not request an exceptional sentence at his second sentencing hearing. Slip op. at 5. "Mr. Richardson asked for a low-end standard range sentence. While suggesting that there were mitigating circumstances, he did not ask the court to consider those circumstances as a basis to impose an exceptional sentence." Slip op. at 5.

Defense counsel's sentencing argument was not a model of clarity but the Court of Appeals misread the record in terms of what arguments were ruled on. Defense counsel began by asking for a sentence at the low end of the standard range, but also presented an alternative request for a mitigated exceptional

sentence. RP 6-7 (8/10/20). If counsel was content with only asking for the low end of the standard range, there would be no reason to additionally argue that such a sentence was unconstitutional and that mitigating factors should be taken into account.

The Court of Appeals pointed out counsel did not utter the phrase "exceptional sentence" at resentencing (slip op. at 4), but there are no magic words that need to be used to request an exceptional mitigated sentence. In context, it was clear that defense counsel at resentencing was reiterating the arguments for a mitigated sentence that were advanced at the original sentencing hearing. That is why counsel reminded the court of the "mitigating factors in this case." Id. at 6.

The trial court labored under no misapprehension as to what defense counsel was seeking. The trial court recognized counsel had "restated their request for a mitigated sentence" and that the court had denied that request at the first sentencing hearing. RP (8/10/20) 10. For resentencing, the court again

ruled against Richardson on the matter, expressly did not find "any mitigating factors," and incorporated what the court previously said on the record. RP (8/10/20) 10. Fairly read, the trial court treated defense counsel's request as a restated request for an exceptional mitigated sentence and denied that request. The court's ruling on this matter is therefore a proper part of the present appeal.

The Court of Appeals alternatively held that, even if it were to consider the merits, Richardson's challenge to the sentence fails because the court "did not refuse to consider evidence of mitigation" but rather, "after hearing from Mr. Richardson and his attorney, the trial court disagreed with their assessment of the credibility of the information provided." Slip op. at 5-6.

The record does not show the court rejected Richardson's request for an exceptional sentence downward based on an adverse credibility finding regarding Richardson's claim of being threatened. At no time did the court say Richardson's

account was not credible. Instead, the court did not find the mitigator because no such fact was produced during trial testimony. RP 1048. As argued, that was error because facts in support of a mitigated sentence need not be produced in the form of trial testimony. Allocution can be used to present facts in support of a mitigated sentence.

A sentencing court's decision will be reversed if the court misapplies the law. State v. Haag, 198 Wn.2d 309, 317, 495 P.3d 241 (2021). The sentencing court here misapplied the law regarding what information it could rely on in determining whether a factual basis for a mitigating factor existed.

F. CONCLUSION

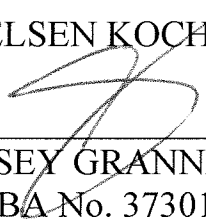
For the reasons stated, Richardson requests review.

I certify that this document was prepared using word processing software and contains 3281 words excluding those portions exempt under RAP 18.17.

DATED this 6th day of January 2022.

Respectfully submitted,

NIELSEN KOCH, PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. RICHARD JOHN RICHARDSON, Appellant.	)	No. 37719-9-III UNPUBLISHED OPINION

STAAB, J. — Richard John Richardson appeals the sentence imposed following remand from an earlier appeal. He contends that the trial court failed to consider evidence of mitigating circumstances supporting his request for an exceptional sentence. In addition, Mr. Richardson contends that the standard-range sentence imposed by the trial court was disproportionate to his culpability and violates his constitutional rights against cruel punishment. We affirm.

FACTS

Mr. Richardson and three other codefendants hatched a plan to rob one of their drug dealers. While planning the robbery, one of the men, Isaiah Freeman, suggested killing the victim. During the robbery, Mr. Richardson acted as a lookout and a participant in the robbery and murder. In 2018, a jury found Mr. Richardson guilty of

murder in the first degree under the felony murder statute and conspiracy to commit first degree robbery. Report of Proceedings (RP) (March 15, 2018) at 997-98. The detailed allegations underlying the convictions are laid out in *State v. Richardson*, 12 Wn. App. 2d 657, 459 P.3d 330 (2020).

At his April 20, 2018 sentencing, Mr. Richardson raised several issues. He argued that the murder and robbery convictions constituted same criminal conduct for purposes of calculating Mr. Richardson's offender score. He also requested an exceptional sentence below the standard range based on mitigating circumstances. And finally, he asserted that the mandatory minimum sentence was void for vagueness as applied to felony murder and constituted cruel punishment given Mr. Richardson's level of involvement.

In support of his request for an exceptional sentence, Mr. Richardson's attorney pointed to several mitigating factors, including duress and inducement. Counsel pointed out that Mr. Richardson was not privy to some of the statements by Freeman about plans to kill the victim. Counsel also noted that after the crime was completed, Freeman threatened all of the other participants with harm if they said anything.

Mr. Richardson did not testify at his trial. During allocution at his April 20, 2018 sentencing, he told the judge that he was not aware of plans to kill the victim. Mr. Richardson also asserted that Freeman threatened him during the commission of the murder. While he admitted being in the room during the murder and handing a frying

pan to Freeman who was standing over the victim, Mr. Richardson explained that Freeman was threatening him (Richardson) with a knife at the time.

Following Mr. Richardson's allocution, the trial court calculated his offender score at 2, finding that the robbery and murder did not constitute the same criminal conduct. The court calculated Mr. Richardson's standard range for first degree murder at 261 to 347 months. Next, the court recognized that mitigating factors would allow the court to sentence below the standard range. Nevertheless, the court declined to find mitigating circumstances, noting that the evidence at trial did not support Mr. Richardson's claim of duress or inducement. Ultimately, the court rejected the State's request for a high-end standard range sentence. Instead, the court imposed a low-end sentence of 261 months, plus 24 months for the deadly weapon enhancement, to run concurrent with the sentence of 30.75 months on the robbery conviction.

In his first appeal, Mr. Richardson challenged a hearsay objection, the jury instruction on robbery, the calculation of his offender score, and the imposition of financial obligations. This court reversed his conviction for conspiracy to commit first degree robbery. *Richardson*, 12 Wn. App. 2d at 668. The State chose not to retry Mr. Richardson on the robbery charge. At Richardson's August 10, 2020 resentencing, the parties acknowledged the mandatory minimum sentence of 20 years for first degree murder under RCW 9.94A.540(1). The court calculated Mr. Richardson's offender score

at zero and his standard range at 240 to 320 months plus a 24-month deadly weapon enhancement.

The State asked for a sentence at the bottom of the standard range. Notably, Mr. Richardson's attorney agreed with the State, stating, "So we are asking for the Court to impose the low end of the range, 240 months, and then with the additional 24 months deadly weapon enhancement for 264 months." Supp. RP at 6. Although counsel commented that there were mitigating factors, as addressed at the first sentencing hearing, counsel did not ask the court to go below the standard range and never uttered the phrase "exceptional sentence." Nor does the record contain a sentencing memorandum requesting an exceptional sentence. Counsel did indicate that he was preserving his prior constitutional objection to the mandatory minimum sentence.

The court offered Mr. Richardson an opportunity for allocution, but he declined. The court then imposed the sentence requested by both parties of 264 months, a sentence at the bottom of the standard range.

ANALYSIS

Mr. Richardson appeals his standard range sentence. As a general rule, standard range sentences cannot be appealed. RCW 9.94A.585(1); *State v. Friederich–Tibbets*, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994). While a defendant may not appeal the amount of time imposed under a standard range sentence, a defendant can appeal the

procedure by which the sentence was imposed. *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719 (1986).

Mr. Richardson argues that the trial court's procedures at resentencing were flawed. He contends that the trial court overlooked evidence of mitigation presented at trial and failed to consider Mr. Richardson's allocution at his first sentencing hearing, thereby penalizing Mr. Richardson for exercising his right not to testify at trial. All of these issues are premised upon Mr. Richardson's assertion that he requested an exceptional sentence at his second sentencing. He did not. Mr. Richardson asked for a low-end standard range sentence. While suggesting that there were mitigating circumstances, he did not ask the court to consider those circumstances as a basis to impose an exceptional sentence. The phrase "exceptional sentence" was never uttered. There was no request, written or oral, for a sentence below the standard range. Since Mr. Richardson did not ask for an exceptional sentence, he cannot complain on appeal that the trial court's procedure deprived him of a meaningful opportunity for an exceptional sentence. RAP 2.5(a); *See State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015).

Even if we were to consider the merits, Mr. Richardson's challenge to the sentence that he asked for would fail. On appeal, Mr. Richardson complains that the court did not consider the evidence at trial or his first allocution in support of mitigating circumstances. In truth, there is nothing in the record to support this argument. The court did not refuse to consider evidence of mitigation. Instead, after hearing from Mr. Richardson and his

attorney, the trial court disagreed with their assessment of the credibility of the information provided. Where a trial court has considered the facts and concluded there is no basis for an exceptional sentence, the court has exercised discretion. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

For the first time on appeal, Mr. Richardson suggests that the 20-year mandatory minimum sentence for first degree murder under RCW 9.94A.540(1) can be read to incorporate any sentencing enhancements. In other words, he contends that the 20-year mandatory minimum is met with an 18-year sentence added to a 24-month deadly weapon enhancement. Richardson failed to raise this argument below, and he does not cite any direct authority on appeal to support this position. We decline to consider the argument. RAP 2.5(a).

Finally, Mr. Richardson challenges the constitutionality of the 20-year mandatory minimum sentence as violating his right to be free from cruel punishment. Mr. Richardson argues that the sentence of 262 months for a conviction of felony murder violates both article I, section 14 of the Washington State Constitution and the Eighth Amendment of the United States Constitution. He contends that the sentence is grossly disproportionate to the offense based on his culpability in this case.

Although a sentence within the standard range for an offense is not appealable, Mr. Richardson is challenging the constitutionality of the sentence and whether it amounts to "cruel punishment" under article I, section 14 of the Washington State

Constitution. RCW 9.94A.585(1). A defendant is permitted to challenge the sentence imposed as unconstitutionally disproportionate to the offense that he committed. *State v. Fairbanks*, 25 Wn.2d 686, 171 P.2d 845 (1946). This issue requires the court to interpret the constitution in the context of the sentence imposed on Mr. Richardson. As a result, the issue is reviewed de novo. *State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015).

The Washington State Constitution prohibits the infliction of "cruel punishment." Article I, section 14. "Cruel punishment" under this section can include a sentence that is disproportionate to the offense. *State v. Manussier*, 129 Wn.2d 652, 676, 921 P.2d 473 (1996). Although Richardson here has asserted that his sentence violates both this provision of the Washington State Constitution and the Eighth Amendment, "the state constitutional proscription against cruel punishment affords greater protection than its federal counterpart." *Manussier*, 129 Wn.2d at 674. "Therefore, if the state provision is not violated, the statute violates neither constitution." *State v. Morin*, 100 Wn. App. 25, 29, 995 P.2d 113 (2000).

We analyze Richardson's constitutional challenge with a strong presumption that the punishment authorized by the legislature is constitutional. The legislature has "virtually unlimited" power to "define crimes and prescribe punishments." *State v. Cook*, 26 Wn. App. 683, 686, 614 P.2d 215 (1980). As a result, "[i]t is the prerogative of the legislature to determine the kinds and severity of punishment appropriate to each offense

and to each degree of a given offense, subject only to the limitations that it not be cruel or unusual." *Id.* (citing *Hendrix v. Seattle*, 76 Wn.2d 142, 157, 456 P.2d 696 (1969), *overruled on other grounds by McInturf v. Horton*, 85 Wn.2d 704, 538 P.2d 499 (1975)).

Mr. Richardson raises an as-applied challenge to the constitutionality of his sentence, arguing that it is grossly disproportionate to his culpability. Under our State Constitution, Mr. Richardson's punishment for first degree felony murder is constitutionally disproportionate only if the punishment is clearly arbitrary and shocking to the sense of justice. *State v. Smith*, 93 Wn.2d 329, 344-45, 610 P.2d 869 (1980). The appropriate test for this analysis was set forth in *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980). *Fain* instructs the court to look at (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in the same jurisdiction. *Id.* at 397.

The first *Fain* factor takes into account not only the general nature of the offense, but also the defendant's particular culpability. *State v. Moretti*, 193 Wn.2d 809, 831-32, 446 P.3d 609 (2019). In this case, Mr. Richardson was convicted of first degree felony murder. This is a class A felony with a maximum possible sentence of life imprisonment. RCW 9A.32.030(2); RCW 9A.20.021(1)(a). The mandatory minimum sentence is 20 years. RCW 9.94A.540(1)(a). The crime for which Richardson was sentenced was a serious, violent offense.

Categorically, the felony murder statute has withstood scrutiny against claims that it constitutes cruel and unusual punishment. "The felony murder rule is harsh, but it has repeatedly survived claims that it violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I, sections 3, 12, and 14 of the Washington Constitution." *State v. Gilmer*, 96 Wn. App. 875, 892, 981 P.2d 902 (1999), *overruled in part on other grounds by State v. Salavea*, 151 Wn.2d 133, 86 P.3d 125 (2004); *See also State v. Goodrich*, 72 Wn. App. 71, 77-78, 863 P.2d 599 (1993); *State v. Crane*, 116 Wn.2d 315, 333, 804 P.2d 10 (1991); *State v. Wanrow*, 91 Wn.2d 301, 588 P.2d 1320 (1978).

While Richardson claims he is not raising a categorical challenge, he nonetheless argues that a person who commits first degree felony murder is generally less culpable than one who commits intentional murder, and yet the sentencing range for both crimes is the same. In essence, he posits that if a person who commits intentional murder can be sentenced to 20 years, then a person who commits the less culpable crime of felony murder should get less than 20 years. We reject this argument for two reasons.

First, Richardson's comparison argument is essentially a categorical challenge to the felony murder penalties. This argument has been rejected in the past, and we do not deviate from that precedent now. Moreover, as the State points out, felony murder is not simply a more serious version of the underlying felony, but a different crime altogether;

one that rises to the level of murder. *See Bowman v. State*, 162 Wn.2d 325, 333, 172 P.3d 681 (2007).

Nor is the first *Fain* factor a comparison analysis. In *Fain*, the court held that a life sentence as a habitual offender was unconstitutionally disproportionate to the underlying offenses. In considering the nature of the offenses, the court noted that Fain's underlying crimes were mere property crimes with aggregate losses less than $470. *Fain*, 94 Wn.2d at 397-98. The crimes did not include violence, threats, or weapons. *Id.* at 398. Instead, the offenses were considered relatively minor. *Id.* In this case the predicate felony was first degree burglary, a class A felony, which requires the use of violence or the possession of a deadly weapon. RCW 9A.52.020. Unlike the defendant in *Fain*, Richardson was not sentenced to 20 years for a relatively minor offense.

Reviewing the nature of the offense also requires that we consider the culpability of the offender who committed the crime. *State v. Moretti*, 193 Wn.2d at 832. Richardson minimizes his own culpability for this crime, arguing that he himself never intended to kill anyone and did not, in fact, kill the victim. This argument fails to acknowledge that Richardson participated in a violent burglary that turned deadly. Richardson had several opportunities to eject himself from this crime as it evolved from a burglary to a murder. Richardson stood guard as the crime began, assured a neighbor there were no problems, restrained Stewart, kicked him in the face, and handed Freeman

a frying pan used to hit Stewart in the face. Richardson's participation was not de minimis.

Turning to the second *Fain* factor, Richardson argues that the legislative purpose of the felony murder rule—to deter persons from causing a homicide during the commission of a felony—is ineffective because most felons, including Richardson, do not know about the felony murder. He does not cite any authority for his conclusion. Moreover, deterrence is just one of the penological objectives of the felony murder statute; another objective is retribution. "The legislature's intent underlying the felony murder statutes is to punish those who commit a homicide in the course of a felony under the applicable murder statute." *State v. Muhammad*, 194 Wn.2d 577, 606, 451 P.3d 1060 (2019). Richardson's actions fit squarely within the purpose of the statute.

As to the third *Fain* factor, Richardson acknowledges that Washington's sentencing scheme for first degree felony murder is comparable to other jurisdictions.

The fourth *Fain* factor requires a comparison of the sentence for felony murder with other offenses in Washington. In *Fain*, the court evaluated the defendant's life sentence as a habitual offender against the sentences he would have received without the enhancement, noting that the most serious offense carried a maximum sentence of ten years. *Fain*, 94 Wn.2d at 401. Richardson argues that first degree murder is the only offense that carries a mandatory minimum sentence of 20 years. *See* RCW 9.94A.540(1)(a). He continues that as between the different means of committing first

degree murder, felony murder is the least culpable because it does not require proof of an intent to kill. While Richardson argues that he is not the worst of the worst, he fails to establish that he would otherwise receive a shorter sentence under a different statute for his participation in this murder.

After applying the four factors set forth in *Fain*, we concluded that Richardson's sentence of 262 months, a sentence at the bottom of the standard range for participating in a burglary which culminated in a homicide, was not arbitrary or unjust. Categorically, the standard range punishment imposed on Mr. Richardson here did not amount to "cruel punishment" under article I, section 14. It was properly within the guidelines decided by the legislature, which determined the guideline sentencing range appropriate for the offense of felony murder.

We affirm Mr. Richardson's sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Fearing, J.

Pennell, C.J.

NIELSEN KOCH P.L.L.C.

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