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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RANDY P. CAPPS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold E. Johnson

No. 94-1-01998-0

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court err when it did not transfer defendant's motion for relief from judgment pursuant to CrR 7.8(c) when it found the motion to be without merit?
2. Is defendant's motion time-barred as there have been no significant changes in the law which would affect him since the time he was sentenced?

B. STATEMENT OF THE CASE.

1. FACTS

Randy Capps, hereinafter "defendant," pleaded guilty to one count of aggravated murder on May 1, 1995. CP 10-14. He was sentenced to the statutorily imposed mandatory sentence of life without the possibility of parole or early release. CP 15-24. He was 20 years old at the time he committed the aggravated murder. CP 26-31.

In 2017, defendant filed a motion for relief from judgment pursuant to CrR7.8(b). *Id.* His argument for relief related to being entitled for the sentencing court to consider his age at the time of the murder. *Id.* He relied on *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), and *In re Light-*

Roth, 200 Wn. App. 149, 401 P.3d 459 (2017) as ground for relief as he claimed such constituted a significant change in the law. *Id.* He stated he was entitled to resentencing simply on first degree murder, without the aggravating factors being applied. *Id.*

Pierce County Superior Court Judge Garold Johnson denied his motion. CP 32-36. The court found defendant was not timed-barred under RCW 10.73.090 or. 100, but that he had not shown how his age alone was sufficient grounds to be entitled to resentencing. *Id.* Defendant subsequently filed a timely notice of appeal. CP 37.

C. ARGUMENT.

1. THE TRIAL COURT SHOULD HAVE TRANSFERRED DEFENDANT'S MOTION TO THIS COURT UNDER CrR 7.8(c).

A court abuses its discretion when its decision is based on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). CrR 7.8 provides "The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing." CrR 7.8(c)(2). If the

court does not transfer a motion to the Court of Appeals, it shall order a show cause hearing to address the matter. CrR 7.8(c)(3). Under the court rule, such transfer procedures or show cause hearings are necessary. *Id.*

The State concedes that the court here did not transfer the motion to the Court of Appeals or order a show cause hearing. Rather, the court found the issue was not time-barred, but denied the motion nonetheless. CP 32-36. This is not a valid option under CrR 7.8. The court here abused its discretion but not transferring the motion to this Court.

The appropriate remedy would ordinarily be to remand this matter back to the court to enter an order under CrR 7.8 to transfer the motion to this Court as a personal restraint petition. At this point, defendant's argument is time-barred as *O'Dell* was not a significant change in the law. *Light-Roth* 191 Wn.2d at 330. As such, the court on remand must transfer the motion to this Court as a time-barred motion and as being without merit. CrR 7.8(c). However, in the interests of judicial economy, this Court could choose to address the substantive matters defendant raises as a PRP in its consideration of this appeal. Regardless of what this Court elects to do at this time, the matter should eventually end up before it as a PRP.

2. DEFENDANT’S MOTION IS TIME-BARRED AS THERE HAVE BEEN NO SIGNIFICANT CHANGES IN THE LAW AS APPLIED TO HIM SINCE HE WAS SENTENCED.¹

Defendant argues that he is entitled to a new sentencing hearing as he committed his crimes at the age of 20. *See* Brf. of App. at 6-10. But as explained below, there have been no significant changes in the law as applied to him since he was sentenced making his claim time-barred and he was sentenced to the only possible penalty for the crime of aggravated murder to which he pleaded guilty.

- a. There have been no significant changes in the law and hence defendant is not exempted from the one year time-bar.

Both in his motion for relief from judgment and in his current appeal, he argues there has been a significant change in the law entitling him to being resentenced. CP 32-36; Brf. of App. at 7-9. He is mistaken.

In 2015, the Court issued its holding in the seminal case of *State v. O’Dell*, 183 Wn.2d at 358. In *O’Dell*, the Court allowed for age to be a mitigating factor entitling a defendant to an exceptional sentence below the standard range, but age alone was not a *per se* mitigating factor. *O’Dell*, 183 Wn.2d at 695. *O’Dell* held that a trial court must have the discretion to consider youth as a mitigating factor. *O’Dell*, 183 Wn.2d at 695-696. Youth

¹ The State responds to defendant’s substantive argument in the event this Court elects to address the claims on the merits at this time.

alone could “...amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range.” *Id.* Interestingly, the Court in its holding specifically references the fact how O’Dell himself had only turned eighteen a few days before his charged offense. *Id.*² The Court stated youth must be considered for “...an offender like O’Dell, who committed his offense *just a few days* after he turned 18 [sic].” *Id.* (emphasis added).

The significance of *O’Dell* was unclear as to its retroactive effect and whether it constituted a significant change in the law until the Court issued its ruling in *Matter of Light-Roth*, 191 Wn.2d 328, 422 P.3d 444 (2018), in August 2018. *Light-Roth* concerned a PRP where the judgment and sentence became final more than one year prior to the PRP’s filing. *Light-Roth*, 191 Wn.2d at 332. This was the first opportunity for our high court to determine if *O’Dell* constituted a significant change in the law, hence exempting a subsequent petition from the one year time-bar. *Light-Roth* 191 Wn.2d at 330. The Court explicitly held that *O’Dell* was not a significant change in the law exempting a PRP from the time-bar. *Id.*

Defendant here claims though how *O’Dell* represented a significant change in the law for offenders like himself whom were sentenced prior to

² Ten days to be precise. *O’Dell*, 183 Wn.2d at 683.

the United States Supreme Court issuing its decision in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). *See* Brf. of App. at 7. He claims that in *Roper* for the first time, the Supreme Court recognized juveniles and adults were different for sentencing purposes. *Id.* While such is true, *Roper* and its progeny set a bright-line rule of eighteen to differentiate between an adult and a juvenile for sentencing. In *Roper* the Court drew a bright-line at age eighteen when holding the death penalty was unconstitutional for juveniles. The Court held, “the age of 18 [sic] is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for the death penalty ought to rest.” *Roper*, 543 U.S. at 574. Using the same logic as *Roper*, in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), the Court held “those who are below [the age of eighteen] when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.” *Graham*, 560 U.S. at 74-75. Finally, in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the Court held “mandatory life for those *under the age of 18* [sic] at the time of their crimes violates the Eighth Amendment...” *Miller*, 567 U.S. at 465 (emphasis added). Thus the change in the law differentiated between those under eighteen and those over eighteen.

Defendant here was twenty years old when he committed his crime. CP 26-31. *Roper*, *Graham*, and *Miller* are not applicable to him. He has not shown otherwise. *O'Dell* does not provide him relief as it is not a significant change in the law. *Light-Roth* 191 Wn.2d at 330. This Court should reject his requested relief as being without merit.

- b. Federal and Washington State precedent only applies to juveniles under the age of eighteen and does not benefit defendant.

“Except as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years.” RCW 26.28.010. Our State Constitution guarantees a voting age of eighteen to its citizens. Article VI, section 1. It also states that individuals whom are at least eighteen years old are liable for service in the militia. Article X, section 1. Similarly, state law explicitly states a juror must be at least eighteen years old (RCW 2.36.070(1)) and marriage licenses can be entered into without parental consent once a person is eighteen (RCW 26.04.210(1)). Certain rights also only take effect or can be lost upon turning eighteen. For instance, the right to bear arms enshrined in Article I, section 24 of our state constitution does not necessarily apply unrestricted to those under the age of eighteen. *See State v. Sieyes*, 168 Wn.2d 276, 225 P.3d 995 (2010) (the constitution is not violated by limiting the circumstances those under eighteen can possess a firearm). Our state’s

“paramount duty” of educating “children” under Article IX, section 1, only applies to those under the age of eighteen. *Tunstall ex rel Tunstall v. Bergeson*, 141 Wn.2d 201, 219, 5 P.3d 691 (2000). Finally, within our justice system, a “juvenile,” “youth,” and “child” is defined as “...any individual who is *under the chronological age of eighteen*” and who has not been transferred to an adult court. RCW 13.40.020(15) (emphasis added). Thus, our constitution and state statutes make it abundantly clear that a juvenile and a youth is one who is under eighteen years old. An adult – and the full consequences of being an adult – apply to one who is over the age of eighteen.

The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment while Article I, section 14 of the Washington State Constitution prohibits cruel punishment. Our Supreme Court has held that Article I, section 14 often provides greater protection than the federal constitution. *State v. Rivers*, 129 Wn.2d 697, 712, 921 P.2d 425 (1996) (citing *State v. Fain*, 94 Wn.2d 387, 392-393, 617 P.2d 720 (1980)). Hence, if a sentence does not violate Article I, section 14, it does not violate the Eighth Amendment. *Id.*

Fain created four factors to be considered in determining whether punishment is cruel under Article I, section 14: (1) the nature of the offense; (2) the legislative purpose behind the statute; (3) punishment which would

have been received in other jurisdictions; and (4) the punishment which would have occurred for the same or other similar offense in the same jurisdiction. *Fain*, 94 Wn.2d at 397. For life sentences without parole for juveniles, the Supreme Court has rejected the *Fain* analysis and rather has adopted the categorical bar analysis. *State v. Bassett*, – Wn.2d –, 428 P.3d 343 (2018). The categorical bar analysis looks at (1) if there is an objective indicia of a national consensus against the sentencing practice at issue; and (2) the court’s own independent judgment based on the standards of controlling precedent and the court’s understanding and interpretation of the section’s text, history, and purpose. *Bassett*, 428 P.3d at 350 (quoting *Graham v. Florida*, 560 U.S. 48, 61 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)). *Bassett* though only applied to juveniles, not adults. *Bassett*, 428 P.3d at 346. Defendant cites to no case, text, legislative history, or purpose which states otherwise. Yet, under either analysis, what defendant claims he is entitled to – an exceptional downward sentence without the aggravated murder conviction– would not apply.

Beginning with *Fain*, a bright-line rule of age eighteen satisfies both the Eighth Amendment and Article I, section 14. When considering the nature of the offense, our legislature has elected to treat aggravated murder as a unique category of murder separate from all other crimes and punishments. Our legislature made it clear that no court rule promulgated

by the Supreme Court will supersede or alter any provision of RCW 10.95.010. Our legislature then took care to prescribe specific protected classes of people whom if killed, their murderer can be charged with aggravated murder. *See* RCW 10.95.020. Similarly, certain actions by a murderer, such as killing while in flight from a specific crime or killing multiple people, could also elevate to aggravated murder. *Id.* This demonstrates how aggravated murder is not a mere crime, but rather an offense of particular concern and one which is extremely serious.

Second, the legislative purpose behind the statute appears to be in order to protect certain classes of people and prohibit certain actions. This is likely meant as a deterrence factor. *See State v. Witherspoon*, 180 Wn.2d 875, 888, 329 P.3d 888 (2014). It is also likely an attempt to segregate the most heinous murderers from the rest of society. *Id.*

Third, defendant has cited to no law or authority to indicate life without parole would not be the same penalty in other jurisdictions for similar crimes. But even if he did, defendant would be hard-pressed to find support for a contention that other similar jurisdictions would not impose life without parole. In fact, other than Alaska, every single state, the District of Columbia, the federal government, and the military authorize a sentence

of life without parole for at least some type of murder. *See* <https://deathpenaltyinfo.org/life-without-parole>.³

Finally, the legislature made clear how the only penalty for aggravated murder is life without parole. RCW 10.95.030(1). This is proportional with other offenses, many of which are less severe in nature. Under our persistent offender laws, an offender convicted of their third “most serious offense” receives an automatic sentence of life without the possibility of parole. RCW 9.94A.570. Some of these most serious offenses include willful alteration and forgery of medication, robbery in the second degree, manslaughter in the second degree, indecent liberties, assault in the second degree, and assault of a child in the second degree. *See* RCW 9.94A.030(33), RCW 70.245.200(1). Aggravated murder is a significantly more serious offense than any of the above crimes, not to mention other most serious offenses not listed above. *See* RCW 9.94A.030(33). Our courts have upheld the constitutionality under *Fain* for these non-murder offenses, offenses less severe than aggravated murder. *See Witherspoon*, 180 Wn.2d at 889. Thus, under the fourth *Fain* factor there is proportionality.

Even under a categorical bar analysis, defendant’s sentence is constitutional. First, the objective consensus at the national level is to create

³ Alaska mandates a defendant convicted of first degree murder to serve a mandatory term of imprisonment of 99 years. AS 12.55.125.

a bright-line rule at age eighteen as demonstrated by *Roper*, *Graham*, and *Miller*. See Section C.2.a, *supra*; see also *Roper*, 543 U.S. at 574, *Graham*, 560 U.S. at 74-75, *Miller*, 567 U.S. at 465. The national objective consensus is not to treat those over eighteen as children. On the contrary, as the cases make clear, the national consensus is to treat those over eighteen as adults for Eighth Amendment purposes.

Roper in particular examined how virtually every state makes the age of eighteen the time when one is considered an adult. The *Roper* Court included three appendices which conducted a state-by-state breakdown of the age of voting, serving on juries, or marrying without parental consent. *Roper*, 543 U.S. at Appendices B-D. The Court stated how “almost every state prohibits those under [eighteen] years of age” from participating in the above activities. *Roper*, 543 U.S. at 569. More specifically, all 50 states and the District of Columbia have set eighteen as the minimum age to vote⁴ and 45 states including D.C. have set eighteen as the minimum age for jury service and to marry without parental consent. *Roper*, 543 U.S. at Appendices B-D. Hence, the national consensus demonstrates the age of eighteen is a bright-line cutoff to be treated as an adult, including for Eighth Amendment purposes.

⁴ While the Twenty-Sixth Amendment of the United States Constitution provides those eighteen or older can vote, *Roper*’s Appendix B indicates that no state has a lower minimum voting age.

The second factor in the categorical bar analysis is the court's own independent judgment based on the standards of controlling precedent and the court's understanding and interpretation of the section's text, history, and purpose. *Bassett*, 428 P.3d at 350 (quoting *Graham v. Florida*, 560 U.S. at 61). Defendant does not meet this factor. Our courts have historically held Article I, section 14 – and by implication the Eighth Amendment – to not be violated by imposing a mandatory life sentence without the possibility of parole for murder committed as an adult. *State v. Moen*, 4 Wn. App.2d 589, 601, 422 P.3d 930 (2018) (citing *In re Snook*, 67 Wn. App. 714, 720, 840 P.2d 207 (1992)). *Snook* noted how since at least 1978 our courts have rejected the claim that life without parole for murder is an unconstitutional sentence constituting cruel punishment. *Snook*, 67 Wn. App. at 720 (citing *State v. Forrester*, 21 Wn. App. 855, 870, 587 P.2d 179 (1978)). This is the case even for mandatory life without parole sentences. *Forrester*, 21 Wn. App. at 870-871.

At no time in our State's history have our courts found there to be a categorical bar banning life without parole sentences for adults. A bright-line rule allowing those over the age of eighteen who commit aggravated murder to be sentenced to life without the possibility of parole is in line with the text, history, and purpose of the Eighth Amendment, Article I, section 14, and RCW 10.95. Defendant has failed to meet his burden to show

otherwise. He has not shown either constitutional error resulting in actual or substantial prejudice or a non-constitutional error amounting to a fundamental defect inherently resulting in a miscarriage of justice. This Court should dismiss the petition as being without merit.

- c. Aggravated murder carries a mandatory penalty of life without the possibility of parole and the SRA's exceptional sentencing provisions do not apply.

Aggravated murder is Washington's most serious criminal offense and has its own sentencing chapter. RCW Ch. 10.95. "RCW 10.95.030(1) requires trial courts to sentence persons convicted of aggravated first degree murder to life imprisonment without possibility of release or parole..." *State v. Meas*, 118 Wn. App. 297, 306, 75 P.3d 998, 1002 (2003) (citations omitted).

Washington's current aggravated murder sentencing statute was enacted in 1981, the same year as the SRA. *See* Laws of 1981, Ch.s 137 and 138. Enactment of the aggravated murder statute repealed prior statutory provisions related to punishment of Washington's most serious crime, aggravated first degree murder. *Id.* A new section was added to Title 10 governing the imposition of one of two possible sentences in aggravated murder cases. Laws of 1981, Ch. 138. *See* former RCW 10.95.030(1) and RCW 10.95.030(2). Until 2014, that provision allowed for only two

possible sentences for defendants convicted of aggravated murder, be they juveniles or adults: death or life in prison without parole. *Id.*

Aggravated murder sentencing was amended in 2014 in response to the United States Supreme Court's *Miller* decision. The 2014 so called *Miller* fix legislation amended Washington's statutory provisions to apply to juvenile aggravated murder offenders. *See* Laws of 2014, Ch. 130, section 1. The purpose of the amendments was to address the "mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*. . . ." RCW 10.95.030(3)(b).

Prior to 2014, there had never been any indication that the sentencing scheme which applies to non-aggravated murder cases, the SRA, applied to the aggravated murder statute. *Meas*, 118 Wn. App. at 306.

RCW 10.95.030(1) requires trial courts to sentence persons convicted of aggravated first degree murder to life imprisonment without possibility of release or parole. . . The only statutory exception occurs when the trier of fact finds no mitigating circumstances to merit leniency in a special sentencing proceeding, in which case, the sentence is death.⁵

Id. (citation omitted) (citing *State v. Ortiz*, 104 Wn.2d 479, 485-486, 706 P.2d 1069 (1985)).

⁵ The State notes that while the original statute also allowed death as punishment, the Supreme Court's decision in *State v. Gregory*, – Wn.2d –, 427 P.3d 621 (2018), found the statute to be unconstitutional as applied to the death penalty. The State only cites to death penalty cases to demonstrate the mandatory sentencing requirements for aggravated murder which are separate from the SRA.

If the SRA applied to aggravated murder it is likely that a robust jurisprudence would have developed over the past 35 years concerning mitigation and exceptional downward sentences. What better way to avoid life in prison than to seek an exceptional sentence? The reason no such jurisprudence has developed is that the two sentencing statutes are separate and apply to different offenses. *Ortiz*, 104 Wn.2d at 485–486. In *Ortiz*, the court stated:

We take this time, however, to express our dissatisfaction with the mandatory sentencing provision in the aggravated first degree murder statute, RCW 10.95. Unlike the Sentencing Reform Act of 1981, RCW 9.94A, which allows the trial judge to depart from the prescribed sentencing range when the prescribed sentence would impose excessive punishment on a defendant, the aggravated first degree murder statute *allows for no such flexibility*.

Id. (emphasis added).

Both the Supreme Court and this Court have adhered to the reasoning in *Ortiz*. The Supreme Court, has stated

The SRA and RCW 10.95 serve two separate functions and are consistent. . . The SRA is a determinate sentencing system for felony offenders. It gives first degree aggravated murder a seriousness score of 15 and provides for two possible sentences, life without parole or death.”

State v. Brett, 126 Wn.2d 136, 184, 892 P.2d 29 (1995) (citation omitted);

State v. Kron, 63 Wn. App. 688, 694, 821 P.2d 1248, 1252 (1992) (“The Legislature has specified in two separate statutes that death or life in prison without parole will be the only sentencing alternatives for someone who

commits aggravated murder. The Legislature could not have intended any other penalty.”); *State v. Hachenedy*, 160 Wn.2d 503, 511, 158 P.3d 1152 (2007) (“A verdict of aggravated first degree murder can subject the defendant to the death penalty, but where the prosecutor has chosen not to seek the death penalty, the sentence must be life without the possibility of release.”). This Court citing *Ortiz* stated explicitly

Unlike the Sentencing Reform Act of 1981, the aggravated first degree murder statute does not allow a trial judge flexibility to depart from the prescribed sentencing range...[The defendant] also claims, without citing to authority, that the trial court had an option to sentence him on either of his two convictions. But RCW 10.95.030 *does not give trial courts an option in sentencing defendants convicted of aggravated first degree murder.*

Meas, 118 Wn. App. at 306 (emphasis added). Recently, this Court again reaffirmed this principle by holding how the statute, “...does not give the trial court discretion to consider mitigating factors and depart from the prescribed life sentence.” *State v. Moen*, 4 Wn. App.2d 589, 603-604, 422 P.3d 930 (2018).

Miller adds further support to the view that the SRA does not apply to this case. *Miller*’s holding was limited to cases where it was mandatory for a juvenile to be sentenced to life in prison without the possibility of parole. *Miller* 567 U.S. at 465. (“We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.”). Thus, if all along

Washington's aggravated murder sentencing statute had provided for a less than life sentence, if it had incorporated the SRA's mitigation exceptional sentence provisions, there would have been no need for the *Miller* fix. If life in prison was not mandatory, *Miller* would not apply.

In light of the foregoing, defendant's arguments about youth being a mitigating factor and exceptional sentences are not well taken as to aggravated murder. Since this case is about aggravated murder, RCW 10.95.030 applies to the exclusion of the mitigating circumstances provisions applicable to an exceptional sentence. RCW 9.94A.535(1)(c)(d) or (e). Defendant is wrong insofar as the trial court's authority to impose an exceptional sentence. He has not shown how the trial court imposing the mandatory sentence results in either a constitutional error amounting to actual or substantial prejudice or a non-constitutional error which amounts to a fundamental defect which inherently results in a miscarriage of justice. This Court should dismiss his claims as being without merit.

D. CONCLUSION.

The court below erred when it dismissed defendant's CrR 7.8 motion. Such should have been transferred to this Court as a personal restraint petition. While the proper remedy now would be to remand to the

court below to enter such an order, this Court could also address the matter now on the merits in the interests of judicial economy.

Defendant cannot get the relief he seeks as *O'Dell* was not a significant change in the law. Further, under both a categorical bar analysis or under the *Fain* factors, defendant is subject to life in prison for the aggravated murder he committed as an adult. Our courts and legislature have made clear that the only sentence for an adult convicted of aggravated murder is life without the possibility of parole. This Court should affirm his statutorily mandated sentence of life without the possibility of parole.

DATED: January 18, 2019.

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WSB # 53939

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-18-19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

January 18, 2019 - 1:40 PM

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