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Court of Appeals
Division II
State of Washington
1/25/2019 4:20 PM

No. 51409-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY HAAG,

Appellant.

BRIEF OF RESPONDENT

RYAN P. JURVAKAINEN
Prosecuting Attorney
DAVID PHELAN/WSBA #36637
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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I. ANSWERS TO ASSIGNMENT OF ERROR

1. The sentencing court properly sentenced Petitioner to a minimum term sentence of 46 years to life and appropriately considered all of the *Miller* factors.
2. The sentence imposed by the court was not a *de facto* life sentence
3. The sentence imposed was authorized by the verdict of the jury
4. If a re-sentencing is required, it should be handled by Judge Evans.

At the outset, the State acknowledges the procedural defect of handling this matter as a direct appeal, as opposed to a personal restraint petition and also acknowledges this court's authority to review the case under the appropriate procedural posture of a personal restraint petition, rather than a direct appeal of the sentencing hearing. *State v. Delbosque*, 430 P.3d 1153, 1158 (2018). Because this court will review this as a personal restraint petition, hereafter Mr. Haag will be referred to as Petitioner.

II. STATEMENT OF THE CASE

The Respondent generally accepts the Petitioner's recitation of the facts, but would add a few specific notations for the court's consideration.

Judge Evans had access to the transcript of the original jury trial and read it entire. RP 183. The trial transcript was filed by the Respondent before the re-sentencing and is marked as CP 81.

The actual murder was monstrous. At trial, Petitioner testified that he had killed seven-year old Rachel Dillard, that he had strangled her, put a belt around her neck, and then put her in the bathtub. CP 564-565. He testified that he put his hands on her neck and strangled her as she cried. CP 569. When that didn't work, he testified he left her on the bed crying, then went to his closet and grabbed a belt and looped it around her neck. CP 570-572. He then put her in the bathtub to "make sure" that "she wasn't alive anymore." CP 574. He then took her out of the bathtub, tied her up, and put a plastic bag around her head. CP 575. He testified he put the bag there because "things were coming out" and that "there was stuff on the mouth." CP 575. The "stuff on her mouth" was the frothy mix of air and water that shows she was still alive when he drowned her in the bathtub. CP 273. He then hid her under his bed. CP 575. Officer Geizler of the Longview Police Department found Rachel under his bed, naked, with a bag over her head, and with her ankles bound. CP238. Rachel Dillard's cause of death was a combination of manual strangulation, ligature strangulation (the belt), and drowning. CP 275.

The sentencing court specifically acknowledged the Petitioner's youthful brain development and attendant issues including impulsivity, lack of regulation regarding judgments and decisions, the inability to properly weigh and perceive risk, and the inability to assess long-term consequences. RP 19. The sentencing

court acknowledged the diminished culpability that comes with a youthful brain. RP 20. The court found that Petitioner was neither irreparably corrupt or irretrievable depraved. RP25.

The Petitioner's claim that Judge Evans referred to Mr. Haag as a "man" at the time of the murder appears to be incorrect. He did refer to Petitioner as a "seventeen-year-old young man." His next use of the word "man" came in context of discussing his post-conviction track record and clearly does not refer to Petitioner as he was at the time of the crime.

Judge Evans did make reference to the Petitioner's weight at the time of the murder, as well as the difference in ages, but such reference is obviously appropriate given that such a weight difference likely played a role when Petitioner strangled the little girl.

Finally, the State recommended a sentence of 60 years to life. RP 122. The Defense requested a sentence of 25 years to life. RP 183.

III. ARGUMENT

A. ISSUE #1: THE SENTENCING COURT PROPERLY RE-SENTENCED THE PETITIONER

The sentencing court properly imposed a 46 year to life sentence after a conducting a full resentencing hearing. Judge Evans conducted a multi-day resentencing hearing, gave the Petitioner every opportunity to present witnesses and experts on his behalf, and carefully weighed and analyzed all the arguments and evidence presented. Judge Evans gave an oral ruling that covered all of the

evidence provided by Petitioner and examined the ways in which the evidence applied to the *Miller* factors. Judge Evans left no stone unturned and Petitioner's claims regarding the conduct of the court amount to little more than a disagreement about the outcome.

This court recently considered the question of a sentencing court's compliance with the dictates of *Miller* in *State v. Delbosque,* 430 P.3d 1151 (2018). The sentencing court in that case made numerous findings of fact that were unsupported by substantial evidence and the case was remanded for a new resentencing. *Id.* at 1161. Those deficiencies are not present in this case. Unlike the superior court in *Deblosque*, the sentencing court in this case specifically articulated all of the *Miller* factors and offered specific analysis as to how they applied to his decision. Enumerated in RCW 10.95.030 (3)(b), the *Miller* factors include the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated. The record reveals that the sentence court carefully considered each of these factors before announcing a sentence.

In terms of the first enumerated *Miller* factor, the age of the individual, the sentencing court found that Petitioner's age and brain development at the time of the incident were consistent with the youthful deficiencies expected of someone his age. RP 19. The

sentencing court acknowledged that Petitioner was an adolescent and that he was seventeen years old. RP 19. The court indicated that it considered his age when it announced the sentence. RP 26. The sentencing court clearly considered the age of the Petitioner when it formulated their sentence.

In terms of the second enumerated *Miller* factor, the childhood and life experience of the individual, the court engaged in a step-by-step analysis of his childhood as it related to *Miller.* RP 20. The court acknowledged that he was abandoned by his biological father, that he was subject to verbal and emotional abuse by his stepfather, that he dealt with issues related to his weight and his sexuality, and that he lived in poverty. RP 21. The court also examined the positive aspects of his childhood. RP 20. The court clearly considered the childhood and life experience of the Petitioner before it announced the sentence.

In terms of the third enumerated *Miller* factor, the degree of responsibility the youth was capable of exercising, the sentencing court acknowledged the Petitioner's diminished culpability. RP 20. The court also acknowledged all the attendant issues regarding the effects of his adolescent brain on his behavior. RP 19. The court clearly found that because of his adolescent brain he was not able to exercise the same responsibility for his actions and that because of his he was "less deserving of the most severe punishment." RP 20.

The fourth *Miller* factor, the prospect for rehabilitation was also explicitly acknowledged by the sentencing court. The court noted the assessments prepared by both Dr. Beyer and Dr. Roesch indicated that the Petitioner was "a good candidate for rehabilitation" and noted that there was nothing in the record to rebut those findings. RP 23. The court also examined his post-incarceration behavior and its relationship to his prospects for rehabilitation. The court acknowledged his change and growth while in prison, his clean prison record, as well as his restorative activities including religious practice. RP 24-25. The court found that Petitioner "had likely aged out of what is called adolescent-limited delinquency" and concluded that Petitioner was neither "irretrievable depraved" nor "irreparably corrupt." RP 25. The court found Petitioner's apology and remorse sincere. RP 25. The court thoroughly explored the fourth *Miller* factor.

Petitioner fails to show how the Court's reliance on retribution was unlawful in any way. Petitioner's central claim is that the sentencing court's reliance on retribution was improper and that the court should have focused on rehabilitation. Petitioner then cites to numerous cases discussing the diminished role that retribution is expected to play in such re-sentencings, but does not actually demonstrate that a court may not consider it. The sentencing court **must** consider the *Miller* factors, but nothing about Judge Evans oral

ruling suggests that he failed to do so. The sentencing court is given substantial deference in how it evaluates the evidence. Even where the Washington State Supreme court appeared to disagree with the decision of the sentencing court, it upheld the sentence and acknowledged the deference granted to the sentencing court in hearings such as these. *State of Washington v. Ramos*, 187 Wn.2d 420, 453 (2017).

While the focus of a *Miller* re-sentencing is properly on the offender, there court is still allowed to consider the actual crime. The court properly considered not just the Petitioner's claims, but also the underlying crime. And the court is certainly able to call a murder monstrous, even in the context of a *Miller* re-sentencing. *State v. Ramos*, 187 Wn.2d at 452. The court must address *Miller*, but it need not myopically focus on the Petitioner, to the exclusion of examining the crime itself.

Petitioner's claim in Issue #1 can be reduced a simple disagreement with the sentence. The Petitioner cannot point to any particular unlawful act by the sentencing court, the record demonstrates that the sentencing court considered all the *Miller* factors, and the sentence was less than life without the possibility of parole. While the Petitioner might not like the outcome of the resentencing, it is a lawful standard range sentence. The restraint of Petitioner is lawful and this court should deny the Petition.

B. ISSUE #2. THE SENTENCE IMPOSED WAS NOT A *DE FACTO* LIFE SENTENCE

The sentencing court did not impose a *de facto* life sentence. There is no evidence in the record regarding Petitioner's life expectancy, nor any individualized information regarding any health issues or other things that might affect his life expectancy. He would be eligible for parole when he was 63 years old and there is no evidence in the record or before the court regarding his specific life expectancy. So as it relates to the Petitioner there is no evidence regarding whether this is a *de facto* life sentence for them.

The question then becomes whether the sentence represents or passes a general threshold which the court would consider a *de facto* life sentence. The issue is actually two-fold, (1) is this a *de facto* life sentence, and (2) if so, are *de facto* life sentences prohibited as a matter of law. The sentence imposed in this case was not a *de facto* life sentence, and even if it was, such a sentence was authorized by law and does not violate either State or Federal constitutional principles.

The threshold question here is whether the sentence is a *de facto* life sentence. Because of the lack of a statutory or commonly accepted understanding of what constitutes a *de facto* life sentence, it is difficult to answer this question. There is currently no commonly accepted definition of a *de facto* life sentence in Washington state jurisprudence. The closest definition comes in the form of a footnote

in *Ramos*, where the court noted that "it is undisputed that Ramos' 85 year aggregate sentence is a *de facto* life sentence" and then went on to reserve for another case an actual examination of what constituted a *de facto* life sentence. *Ramos*, 187 Wn.2d at 459, n.6.

A vast gulf exists between an 85 year sentence and a 46 year to life sentence. Petitioner claims that a 46-year to life sentence is a *de facto* life sentence without proposing any sort of framework for determining what is and is not a *de facto* life sentence, other than reference to some studies showing a diminished life expectancy in some cases or in particular populations. Nor does invoking the principle of geriatric or meaningful release provide any clarity as to what is or should be considered a *de facto* life sentence. Prospective release at age of 63 does not amount to a *de facto* sentence of life without parole under an individualized analysis, nor should it be as a general rule.

Just because this sentence would result in a "geriatric" release does not mean it is a *de facto* life sentence. Petitioner claims in its discussion of geriatric release, or a "meaningful opportunity for release" in Issue #1 that geriatric release does not "provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*," citing to *Iowa v. Null*, 836 N.W. 2d 41, 71 (Iowa 2013), but the *Null* court misstated *Graham*'s requirements. The

"meaningful opportunity" discussed in *Florida v. Graham*, was only an opportunity for release during their natural life. 560 U.S. 48, 75 (2010). This is clear based on the actual language from *Graham,* "meaningful opportunity" had nothing to do with life "after" release, but instead applied to the chance of a parole hearing. *Id.* Even accepting *Null, Bear Cloud*, and *Casiano* as persuasive authority, the courts in each of those cases only found that the sentences in those cases were enough to establish the need for a *Miller* hearing, not that a subsequent sentence would necessarily be barred. *Null*, 836 NW.2d at 72 ("we conclude that *Miller's* principles are fully applicable to a lengthy term-of-years sentence..."), *Bear Cloud vs. Wyoming*, 334 P.3d 132, 141 (Wyoming 2014), ("we hold that the teachings of the *Roper/Graham/Miller* trilogy require sentencing courts to provide an individualized sentencing hearing to weight the factors for determining a juvenile's 'diminished culpability and greater prospects for reform', when, as here, the aggregate sentences result in the functional equivalent of life without parole.") *Casiano v. Commissioner of Correction*, 317 Conn. 52, 79 (Conn. 2015) ("the procedures set forth in *Miller* must be followed when considering whether to sentence a juvenile offender to fifty years imprisonment without parole."). None of the aforementioned cases held that there was either a proportional or categorical bar to a *de facto* life sentence, only that such a sentence would be subject to a *Miller* hearing.

This sentence is not a *de facto* life sentence. There is an opportunity for release and that is all that is required under *Graham*. Even resorting to actuarial tables and epidemiological studies, there is no way for this court or the sentencing court to determine with any reasonable degree of certainty the lifespan of the Petitioner, or what his health prospects might be like twenty-years from now.

As to the question of whether a *de facto* life sentence is or should be categorically barred, the answer is no. There is no existing caselaw that bars the imposition of such a sentence. Indeed, a *de facto* life sentence was upheld in *Ramos*. 187 Wn.2d at 458. The sentencing court is in the best position to determine the appropriate sentence based on a review of the individual case and the individual offender, including setting a minimum term given the age of the defendant.

The Respondent acknowledges the existence of a categorical bar for life without parole sentences pursuant to the recent decision by the Washington Supreme Court in *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018). That decision also explicitly stated that Article I, Section 14 of the Washington State Constitution provides greater constitutional protections in the context of juvenile sentence. *Id.* at 81. On remand, the only limitation put on the sentencing court was "that the trial court may not impose a minimum term of life as it would result in a life without parole sentence." *Id.* at 91. This is an

implicit endorsement of the trial court's authority to impose any sentence short of a minimum term of life and that even under the more stringent Article I, Section 14 analysis, such a sentence may be contemplated.

This sentence was not a *de facto* life sentence and even if it was, such a sentence is not barred by law. The restraint of the Petitioner is lawful and the petition should be denied.

C. ISSUE #3. THE SENTENCE WAS AUTHORIZED BY THE VERDICT OF THE JURY

Aggravated Murder in the First Degree is unlike the statutory scheme implicated in the *Alleyne* decision and the sentence imposed amounts to a standard range sentence. Petitioner was originally sentenced to life without the possibility of parole, the presumptive sentence at the time of his conviction. Subsequently, the statutory scheme was amended in light of *Miller* and now such a verdict authorizes the sentencing court to sentence "a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years." RCW 10.95.030 (3)(a)(ii). The statute also specifically authorizes the court to impose a "minimum term of life." *Id.*

Where the statute in *Alleyne* ran afoul of the constitutional protections of *Apprendi, Ring, and Blakely,* was in manner it allowed a change in the minimum term of imprisonment based on specific

additional facts. *Alleyne vs. United States*, 570 U.S. 99, 117(2013). The statutory scheme in question allowed an increased minimum sentence if in addition to possessing a firearm, it was either brandished or discharged. Title 18 U.S.C. § 924(c)(1)(A). The issue in *Alleyne* was that the judge found the fact which increased the minimum sentence, not a jury, running afoul of *Apprendi* because such a fact would necessarily be considered an element of the crime. *Id.* at 116-117. The findings in *Alleyne* simply do not apply to the case at the bar.

The "factors" in *Miller* are not analogous to the *Alleyne* element of a crime analysis. The *Miller* factors do not allow or authorize the judge to increase or decrease the minimum term based on a specific finding, but rather inform the court as to the appropriate sentence to impose within the standard range. This discretion is specifically endorsed in *Alleyne*, where the court noted that "our ruling today does not mean that any fact that influences judicial discretion must be found by a jury." *Id.* The court quoted *Apprendi* writing that"[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." *Id., quoting Apprendi v. New Jersey,* 530 U.S. 466, 519 (2000). Under the current statutory scheme, there *Miller* factors are simply things the court must consider when determining a sentence, they do not represent potential elements of a crime that must be submitted to a jury.

Here, Judge Evans was not required to find any specific facts that were necessary in order to authorize the sentence that he imposed. There is no issue with a fact being an element of the crime that must be submitted to the jury. The sentence imposed by the sentencing court in this case was a standard range sentence, within the established statutory guidelines, and without the need of a finding of any particular fact in order to justify the sentence. The court exercised only the discretion recognized by the *Alleyne* court as something "long recognized" and "does not violate the Sixth Amendment." *Id.* at 570 U.S. at 116. This is because the statute here authorized the judge to impose any minimum term. The sentence was entirely authorized by law. The restraint of the Petition was lawful and the petition should be denied.

D. ISSUE #4. JUDGE EVANS SHOULD REMAIN THE SENTENCING JUDGE IN THE EVENT THE CASE IS REMANDED

Notwithstanding the logistical issues of bring a new judge up to speed on an old case with a voluminous record, the Hon. Judge Evans did nothing to warrant his removal or recusal for any subsequent sentencing hearing on this case.

In each case cited by the Petitioner, the judge had done an affirmative act that showed an appearance of bias. Petitioner cited *City of Seattle v. Clewis*, but in that case the court had issued a material witness warrant *sua sponte,* when a material witness warrant was

something only the prosecutor request. 159 Wn.App 842, 851 (2011). Nor did Judge Evans pronounce a sentence before it had considered all available information, as in *State v. Aguilar-Rivera*, 83 Wn. App. 199, 203, 920 P.2d 623 (1996). The Petitioner is unable to muster a single affirmative act by Judge Evans that suggests he acted in any way to create an appearance of bias that would merit his removal from the case. Rather, the evidence shows that Judge Evans allowed both parties full opportunities to be heard, allowed the allocution by the defendant, and conducted the sentencing in a manner that showed his own professionalism and his willingness to listen to and weigh all the evidence. RP 15-28.

Nor is the Petitioner in a "disadvantaged position" by having Judge Evans conduct their re-sentencing should one be necessary. Petitioner concluded their argument by noting that because a decision was announced, they were arguing from a disadvantaged position, and cited to *Crider*, 78 Wn.App. 849, 861 (1995). Unlike the Judge in *Crider*, who announced his sentence before the allocution of the defendant, Judge Evans did not announce a sentence until after both parties presented all that they had. There is no evidence to suggest Petitioner would be placed in a disadvantaged position.

Because there is no actual showing of even an alleged appearance of bias, it is unnecessary to order a subsequent resentencing to be in front of any judge other than Judge Evans.

IV. CONCLUSION

On January 19th, 2018, the Hon. Judge Michael Evans resentenced the Petitioner, Timothy Haag, for the Aggravated First Degree Murder of Rachel Dillard. The re-sentencing occurred because of the *Miller* decision, and the Dillard family, who had buried their daughter two decades ago, was forced to face the fact that the life sentence the court delivered to them was no more and that the person who murdered their seven year-old daughter could be paroled within a year. The Petitioner, who had served over 20 years in prison for the murder, was present and facing the certainty of a new life. No matter the minimum-term, the re-sentencing would allow him access to vocational training and new programs that would prepare him for life outside of prison, where he had spent his entire adult life. He was facing the prospect of deliverance from a sentence that offered him no hope for release, ever. The sentencing was set in front of a new judge with a new prosecutor and a new defense attorney. Experts were flown in, families traveled through blizzards, and everyone wondered what the future would bring. It was an emotional time for all involved.

However, as emotional as it was, there is no evidence in the record that Judge Evans strayed from his duty to fairly and accurately weight the information provided to him, consider all of the sentencing factors, and then render sentence that took into account all of the facts

and circumstances of the case. While Judge Evans explicitly acknowledge that retribution was an important part of his sentence, he went out of his way to also show that he had carefully considered each of the *Miller* factors and all of the evidence provided in mitigation. The State requested a sentence of 60 years to life. The defense requested a sentence of 25 years to life. Judge Evans sentenced Petitioner to a minimum term of 46 years to life, a number just about halfway between. Petitioner will be eligible for parole when he is 63 years old.

The sentence was not a *de facto* life sentence. Petitioner will be eligible for release and though he will be old, there is no evidence in the record to suggest that someone in his position would not survive to see their parole opportunity. Moreover, Petitioner will now have the hope of eventual release, a hope that was so important in the *Graham*, *Roper*, and *Miller* cases, the hope for eventual freedom.

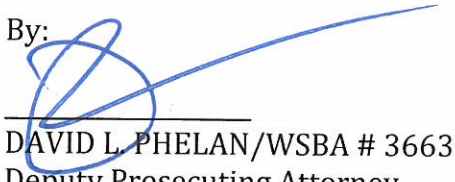
Even if the sentence were to be considered a *de facto* life sentence, such a sentence is authorized by law, both explicitly in *Ramos*, and implicitly in *Bassett*.

The restraint imposed on the Petitioner is lawful and the petition should be denied.

Respectfully submitted this 25th day of JANUARY, 2019.

RYAN P. JURVAKAINEN
Prosecuting Attorney

By:



DAVID L. PHELAN/WSBA # 36637
Deputy Prosecuting Attorney
Representing Respondent

APPENDIX A

RCW 10.95.030

Sentences for aggravated first degree murder.

(1) Except as provided in subsections (2) and (3) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person had an intellectual disability at the time the crime was committed, under the definition of intellectual disability set forth in (a) of this subsection. A diagnosis of intellectual disability shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of intellectual disabilities. The defense must establish an intellectual disability by a preponderance of the evidence and the court must make a finding as to the existence of an intellectual disability.

(a) "Intellectual disability" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

(3)(a)(i) Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person's sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.

(ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.

(b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

(c) A person sentenced under this subsection shall serve the sentence in a facility or institution operated, or utilized under contract, by the state. During the minimum term of total confinement, the person shall not be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release authorized under RCW 9.94A.728, or any other form of authorized leave or absence from the correctional facility while not in the direct custody of a corrections officer. The provisions of this subsection shall not apply: (i) In the case of an offender in need of emergency medical treatment; or (ii) for an extraordinary medical placement when authorized under *RCW 9.94A.728(3).

(d) Any person sentenced pursuant to this subsection shall be subject to community custody under the supervision of the department of corrections and the authority of the indeterminate sentence review board. As part of any sentence under this subsection, the court shall require the person to comply with any conditions imposed by the board.

(e) No later than five years prior to the expiration of the person's minimum term, the department of corrections shall conduct an assessment of the offender and identify programming and services that would be appropriate to prepare the offender for return to the community. To the extent possible, the department shall make programming available as identified by the assessment.

(f) No later than one hundred eighty days prior to the expiration of the person's minimum term, the department of corrections shall conduct, and the offender shall participate in, an

examination of the person, incorporating methodologies that are recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the person will engage in future criminal behavior if released on conditions to be set by the board. The board may consider a person's failure to participate in an evaluation under this subsection in determining whether to release the person. The board shall order the person released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released. If the board does not order the person released, the board shall set a new minimum term not to exceed five additional years. The board shall give public safety considerations the highest priority when making all discretionary decisions regarding the ability for release and conditions of release.

(g) In a hearing conducted under (f) of this subsection, the board shall provide opportunities for victims and survivors of victims of any crimes for which the offender has been convicted to present statements as set forth in RCW 7.69.032. The procedures for victim and survivor of victim input shall be provided by rule. To facilitate victim and survivor of victim involvement, county prosecutor's offices shall ensure that any victim impact statements and known contact information for victims of record and survivors of victims are forwarded as part of the judgment and sentence.

(h) An offender released by the board is subject to the supervision of the department of corrections for a period of time to be determined by the board. The department shall monitor the offender's compliance with conditions of community custody imposed by the court or board and promptly report any violations to the board. Any violation of conditions of community custody established or modified by the board are subject to the provisions of RCW 9.95.425 through 9.95.440.

(i) An offender released or discharged under this section may be returned to the institution at the discretion of the board if the offender is found to have violated a condition of community custody. The offender is entitled to a hearing pursuant to RCW 9.95.435. The board shall set a new minimum term of incarceration not to exceed five years.

18 U.S.C.A. § 924

§ 924. Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever--
(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;
(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;
(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or
(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.
(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.
(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--
(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or
(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.
(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.
(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.
(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a

juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.
(ii) A juvenile is described in this clause if--
(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and
(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.
(B) A person other than a juvenile who knowingly violates section 922(x)--
(i) shall be fined under this title, imprisoned not more than 1 year, or both; and
(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.
(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.
(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.
(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
(i) be sentenced to a term of imprisonment of not less than 5 years;
(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--
(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.
(C) In the case of a second or subsequent conviction under this subsection, the person shall--
(i) be sentenced to a term of imprisonment of not less than 25 years; and
(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.
(D) Notwithstanding any other provision of law--
(i) a court shall not place on probation any person convicted of a violation of this subsection; and
(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.
(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.
(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--
(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.
(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries

armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a

reasonable attorney's fee, and the United States shall be liable therefor.
(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.
(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.
(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--
(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;
(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);
(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;
(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;
(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and
(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.
(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
(2) As used in this subsection--
(A) the term "serious drug offense" means--
(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;
(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--
(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and
(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.
(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.
(g) Whoever, with the intent to engage in conduct which--
(1) constitutes an offense listed in section 1961(1),
(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,
(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or
(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.
(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.
(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.
(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law

unless such provision is inconsistent with any of the purposes of this subsection.
(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--
(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and
(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.
(k) A person who, with intent to engage in or to promote conduct that--
(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;
(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or
(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.
(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.
(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.
(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.
(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.
(p) Penalties relating to secure gun storage or safety device.--
(1) In general.--
(A) Suspension or revocation of license; civil penalties.--With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing--
(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) Review.--An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) Administrative remedies.--The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

CERTIFICATE OF SERVICE

DAVID PHELAN, certifies that opposing counsel was served electronically via the Division II portal:

MARY KATHERINE YOUNG HIGH
Pierce County Department of Assigned Counsel
949 Market Street, Suite 334
Tacoma, WA 98402
mhigh@co.pierce.wa.us

JENNIFER VICKERS FREEMAN
Pierce County Department of Assigned Counsel
949 Market Street, Suite 334
Tacoma, WA 98402
Jfeem2@co.pierce.wa.us

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January 25th, 2019.

DAVID PHELAN

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

January 25, 2019 - 4:20 PM

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Appellate Court Case Title:	State of Washington, Respondent v. Timothy E. Haag, Appellant
Superior Court Case Number:	94-1-00411-2

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