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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL M. FURMAN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 89-1-00304-8

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BRIEF OF RESPONDENT

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DATED May 15, 2019, Port Orchard, WA

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## I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Furman's claims must be considered as a PRP?
2. Whether the weight to give to the mitigating evidence was within the sole discretion of the trial court and not subject to reweighing on appeal?
3. Whether the trial court properly considered the evidence of mitigation presented to it where:
  - a. The trial court's findings regarding remorse are neither contradictory nor an abuse of discretion;
  - b. The trial court's findings regarding Dr. Young's testimony are supported by the record;
  - c. Furman failed to present any testimony tying his abusive childhood and immaturity to the crime;
  - d. The trial court accepted and properly considered Furman's evidence of rehabilitation while in prison;
  - e. The trial court did not imposed a de facto life sentence; and
  - f. Neither *Fain* nor *Bassett* are relevant to whether the trial court abused its discretion?

## II. STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

Michael Furman was arrested on April 30, 1989 for the rape and murder of 85 year-old Ann Presler, which occurred on April 27, 1989 in Kitsap County. Furman was 17 years, 10 months, and 8 days old at the time of his arrest, so jurisdiction initially rested in the juvenile court system. *State v. Furman*, 122 Wn.2d 440, 444-45, 858 P.2d 1092 (1993). Furman was charged in Kitsap County juvenile court. *Id.*

At the time, RCW 13.04.030(5)(a) (1989) mandated a declination hearing pursuant to RCW 13.40.110.<sup>1</sup> The juvenile court commissioner, after considering the eight criteria in *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), determined that declination of juvenile jurisdiction would be in the best interest of the public. *Furman*, 122 Wn.2d at 447-48. The Supreme Court affirmed this decision on direct appeal. *Id.* Thereafter, Furman was charged in Kitsap County Superior Court Cause with one count of aggravated murder in the first degree. CP 1. The State also filed notice that it would seek the death penalty. *Furman*, 122 Wn.2d at 445.

The jury found Furman guilty of premeditated first degree murder

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<sup>1</sup> Today, the adult court would have exclusive jurisdiction. RCW 13.04.030(1)(e)(v)(A); RCW 9.94A.030(45)(a)(i).

with five aggravating factors. RP XIX:3137-38.<sup>2</sup> Thereafter a penalty proceeding was held before the same jury that had decided the guilt phase of the trial. In accordance with *State v. Bartholomew*, 101 Wn.2d 631, 643, 683 P.2d 1079 (1984) (*Bartholomew II*), the State's case-in-chief was limited to only the introduction of Furman's criminal convictions. Furman then introduced testimony from various relatives, a mitigation expert, and a former neighbor. These witnesses addressed Furman's chaotic upbringing, his own victimization and his level of maturity.

The jury, after hearing testimony from the defense experts and with the State only permitted to present criminal history, determined that the State had overcome the presumption of leniency and proven beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency. RP XXIII:3603. Furman was thereafter sentenced to death in accordance with the jury's verdict. RP XXIII:3622.

On direct appeal, Supreme Court affirmed his convictions, but vacated his death sentence on the grounds that RCW 10.95 does not subject individuals who commit aggravated first degree murder prior to their eighteenth birthday to the death penalty. *Furman*, 122 Wn.2d at 456.

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<sup>2</sup> References to reports of proceedings followed by Roman numerals are to the original direct appeal reports of proceedings. These transcripts were reviewed by the court below. *See* State's Supp. CP (Clerk's Minutes, Nov. 14, 2015 & Jan. 2, 2015; Memorandum Opinion, Aug. 6, 2015). References to reports followed by dates in Arabic numerals are to those requested by Furman in conjunction with the present proceeding.

The Supreme Court remanded to the trial court for resentencing to life in prison without the possibility of parole. *Furman*, 122 Wn.2d at 458. Furman was resentenced on December 20, 1993.

Furman, represented by counsel, filed a personal restraint petition in 1994. The Court dismissed the petition. *In re Furman*, No. 18935-6-II (Aug. 22, 1995). Furman's counsel also filed a petition for review, which the Supreme Court denied. *In re Furman*, No. 63298-7 (Dec. 1, 1995).

Furman thereafter filed a petition for a federal writ of habeas corpus, again with counsel. The petition was denied and the denial was affirmed on appeal. *Furman v. Wood*, 190 F.3d 1002 (9<sup>th</sup> Cir. 1999).

After the Supreme Court decided *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), Furman filed a personal restraint petition in this Court on June 24, 2013. The Court dismissed the petition, finding that the "Miller fix" statute provided an adequate remedy. *In re Furman*, Order Dismissing, at 1 (Oct. 16, 2014) (citing *In re McNeil*, 181 Wn.2d 582, 334 P.3d 548 (2014)). CP 178.

Thereafter, the matter was brought before the Superior Court for resentencing pursuant to the *Miller* fix statute. RP (3-3/5) 3. The court heard testimony from State and defense witnesses over the course of three days. RP (3/5-6), RP (3/26). After hearing argument of counsel, the court took the matter under advisement. RP (3/26) 93. The court thereafter

entered extensive findings of fact and conclusions of law, and sentenced Furman to a minimum term of 48 years. RP (6/8) 7-23; CP 211-23. The court summarized its findings as follows:

Based on the seriousness of the crime, its deliberate, cruel and intentional conduct, the low end, 25 years, is not appropriate. Taking into consideration his age and abusive childhood, which may have had some part in his committing the crime, plus his immaturity and lack of judgment based on his age, and his demonstrate rehabilitation while in prison, the Court believes he must at some point be given a meaningful opportunity of parol [sic]. Therefore, the Court will sentence the defendant to a minimum term of 48 years in prison, being first eligible for parole at age 65. His maximum term remains life.

CP 223.

## **B. TRIAL FACTS**

### ***1. The Rape and Murder***

On the morning of April 27, 1989, Furman said he consumed three or four bowls of marijuana before he left his home. RP XIII:2282, 2354-55. At approximately 8:15 a.m., Furman began going door to door in the Sedgwick area of Kitsap County looking for yard work. Exh. 91 and 93 (Furman's April 30, 1989, 10:45a.m. taped statement, hereinafter cited as "Tape 1").

Furman contacted Velma Rader between 9:00 and 9:30 a.m. RP XI:1996-97. Rader spoke with Furman for a brief period of time, and he impressed her "as just being a nice young boy going around trying to find

some work to do.” RP XI:1998. Rader did not notice any unusual odors emanating from Furman or anything unusual about his eyes, speech, or physical movements. RP XI:1998-99.

Furman contacted Marvin Lambert at approximately 9:15 a.m. RP XI:1977. Lambert did not need Furman’s services, but he told Furman about a job that was listed in the paper. Furman did not manifest any interest in the \$7.00 an hour position, and left. RP XI:1978. Lambert observed Furman walk down the 200 foot long driveway. He did not notice any unusual odors emanating from Furman, and Furman’s physical movements, speech, behavior, and eyes were all normal. RP XI:1978-79.

Furman contacted Jeanne O’Hair at approximately 10:00 a.m. RP XI:1973-74. O’Hair spoke with Furman for approximately one minute. RP XI:1975. During this conversation, O’Hair did not detect any unusual odors emanating from Furman. She also did not notice anything unusual about Furman’s behavior, physical movements, eyes or speech. RP XI:1974. Furman left after O’Hair indicated that she had no work for him. RP XI:1973-74.

Furman contacted Sigrid Griffiths, a retired registered nurse, at approximately 10:00 a.m. RP XI:1988-90. Griffiths observed Furman while they discussed whether she had any work for him to do. She detected no unusual odors, and noted nothing unusual about Furman’s

eyes, movements, or speech. RP XI:1992.

Furman contacted the victim, Ann Presler, at approximately 9:30 to 10:00 a.m. Exh. 92 & 93. (April 30, 1989 12:04 p.m. taped statement) (hereinafter cited as “Tape 2”). Presler lived alone, and at 85 years of age required hearing aids, glasses, and dentures. RP XI:2025, XIII:2238, XIV:2421.

Presler, who had previously expressed concern over the state of her windows to a friend, offered to hire Furman to clean her windows for \$10.00. RP XI:2026; Tape 2. Furman accepted the job, and entered Presler’s house. Furman took all the knickknacks out of one window, washed the window, and then replaced the knickknacks. He started on the second window, but ran out of Windex before he completed it. Furman went into the kitchen to ask Presler for more glass cleaner. Presler indicated that all she had was dish soap, which Furman rejected. Tape 2.

Furman got angry for no clear reason, and punched Presler in the right ear with his fist. RP XIV:2432-33. Furman hit her twice more, and Presler fell to the ground screaming, yelling, and murmuring. Tape 2. Furman continued his assault on Presler, which he later detailed in his statement to the police:

A. [...] Grabbed a rag, grabbed a coffee pot and I hit her in the head.

Q: Did you put the rag over the coffee pot?

A: Yeah over, I had it in my hand. Then I grabbed, grabbed the coffee handle with my hand. And struck her with my right, right struck her with the coffee pot in my right hand. And ah, left left out that room and went through living room, into her bed, one of the bedrooms, that had all the of the um, knitting and stuff in it. And I grabbed ah, grabbed ah a vase. I ran back in there.

Q: Okay, go ahead.

A: Right back in there. I hit her a couple times, til it broke. Ran back and got another one and she was still yelling. I hit her more times with the other one.

Q: Okay, go ahead.

A: And I, it was, I went back three different times I think to grab vases.

Q: They kept breaking?

A: Yeah, they kept breaking, the last one I was hitting her with was like a crystal, crystal vase or like for had liquid in it. All three of them had liquid in em. I don't know if it was alcohol or water or food color. I don't know.

Q: Then what happened?

A: Then, then I got on top of her?

Q: Took her clothes off?

A: Yeah, I reached up under her and pulled, pulled her nylons off with her underwear.

Q: What was she saying to you at this point?

A: She murmuring, I couldn't understand. It was like mmmm .... I don't know, I couldn't understand it.

Q: Okay, then what happened?

A: I got on top of her, and had sex with her for about two minutes.

Q: Did you climax?

A: Yeah.

Q: Inside her?

A: Yeah. And then I got up and turned around and went back, went back into the room, and looked, looked at a couple little things see if there was any money or anything. ...

Q: You knew she was not dead at this time?

A: I knew she wasn't dead. No, I, I, after I climaxed I went in and started looking through the house and that's when I went through the purse. I hadn't hit her with the crystal vase yet, I went through the purse with the rag on my hand so I wouldn't leave anymore finger prints than I already had. And, that's when I found the thirty dollars. I grabbed, grabbed, went, grabbed that rag went back to her bedroom, grabbed the crystal thing. The crystal vase, and I hit her in the head, and I remember a big hole being there. Then, like left for the door, I hopped back over her body, left for the back door again, hopped back over her body I don't know what I was doing.

Q. So when you went back you hit her with the vase, the crystal vase?

A. Yeah.

Q. Why did you hit her again?

A. She was still alive.

Q. And you wanted to make sure she was dead?

A. I didn't want to get in trouble. I ...

Q. And you wanted her to be dead?

A. I don't want a witness, I don't want her to be dead, no.

Q. But at the time?

A. I never wanted her to be dead.

Q. I understand that, but at the time? You realize what?

A. I realized if I didn't, she was gonna say something. I was gonna get in alot of trouble.

Q. So you realize what, you had to do what?

A. I had to kill her.

- Q. Okay, okay. So then what happened after you realized that?
- A. I realized I had to kill her and I grabbed the vase, the crystal vase and I hit her. Three or four times, I remember the ...
- Q. In the head?
- A. Yeah. I remember the last time that I hit her I struck her with my right, my right with my right hand with the vase in it, I remember hitting her on her right side of her head and left a hole. Then I jumped towards the door and I jumped back over her body and I jumped back towards the door. I think that happened like three times. Then I opened up the door with the rag in my hand.
- Q. What happened about, you kept hitting her?
- A. Yeah,
- Q. Because she kept ...
- A. She was making noises, and I hit her three more time after I had sex with her.
- Q. Okay, okay.
- A. And I jumped back three for four times and then with the rag in my hand I opened the door and left. I ran through her back yard and I heard a dog start barking so I ran as fast as I could, like I was gonna leave a house. Like, left made it look like I left the house and some guy was standing outside.
- Q. You were running?
- A. Yeah, I was walking at that point. I was part time walking part time jogging, when he wasn't kinda looking at me it looked like he was facing the other way I jogged. He was like behind the tree he was doing repair on a little green box, like AT&T or something.
- Q. Did you have blood on your clothes?
- A. Yeah.
- Q. What shoes were you wearing?

A. What, I was wearing my blue and white shoes.

Q. Your what?

A. My blue and white shoes.

Q. They're at home?

A. Yeah.

Q. Do you still have them?

A. Ah, I think they're under my as you go in my room you turn left, they be a couple pillows, a couple sleeping bags. They're under there.

Q. And you're clothes are under there?

A. No, my clothes I, well my pants are still there.

Q. Okay, do they have blood on them?

A. No I washed them.

Q. Okay.

A. And my shirt I threw away. My shirts up in the attic.

Q. Okay, tell the truth now.

A. My shirt is up in the attic in a box.

Q. Do you sleep in the house or in the garage?

A. I sleep, well it's my bedroom but it's the garage, it use to be my Dad's work room.

Q. So the shirt in the attic in the garage?

A. Yeah.

Q. Okay and your pants are where?

A. My pants got washed, they're in my room.

Q. Where at in your room?

A. Sitting on the, on the chair looks like a car seat.

Q. Did you wash them?

A. Yeah the jeans I did.

Q. And, and the shoes are where?

A. The shoes are by my, the two sleeping bags.

Q. Okay, okay. Did you tell anybody else about this?

A. I didn't tell nobody. Wait okay after I left and went to the store and I saw these two guys and they asked me if I wanted to buy some drugs. And I told them yeah cause I wanted to forget about what I did. I was talking to them and I asked him if he had ever killed anybody. He says, well he hit somebody alot of time and he thought he was dead but he doesn't know if he killed them or not.

Tape 2.

In a later interview, Furman indicated that despite his drug use he knew exactly what he was doing when he killed and raped Presler. RP XIII:2282, XIV:2450. He also indicated that he formulated the plan to assault Presler after washing the first window. RP XIV:2432.

## **2. *The Investigation***

Presler's body was discovered on April 28, 1989 at approximately 8:40 a.m. by a long-time personal friend, Gladys Hanson. RP XI:2024-28. Presler was lying on the floor partly in the kitchen and partly in the utility room. Her face was blue and swollen, and she was naked from the waist down. RP XI:2001-02, 2028.

An autopsy later revealed that Presler had sustained multiple contusions and lacerations on her hands and arms. RP XIII:2213-15. These wounds were in the nature of "defensive wounds." RP XIII:2229. Presler had also sustained a number of major head injuries including three separate skull fractures. RP XIII:2217. The head wounds appeared to have

been caused by a heavy, hard, somewhat angular blunt object. RP XIII:2228. All of these wounds could have been inflicted in a period of 10 to 30 minutes. RP XIII:2233.

Detectives conducted a thorough examination of Presler's house. There were no signs of forced entry, but a towel or cloth was found partially sticking out of the back door between the door and the casing. RP XI:2044, RP XII:2064-67. An empty bottle of Windex was found on a small table near one of the living room's picture windows, and it appeared as if someone had been interrupted while cleaning the windows. RP XI:2136, XIII:2250-51.

Splattered blood and blood streaks were discovered in the utility room and kitchen. RP 14 XII:2069-75. Presler's underpants, pantyhose, and a shoe were on the floor in the utility room, and a hearing aid and upper or lower denture was found in the kitchen. RP XII:2069-70, 2073. A towel containing pieces of green glass and a dented thermos bottle which had a broken liner were found near Presler's head. RP XII:2085-86. An unbroken square glass decanter containing approximately a pint of water was found wrapped in a cloth near Presler's right hand. RP XII:2090-91. Presler's purse was lying open on the counter, and the money she had withdrawn from the bank on April 21, 1989 was missing. RP XI:2030-31. The location of items inside Presler's home was consistent with Furman's

detailed confessions.

Because there were no signs of forced entry, the investigation initially focused on Presler's family members and her paperboy. RP XIII:2254-58. Detectives also spoke with Presler's neighbors, and learned from them that Furman had been going door to door looking for work on the day of the murder. RP XIII:2257-58. Furman was contacted on April 29, 1989, and he agreed to go with Kitsap County Sheriff's Detective James Harris to point out the houses he had visited when looking for work.

On April 30, 1989, Furman met Harris as previously arranged. RP XIII:2261. He rode around with Harris for a little while, and then went to the sheriff's office. Furman gave a taped statement at 10:45 a.m. in which he denied having any contact with Presler. Tape 1. Harris continued to discuss the murder with Furman after fingerprints and hair samples were collected. Furman altered his story several times before ultimately confessing. RP XIII:2272-75. At one point, Furman revealed that the scarring on his knuckles was caused by hitting Presler on the side of her head. RP XIII:2284.<sup>3</sup>

A search warrant was obtained for Furman's residence. RP XIII:2372-73. During the search, the detectives discovered Furman's

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<sup>3</sup> On direct appeal, the Supreme Court concluded that Furman's statements were voluntary and properly admitted at trial. *Furman*, 122 Wn.2d at 450-52.

clothing where he said it would be. RP XIII:2354-56, 2379-80. A marijuana pipe was also found in the walls of the garage. RP XIII:2381.

### 3. *Furman's Guilt-Phase Case*

Furman presented a diminished capacity defense, and attempted a voluntary intoxication defense. The trial court rejected the second defense on the basis that Furman had not produced sufficient evidence as to the effect of his voluntary consumption of drugs. RP XIV:2513-15, XV:2599-00, 2602-03, XVIII:2988-92.

Furman took the stand on his own behalf, and testified that he first started using drugs when he was 13 years old. RP XIV:2468. Furman asserted that he smoked one or two bowls of marijuana and two bowls of methamphetamine and marijuana at his home 30 to 45 minutes before going to Presler's home. RP XIV:2469-71. The drugs made Furman high, creating a state where he felt different and just acted without thinking. RP XIV:2471-72. Furman asserted that when he was in this state:

I know what's going on, but I can't understand what's going on. It's like I can see something happening, and I can sit back later and say what happened, but I can't tell you why it happened.

RP XIV:2473. Furman did not disclose his alleged methamphetamine use to Harris or any other investigator in the period immediately following Presler's murder. RP XIV:2488-91.

Furman produced two experts on his behalf. The first expert was Dr. Lloyd Cripe, a clinical neuropsychologist. Neuropsychologists study the relationship between the nervous system and the brain, and a person's cognition, their mind, their behavior and their actions. RP XVI:2610.

Cripe evaluated Furman following a referral from Dr. Bruce Olson, a clinical psychologist. RP XVI:2619-20. Cripe spent 7.5 hours with Furman seven months after the crime, and administered a battery of tests. RP XVI:2620-32, XVII:2813. He reviewed reports prepared by Dr. Herb Marra and Olson, and an affidavit prepared by Dr. Lawrence Halpern, police reports, and Furman's history. RP XVI:2635, 2644-45, 2689, 2694-95, 2716. Cripe also interviewed Furman, indicating that the history he obtained from Furman was an important part of the basis for his opinion. RP XVI:2689. Cripe did not record his interview with Furman verbatim, but he did note everything that was important. RP XVI:2695. Finally, Cripe relied upon his "backlog of experience" and "intuition" in forming his opinions. RP XVI:2634-35, XVII:2787, 2801. Cripe opined with reasonable medical certainty that Furman did not demonstrate a neurologic illness or a brain disease, but that he did

demonstrate some impairments of neuropsychological functioning that involve attention, memory, motor operations, and impulse control. It's also my opinion that as a part of the neuropsych battery, that he demonstrates a rather severe personality disorder.

RP XVI:2636, 2668-69, 2739, 2745. Cripe also opined that

on a daily basis Mr. Furman has tenuous control over his behavior, his actions. And he can maintain that control if he really works at it, and if the external structure around him helps with that. But when he gets into stress situations, and when he gets into things that put a lot of tension into his system, and when drugs come on board, that tenuous control has a very high probability of being abated, and then he becomes very impulsive and does things that end up mystifying all of us.

RP XVII:2780. Cripe further opined that between Furman's disorder and his drug usage

it becomes very improbable that [Presler's murder] was a deliberate, reflected, weighed out action . . . that there was not a normal capacity [to premeditate]. And it certainly was not exercised.

RP XVI:2647-48, 2682. Cripe characterized Furman's assault on and rape of Presler as

an unplanned, nondeliberate, nonreflective act, that although it has a series of components to it, is not the result of a deliberate plan.

RP XVI:2763-64. Cripe indicated that both Marra and Olson's reports and testing were consistent with his opinions, but subsequently acknowledged that Marra specifically diagnosed Furman as having an antisocial personality disorder while Cripe would not use that term. RP XVI:2651, 2669- 78, 2680-81, XVII:2790-91, *but see* RP XVI:2766-68.

Furman's second expert witness was Halpern, a neuropharmacologist. Neuropharmacologists study the effects of mood

and behavior altering drugs, how these drugs work, therapeutic uses for these drugs, and how to cope with some of the problems produced by them, such as withdrawal. RP XVII:2819.

Halpern testified about methamphetamine and its effect on the body when smoked. RP XVII:2823-26, 2833-34. Methamphetamine sped the mind up, but did not cause the mind to go blank. RP XVII:2889. Someone under the influence of methamphetamine would be able to recall events, but their memory would be imperfect. RP XVII:2894-95. As an example, an affected person would

be able to remember how [he] got to [his] car, and where [he] left [his] car. But [he might] not remember that [he] already locked [his] keys inside the car, or something like that.

RP XVII:2895.

Halpern considered the effects of methamphetamine, Furman's drug history, reports prepared by Olson, which included reports of Furman's sexual history that predated Furman's methamphetamine usage, and a picture of the marijuana pipe in forming his opinion as to the drug's effect on Furman's ability to premeditate. RP XVII:2830, 2868, 2869-70, 2883. Halpern, however, never studied Furman's tolerance to methamphetamine. RP XIX:3009. Halpern also indicated that the dosage of methamphetamine and when it was smoked by Furman prior to Presler's rape and murder would affect his opinion, but the undisputed

evidence is that the dosage and time of smoking could not have been determined from the pipe's residue. RP XIV:2459-61, XVII:2835, 2886-87, 2891.

Based upon the foregoing, on Furman's statements regarding his drug usage on the day of the murder, and on a brief factual description of Presler's rape and murder, Halpern opined that Furman was not

able to reflect, or consider, or deliberate about the mechanics of his actions, or the consequences of his actions, as a consequence of the use of the drug.

RP XVII:2863-65.6 He also volunteered that Furman probably suffered from something called Cluver-Busi syndrome, which could cause a person to attempt sex with almost any inanimate object or person. RP XVII:2869-71.

#### ***4. Penalty Phase Evidence***

At the penalty phase, the State's case-in-chief was limited to the introduction of Furman's criminal convictions. Furman introduced testimony to establish that he:

(1) Was malnourished as a very young infant, RP XX:3181, 3184, 3200;

(2) Moved many times while growing up, RP XX:3219, XXI:3333;

(3) Was introduced to marijuana at the age of 13 by an uncle who discouraged him from using any "harder" drugs, RP XX:3208-12;

(4) Was taught how to shoplift at the age of 9 by one of his mother's boyfriends, RP XXI:3315-17;

(5) Voluntarily assisted in the care of a young handicapped neighbor, RP XX:3281-82;

(6) Was never provided appropriate drug treatment or counseling by the California courts or probation departments, RP XX:3226-45, 3235, RP XXI:3330-31;

(7) Was involved in several incidents of sexual abuse as a "victim," RP XX:3222-24, 3228-30, 3233;

(8) Was supportive of his mother, younger siblings, and an ill aunt, RP XX:3228, XXI:3331-32;

(9) Moved to Port Orchard from California with his younger sister so that she could get to know her birth father, RP XX:3227, 3236; 3245-46, XXI:3326;

(10) Was physically abused, RP XX:3202, 3233;

(11) Was the product of a broken home, RP XXI:3314; and

(12) Acted totally out of character when he assaulted and raped Mrs. Presler and that it could only have been caused by drugs. RP XX:3232, 3283.

Over the State's objection, the court allowed Furman to introduce

various photographs from his childhood because they were relevant to mercy and sympathy. RP XXI:3307-10; Ex. P-138, P-139, P-140, P-142, P-145, P-146, P-147.

The State rebutted this evidence through cross-examination by showing that Furman:

(1) Was referred to an out-patient drug treatment center in California in 1988, saw various California probation officers and psychologists, and was placed in the Aschwan Treatment Center, RP XX:3193-94, 3226, 3241-44, 3253-55, 3271-73, XXI:3345;

(2) Consumed drugs before attending certain counseling sessions, RP XX:3275, 3278-79, XXI:3345-46;

(3) Moved to Washington from California because he could not comply with the rules of his mother's household, RP XX:3245-46, 37 XXI:3351;

(4) Denied that he was ever physically abused and that this statement was confirmed by some family members, Tape 3, RP XX:3212-13, 3247-49, XXI:3361-62;

(5) Denied that he was ever sexually abused and that he had been evaluated by a sexual abuse program in California that concluded he had not been sexually abused, RP XX:3244-45;

(6) Taunted his stepfather because he was unemployed and harassed his younger siblings, RP XXI:3347, 3348-49, 3363-64;

(7) Physically struck out at other people and his bedroom walls when he was angry even when he had not consumed drugs, RP XX:3251, 3285-86, XXI:3348-51, 3355-56;

(8) Sexually exposed himself when not on drugs and sexually exploited younger children, RP XXI:3353; and

(9) Violated probation orders by stealing, possessing drug paraphernalia, and threatening to physically harm his supervisor, RP XXI:3340-42, 3352, 3355-56.

Furman also called the juvenile probation officer, David Corn, who had prepared the juvenile case summary for the declination hearing. During direct examination, Corn testified extensively regarding the preparation of the decline summary. RP XXI:3369-74. Corn was permitted to give an opinion regarding Furman's level of maturity and social development. RP XXI:3372-73.

### **C. RESENTENCING FACTS**

Former Kitsap County Sheriff's Detective James Harris first spoke with Furman, who lived about a half mile from Pressler's house, two days after the murder. RP (3/5) 15. Furman agreed to accompany Harris the

next day and show him the houses where he went to looking for work. RP (3/5) 17. When they passed Pressler's house, which had crime scene tape around it, Furman asked if that's where the murder happened. RP (3/5) 18. Furman stated that he did not think he had been to her house. RP (3/5) 18.

As they were leaving, Harris mentioned that the neighbors across the street would have seen anyone coming or going from Pressler's house. RP (3/5) 18. Furman at that point said he was not sure if he had gone to Pressler's house. RP (3/5) 18.

After the ride through the neighborhood, they returned to the sheriff's office, where Harris and Detective Wagner conducted a recorded interview. RP (3/5) 19. The trial court listened to the recording of the interview. RP (3/5) 19. Furman again stated that he did not recall going to Pressler's house. RP (3/5) 20.

After the interview the detectives obtained a hair sample from Furman and then continued talking to him. RP (3/5) 20. They explained to him that they had been showing his photo around and reminded him that the neighbors could see Pressler's house. RP (3/5) 20. Over the course of the next hour, Furman said he might have gone to the house, that he knocked on the door but Pressler had no work for him, to finally stating that Pressler had agreed to pay him \$10 to wash her windows. RP (3/5) 20.

Harris then pointed out to Furman that the window washing had

been started but not completed. RP (3/5) 21. He told Furman that something bad had happened in the house. RP (3/5) 21. Furman sat quietly for a short time and then stated that he did not want to hurt her. RP (3/5) 21.

Furman told Harris that he was washing the windows and they got into an argument over the cleaning fluid he was using and she slapped him. RP (3/5) 21. Furman responded by punching her three times in the head. RP (3/5) 21. After that the detectives conducted another recorded interview with Furman, which was played for the court. RP (3/5) 22.

After that the detectives obtained consent from Furman for a blood draw and to search his house to get the clothes he had hidden in the attic and garage. RP (3/5) 22. They also obtained a warrant to search the house. RP (3/5) 22. When they arrived at the house, Furman's stepfather refused to allow the search and told them to get a warrant. RP (3/5) 23. They showed him the warrant and searched the house. RP (3/5) 23, 29. After the search Furman also admitted involvement in numerous burglaries. RP (3/5) 29.

At no point during any of the conversations with Furman did he not appear to understand what was going on. RP (3/5) 24. He spoke rationally, he responded to the questions, and had no problems at all understanding what was happening, and he communicated well. RP (3/5)

24. Furman did not show any emotion during the interviews. RP (3/5) 24.

They found Pressler's body in the laundry room. RP (3/5) 25. There was blood spatter on the walls and on the washing machine. RP (3/5) 25. There were shards of a broken vase entangled in her clothing. RP (3/5) 25.

In the kitchen they found a ring case that had been moved from the bedroom and a coffee pot that was dented from when Furman hit Pressler with it. RP (3/5) 26. It had blood on it and was dented on both sides. RP (3/5) 27. There was a towel Furman said he had used to wipe his fingerprints from the scene tied to the back door. RP (3/5) 26. Pressler's glasses were found in the kitchen sink and her dentures were on the floor. RP (3/5) 26. Furman struck Pressler with three vases. RP (3/5) 28. Two of them broke. RP (3/5) 28.

After his arrest, Furman initiated contact with Harris on a number of occasions. RP (3/5) 29. On one occasion, Furman agreed that the death penalty would be appropriate. RP (3/5) 30. In a statement a few months after the murder, Furman asserted that the only drug he used was marijuana. RP (3/5) 31. He never mentioned using any other drugs. RP (3/5) 32.

Throughout all their conversations, Furman displayed little remorse. RP (3/5) 32. In the second recorded statement, he stated he felt

bad about what happened and was sorry, but that was it. RP (3/5) 32.

The court then heard from Pressler's daughter-in-law, grandson, granddaughter, and two great-granddaughters on the enormous impact the murder had had on generations of their family. RP (3/5) 43-73.

Furman called forensic psychologist Dalton Young on his behalf. RP (3/5) 75, 77. He evaluated Furman for the resentencing hearing. RP (3/5) 78.

Young first discussed the development of brain science since the 1970s. RP (3/5) 80-94. He then discussed his review of documentation regarding Furman's childhood, and testified regarding the negative events that occurred during it. RP (3/5) 95-113. He then opined that by mid-adolescence, Furman was a "psychological train wreck." RP (3/5) 113.

Young was unable, however, to offer a specific opinion as to how these events would have played out at the time of the murder:

If we -- if we take just the adolescence as a class, I've described what we know about them in terms of their development and brain development and such. We don't know precisely where Michael would have fit along that distribution of maturity and capacities during mid-adolescence. We can't possibly know that. We can't know it with any precision. The best guess would be that he would fall somewhere in the mid-range, which is to say those capacities and maturity would be distributed on a bell curve, right; a normal bell curve, and the odds are he would fall somewhere within that large part.

RP (3/5) 114-15.

Young also discussed some evaluations that were done of Furman about three years before the murder that showed a lower IQ and other maladjustment. RP (3/5) 116. Evaluations after his arrest in 1989 showed that he had an IQ in the 25<sup>th</sup> percentile. RP (3/5) 117. Young then discussed Furman's development since his incarceration. RP (3/5) 119. He noted that Furman had adapted well in prison. RP (3/5) 120-23.

Young again declined to offer an opinion as to whether Furman's childhood and adolescence lessened Furman's culpability:

Q. Can you tell us how at -- what we know of Michael would tell us about his diminished culpability today?

A. Well, the degree of his diminished culpability is up to the Court. It's not for me to decide that ultimate question. What I can point to is these, what I have described, is his considerable immaturity and relative incapacity as compared to an adult.

Q. But given -- so given everything that we know about Michael at 17, would he be, in your opinion, as culpable for this act as would a similarly-situated adult?

A. Well, I think his capacities to make those judgments and restrain impulses was much weaker at 17 than for a normal adult. And so to the extent that that implies reduced culpable, then, yes, indeed. But as I say, ultimately that decision is not mine. That is for the Court.

RP (3/5) 123.

On cross-examination, Young admitted he could not tie Furman's development to the circumstances of the crime:

Q. And it certainly -- it's not your testimony that his

brain development was the cause of this murder, right?

A. There is no direct causal link.

RP (3/5) 126. Young recognized that his opinions were consistent with what had been presented to the court at the original sentencing hearing:

Q. All right. Were you able to identify any big differences between your own analysis and the analysis of Dr. Olsen and Dr. [Cripe] back in 1989?

A. I did not identify substantial differences.

RP (3/5) 133. Young also admitted that his opinions regarding rehabilitation were largely based on statistics:

Q. So that normative research on juveniles aging out [of criminal behavior], we certainly can't specifically apply that to Mr. Furman and say, Well, we have aged out, right?

A. Correct.

Q. We just don't know?

A. Correct. Those are normative, aggregate data.

RP (3/5) 145. Young specifically noted that Furman did not have any issues of diminished capacity in a legal sense:

Q. But certainly it's not your testimony that he did not understand that rape was wrong?

A. Right. No, that is not my opinion.

Q. And he clearly knew that murder was wrong as well?

A. Correct.

Q. And we saw that from his statements and some of the things that he did following the murder. He clearly understood that he had done something very, very wrong?

A. Correct.

RP (3/5) 146.

Young further conceded that did not have data to determine whether Furman's prison progress was unusual:

Q. Mr. Furman has been in the Department of Corrections for 29 years, roughly; a little less than that. Have you over the course of your career had the opportunity to review the Department of Corrections' records for anybody else who has been in prison for that long?

A. Not that long.

Q. Okay. So are you able to testify that his conduct is particularly extraordinary, or you just don't know that?

A. I can't compare it to other persons.

RP (3/5) 148. Finally, he made it clear that he could not predict whether Furman's in-prison behavior would translate to life in society:

Q. And so how somebody behaves in the Department of Corrections, is that a -- would you -- is that the same as how they might behave outside of the Department of Corrections?

A. It depends.

Q. Yeah. It's probably something that we can't really tell?

A. We do know that most adults, by the time they get to be into their 20's and 30's, tend to behave a lot better.

Q. Right. And based upon that generality, we hope to apply that as best we can to Mr. Furman?

A. Well, I am not applying it specifically because we don't know.

Q. We just don't know?

A. There is no way to know.

RP (3/5) 147.

Furman also presented the testimony of his siblings, RP (3/6) 152-89, and his Corrections Industries supervisor. RP (3/26) 4-25. Finally Furman addressed the court. RP (3/26) 26-56.

### III. ARGUMENT

#### A. FURMAN'S PURPORTED APPEAL SHOULD BE REVIEWED AS A PERSONAL RESTRAINT PETITION.

RCW 10.95.035(3) provides that a sentencing “court’s order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986.” The only lawful means of obtaining review of a parole board decision prior to July 1, 1986, was to file a personal restraint petition. *State v. Bassett*, 198 Wn. App. 714, 434-35, 394 P.3d 430 (2017) (citing *In re Rolston*, 46 Wn. App. 622, 623, 732 P.2d 166 (1987)), *aff’d*, 192 Wn.2d 67 (2018). Accordingly, as Furman notes in his brief, Brief of Appellant at 26, his appeal should be considered as a personal restraint petition. *State v. Delbosque*, 6 Wn. App. 2d 407, 413-14, 430 P.3d 1153 (2018), *petition for review granted*, \_\_\_ Wn.2d \_\_\_, 439 P.3d 661 (2019).

**B. THE TRIAL COURT PROPERLY CONSIDERED THE EVIDENCE OF MITIGATION PRESENTED TO IT AND THE WEIGHT IT GAVE TO THE EVIDENCE WAS WITHIN ITS SOLE DISCRETION.**

*1. Standard of review.*

To obtain relief by filing a PRP, the petitioner must show that he is restrained under RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c). *Bassett*, 198 Wn. App. at 722. To show his restraint is unlawful, Furman must demonstrate the court abused its discretion in how it resentenced him. *In re Dyer*, 164 Wn.2d 274, 285-86, 189 P.3d 759 (2008).

A court conducting a *Miller* resentencing abuses its discretion when it “acts without consideration of and in disregard of the facts” or relies on speculation and conjecture in disregard of the evidence. *See Dyer*, 164 Wn.2d at 286 (*quoting In re Dyer*, 157 Wn.2d 358, 363, 139 P.3d 320 (2006)) (explaining when the Indeterminate Sentence Review Board abuses its discretion in setting minimum terms). During the resentencing hearing, the trial court must “fully explore the impact of the defendant’s juvenility on the sentence rendered.” *State v. Ramos*, 187 Wn.2d 420, 443, 387 P.3d 650, *cert. denied*, 138 S. Ct. 467 (2017) (*quoting Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572 (2014)).

The court and counsel thus have an affirmative duty to ensure that

proper consideration is given to the defendant's chronological age at the time of his crime and to youth-related characteristics, including immaturity, impetuosity, and a failure to appreciate risks and their consequences. *Ramos*, 187 Wn.2d at 443 (citing *Miller*, 567 U.S. at 477). The court must also consider the defendant's childhood and life experiences before the crime, the defendant's capacity for exercising responsibility, and evidence of the defendant's rehabilitation since the crime. See RCW 10.95.030(3)(b) (requiring that courts sentencing juveniles for aggravated first degree murder account for 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"); *Miller*, 567 U.S. at 477-78.

In *Delbosque*, on which Furman relies heavily, the petitioner committed aggravated first degree murder in 1993 when he was 17 and received a mandatory sentence of life in prison without parole. *Delbosque*, 6 Wn. App. 2d at 409. Following his *Miller* hearing in 2016, the trial court resentenced him to a minimum term of 48 years with a maximum term of life imprisonment. *Id.* The trial court entered a finding of fact that the petitioner could not be rehabilitated because, first, his present attitude towards others was "reflective of the underlying crime" and, second, the murder "was not symptomatic of transient immaturity, but has proven

overtime to be a reflection of irreparable corruption, permanent incorrigibility, and irretrievable depravity.” *Delbosque*, 6 Wn. App. 2d at 418. *Delbosque* challenged the finding as lacking substantial evidence, and the Court agreed. *Id.* Because the trial court’s finding on rehabilitation lacked substantial evidence, it essentially did not consider whether the petitioner had been or could be rehabilitated. Accordingly, this Court held that the trial court failed to properly consider all mitigating circumstances related to youth, and it granted the PRP. *Delbosque*, 6 Wn. App. 2d at 420.

Here, on the other hand, the trial court explicitly, thoughtfully, and carefully considered mitigating factors related to Furman’s youth and his potential for rehabilitation, giving weight to his age, childhood and life experiences, the degree of responsibility he was capable of exercising, and his chances of rehabilitation. CP 219-23.

In keeping with its “complete discretion,” *State v. Bassett*, 192 Wn.2d 67, 81, 428 P.3d 343 (2018), to weigh factors related to the defendant’s youth and its obligation to “fully explore the impact of the defendant’s juvenility on the sentence rendered,” *Ramos*, 187 Wn.2d at 443 (*quoting Aiken*, 410 S.C. at 543), the court also considered the nature of the crime and Furman’s role in it:

Based on the seriousness of the crime, its deliberate, cruel and intentional conduct, the low end, 25 years, is not appropriate. Taking into consideration his age and abusive childhood, which may have had some part in his

committing the crime, plus his immaturity and lack of judgment based on his age, and his demonstrate[d] rehabilitation while in prison, the Court believes he must at some point be given a meaningful opportunity of parole[e] Therefore, the Court will sentence the defendant to a minimum term of 48 years in prison, being first eligible for parole at age 65. His maximum term remains life.

CP 223 (corrections added).

**2. *The trial court acted within its discretion in determining the weight to give to Furman’s age as a factor in mitigation.***

Furman contends the court erred “in concluding that it need only give ‘minimal weight’ to Mr. Furman’s juvenile status because he was seventeen, almost eighteen, and not sixteen.” Brief of Appellant at 2-3 (Issues 1 & 6), 37, 40-41. Furman misinterprets the trial court’s finding, which was within its discretion.

Essentially, Furman is contending that the court did not weigh the mitigating factors in the manner most favorable to him. But the sentencing court has “complete discretion” in weighing mitigating factors related to youth when sentencing. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). Moreover, the reviewing court cannot reweigh the evidence. *Ramos*, 187 Wn.2d at 453. Here the conclusion Furman objects to stated:

Furman was just two months shy of his 18th birthday, almost an adult. This court does not consider this a mitigating factor in the same way as it would if he had been 14-16. However, in light of the juvenile brain research and

the caselaw, the court gives it minimal weight.

CP 234-35. Plainly, the trial court did not as a matter of law find that it “need only” give minimal weight to Furman’s age. To the contrary, it was noting that Furman’s age was at the high end of the juvenile spectrum, but *nevertheless* gave it some weight due to the brain research, as was further reflected in the conclusion of its order:

Based on the seriousness of the crime, its deliberate, cruel and intentional conduct, the low end, 25 years, is not appropriate. *Taking into consideration his age* and abusive childhood, which may have had some part in his committing the crime, *plus his immaturity and lack of judgment based on his age ...*

CP 223 (emphasis supplied).

Moreover, age *per se* is not a mitigating factor. As the Supreme Court explained in *State v. O’Dell*, 183 Wn.2d 680, 695-96, 358 P.3d 359, 366 (2015), “age is not a *per se* mitigating factor automatically entitling every youthful defendant to an exceptional sentence.” Although Furman may disagree with how the court weighed the evidence, this Court does not reweigh the evidence on review. *Ramos*, 187 Wn.2d at 453. The court here gave due consideration to this factor.

**3. *The trial court’s findings regarding remorse are neither contradictory nor an abuse of discretion.***

Furman next argues that the court erred “in entering finding of fact XVII that Mr. Furman ‘never showed any real remorse,’” which he

contends contradicts Finding of Fact XXIX. Brief of Appellant at 2 (Issue 2). These findings are in no way contradictory. The former finding referred to the testimony of Detective Harris. CP 216; RP (3/5) 32. The latter referred to Furman's allocution at the *Miller* hearing. CP 219; RP (3/26) 26.

The trial court clearly found the former more credible and persuasive. In its discussion of the degree of responsibility Furman was capable of exercising the trial court specifically concluded that Furman had not shown remorse. CP 220. As previously noted, the weight to be given various facts is within the discretion of the trial court, and is not subject to reevaluation of review.

Furman does not appear to challenge the factual basis for the conclusion that Furman lacked remorse. However, even if he did, the trial court had before it testimony at trial that Furman lacked remorse. It also had the benefit of being present to hear Furman's own present-day claim to remorse, which put it in a far better position than this Court to judge his credibility.

***4. The trial court's findings regarding Dr. Young's testimony are supported by the record.***

Furman also argues that the court erred in "entering finding of fact XXIV that Dr. Young 'could not affirmatively state there was a direct

causal link establishing the defendant's brain development (or lack thereof) and the murder of Ms. Presler," Brief of Appellant at 2 (Issue 3), and "finding of fact XXVI indicating Dr. Young could not say how Mr. Furman's exemplary prison conduct would translate outside prison." Brief of Appellant at 2 (Issue 4). He also challenges Finding XXVII. Brief of Appellant at 2-3 (Issue 5). These findings are fully supported by the record.

Finding XXIV is virtually verbatim from Young's testimony:

- Q. And it certainly -- it's not your testimony that his brain development was the cause of this murder, right?
- A. There is no direct causal link.

RP (3/5) 126.

Finding XXV likewise accurately reflects Young's testimony:

- Q. And so how somebody behaves in the Department of Corrections, is that a -- would you -- is that the same as how they might behave outside of the Department of Corrections?
- A. It depends.
- Q. Yeah. It's probably something that we can't really tell?
- A. We do know that most adults, by the time they get to be into their 20's and 30's, tend to behave a lot better.
- Q. Right. And based upon that generality, we hope to apply that as best we can to Mr. Furman?
- A. Well, I am not applying it specifically because we don't know.

Q. We just don't know?

A. There is no way to know.

RP (3/5) 147.

Finally, he faults Finding XXVII, which states:

Juvenile Brain research does not show that juveniles are necessarily incapable of exercising good judgment or that their failure to control antisocial impulses is necessarily excusable. Dr. Young did not say that the defendant couldn't exercise good judgment or control his impulses.

CP 218. Although listed in his assignments of error, Furman does not appear to specifically address this point in his argument. *See State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (Parties raising issues must present considered arguments to the appellate court or they will not be entertained). It will suffice therefore note that these statements are essentially negatives. Furman fails to cite any evidence stating that juveniles in general or Furman in particular are "necessarily incapable" of exercising judgment. Moreover, Young testified was unable to say that the normative research regarding juveniles specifically applied to Furman. RP (3/5) 145. As such, Furman fails to meet his burden of showing that this finding is unsupported by the evidence.

**5. *Because Furman failed to present any testimony tying his abusive childhood and immaturity to the crime, the trial court properly gave these factors only some weight.***

Furman next argues that the trial court's analysis in Conclusion of

Law 3, CP 220, was flawed. Brief of Appellant at 3 (Issue 7), 37-39. Furman relies primarily on *Delbosque*. There, however, this Court reversed because the trial court made a finding that the defendant was incorrigible based on evidence insufficient to support that conclusion.

Here, on the other hand, the trial court weighed the mitigating evidence of youth, but determined that the objective evidence of the crime and the expert testimony failed to tie his youthfulness to the crime:

Despite his abusive childhood, this Court finds Defendant exercised a great deal of responsibility and deliberate conduct in committing this horrific crime. Drugs were not a factor—which he admitted, and there is no evidence he was suffering from any mental health defects which would count as a mitigating factor.

This was not a reckless or impulsive act, but rather one of a clear, cold, calculating decision of a mind fully cognizant of future consequences.” David Corn, his juvenile PO, described the defendant’s actions as going beyond violence and anger and constituted almost “controlled rage.”

The defendant did not go to Ms. Presler’s house intending to kill her, but quickly made to decision to do so shortly after entering her house and seeing her money in her purse. He made a series of strategic choices in killing her, raping her and then covering up the crime. He used rags on the vases he struck her with and on the door to avoid leaving fingerprints, he lied to the detective about whether he had ever been there and said that she slapped him first, and he showed callous disregard and absolute cruelty in raping an 85-year-old woman who was already lying on the floor suffering from severe head wounds from the first two vases he hit her with. Finally, he admitted that he had to kill her to eliminate her as a witness and he deliberately and intentionally hit her again and again with the crystal vase. He also tried to cover up the crime by washing his jeans and hiding his shirt, and when he left the

house, he alternated between running and walking so he wouldn't arouse any suspicion. Further, he showed no remorse for this crime.

The degree of responsibility he was capable of exercising in this instance was quite high, despite his general diminished capacity for self-control and judgment as a juvenile.

CP 220-21. These, are not, in Furman's words, the acts of "a panicked disturbed child." Brief of Appellant at 39.

Furman further argues that the court did not consider Young's testimony about "Furman's diminished culpability, underdeveloped executive brain functioning, including increased risk taking, failure to appreciate consequences and responsibility, and susceptibility to outside influences." Brief of Appellant at 40 (*citing* RP (3/5) 83-88, 94-103).

First, there is no evidence whatsoever that "outside influences" such as peer pressure were involved in this crime. Furman was the sole person involved in the crime and acted alone. *Cf. Bassett*, 192 Wn.2d at 75 (expert testimony tying killing of parents to their refusal to reconcile with defendant).

Next, the cited testimony does not support the conclusions Furman argues. At the first cite, Young extensively discussed the progression of brain science over the last 40 years. At no point during this testimony did he discuss Furman or his crime. RP (3/5) 83-88.

The second cite to Young's testimony was a lengthy discussion of unfortunate events in Furman's childhood. However, the most recent abuse had occurred some five years earlier, when he was 13. RP (3/5) 100. At no point in his testimony did Young connect the general brain science or the traumatic events in Furman's early childhood to his actions in 1989 when he was nearly 18 years old. There was simply no evidence that this crime was the product of any youthful impetuosity. To the contrary, as detailed by the court, Furman's actions at the time of the crime demonstrated an awareness of the criminality of his acts. The Court nevertheless considered the general evidence of Furman's "age and abusive childhood, which may have had some part in his committing the crime, plus his immaturity and lack of judgment based on his age." CP 223. As noted previously, however, age and immaturity are not per se mitigating. Furman failed to present any evidence showing his behavior was the result of his age and immaturity. As such the trial court gave it the weight it found was due, which as also previously discussed, is not for this Court to reweigh.

**6. *The trial court accepted and properly considered Furman's evidence of rehabilitation while in prison.***

Furman next faults the trial court's consideration of Furman's prison behavior. Brief of Appellant at 4 (Issue 8), 41-43. He claims that the court "summarily disregarded the evidence." Brief of Appellant at 43.

This contention is contrary to the record.

The trial noted and accepted the evidence, as Furman notes. It did not “summarily disregard” it, but weighed it in its overall sentencing calculus:

“While a resentencing court may certainly exercise its discretion to consider evidence of subsequent rehabilitation where such evidence is relevant to the circumstances of the crime or the offender’s culpability, we decline to hold that the court is constitutionally required to consider such evidence in every case...” *State v. Ramos*, 187 Wn 2d 420 (2017). The court further stated: “*Miller* requires courts to consider the capacity for rehabilitation when deciding whether a juvenile should be subject to life without parole.” “However, evidence of actual demonstrated maturity and rehabilitation is generally considered later, when it is time to determine whether a former juvenile offender who is up for parole should be given early release.” *Ramos supra*.

The defendant has presented substantial evidence of subsequent rehabilitation while in prison. He has obtained his GED, numerous certificates in electronics and computers, has been virtually infraction free, is a medium risk offender and has consistently received high marks academically and amongst his superiors in his behaviors and interactions with staff, guards and fellow inmates.

While this Court does not find any of this evidence relevant to the circumstances of the crime, however, it acknowledges it may be relevant to the level of his culpability, especially in light of the research on adolescent brain science development which *Miller* requires courts to consider.

CP 221. It further specifically took it into account when it selected the appropriate minimum term:

Taking into consideration his ... demonstrate[d]

rehabilitation while in prison, the Court believes he must at some point be given a meaningful opportunity of parol[e].

CP 223 (corrections added).

**7. *The trial court did not impose a de facto life sentence.***

Furman's also contends that the trial court imposed an impermissible de facto life sentence. Brief of Appellant at 4-5 (Issue 9, 11 & 12), 29-31. This claim is contrary to the Supreme Court's definition of what constitutes a de facto life sentence.

The trial court here was fully cognizant that a de facto life sentence was inappropriate, and believed it was not imposing one:

Nonetheless, this Court believes the current state of the law is that it is unconstitutional to impose a literal or de facto life sentence for a juvenile homicide offender, and the Court must consider *Ronquillo*, in which the court held that a juvenile being sentenced to prison until age 68 is a de facto life sentence.

Based on the seriousness of the crime, its deliberate, cruel and intentional conduct, the low end, 25 years, is not appropriate. Taking into consideration his age and abusive childhood, which may have had some part in his committing the crime, plus his immaturity and lack of judgment based on his age, and his demonstrate rehabilitation while in prison, the Court believes he must at some point be given a meaningful opportunity of parol. [sic] Therefore, the Court will sentence the defendant to a minimum term of 48 years in prison, being first eligible for parole at age 65. His maximum term remains life.

CP 222-23.

Its conclusion is fully supported by the Supreme Court's holding in

*Ramos*, 187 Wn.2d at 434, which defined a de facto life sentence as one resulting “in a total prison term exceeding the average human life-span.” In that case, the defendant was sentenced to a total of 85 years, which would have made him 99 years old at the end of the term. *Ramos*, 187 Wn.2d at 432.

Some courts have hewed to the *Ramos* definition. See *State v. Scott*, 190 Wn.2d 586, 602, 416 P.3d 1182 (2018) (75 years with release at age 92 a de facto life sentence) (Gordon-McCloud, J., concurring); *State v. Keodara*, 3 Wn. App. 2d 1050, 2018 WL 2095683, at \*4 (2018), review denied, 191 Wn.2d 1024 (2018);<sup>4</sup> *State v. Saloy*, 197 Wn. App. 1080, 2017 WL 758539, \*12 (2017), review denied, 188 Wn.2d 1018 (2017) (release date at age 75 a de facto life sentence);<sup>5</sup> but see *State v. Ronquillo*, 190 Wn. App. 765, 775, 361 P.3d 779 (2015) (imprisonment until age 68 a de facto life sentence); *State v. Gilbert*, 3 Wn. App.2d 1007, 2018 WL 1611833, \*23 (2018) (Fearing, J., dissenting) (would hold eligibility for release at age 60 was a de facto life sentence),<sup>6</sup> rev’d, \_\_\_ Wn.2d \_\_\_, 438 P.3d 133, 137 n.4 (2019) (issue of whether sentence was de facto life not considered by Supreme Court).

*Ronquillo*, in holding that release at 68 was a de facto life sentence

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<sup>4</sup> Unpublished; see GR 14.1(a).

<sup>5</sup> Unpublished; see GR 14.1(a).

did not offer any criteria for where to draw the line. On the other hand, in another Division I case, and citing *Ramos*, this Court relied on life expectancy data gathered by the Washington Insurance Commissioner. *Keodara*, 2018 WL 2095683, at \*4 n.6. Under this calculation Furman’s current life expectancy, based on his age of 48 in June 2019, would be 79. See Life-expectancy table, Office of the Insurance Commissioner Washington State.<sup>7</sup> Furman’s eligibility for parole at 65 thus does not, under controlling precedent constitute a de facto life sentence.

**8. *Neither Fain nor Bassett are relevant to whether the trial court abused its discretion.***

Furman finally argues that the trial court’s sentencing calculus was improperly based on the “rejected” analysis of *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980). Brief of Appellant at 4 (Issue 10), 31-35. This contention misapprehends the holding in *Bassett*.

In that case, the Supreme Court considered whether sentencing a juvenile to a life-without-parole sentence could ever be constitutional under the Washington Constitution. *Bassett*, 192 Wn.2d at 72. Its discussion of whether to apply *Fain* or the “categorical bar” analysis was solely with regard to the constitutionality per se of juvenile LWOP

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<sup>6</sup> Unpublished; see GR 14.1(a).

<sup>7</sup> Available at <https://www.insurance.wa.gov/sites/default/files/2017-07/single-life-based-on-2010-us-population-mortality-life-expectancy-tables-1a-through-1h.pdf> (viewed Apr. 26, 2019).

sentences. *Bassett*, 192 Wn.2d at 82-85. The Court ultimately applied the categorical bar analysis and thereafter found juvenile LWOP unconstitutional. *Bassett*, 192 Wn.2d at 85-90. The Court also noted it would reach the same outcome under *Fain*. *Bassett*, 192 Wn.2d at 90-91. The Court then remanded with instructions to resentence Bassett to a minimum term of less than life. *Bassett*, 192 Wn.2d at 91.

At no point did *Bassett* apply the categorical bar analysis or for that matter a *Fain* analysis to the trial court's procedure at a *Miller*-fix resentencing. As discussed previously, the trial court here fully considered the evidence and properly imposed a sentence that does not amount to life or de facto life. The trial court did not abuse its discretion, and as such, Furman's sentence should be affirmed.

#### IV. CONCLUSION

For the foregoing reasons, Furman's sentence should be affirmed.

DATED May 15, 2019.

Respectfully submitted,

CHAD M. ENRIGHT  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS', with a long horizontal flourish extending to the right.

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**KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION**

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