Supreme Court No. 100239-4
COA No. 37445-9-III

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent

v.

ANTHONY WRIGHT,
Defendant/Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF PARTY

Respondent, State of Washington, was the plaintiff in the trial court and the respondent in the Court of Appeals.

II. STATEMENT OF RELIEF SOUGHT

Defendant filed a motion for discretionary review,[1] which this Court has indicated shall be treated as a petition for review.[2] *See* September 24, 2021, Letter Initiating Case. Respondent seeks denial of the defendant's petition for review of the published opinion issued by the Court of Appeals in *State v. Wright*, Slip Op. No. 37445-9 (August 24, 2021).

III. ISSUES PRESENTED

1. Does Mr. Wright present this Court with a basis for review of the decision below where he provides no argument why,

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[1] The defendant's "motion for discretionary review" also indicated that the decision below dismissed his personal restraint petition. Mot. at 1. This is inaccurate. The defendant filed a direct appeal from a 2020 resentencing hearing. CP 105-123. The Court of Appeals affirmed the judgment below.

[2] Hereinafter, the defendant's brief shall be referred to as a petition for review or "petition."

under stare decisis principles, this Court should abandon its longstanding precedent?

2. Have RCW 9.94A.340 and RCW 9.94A.535 "evolved" as applied to adult offenders such that post-sentence rehabilitation may be considered during a resentencing hearing, where rehabilitation is still irrelevant to the circumstances of the crime or the criminal history of the defendant?

3. Does Mr. Wright present this Court with a basis for review where his citation to numerous juvenile and youthful offender cases are unavailing to him, a 28-year old at the time of the murder, and he provides no reasoned analysis as to why those opinions should be extended to afford him relief?

4. Does Mr. Wright present this Court with a basis for review of his state constitutional law claim that his 40 year sentence for consecutive firearm enhancements violates article 1, section 14, where the sentence does not violate the Eighth Amendment, and he fails to undertake a *Fain*[3] analysis?

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

In 2001, twenty-eight-year-old Anthony Wright and his cohorts sought to shoot William Peralta over an unpaid debt of

[3] *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980).

$4,000, and fired several bullets into a house occupied by five adults and three children. RP 77. A three-year-old child died after being struck, and an adult was wounded. RP 77. A jury found Mr. Wright guilty of first-degree murder, attempted first-degree murder, and six counts of first-degree assault. CP 89-90; RP 77. Each charge carried a firearm enhancement. CP 91. The trial court entered a judgment of conviction and imposed a 1,660-month sentence. RP 76. Nearly twenty years later, the defendant sought and was granted a resentencing hearing pursuant to *State v. Weatherwax*, 188 Wn.2d 139, 392 P.3d 1054 (2017).

At the resentencing in 2020, Mr. Wright introduced significant evidence that he had been making positive progress towards rehabilitation while incarcerated. CP 48-56, 62-75; *see* RP at *passim*. Mr. Wright argued that his demonstrated rehabilitation since 2002 justified an exceptional downward

sentence. CP 57. The trial court disagreed with Mr. Wright's claim that post-incarceration rehabilitation could justify an exceptional downward sentence at a resentencing hearing. RP 53, 57.

Mr. Wright also requested the court run the eight firearm enhancements concurrently, claiming changes in the law permit such an exceptional sentence, and arguing that any sentence resting on eight consecutive firearm enhancements would constitute cruel punishment under the State constitution. CP 19-21; *see* RP at *passim*. The trial court again disagreed, reasoning it was bound by caselaw to impose the consecutive, mandatory five-year sentences for each enhancement. RP 56, 63.

The court imposed a low-end sentence, which consisted of 240 months for first-degree murder, 195.75 months for attempted first-degree murder, 480 months for the firearm enhancements, all consecutive to each other; and 93 months for the first-degree

assault convictions, all of which were concurrent with and subsumed by the attempted first-degree murder sentence. RP 61-62; CP 93, 95.

B. DECISION BELOW.

In its thorough opinion, the court of appeals affirmed the decision of the trial court. Specifically, regarding the imposition of an exceptional sentence downward based on rehabilitation subsequent to the crime, the court found that "long-standing case law," including *State v. Law*, 154 Wn.2d 85, 92, 110 P.3d 717(2005), prohibits the use of "factors which are personal and unique to the particular defendant, but unrelated to the crime" to impose a mitigated SRA sentence. Slip Op. at 7. Rather, the SRA "requires factors that serve as justification for an exceptional sentence to relate to the crime, the defendant's culpability for the crime, or the past criminal record of the defendant." *Id*. (citing *Law*, 154 Wn.2d at 89). The court rejected Mr. Wright's

contention that the SRA's requirements have "evolved," noting that several of the SRA's stated purposes, cited by Mr. Wright in support of his argument, were expressly relied on by the *Law* sentencing court in support of the mitigated sentence that was ultimately reversed by this Court. Slip Op. at 8.

Similarly, the court disapproved Mr. Wright's contention that the promulgation of RCW 36.27.130, which permits a prosecutor to request an offender be resentenced "if the original sentence no longer advances the interests of justice," manifests a legislative intent that similar rehabilitation may be considered a mitigating factor during *all* sentencing or resentencing hearings—even those which are not the product of a prosecutorial request under RCW 36.27.130. Slip Op. at 8-9.

The Court of Appeals found the defendant's argument, which relied on cruel and unusual punishment cases for juvenile offenders, unpersuasive, as the premise of those cases—that

"children are different"—did not apply to Mr. Wright, who was 28-years-old when he committed his offenses. Slip Op. at 10.

The court also rejected the defendant's contention that out-of-state caselaw, including federal law, supported his argument that post-conviction rehabilitation is a mitigating factor. Slip Op. at 10. The court found that the cited caselaw interpreted legislative enactments from other jurisdictions which explicitly permitted the consideration of post-offense conduct, including rehabilitation. Slip Op. at 10. Therefore, the Court of Appeals affirmed the trial court's finding that consideration of the defendant's post-offense rehabilitation was a factor that could not be considered under the legislature's "determinate, crime-based approach to sentencing." Slip Op. at 11.

The Court of Appeals likewise rejected the defendant's argument that changes in law now permit a trial court to run multiple firearm enhancements concurrently with each other by

imposing an exceptional downward sentence. The court traced an approximate 20-year-history of this Court's decisions involving whether firearm enhancements may run concurrently to each other, beginning with *Matter of Charles*, 135 Wn.2d 239, 247, 955 P.2d 798 (1998), and *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), through *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) and *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

The Court of Appeals determined that despite *some* changes in the law since *Brown*, its holding, barring concurrent sentences for firearm *enhancements* imposed on adult offenders, controlled Mr. Wright's claim. Slip Op. at 17. The court observed *Houston-Sconiers* only overruled *Brown* as to juveniles, which Mr. Wright clearly was not. Slip Op. at 15-17. Similarly, the court found *McFarland* inapplicable because that case's statutory interpretation only permits the possibility of

concurrent sentences for multiple firearm *offenses*, as distinguished from Mr. Wright's case, which involved multiple firearm *enhancements*.[4] Slip Op. at 15-17.

Lastly, the Court of Appeals rejected the defendant's Eighth Amendment claim that the imposition of eight consecutive five-year firearm enhancements constitutes cruel and unusual punishment. Slip Op. at 18-20. The defendant was neither a juvenile offender at the time of his crimes, nor was his crime subject to the death penalty, either of which circumstance would require an "individualized sentencing." Slip Op. at 19-20. The Court rejected the defendant's article 1, section 14 argument that his sentence constituted "cruel punishment," as he did not undertake a *Fain* analysis. *Fain*, 94 Wn.2d 387.

[4] It does not appear that the defendant has petitioned for review of the Court of Appeals decision distinguishing *McFarland* from *Brown*.

V. ARGUMENT

Under RAP 13.4(b), this Court will only accept review of a Court of Appeals decision if: (1) the decision of the Court of Appeals is in conflict with a decision of this Court, (2) the decision is in conflict with a published decision of the Court of Appeals, (3) the decision involves a significant question of law under the Constitution of the State of Washington or the United States, or (4) the petition involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b).

The defendant's petition for review fails to disclose his age at the time of his offenses—he was 28-years-old. Thus, not only is his reliance on law applicable to offenders under the age of 21 misplaced, but he also fails to provide a reasoned analysis as to why he should benefit from the same constitutional protections afforded to juvenile and youthful offenders specifically on

account of their age. The State requests this Court deny review as the defendant does not establish a significant constitutional question or a matter of substantial public interest.

A. THE DEFENDANT PRESENTS NO ARGUMENT WHY THIS COURT SHOULD ABANDON ITS PRIOR PRECEDENT.

The Court of Appeals found that *State v. Law* controls the first issue presented in the defendant's appeal. Slip Op. at 4. *Law* was decided in 2005. Thus, the defendant's petition for review necessarily requests this Court abandon long-standing precedent in order to afford him his requested relief, but Mr. Wright has failed to demonstrate why this Court should do so. Precedent is important to the law's stability:

> Stare decisis promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. We therefore do not lightly set aside precedent. Instead, we require a clear showing that an established rule is incorrect and harmful before it is abandoned. We may also abandon our

> precedent when its legal underpinnings have changed or disappeared altogether.

State v. Johnson, 188 Wn.2d 742, 756-57, 399 P.3d 507 (2017) (internal quotations, brackets, and citations omitted). Neither circumstance applies here.

The defendant asks this Court to extend the scientific evidence undergirding *Miller v. Alabama* and *State v. Houston-Sconiers*, and their progeny to a fully formed adult who was 28-years-old when he committed murder, and yet fails to explain why he is subject to the same scientific principles or constitutional protections. Based significantly on considerations only applicable to juveniles and youthful offenders, or on sentencing law from other jurisdictions, Mr. Wright asks this Court to overturn its decision in *Law* that the SRA does not permit consideration of factors which are personal to a defendant

and which do not relate to the circumstances of the crime committed or the criminal history of the defendant.[5]

In seeking an extension of the constitutional protections available to juveniles and youthful offenders, Mr. Wright has not presented any credible scientific evidence or studies which demonstrate 28-year-old brains are similarly underdeveloped and prone to decision-making difficulties that would mitigate a juvenile or youthful offender's culpability in committing a criminal offense. To the contrary, scientific evidence suggests that risk-taking peaks at 16 to 17 years of age, and brain structure and functions studies reveal growth in the areas of the brain associated with decision-making and judgment *up to* 25-years-old. Barry C. Feld, ADOLESCENT CRIMINAL RESPONSIBILITY,

[5] This Court characterized RCW 9.94A.340 as "explicit[ly] command[ing] that sentences be imposed 'without discrimination as to any element that does not relate to the crime or the previous record of the defendant.'" *Law*, 154 Wn.2d at 97.

PROPORTIONALITY, AND SENTENCING POLICY: *ROPER, GRAHAM, MILLER/JACKSON*, AND THE YOUTH DISCOUNT, 31 Law & Ineq. 263, 286 (2013); Jay Giedd, BRAIN DEVELOPMENT, IX: HUMAN BRAIN GROWTH, 156 Am. J. Psychiatry 4 (1999). As further discussed below, the defendant has failed to demonstrate both how *Law* was incorrectly decided and how that decision is harmful. This Court should decline to review the decision below.

B. THIS COURT SHOULD DECLINE TO REVIEW WHETHER RCW 9.94A.340 AND RCW 9.94A.535 PROHIBIT CONSIDERATION OF POST-CONVICTION REHABILITATION DURING ADULT SENTENCING HEARINGS.

1. Post-conviction rehabilitation does not directly relate to the crime, the defendant's culpability for the crime, or the defendant's criminal history.

The Sentencing Reform Act sets forth nonexclusive "illustrative" mitigating factors, *see* RCW 9.94A.535, all of which this Court has observed "relate directly to the crime or the

defendant's culpability for the crime." *Law*, 154 Wn.2d at 95; *and see* former RCW 9.94A.390(1) (1999).

The SRA "requires factors that serve as justification for an exceptional sentence to relate to the crime, the defendant's culpability for the crime, or the past criminal record of the defendant." *Law*, 154 Wn.2d at 89. A factor "'must relate to the crime and make it more, or less, egregious.'" *Id*. at 98 (quoting *State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002)). This limitation is required by the nondiscrimination mandate of the SRA, which provides that sentences be imposed "without discrimination as to any element that does not relate to the crime or the previous record of the defendant." RCW 9.94A.340.

This Court has repeatedly rejected exceptional sentences based on factors personal in nature to a particular adult defendant. *See Law*, 154 Wn.2d at 97-98 (citing *State v. Freitag*,

127 Wn.2d 141, 145, 896 P.2d 1254 (1995), *amended,* 127 Wn.2d 141, 905 P.2d 355 (1995) (SRA precludes consideration of defendant's altruistic past during sentencing); *State v. Ha'mim*, 132 Wn.2d 834, 836–37, 940 P.2d 633 (1997), (age alone[6] does not relate to the crime or previous record of the defendant); *State v. Fowler*, 145 Wn.2d 400, 409, 38 P.3d 335 (2002) (strong family support for defendant does not justify an exceptional sentence)).[7]

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[6] *Ha'mim* was subsequently clarified in *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015), which held that youthfulness *may* support an exceptional sentence downward if the sentencing court finds that the defendant's youth diminished his or her capacity to appreciate the wrongfulness of his or her conduct or to conform that conduct to the requirements of the law.

[7] In response to an amicus curiae brief filed in *Law*, this Court observed, "while amicus asserts general policy justifications for consideration of such personal factors, it fails to show how our prior interpretations of the SRA are in fact incorrect. Absent such a showing, the doctrine of stare decisis compels us to reaffirm our prior case law construing the SRA." 154 Wn.2d at 103. Here

Mr. Wright's post-offense, post-conviction rehabilitation, while laudable, does not relate to the circumstances of the crime or to his criminal history from 2001. A rule which interprets RCW 9.94A.340 and RCW 9.94A.535 to permit consideration of post-conviction rehabilitation during a sentencing or resentencing hearing, would result in an unending stream of resentencing requests—an unworkable scheme that would overburden Washington's trial courts and which would undermine the finality of judgments entered long ago. Such a decision could also result in the return of racially biased and skewed sentencing practices the SRA was promulgated to prevent. *See* Slip Op. at 5-6.

The defendant claims post-conviction rehabilitation is the "conceptual opposite of rapid recidivism" and that

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too, the defendant fails to demonstrate how this Court's interpretation of the SRA is harmful, even if harsh.

"extraordinary rehabilitation" both differentiates a defendant from others convicted of the same crime and decreases the defendant's culpability for the crime, and therefore is a permissible basis for an exceptional sentence downward. Pet. at 12. It is unclear, however, how an adult defendant's culpability at the time of the crime may be said to have been diminished by extraordinary rehabilitation occurring years or decades after the fact.

For juveniles and youthful offenders on the other hand, post-conviction rehabilitation *may* be relevant in a resentencing hearing—as the *capacity* for rehabilitation is a necessary consideration in imposing a sentence for such offenders. *State v. Ramos*, 187 Wn.2d 420, 449, 387 P.3d 650 (2017), *as amended* (Feb. 22, 2017) (*citing Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)). Similarly, a *demonstrated* ability for reform during adulthood may call into

question whether a child or youthful offender was incorrigible at the time of the offense, or, whether, as science recognizes, the offender's youthfulness at the time of the crime might mitigate their culpability for the offense. *State v. Delbosque*, 195 Wn.2d 106, 121-122, 456 P.3d 806 (2020) (because a child's character traits are not as well-formed as an adult's, "resentencing court[] must consider the measure of rehabilitation that has occurred since a youth was originally sentenced to life without parole" … "The key question is whether a defendant is capable of change. If subsequent events effectively show that the defendant has changed or is capable of changing, LWOP is not an option")(italics removed); *see also Matter of Monschke*, 197 Wn.2d 305, 321, 482 P.3d 276 (2021); *O'Dell*, 183 Wn.2d at 695.

Yet, when an offender is a fully-formed adult—well over the age of 25 when experts agree the brain has matured—the court may not take those considerations into account at

sentencing under the SRA provisions discussed above. This is so because demonstrated rehabilitation does not bear on an adult offender's culpability *at the time of the offense*, committed by a person with a fully-developed brain.

Post-conviction rehabilitation is also not the "conceptual opposite of rapid recidivism," Pet. at 12, the gravamen of which is "disdain for the law" manifested by the commission of a new offense "shortly after being released from incarceration." *State v. Combs*, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010). Rapid recidivism, of course, involves the timing of the current offense in relation to the past history of the offender, both of which are permissible considerations for an exceptional sentence.

The defendant has not offered any scientific evidence that would demonstrate individuals in their late-20s suffer from the same hallmark characteristics of youth that would permit a court

to find their criminal culpability was mitigated by their youth. This Court should decline to extend *Miller*, *Houston-Sconiers* and their progeny to the defendant or others similarly situated absent such evidence or indicia of a contrary legislative intent.

2. The promulgation of RCW 36.27.130 did not amend the SRA.

The Court of Appeals also properly found that the legislature's enactment of RCW 36.27.130 did not amend or modify RCW 9.94A.340, which has remained unaltered since 1983. The Legislature's stated intent in promulgating RCW 36.27.130, a provision *outside the SRA* within a title applicable to prosecuting attorneys, was to provide *prosecutors* "the discretion to petition the court to resentence an individual if the person's sentence no longer advances the interests of justice." Laws of 2020, ch. 203, § 1. Had the Legislature intended sentencing or resentencing courts not engaging in a RCW 36.27.140 felony resentencing to employ the same

considerations outlined in RCW 36.27.140, certainly it would have concurrently amended RCW 9.94A.535 to include post-offense rehabilitation as a permissible factor on which a court might rest an exceptional downward sentence. This Court presumes the legislature is aware of its cases involving statutory interpretation, and, if it were dissatisfied with this Court's interpretation of the SRA, could have amended it anytime. *See e.g., State v. Blake*, 197 Wn.2d 170, 190, 481 P.3d 521 (2021) (Gordon-McCloud J., majority opinion).

Further, in construing the sentencing statutes at issue, even if ambiguous, this Court would not look to an unrelated statute in an unrelated act to discern the Legislature's intent. *State Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002) (under "plain meaning rule" of statutory interpretation, the meaning of a statute is determined by an examination of the statute in which the provision is found, as

well as related statutes or other *provisions of the same act* in which the provision is found). The Court of Appeals properly determined the promulgation of RCW 36.27.130 did not affect this Court's interpretation of the SRA provisions at issue here.

3. The defendant's citation to other jurisdictions is inapt.

The lower court properly found the cases the defendant cites in support of his argument are inapplicable here. *Williams v. People of State of N.Y.*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949), held that the federal due process clause did not *limit* a sentencing judge's consideration to factors received in open court; the case involved whether a trial judge could consider a probation department report on the past life, health, habits, conduct and mental and moral propensities of the defendant. *Id*. at 242, 245. The United States Supreme Court observed a national trend (in 1949) which permitted many sentencing courts great discretion in what sources could be

consulted prior to imposing an individualized sentence. *Id*. at 246-248. *Williams* long-predates our Legislature's adoption of the SRA, which was designed to limit the "near unfettered discretion" sentencing courts enjoyed under our former indeterminate sentencing scheme, to prevent the biased and skewed sentencing practices which were known to occur under that regime. *See* Slip Op. at 5-6. *Williams* did not hold that a sentencing judge *must* be permitted to consider post-conviction rehabilitation. The defendant has failed to disclose any relevant precedent, evaluating the constitutionality of statutes similar to Washington's, that requires the consideration of the post-offense conduct or rehabilitation of the offender as a matter of due process. Where no authorities are cited in support of a proposition, the court may assume that counsel, after diligent search, has found none. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

As with *Williams*, the United States Supreme Court analyzed federal law in *Pepper v. United States*, 562 U.S. 476, 131 S.Ct. 1229, 179 L.Ed.2d 196 (2011), and determined a resentencing court could consider post-conviction rehabilitation after a defendant's conviction had been reversed on appeal. In holding that a court had such discretion, the Supreme Court discussed the "federal tradition" which permits sentencing judges to consider the convicted person as an individual, and every case as a "unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue." *Id*. at 488. Congress expressly codified this longstanding principle, stating, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of

imposing an appropriate sentence." *Id*. at 488 (quoting 18 U.S.C. § 3577 (1970)).

Unlike the federal sentencing scheme, however, Washington's legislature has eschewed the federal (and Washington's pre-SRA) tradition of affording sentencing judges such broad discretion, again as above, out of concern that such discretion led to racially disparate sentences. *See also Law*, 154 Wn.2d at 99 (quoting DAVID BOERNER, SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT OF 1981 § 9.17, at 9–50 (1985) ("rather than granting the trial court extensive discretion in departing from the guidelines, the legislature adopted a 'general' and 'broad[]' provision 'which uses the crime and previous record of the defendant as the *sole* basis for determining what information may be considered. Information that does not 'relate' to those two facts is not relevant") (emphasis the court's)).

It is well settled that the "fixing of penalties or punishments for criminal offenses is a legislative function, and the power of the legislature in that respect is plenary and subject only to constitutional provisions." *Law*, 154 Wn.2d at 92. The defendant has offered no constitutional prohibition on the sentencing scheme adopted by the legislature, and the Court of Appeals properly rejected the defendant's invitation to find RCW 9.94A.340 and RCW 9.94A.535 have "evolved" such that the resentencing court abused its discretion in declining to consider Mr. Wright's post-offense, post-conviction rehabilitation, unrelated to either his crime or culpability for the crime (committed as an adult) or his criminal history, as a mitigating factor. This Court should likewise decline the defendant's invitation to overturn its precedent where the defendant has failed to demonstrate the court below erred and

this Court's interpretation of the relevant statutory provisions is both incorrect and harmful.

C. THIS COURT SHOULD DECLINE REVIEW OF THE DEFENDANT'S CLAIM THAT THE IMPOSITION OF MANDATORY CONSECUTIVE FIREARM ENHANCEMENTS CONSTITUTES CRUEL PUNISHMENT.

Mr. Wright asks this Court to extend constitutional protections against mandatory sentencing schemes, applicable only to certain offenders, to his consecutive, mandatory firearm enhancements. The defendant inexplicably fails to support his state constitutional claim with a *Fain* analysis. Under the Eighth Amendment, a sentence is not subject to an individualized sentencing hearing simply because the sentence is mandatory. Rather, the United States Supreme Court has extended the right to an individualized sentencing to juveniles sentenced in adult court and individuals subject to the death penalty.

1. The Court should decline review because the defendant fails to properly brief his article 1, section 14 argument.

The Eighth Amendment bars cruel and unusual punishment while article 1, section 14 bars cruel punishment.[8] This Court has held that the state constitutional provision is more protective than the Eighth Amendment in this context. *State v. Rivers*, 129 Wn.2d 697, 712, 921 P.2d 495 (1996) (citing *Fain*, 94 Wn.2d at 392–93). Consequently, if the court finds the sentencing practice does not offend the state constitution, it need not further analyze the sentence under the federal constitution. *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014), *as corrected* (Aug. 11, 2014).

Fain provides four factors to consider in analyzing whether punishment is prohibited as cruel under article I, section 14: "(1) the nature of the offense, (2) the legislative purpose

[8] The defendant refers to "cruel punishment" at least twice in his petition. Pet. at 14-15.

behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction." *Rivers*, 129 Wn.2d at 713 (citing *Fain*, 94 Wn.2d at 397, 617 P.2d 720).

The defendant does not undertake this analysis, just as he failed to do in the Court of Appeals. Slip Op. at 20. Although the defendant presented a *Fain* analysis to the trial court, he did not renew or update that analysis for the appellate court or this Court. CP 23-28. Therefore, that analysis is not properly before this Court. *See Washington Bankers Ass'n v. State,* No. 98760-2, 2021 WL 4467805 (Sep. 30, 2021) at 9 (*citing State v. Gamble*, 168 Wn.2d 161, 180, 225 P.3d 973 (2010) ("argument incorporated by reference to other briefing is not properly before this court"); *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 890, 251 P.3d 293 (2011), *as amended* (July 11, 2011) ("We do not permit litigants to use incorporation by

reference as a means to argue on appeal or to escape the page limits for briefs set forth in RAP 10.4(b)")).

This Court should decline review of this issue for that reason alone. *See Sprague v. Spokane Valley Fire Dep't*, 189 Wn.2d 858, 876, 409 P.3d 160 (2018) ("We will not consider arguments that a party fails to brief").

2. The Eighth Amendment does not require individualized sentencing for all mandatory sentences.

A sentence is not cruel and unusual under the Eighth Amendment simply because it is mandatory. *Miller*, 567 U.S. at 480-481. This is perhaps best illustrated by *Harmelin v. Michigan*, in which the defendant was sentenced to life without parole for possession of more than 650 grams of cocaine. 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991).

However, certain offenders are subject to more protective rules. "Children are different" from adults for purposes of sentencing, and are entitled to an individualized sentencing

hearing when being sentenced in adult court. *Miller*, 567 U.S. at 471; *Houston-Sconiers*, 188 Wn.2d at 8. "Death is different" too, and individuals subject to the death penalty are similarly entitled to an individualized-capital-sentencing hearing. *Harmelin*, 501 U.S. at 994. However, the United States Supreme Court has been clear there is no "comparable requirement outside the capital context,[9] because of the qualitative difference between death and all other penalties:"

> It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Id. at 995-996 (footnote added).

Mr. Wright was not a child when, at age 28, he committed murder, attempted murder, and multiple counts of assault.

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[9] *Harmelin* was decided well before *Miller*, and thus, the individualized sentencing rule under the Eighth Amendment now includes death penalty and juvenile LWOP sentencing.

Mr. Wright is not subject to the irrevocability of a death sentence. Thus, the defendant has failed to demonstrate how his term-of-years sentence, while lengthy, is subject to an individualized sentencing hearing under the Eighth Amendment. Without any additional analysis of the issue, this Court should decline review.

VI. CONCLUSION

For the reasons stated above, Respondent requests the Court deny the petitioner's request for review.

This document contains 4,851 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 18 day of October 2021.

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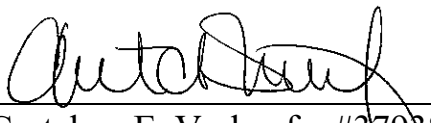

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re: Personal Restraint Petition of ANTHONY WRIGHT, Petitioner,	NO. 100239-4 COA NO. 37445-9-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on October 18, 2021, I e-mailed a copy of the Answer to Petition for Review in this matter, pursuant to the parties' agreement, to:

Jeffrey E. Ellis
jeffreyerwinellis@gmail.com

10/18/2021 **(Date)** Spokane, WA **(Place)** **(Signature)**

SPOKANE COUNTY PROSECUTOR

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