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Supreme Court No. 102628-5
Court of Appeals No. 56648-6-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CLINTON LARRY,

Petitioner.

---

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

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PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER

Clinton Larry, petitioner here and appellant below asks this Court to accept review of the Court of Appeals published decision issued on November 7, 2023, pursuant to RAP 13.3 and RAP 13.4(b)(1)-(4). The opinion is attached.

## B. ISSUES PRESENTED FOR REVIEW

1. This Court's ruling in *Houston-Sconiers*[1] gave courts limitless discretion in sentencing children tried as adults. This has resulted in widely disparate sentences that also frequently maintain the sentencing ranges designed for adult offenders.

This Court should grant review to provide guidance to lower courts and give meaning to the constitutional principle that "children are different." Under art. I, § 14, when a sentencing court determines the child's conduct at the time of the offense was mitigated by youth, the sentencing court's discretion must begin with the presumptive sentencing ranges

[1] *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

established for children under the Juvenile Justice Act (JJA), rather than the standard range sentences established for adult defendants by the Sentencing Reform Act (SRA). RAP 13.4(b)(3)&(4).

2. This Court does not tolerate a prosecutor's appeals to racial or ethnic bias whether intentional or not. The use of animal analogies to describe people often operates as racist code, and was routinely used throughout the 1990s and 2000s to dehumanize children of color to justify their harsh treatment in the criminal justice system. The prosecutor's use of animalistic imagery to describe Mr. Larry, who is Black and Native American, was an appeal to racial bias that requires review by this Court. RAP 13.4(b)(1)-(4).

## C. STATEMENT OF THE CASE

### 1. In 1999, the court sentences 17-year-old Mr. Larry to a de facto life sentence.

In 1999, when he was 17-years-old, Clinton Larry tried to burglarize the Burger King he had worked at along with an adult who was five years older than him. CP 120, 276. They

abducted, shot, and injured the Burger King manager, Jorge Rivera, in the process. CP 276. The adult Mr. Larry committed the crime with had already been in and out of prison. CP 120. He implicated Mr. Larry as the ringleader. CP 120. Both felt remorse for the shooting that seriously injured Mr. Rivera. CP 111. Mr. Larry was convicted of attempted murder, kidnapping, and two counts of robbery, each in the first-degree, with firearm enhancements. CP 41.

Because of the SRA's sentencing scheme and the prosecutor's deliberate decisions when charging Mr. Larry, his standard range was 50 to 60 years in prison. CP 136. This range exceeded the standard range for intentional murder. CP 112.

The sentencing court noted "the sentencing ranges are high," especially with the weapon enhancements. CP 140. The court sentenced Mr. Larry to 50 years, or 600 months in prison, which made him eligible for release from prison at age 67. CP 18, 141.

In 2005 Mr. Larry was resentenced because his offender score was incorrect. CP 65. Based upon the new offender score, the court sentenced him to 46 years in prison. CP 69.

In 2017, Mr. Larry moved for a resentencing under *Houston–Sconiers,* because the trial court did not consider the mitigating circumstances of his youth in 1999 or 2005. CP 85. Mr. Larry was resentenced in 2021.

2. In 2021, the court finds Mr. Larry's youth mitigated his culpability, and slightly reduces the original sentence.

Mr. Larry was born to a drug-addicted mother and raised in his grandmother's home where he suffered emotional, physical, and sexual abuse. RP 24–25. Mr. Larry had difficulty in school and was placed in special education classes. RP 25. The psychologist who evaluated Mr. Larry, Dr. Carlson, found Mr. Larry's "borderline intellectual functioning overall" was consistent with his report of in utero exposure to narcotics. RP 77.

Dr. Carlson explained that “research shows adolescents on the whole tend to be more impulsive than their adult counterparts and have more difficulty understanding and thinking through the consequences or potential consequences of their behavior.” RP 29. A person “exposed prenatally to crack cocaine would likely have more difficulty, greater difficulty than those of similar-aged peers.” RP 29.

Dr. Carlson’s review of Mr. Larry’s recent DOC history showed he was “infraction free since about 2014 which suggests that he’s been working towards behavioral control and been able to be compliant within the prison setting for a good period of time.” RP 30.

The prosecutor admitted, “what Mr. Larry has put forward to you is unfortunate,” and that his adverse life experiences “set him behind, at least potentially,” from his peers. RP 117–18. But the prosecutor saw “no connection between what Mr. Larry’s upbringing was and the conduct that he engaged in.” RP 118–19.

Recognizing that comparing people to animals was "probably going to get [him] labeled a racist," the prosecutor nonetheless proceeded, claiming Mr. Larry's crime was not influenced by "a pack mentality among gangs" when he committed his offense. RP 111. Rather, he claimed Mr. Larry acted as a "lone wolf," with "no gang affiliation until he goes into custody." RP 111. The prosecutor concluded Mr. Larry had "none of the hallmark features of youth minimize what Mr. Larry did." RP 111.

The prosecutor expressed frustration by what he viewed as a lack of guidance after *Houston-Sconiers*, lamenting, "the appellate court, and in particular the Washington Supreme Court[']s" standard of review was whether they agreed with the trial court's sentence. RP 5–6. The prosecutor also took issue the *Houston-Sconiers'* holding that a court has absolute discretion to sentence a juvenile tried as an adult, with no reference at all the juvenile standard ranges in the JJA, noting "if there were some tie to the juvenile sentencing structure as a

limit on your discretion, it might make some more sense, at least, just from the fundamental perspective." RP 104.

Instead of tying the court's discretion to the JJA, the prosecutor argued the court should apply the same adult standard range sentence the sentencing court had previously imposed because this "was one of those cases" where children should be treated as adults because they "behaved as adults." RP 104.

Mr. Larry reminded the court that using the nearly de facto life sentence the court had previously imposed as a benchmark was flawed, because sentences imposed under the SRA have resulted in racial disparity, and "certain categories of defendants get worse sentences and wind up doing more time" RP 120. This was true for Mr. Larry, an "African American and Native" man who is "statistically one of the categories of people that have gotten harsher sentences within our courts." RP 120.

The court found Mr. Larry's "youth and cognitive development may have contributed to his lack of seeing options other than crime-related options when it came to being unemployed and not having money." RP 139. But the court also stated it was "not going to ignore what happened in this particular case," and noted Mr. Larry's planning and "sophistication" was "significant.' RP 138.

The court found a basis for an "exceptional sentence" and ran counts one and two concurrent, rather than consecutive. RP 140. "The second part" of the court's "exceptional sentence" was allowing Mr. Larry to earn good time "as opposed to flat-time" for the firearm enhancements. RP 141.[2] This resulted in a sentence reduction of only six years.

On appeal, Mr. Larry argued that the Eighth Amendment and Article I, § 14 required the trial court to presumptively sentence him commensurate with the culpability of a child and

[2] The State cross-appealed on this portion of the court's sentence which the Court of Appeals upheld. Op. at 1–2.

the court erred in using the SRA as its benchmark. Wrongly believing *State v. Gregg*, 196 Wn.2d 473, 486, 474 P.3d 539 (2020) precluded Mr. Larry's claim, the Court of Appeals refused to impose constitutional parameters around a court's discretion when sentencing children tried as adults. Op. at 8-10. The Court also condoned the use of animal tropes by a prosecutor who has been warned numerous times not to use them when referring to people of color, yet again did so in Mr. Larry's case. Op. at 18-20.

## D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

### 1. To give meaning to the constitutional maxim that "children are different," this Court should require the sentencing court to presumptively impose a sentence commensurate with the culpability of a child when it determines a child's adult-charged crime is mitigated by youth.

In *State v. Gregg*, the dissenting justices of this Court found it "troubling" that "the vast majority of children who have been transferred to adult court since *Houston-Sconi*ers are receiving standard sentences designed for adults." *State v. Gregg,* 196 Wn.2d 473, 489, 474 P.3d 539 (2020) (González,

C.J., dissenting). But this should come as no surprise, because courts use the SRA—a sentencing scheme designed for adult offenders— as its guidepost even after finding the child's crime was mitigated by youth. Instead, once a court finds a child's attributes warrant an exceptional sentence, it should use the juvenile sentencing range as its starting point because presumptively sentencing a child based on punishment designed for children rather than adults gives meaning to the constitutional difference between children and adults.

a. Because of their diminished culpability, children must be sentenced differently than adults, even when tried as adults for serious offenses.

Courts have long recognized "that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988). Unlike adult crime, youth crime "is not exclusively the offender's fault," as it represents "a failure of family, school, and the social system, which share responsibility for the

development of America's youth." *Id*. at 834 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 116, n. 11, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)). Children are deemed to "characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." *J.D.B. v. North Carolina*, 564 U.S. 261, 273, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011).

When sentencing youth, courts may not "proceed as though they were not children." *Miller v. Alabama,* 567 U.S. 460, 474, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). The general rule that children are treated as children, not adults, reflects "the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult." *Thompson*, 487 U.S. at 824-25. The prosecution of children as adults is the rare exception to this rule. *See Id.* at 823-24 (Other than statutes allowing children to be tried as adults, "there are no Oklahoma statutes, either civil or criminal, that treat a person under 16

years of age as anything but a 'child'"); *see also Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) ("in recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent").

Just because state statutes allow children to be tried as adults does not mean that the adult punishment is presumed to follow:

> [T]he transfer laws show "that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders*."

*Graham v. Florida,* 560 U.S. 48, 66, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (citing *Thompson,* 487 U.S. at 826, n. 24) (emphasis in original). The principles underlying adult sentences—retribution, incapacitation, and deterrence—do not rationally lead to the same sentences for children. *Graham,* 560 U.S. at 71–73.

The trend of harshly punishing children like adults reached its peak in the "superpredator" era of the late 1980s and 1990s, when Mr. Larry was first tried and sentenced. Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 Law & Ineq. 263, 270-271 (2013). But the policies adopted in the superpredator era are now recognized to be an ineffective, racist political response to juvenile crime, where "racial stereotypes taint culpability assessments, reduce the mitigating value of youthfulness for children of color, and contribute to disproportionate numbers of minority youths tried and sentenced as adults." *Id.; see also State v. Anderson*, 200 Wn.2d 266, 293, 516 P.3d 121(2022) (González, C.J., dissenting).

In Washington, a trial court must consider the *Miller* factors in determining whether a child tried in adult court should receive an exceptional sentence under the SRA. *Houston-Sconiers*, 188 Wn.2d at 21; U.S. Const. Amend. VIII.

The child bears the burden of showing their youth warrants an exceptional sentence. *Gregg* 196 Wn.2d at 486. When the court finds a child's crime was mitigated by their youth, there is no guide to a court's discretion in arriving at the appropriate punishment, other than zero to the top of the adult-standard range. *Houston-Sconiers,* 188 Wn.2d at 24 (zero years of incarceration valid baseline).

This limitless range based entirely on a judge's discretion has produced uneven, unfair results. *See, e.g.*, *Anderson,* 200 Wn.2d at 311 (Yu, J., dissenting). And presumptively applying the SRA to juveniles tried as adults to determine the correct sentence within this range cannot be reconciled with jurisprudence recognizing the constitutionally significant fact that children are different than adults. Rather, to give meaning to the constitutional difference between adult and children at sentencing, once the court finds the youth's crime was mitigated by youth, a court should no longer presumptively apply the SRA's adult sentencing range, but instead the juvenile

sentencing range, which provides punishments designed for children, not adults.

b. Article I, §14 imposes a categorical bar to presumptive application of sentences designed for adults, not children.

Article I, section 14 prohibits "cruel" punishment. Washington courts have consistently held that this provision is broader than its Eighth Amendment counterpart, and should be interpreted independently. "In the context of juvenile sentencing, article I, section 14 provides greater protection than the Eighth Amendment." *State v. Bassett*, 192 Wn.2d 67, 82, 428 P.3d 343 (2018). However, "even where it is already established that the Washington Constitution may provide enhanced protections on a general topic, parties are still required to explain why enhanced protections are appropriate in specific applications." *Id.* at 79 (*citing State v. Ramos,* 187 Wn.2d 420, 453-54, 387 P.3d 650 (2017)).

An independent state constitutional analysis indicates that a more protective rule is required when sentencing children

in adult court, and that our courts should categorically bar presumptive application of adult range sentences to juveniles tried in adult court but whose crimes are mitigated by youth.

The *Gunwall* factors support this more protective rule under Article I, section 14. *State v. Gunwall*, 106 Wn.2d 54, 59-61, 720 P.2d 808 (1986). The factors to consider in support of this more expansive protection are (1) the textual language of the state constitution; (2) differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state and local concern. *Bassett,* 192 Wn.2d at 79 (citing *Gunwall,* 106 Wn.2d at 61-62).

The first three factors "provide cogent grounds for finding article I, section 14 more protective than the Eighth Amendment" and weigh in favor of interpreting the state clause as providing broader rights. *Bassett,* 192 Wn.2d at 80.

Likewise, the fifth and sixth factors weigh in favor of interpreting the state clause more broadly. *Id.* at 82. The fourth factor, our state's established bodies of law, especially the juvenile justice laws, provide grounds for requiring the presumption that a child should be sentenced as a child when the court finds their conduct reflects the diminished culpability of youth. *Id.* at 80.

Preexisting state law weighs in favor of interpreting our state constitutional provision as more protective in this context. Recognizing the developments in science that demonstrate juveniles are less psychologically mature than adults and less criminally culpable, our courts have consistently applied broader protections to juveniles at sentencing than the Eighth Amendment specifically requires. *See Bassett*, 192 Wn.2d at 90 (holding sentence of life without parole categorically barred for juveniles); *Houston-Sconiers*, 188 Wn.2d at 20-21 (requiring individualized consideration of mitigating factors related to youthfulness when sentencing any juvenile); *Ramos,* 187

Wn.2d at 437 (extending requirement for "*Miller* hearing" to "de facto life-without-parole sentences" for juveniles); *State v. O'Dell,* 183 Wn.2d 680, 683, 358 P.3d 359 (2017) (permitting 18-year-old offender to seek exceptional sentence downward on basis of youth); *Matter of Monschke*, 197 Wn.2d 305, 326, 482 P.3d 276 (2021) (mandatory LWOP unconstitutional for 18-20 year olds convicted of aggravated murder); *State v. Haag*, 198 Wn.2d 309, 330, 495 P.3d 241 (2021) (46–year sentence amounts to a de facto life sentence life sentence that is unconstitutional under article I, section 14).

In addition, our legislature has also demonstrated its "ongoing concern for juvenile justice issues." *Bassett,* 192 Wn.2d at 81 (quoting *Ramos*, 187 Wn.2d at 446) (citing RCW 9.94A.540(3) (eliminating mandatory minimum sentences for juvenile offenders tried as adults)) (internal quotations omitted).

When a child is tried in juvenile court, the legislature has established incremental sentencing ranges for younger and older teens between the ages of 15-17, which shows it has

carefully considered punishment that tracks teenage development. RCW 13.40.0357.

In 2019, our legislature again announced that children must be treated differently allowing them to remain in juvenile detention until age 25, regardless of whether they are tried as children or adults. Laws of 2019, ch. 322, §1.

Preexisting Washington state law establishes that our state constitution should provide broader protections than its federal counterpart in the context of sentencing a child tried as an adult, but whose crimes reflect the attributes of youth.

An article I, §14 claim that a sentence is "categorically unconstitutional based on the nature of the juvenile offender class" is subject to the categorical bar analysis. *Bassett,* 192 Wn.2d at 82–83. This categorical approach "requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question" and whether the sentence "serves legitimate penological goals." *Id.* at 83. Issues of culpability,

the severity of the punishment, and whether penological goals are served all allow the court to include youth-specific reasoning in its analysis. *Id.* at 83–84.

This Court should adopt a categorical bar to presumptive application of the SRA's sentencing ranges to children whose crimes are mitigated by youth because the SRA does not account for the diminished culpability and the child's age in providing the appropriate sentence ranges as the JJA does. This is because the Acts serve entirely different purposes.

The JJA's purpose is to create a "system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders and their victims." RCW 13.40.010(2). The SRA, by contrast, aims primarily "to make the criminal justice system accountable to the public. RCW 9.94A.010(1)-(7). Notably, the JJA presumes careful consideration of the child's specific circumstances, imposing punishment commensurate with the child's specific culpability, whereas the SRA seeks proportionality with other

offenders, taking into account the offender's prior criminal history and the seriousness of the offense.

The SRA does not contemplate preparing a person for reentry through treatment and rehabilitation as the JJA does—rather it seeks to conserve financial resources. Though both strive for protection and accountability, the JJA integrates the needs of the child in this aim. Where the JJA "attempts to tread an equatorial line somewhere midway between the poles of rehabilitation and retribution" the SRA's "paramount purpose" is punishment. *State v. T.C.*, 99 Wn. App. 701, 707, 995 P.2d 98 (2000).

Because the JJA is designed to account for the particular nature of youthful offending, once a court finds, as in Mr. Larry's case, that his youth made him less culpable than an adult offender, CP 401, the sentencing court should begin with consideration of the juvenile range and move upwards based on the court's assessment of the degree of his diminished

culpability, rather than adjust downward from the SRA, which is designed for adult offenders.

"The fact of youthfulness does not fade away because the prosecutor has opted to try an individual in adult court." *Gregg*, 196 Wn.2d at 491 (Yu, J. dissenting). The legislature has created a juvenile sentencing scheme that contemplates a child's diminished culpability and capacity for change. This Court should adopt a categorical bar to presumptive application of the SRA's sentence range to juvenile offenders tried in adult court whose crimes reflect transient immaturity, and instead require presumptive application of the legislature's carefully crafted sentencing ranges for juvenile offenders when a child's crime is mitigated by youth.

c. Alternatively, failure to presumptively apply the juvenile sentencing range when imposing an exceptional sentence fails under a *Fain* proportionality test.

Alternatively, a combination of factors renders the court's sentence unconstitutional as applied to Mr. Larry under the *Fain* proportionately test.

*State v. Fain* provides four factors a court should consider in deciding if a sentence is proportional under article I, section 14: (1) the nature of the offense; (2) the legislative purpose behind the sentencing statute; (3) the punishment imposed in other jurisdictions for the same offense; and (4) the punishment imposed for other offenses in the same jurisdiction. 94 Wn.2d 387, 397, 617 P.2d 720 (1980).

As recognized in *Bassett,* the *Fain* framework does not include significant consideration of the characteristics of children as a class. *Bassett,* 192 Wn.2d at 83. Rather, this analysis "weighs the offense with the punishment," which makes it ill suited to a categorical challenge based on the characteristics of children as an offender class. *Id.*

However, the *Fain* proportionality test may be useful here because it allows for comparison between the juvenile and adult sentencing schemes. This is a helpful framework for determining that an adult sentence governed by the SRA is

grossly disproportionate when imposed for crimes committed by children. *See Id.* at 84-85.

The Washington legislature has established standard sentencing ranges in juvenile court. Though RCW 13.04.030 makes adult court jurisdiction automatic for serious violent offenses of kidnapping and attempted murder for 16–17 years olds, our courts also recognize that arbitrary distinctions between teenagers of different years. A child's chronological age may not accurately reflect their brain development, which could be the same between a 15–year–old and a 17–year–old. *See, e.g., Monschke,* 197 Wn.2d at 323 (recognizing arbitrariness of drawing lines based on age).

In Mr. Larry's case, as for most juveniles tried in adult court, the disparity between a sentence they would receive if treated as child is staggering. His standard range under the JJA is 240 months, but under the SRA it is 525–620 months. RCW 13.40.0357; CP 14. This is the difference between living a life in prison or out of prison.

The widely different ranges designed for children under the JJA and the SRA demonstrates that application of the SRA ranges to a juvenile offender who lacked the criminal culpability of an adult is grossly disproportionate. *Fain,* 94 Wn.2d at 397.

d. This Court should accept review and give meaning to the constitutional difference between children and adults in sentencing.

Under either the categorical approach or *Fain*'s proportionality test, Article I, section 14 requires that a child be sentenced commensurate with the diminished culpability of a child when the court finds the offense was committed with the diminished capacity of youth.

In Mr. Larry's case, the prosecutor recognized "if there were some tie to the juvenile sentencing structure as a limit on your discretion, it might make some more sense, at least, just from the fundamental perspective." RP 104. But instead of tying the court's discretion to the applicable JJA range based on Mr. Larry's youth, the prosecutor argued that the court should

view “this particular sentence from what the maximum that Judge McCarthy could have given Mr. Larry, meaning the high end of the range and consecutive on all counts.” RP 6. The prosecutor urged the court to maintain the court’s previous sentence of 552 months that was entered *without* consideration of how his crime was impacted by his youth. RP 119.

The court disagreed and found a mitigated sentence was warranted, but used the adult standard range as his benchmark. The court made only minor adjustments to the previous adult sentence by allowing good time for the firearm enhancements and slightly reducing the sentence from 552 to 480 months. CP 373; *see also* RP 11–12 (confirming SRA’s standard range).

Instead of presumptively applying the SRA, the court should have presumptively considered the juvenile range for Mr. Larry’s conduct. Using the JJA as its benchmark, the court should be required to consider whether Mr. Larry’s culpability was so different from another teenager subject to the juvenile

standard range, rather than starting from a de facto presumptive life sentence designed for adult offenders under the SRA.

This Court should accept review and require children to be presumptively sentenced commensurate with the culpability of a child under Article I, section 14.

**2. The prosecutor's use of animalistic language was an appeal to racial bias that dehumanized Mr. Larry and deprived him of a fair sentencing hearing.**

"Racist rhetoric has no place in our justice system. It is hurtful, thwarts due process, and undermines the rule of law." *State v. McKenzie*, 21 Wn. App. 2d 722, 723, 508 P.3d 205 (2022). "Many animal comparisons operate as racist code." *In re Pers. Restraint of Richmond*, 16 Wn. App. 2d 751, 752, 482 P.3d 971 (2021). "Racially coded language is insidious in many ways. It is hurtful and silencing to those who readily understand the message. It can also trigger implicit bias for listeners who do not immediately register the significance of what has been said." *McKenzie,* 21 Wn. App. 2d at 730 (citing *State v. Monday*, 171 Wn.2d 667, 678–79, 257 P.3d 551 (2011)).

In *McKenzie*, the prosecutor introduced the concept of a "gorilla pimp" into the trial. *Id.* at 723. This concept was found to have tapped "into deep seated racial prejudice by comparing Black human beings to primates." *Id.* This perpetuated the "harmful stigmatization of Black men." *Id.* at 732.

Notably, the prosecutor in Mr. Larry's case is the same prosecutor the *McKenzie* court found had repeatedly been reversed for the use of racist imagery: "We note this appears not to be the first time the prosecutor in Mr. McKenzie's case has utilized inflammatory stereotyping, leading to reversal of a conviction." *McKenzie*, 21 Wn. App. 2d at 73 (citing *State v. Tarrer*, No. 41347-7-II, slip op. at 14-17, 2013 WL 1337943 (Wash. Ct. App. Apr. 2, 2013)[3] (unpublished); *State v. Ellis*, No. 53691-9-II, 2021 WL 3910557 (Wash. Ct. App. Aug. 31, 2021)[4] (unpublished) (GR 14.1)); *See also* Sean Robinson,

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[3] https://www.courts.wa.gov/opinions/pdf/D2%2041347-7-II%20Unpublished%20Opinion.pdf

[4] https://www.courts.wa.gov/opinions/pdf/D2%2053691-9-II%20Unpublished%20Opinion.pdf

*Court Cites 'Racist Rhetoric' by Pierce County Prosecutor, Reverses Sex Crime Conviction,* The Chronicle (May 7, 2022)[5] (identifying John Neeb as the prosecutor in each of these cases).

This is the same prosecutor who prosecuted Mr. Larry in 1999, when he received a de facto life sentence of 600 months for a crime he committed when he was 17 years old. CP 12–18. The 1990s was the era of the "superpredator myth," which "employed a particular tool of dehumanization—portraying Black people as animals." *State v. Belcher*, 342 Conn. 1, 19, 268 A.3d 616 (2022). This was conveyed through "superpredator metaphor," such as "images of packs of teens prowling the streets." *Id.* at 19. Youth were accused of "wilding" and alternately referred to as "wolf packs," "rat packs," "savages," and "animals." N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 Cardozo L. Rev. 1315, 1348–49 (2004).

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[5] https://www.chronline.com/stories/court-cites-racist-rhetoric-by-pierce-county-prosecutor-reverses-sex-crime-conviction,290999 (last visited October 7, 2022).

In 2021, the prosecutor used the dehumanizing metaphors of the superpredator era to describe Mr. Larry. The prosecutor accurately predicted "I'm probably going to get labeled a racist," but persisted nonetheless. RP 111. The prosecutor's act of describing Mr. Larry as either a dangerous "lone wolf," or belonging to the "pack mentality" of a gang presented the court with a range of dehumanizing characterizations specifically employed to argue Mr. Larry had "none of the hallmark features of youth." RP 111.

Labeling children accused of crimes as "wolf packs" and the use of animalistic imagery for children of color has the powerful effect of adultification, which in turn results in them more likely being viewed as adult criminals, not children. Brent Staples, *The Racist Trope That Won't Die,* N.Y Times Opinion (June 17, 2018).[6] This prosecutor's use of the same animalistic tropes used to dehumanize children of color during the

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[6] https://www.nytimes.com/2018/06/17/opinion/roseanne-racism-blacks-apes.html (last visited October 7, 2022).

“superpredator” era had no place at a juvenile resentencing in 2021. *See Anderson*, 200 Wn.2d at 293 (González, C.J., dissenting).

If the prosecutor flagrantly or apparently intentionally appeals to racial or ethnic bias, the defendant is entitled to automatic reversal. *State v. Zamora,* 199 Wn.2d 698, 722, 512 P.3d 512 (2022). This is an objective test in which the prosecutor’s intent is irrelevant; the inquiry is whether the misconduct *appeared* intentional within the context of the trial. *Id.* at 716. The Court of Appeals refused to accept the prosecutor’s admission that his comments comparing people to animals would appear to be racist. RP 111; Op. at 21. This opinion conflicts with decisions that refuse to condone the use of animal tropes, and specifically by this prosecutor. This Court should accept review. RAP 13.4(b)(1)-(4).

E. CONCLUSION

This Court should accept review. RAP 13.4(b)(1-(4).

Respectfully submitted this the 7th day of December 2023.

In compliance with RAP 18.17, this document contains 4,947 words.

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Washington State
Court of Appeals
Division Two

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| STATE OF WASHINGTON, Respondent, v. CLINTON LAMONT LARRY, Appellant. | No. 56648-6-II PART PUBLISHED OPINION |
|---|---|

MAXA, J. – Clinton Larry appeals his sentence imposed after the trial court granted his CrR 7.8 motion for a resentencing pursuant to *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). Although the trial court found that mitigating factors of youth warranted an exceptional sentence downward and reduced his sentence from 552 months to 480 months, Larry challenges aspects of the resentencing process. The State argues that Larry's appeal is moot under *In re Personal Restraint of Hinton*, 1 Wn.3d 317, 525 P.3d 156 (2023), and *In re Personal Restraint of Carrasco*, 1 Wn.3d 224, 525 P.3d 196 (2023), because RCW 9.94A.730(1) – which allows a person sentenced for an offense committed as a juvenile to petition for release after 20 years of confinement – provides him with an adequate remedy.

The State also cross-appeals, arguing that the trial court did not have the authority to order that the four firearm sentencing enhancements would be subject to earned early release time as opposed to flat time as part of the exceptional sentence.

We hold that (1) *Hinton* and *Carrasco* do not apply to Larry's appeal because those cases were based on RAP 16.4(d), which applies only to personal restraint petitions (PRPs) in the

appellate court; (2) article I, section 14 of the Washington Constitution does not require presumptive application of the sentencing ranges under the Juvenile Justice Act of 1997, chapter 13.40 RCW (JJA), once a trial court finds that mitigating factors of youth warrants an exceptional sentence downward; and (3) regarding the State's cross-appeal, the trial court did not exceed its authority in ordering the firearm sentencing enhancements to be subject to earned early release time. In the unpublished portion of this opinion, we consider and reject Larry's other arguments.

Accordingly, we affirm Larry's sentence.

## FACTS

*Background*

In 1999, when he was 17 years old, Larry planned and carried out a robbery of the Burger King at which he had worked. He was joined by an accomplice. During the course of the robbery, Larry kidnapped the manager of the Burger King and shot him multiple times.

Larry was convicted on five counts: first degree attempted murder (count I), first degree kidnapping (count II), and three counts of first degree robbery (counts III-V), with firearm sentencing enhancements on counts I through IV. He was sentenced to a total of 600 months of confinement, including 240 months of sentencing enhancements. In addition, restitution was ordered in the amount of $47,434.49 to the victim and $4,500.48 to an insurance company.

In 2005, Larry was resentenced due to a correction of his offender score. He was resentenced to a total of 552 months of confinement, including 240 months of firearm sentencing enhancements. Restitution was set in the same amount as in the original order.

In 2017, Larry filed a CrR 7.8 motion requesting resentencing pursuant to *Houston-Sconiers*. The trial court granted the motion.

*Resentencing*

At resentencing, the State asked the trial court to impose the same sentence that was imposed in 2005. Larry asked the court to impose a total of 264 months on all charges.

The trial court noted that it could consider "Mr. Larry's age and any apparent lack of ability to control his impulses that may have existed in 1999, . . . a perceived lack of understanding, . . . [and] cause and effect of what sort of consequences his behaviors at the time might bring about," in order to consider imposing an exceptional sentence. Report of Proceedings (RP) (Oct. 19-20, 2021) at 138. After reviewing the court filings from the previous sentencings, pleadings submitted by the parties, witness testimony, and counsels' arguments, the trial court found that there was a basis for an exceptional sentence.

The trial court found that nothing mitigated Larry's participation in the crime because he was the "ringleader." Clerk's Papers (CP) at 372. But the court did consider and account for Larry's youth, childhood experience, cognitive development, and his behavior in prison.

The trial court determined that an exceptional sentence below the standard range was appropriate and authorized by *Houston-Sconiers*. The court sentenced Larry to 240 months on count I, 51 months on count II, and 144 months each on counts III through V, to run concurrently. The sentence on the five counts totaled 240 months. That sentence was an exceptional sentence because count I and count II were serious violent offenses that would be served consecutively to each other in a standard range sentence.

The trial court also imposed firearm sentencing enhancements of 240 months – 60 months each on counts I through IV – to run consecutively to each other and to the underlying counts. The sentence resulted in a total of 480 months of confinement. But the trial court stated that as an exceptional sentence authorized by *Houston-Sconiers*, it was ordering that the firearm

sentencing enhancements would be subject to reduction for earned early release time – as opposed to flat time – at the same percentage as counts I and II.

Larry appeals his sentence, and the State cross-appeals the trial court's order that the firearm sentencing enhancements be subject to reduction for earned early release time.

## ANALYSIS

### A. MOOTNESS UNDER RAP 16.4(d)

The State argues that *Hinton* and *Carrasco* render Larry's appeal moot because he has an adequate remedy under RCW 9.94A.730(1). We disagree.

Under RAP 16.4(d), an "appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances."

The substantive rule in *Houston-Sconiers* prohibits application of adult standard ranges in the Sentencing Reform Act of 1981, chapter 9.94A (SRA) and enhancements that would be disproportionate punishment for juveniles who possess diminished culpability. *Hinton*, 1 Wn.3d at 328-29. But RCW 9.94A.730(1) grants defendants that were sentenced to lengthy terms for offenses committed as juveniles the right to petition the Indeterminate Sentence Review Board (ISRB) for early release after serving no less than 20 years. Offenders subject to RCW 9.94A.730 are entitled to a parole hearing before the ISRB with a presumption of release. RCW 9.94A.730(3). And if an offender's petition is denied, he or she "may file a new petition for release five years from the date of denial or at an earlier date as may be set by the board." RCW 9.94A.730(6).

Because RCW 9.94A.730 effectively converts a standard range adult sentence into an indeterminate sentence for juvenile offenders, the Supreme Court in *Hinton* and *Carrasco* held

under RAP 16.4(d) that RCW 9.94A.730 is an adequate remedy for a violation of the *Houston-Sconiers* substantive rule. *Hinton*, 1 Wn.3d at 334-35; *Carrasco*, 1 Wn.3d at 230-32. Therefore, the court affirmed the dismissal of the PRPs in both cases. *Hinton*, 1 Wn.3d at 321; *Carrasco*, 1 Wn.3d at 227.

However, RAP 16.4(d) expressly applies only to *appellate courts* and only to *PRPs*. The rule expressly does not apply to trial courts or to CrR 7.8 motions. In *Hinton* and *Carrasco*, the petitioners filed CrR 7.8 motions seeking resentencing pursuant to *Houston-Sconiers*, and the trial courts transferred the motions to the Court of Appeals for consideration as PRPs. *Hinton*, 1 Wn.3d at 322; *Carrasco*, 1 Wn.3d at 228-29. Here, Larry filed a CrR 7.8 motion for resentencing pursuant to *Houston-Sconiers*, but the trial court granted the motion. Therefore, Larry's motion was never converted to a PRP. As a result, under its express language, RAP 16.4(d) is inapplicable here.

We acknowledge that both CrR 7.8 motions and PRPs are collateral attacks. *See* RAP 10.73.090(2) (a collateral attack is "any form of postconviction relief other than a direct appeal"). But RAP 16.4(d) refers specifically to PRPs, not to collateral attacks.

The State cites to *State v. Hubbard*, 1 Wn.3d 439, 527 P.3d 1152 (2023), to argue that the rule that a court cannot provide relief if an alternative adequate remedy is available applies equally to a CrR 7.8 motion in the trial court and a PRP in the appellate court. But *Hubbard* did not address RAP 16.4(d). Instead, the court held that *the one-year time bar in RCW 10.73.090* applies equally to CrR 7.8 motions and PRPs. *Hubbard*, 1 Wn.3d at 451. But RCW 10.73.090 refers generally to "collateral attacks," while RAP 16.4(d) expressly is limited to PRPs.

Arguably, it "makes sense" that CrR 7.8 motions should be treated the same as PRPs regarding the inadequate remedy requirement. But RAP 16.4(d) does not say that. Neither does

CrR 7.8. And there is no authority for the proposition that the inadequate remedy requirement in RAP 16.4(d) applies to CrR 7.8 motions that are not converted to PRPs. In the absence of any authority, we decline to create a new rule that would apply in this case.

Because RAP 16.4(d) is inapplicable, we hold that Larry's appeal is not moot under *Hinton* and *Carrasco*.

B. PRESUMPTIVE SENTENCING RANGE

Larry argues that article I, section 14 of the Washington Constitution requires the trial court to presumptively sentence a defendant using the JJA sentencing ranges instead of the SRA sentencing ranges once the court finds that mitigating factors of youth warrant an exceptional sentence. We disagree.

1. Legal Principles – SRA and JJA

The legislature has determined that every person convicted of a felony shall be sentenced as provided in the SRA. RCW 9.94A.505(1). RCW 9.94A.510 provides standard range sentences depending on the seriousness of the offense and the defendant's offender score. A defendant seeking to obtain a sentence below the standard range has "the burden of proving by a preponderance of the evidence 'that there are substantial and compelling reasons justifying an exceptional sentence' below the standard range." *State v. Ramos*, 187 Wn.2d 420, 434, 387 P.3d 650 (2017) (quoting RCW 9.94A.535). Juveniles convicted of felonies in adult court are subject to the SRA standard sentencing ranges. *See State v. S.J.C.*, 183 Wn.2d 408, 418, 352 P.3d 749 (2015).

In addition, the legislature has provided sentencing enhancements if the defendant was armed with a firearm when committing a felony. RCW 9.94A.533(3). Firearm sentencing

enhancements are mandatory and must be run consecutively to all other sentencing provisions, including other sentencing enhancements. RCW 9.94A.533(3)(e).

The Supreme Court in *Houston-Sconiers* held that when sentencing juveniles in adult court, trial courts "must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." 188 Wn.2d at 21. This means that the trial court is not bound by the SRA's standard ranges, and the low end of a juvenile's sentencing range is no time in confinement. *In re Pers. Restraint of Forcha-Williams*, 200 Wn.2d 581, 597, 520 P.3d 939 (2022).

The JJA provides completely different – and far lower – sentencing ranges than the SRA for offenders in juvenile court. RCW 13.40.0357. The JJA also provides different sentences when a juvenile is armed with a firearm when committing an offense. RCW 13.40.193. "Our juvenile justice system . . . gives children far more opportunities for redemption and rehabilitation than our criminal justice system offers to adults." *State v. Gregg*, 196 Wn.2d 473, 486, 474 P.3d 539 (2020) (González, J., dissenting).

2. Lack of Supporting Authority

Neither *Houston-Sconiers* nor any of the cases applying *Houston-Sconiers* have held or even suggested that trial courts who impose a sentence on a juvenile after considering the mitigating factors of youth must presume that the JJA sentencing ranges apply. Instead, the cases express the possible sentences under *Houston-Sconiers* in terms of the adult standard ranges, but without a minimum sentence. *See*, *e.g.*, *In re Pers. Restraint of Ali*, 196 Wn.2d 220, 246, 474 P.3d 507 (2020) (stating that "under *Houston-Sconiers*, Ali's sentencing range went from 312-390 months to 0-390 months.").

Two cases indicate that neither article I, section 14 nor the Eighth Amendment to the United States Constitution require a trial court to presumptively apply JJA sentencing ranges. In *Ramos*, the Supreme Court rejected the argument that the Eighth Amendment prohibited requiring a juvenile sentenced to a de facto life sentence to bear the burden of proving at a *Miller*[1] hearing that the SRA standard range sentence was inappropriate. 187 Wn.2d at 444-46. The court stated,

> Pursuant to the SRA, the offender carries the burden of proving that an exceptional sentence below the standard range is justified. Ramos argues that as a matter of constitutional law, the burden must be shifted to the State to prove that a standard range sentence is appropriate. However, he has not shown that such burden-shifting is required by the Eighth Amendment.

*Id.* at 445. The court concluded, “Therefore, at this time we cannot hold that the SRA’s allocation of the burden of proof for exceptional sentencing is constitutionally impermissible as applied to juvenile homicide offenders.” *Id.* at 446.

In *Gregg*, the Supreme Court addressed a similar issue for a *Houston-Sconiers* hearing. 196 Wn.2d at 478-83. The defendant argued that “it is unconstitutional for a standard range sentence to be presumptively valid for a juvenile sentenced in adult court and the burden should be on the State to prove that youth was not a mitigating circumstance in every case.” *Id.* at 479. The court noted that *Ramos* had rejected this argument under the Eighth Amendment. *Id.* The court acknowledged that it had not addressed this issue under article I, section 14. *Id.* at 480. But the court found no basis under article I, section 14 for invalidating the SRA’s procedure for exceptional sentences or shifting the burden of proof to the State. *Id.* at 480-82. The court stated that the principles surrounding the mitigating qualities of youth and discretionary sentencing “do not support invalidating the statutory *procedure* required to be applied.” *Id.* at 482.

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[1] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

The court also addressed the defendant's argument that instead of presuming that the SRA standard range sentence is valid, trial courts must start with the presumption that an exceptional sentence below the standard range is required unless the State proves otherwise. *Id.* at 482. The court rejected this argument:

> Without explicitly stating as much, Gregg asks this court to rewrite the SRA and declare standard range sentences to be exceptional sentences when applied to juveniles. To reach this result, we would not only need to declare the SRA structure partially unconstitutional but we would also need to overrule some of our cases. We disagree with the arguments made by Gregg, and he has not shown that such relief is appropriate in this case.

*Id.* at 482-83.

The dissenting opinion asserted that trial courts should "start from the presumption that a downward departure from the standard range is appropriate" and that this "presumption should be followed unless the judge is persuaded that the case before them is one of the rare cases where a standard range adult sentence is appropriate." *Id.* at 489-90 (González, J., dissenting). But the dissent did not mention the JJA or suggest that the trial court should start with the presumption that the JJA sentencing range should be applied.

We conclude that *Gregg* requires us to reject Larry's article I, section 14 argument that the JJA sentencing ranges must be presumed to apply. The Supreme Court expressly rejected the argument that trial courts must start with the presumption that an exceptional sentence below the SRA standard range is required. *Id.* at 482-83. If the Supreme Court did not require a trial court to presume that an exceptional sentence downward must be imposed, a trial court cannot be required to presume that a sentence within the JJA standard range must be imposed. Even the dissent in *Gregg* did not go that far.

However, we clarify that Larry's suggestion that there is a presumption that trial courts will apply the SRA when sentencing juveniles in adult court is inaccurate. The SRA standard

range serves as a "starting point" for the sentencing of juveniles. *Forcha-Williams*, 200 Wn.2d at 596. But there is no presumption. As noted above, trial courts have full discretion to impose *any* sentence below the top end of the standard range if the offender has diminished culpability based on youth. *Forcha-Williams*, 200 Wn.2d at 597; *Houston-Sconiers*, 188 Wn.2d at 21. This includes a sentence of no prison time. *Forcha-Williams*, 200 Wn.2d at 597. And it would include a sentence within the JJA sentencing ranges.

This means that the trial court may look to the SRA for guidance in forming its discretionary sentence, but it is not *required* to apply the SRA. *Forcha-Williams*, 200 Wn.2d at 597. And the trial court also may look to the JJA for guidance in crafting a discretionary sentence. The only requirement before making a discretionary sentence is for the court to have considered the mitigating circumstances related to the juvenile's youth. *Houston-Sconiers*, 188 Wn.2d at 23.

We hold that article I, section 14 does not require presumptive application of the JJA when sentencing juveniles in adult court.

### C. Earned Early Release Time for Firearm Sentencing Enhancements

The State cross-appeals, arguing that the trial court erred when it ordered that Larry's firearm sentencing enhancements would be subject to earned early release time. Larry argues that this portion of the court's sentence is a permissible exercise of its discretion under *Houston-Sconiers*. We agree with Larry.

#### 1. Legal Principles

"A trial court's sentencing authority is limited to that granted by statute." *State v. Button*, 184 Wn. App. 442, 446, 339 P.3d 182 (2014). "Whether a sentencing court has exceeded its statutory authority is a question of law that we review de novo." *Id.*

Under RCW 9.94A.729(1)(a), an offender's sentence term "may be reduced by earned release time in accordance with procedures that shall be developed and adopted by the correctional agency having jurisdiction in which the offender is confined." However, RCW 9.94A.729(2)(a) states,

> An offender who has been convicted of a felony committed after July 23, 1995, that involves any applicable deadly weapon enhancements under RCW 9.94A.533 (3) or (4), or both, *shall not receive any* good time credits or *earned release time* for that portion of his or her sentence that results from any deadly weapon enhancements.

(Emphasis added.)[2]

Similarly, RCW 9.94A.533(3)(e) states that all firearm sentencing enhancements "shall be served in total confinement." RCW 9.94A.533(3)(e) also states that "all firearm enhancements under this section are mandatory" and "shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements."

However, as noted above, *Houston-Sconiers* adopted a new rule for sentencing juvenile offenders based on a consideration of the mitigating qualities of youth: trial courts "must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." 188 Wn.2d at 21. The question here is whether a trial court has discretion to disregard the limitation on earned early release time in RCW 9.94A.729(2)(a) and RCW 9.94A.533(3)(e) – both SRA provisions – in imposing a sentence under *Houston-Sconiers*.

2. Analysis

There is no question that under *Houston-Sconiers*, a trial court sentencing a juvenile offender can impose any term of confinement after considering the mitigating qualities of youth,

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[2] Former RCW 9.94A.729(2) (2020), the statute in effect at the time of Larry's resentencing, contains identical language. LAWS OF 2020, ch. 330, § 2.

regardless of otherwise applicable provisions. 188 Wn.2d at 21. For example, a trial court may depart from mandatory sentencing enhancements. *Id.* at 34. A trial court may run weapon sentencing enhancements concurrently instead of consecutively. *See Ali*, 196 Wn.2d at 234. And a trial court may impose no prison time at all. *Forcha-Williams*, 200 Wn.2d at 597.

On the other hand, the Supreme Court in *Forcha-Williams* clarified "that the Eighth Amendment does not give judges 'absolute discretion' carte blanche to impose *any* sentence." *Id.* at 596 (emphasis added). The absolute discretion is only " 'to impose any sentence below the SRA range or enhancements.' " *Id.* (quoting *In re Pers. Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 265, 474 P.3d 524 (2020)). In *Forcha-Williams*, the court held that a trial court does not have discretion under *Houston-Sconiers* to impose a determinate sentence where the legislature has mandated an indeterminate sentence. *Id.* at 591. This is because it is the function of the legislature, and not the judiciary, to fix punishments for criminal offenses. *Id.* Similarly, a trial court cannot change the maximum sentence for an indeterminate sentence. *Id.* at 596-98.

Larry focuses on the requirement in RCW 9.94A.533(3)(e) that firearm sentencing enhancements must be served in total confinement. He points out that the same subsection also states that firearm sentencing enhancements are mandatory and that they must be run consecutively to all other sentencing provisions. But the court in *Houston-Sconiers* held that the mandatory nature of these sentencing enhancements violated the Eighth Amendment. 188 Wn.2d at 25-26. And under *Houston-Sconiers*, a trial court has discretion to run firearm sentencing enhancements concurrently rather than consecutively. *Ali*, 196 Wn.2d at 234. If a trial court can disregard the other two provisions based on the mitigating qualities of youth, there is no reason a trial court also cannot disregard the requirement that the firearm sentencing enhancements be served in total confinement.

Larry also emphasizes that allowing early release time for his firearm sentencing enhancements could have the effect of reducing the length of total confinement. Therefore, the trial court's provision falls under the rule that trial courts have " 'absolute discretion to impose any sentence below the SRA range or enhancements in order to protect juveniles who lack adult culpability from disproportionate punishment.' " *Forcha-Williams*, 200 Wn.2d at 596 (quoting *Domingo-Cornelio*, 196 Wn.2d at 265).

The State focuses on the directive in RCW 9.94A.729(2)(a) that an offender cannot receive good time credits for the portion of the sentence resulting from deadly weapon enhancements. The State emphasizes that this statute is directed toward the Department of Corrections (DOC), not the trial court, and the trial court cannot override this absolute prohibition. The State also emphasizes that there is no grant of legislative authority for the trial court's order. The State points out that a trial court has no authority to grant or restrict early release time. *In re Pers. Restraint of West*, 154 Wn.2d 204, 212-13, 110 P.3d 1122 (2005).

In addition, the State cites to *Forcha-Williams* for the proposition that a trial court cannot disregard all sentencing laws based on *Houston-Sconiers*. Instead, the State argues that *Houston-Sconiers* only authorizes a trial court to depart from SRA standard ranges and sentencing enhancements. And the State notes that no authority supports the extension of *Houston-Sconiers* to allow earned early release time.

We conclude that Larry has the better argument. Ordering that firearm sentencing enhancements will be subject to earned early release time is not the same as changing a sentence from indeterminate to determinate as in *Forcha-Williams*. And if a trial court can ignore the legislature's directive in RCW 9.94A.533(3)(e) that firearm sentencing enhancements are mandatory and must be run consecutively to all other sentencing provisions, there is no reason

why a trial court cannot also ignore the directive that firearm sentencing enhancements cannot receive earned early release time. The trial court here simply used a different method for potentially reducing Larry's time in confinement.

The State also argues that the trial court's earned early release time order must be reversed because a trial court does not have the authority to grant or deny earned early release time under *West*, 154 Wn.2d at 212-13. However, the trial court did not "grant" Larry release time. Instead, the court ordered that the firearm sentencing enhancements would be subject to reduction for earned early release time. DOC still will determine whether or not Larry is eligible for earned early release time as in any other case. Therefore, we reject this argument.

We hold that the trial court did not err in ordering that Larry's firearm sentencing enhancements would be subject to earned early release time.

## CONCLUSION

We affirm the trial court's sentence.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

In the unpublished portion of this opinion, we address and reject Larry's remaining arguments. We hold that (1) the prosecutor did not engage in misconduct involving racial bias by referring to Larry as a "lone wolf" at sentencing, (2) the invited error doctrine bars Larry from seeking appellate review regarding admission of a report prepared by a DOC psychologist, and (3) Larry failed to preserve his argument that the trial court abused its discretion by failing to consider his youth when imposing the same restitution as in the original sentence because he did not raise the issue in the trial court.

ADDITIONAL FACTS

*Resentencing Materials and Evidence*

Larry submitted a memorandum on resentencing that discussed the history of the case, his childhood background, developments in juvenile cognitive culpability, and applicable law. Larry also submitted DOC records and certificates, including a psychological evaluation by DOC psychologist Dr. Deborah Wentworth. In addition, Larry was evaluated by Dr. Kristin Carlson, a psychologist with the Department of Social and Health Services at the Special Commitment Center who also has a private practice where she does forensic evaluations for the court and clinical therapy patients. Dr. Carlson prepared a report regarding her evaluation.

Dr. Wentworth had prepared the report for the ISRB in order "to provide a written evaluation of the current behavior and risks that may assist the Board in determining the potential for re-offense, violence risk, capacity to function in a less restrictive environment, and/or whether Mr. Larry's rehabilitation is complete." CP at 309. The report stated that Larry voluntarily had provided the information that Dr. Wentworth based her report on, was advised of the departmental policy regarding information practices, and was given notice that he may request to review a copy of the evaluation.

Dr. Wentworth concluded that Larry had a high to moderate risk of reoffending and a high risk of future violence. She also noted that he had committed 67 infractions in prison, 59 of which were serious. However, he had no infractions since October 2018 and no serious infractions since June 2014. According to the report, Larry's serious infractions stopped and his behavior improved significantly once he turned 32. Larry stated that "he realized he might have a chance to obtain early release and that his behavior was only hurting himself." CP at 316.

Dr. Carlson testified at the resentencing hearing. She had performed a clinical interview examining Larry's history and background, and conducted a mental status exam and two psychological assessments. Dr. Carlson also had reviewed Larry's DOC records, including Dr. Wentworth's report.

Dr. Carlson testified that Larry's intellectual functioning was in the borderline functioning range, which was much lower than average for his age, and that he had a typical motivation for treatment in a therapeutic setting. She stated that Larry had been relatively infraction free since 2014, which showed that he had been working on behavioral control and had been compliant within the prison setting. Dr. Carlson believed there were indicators showing that Larry had been managing his impulsivity.

On cross-examination, the State questioned Dr. Carlson about how her conclusions differed from Dr. Wentworth's conclusions. The State also asked whether it was significant that Larry changed his behavior in prison for the better at the same time that the law changed, which allowed for a sentence reduction for good behavior.

In addition, the State questioned Dr. Carlson about Larry's gang involvement. Although Larry got involved with a gang while in prison, he was not directly involved with gangs prior to incarceration. Larry had indicated to Dr. Carlson that he was in charge during the incident that led to his convictions.

When discussing the admission of exhibits during the resentencing hearing, Larry offered to stipulate to the admission of the entire packet of DOC records he had submitted. But when the State requested to specifically admit Dr. Wentworth's report as an exhibit, Larry objected for the same reason that the State initially objected to Dr. Carlson's report. Larry argued that the State did not lay a proper foundation for Dr. Wentworth's report because Dr. Wentworth did not

testify. The State noted that Larry provided the report to the court and that Dr. Carlson reviewed and discussed the report during her testimony. The trial court admitted Dr. Wentworth's report for "illustrative purposes." RP (Oct. 19-20, 2021) at 85.

*Prosecutor's Statements*

During the resentencing hearing, the prosecutor discussed the mitigating factors of youth. When discussing the family and peer pressure factor, the prosecutor stated,

> Generally speaking, I think, and I'm probably going to get labeled a racist for saying this, but I think when you talk about peer pressures that affect these kids these days, what you're looking at, in theory, is gang affiliation and how there is a pack mentality among gangs. And so if you have Mr. Larry being involved in a gang, there is the potential for his peers to put pressure on him to do the kind of behavior that they're doing and to commit the kind of crimes they're committing. Mr. Larry has none of that. *He's a lone wolf.* He has no gang affiliation until he goes into custody.

RP (Oct. 19-20, 2021) at 111 (emphasis added). Larry did not object.

*Restitution*

At resentencing, neither party made a request regarding restitution, and restitution was not discussed. In the judgment and sentence, the trial court ordered restitution in the same amount as Larry's previous two sentencings: $47,434.49 to the victim and $4,500.48 to the insurance company.

## ANALYSIS

### A. PROSECUTORIAL MISCONDUCT

Larry argues that the prosecutor engaged in misconduct that involved racial bias,[3] and so he is entitled to a new resentencing hearing. We disagree.

[3] At the resentencing hearing, Larry stated that he was Black and Native American.

1. Legal Principles

The general rule is that to prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of all the circumstances of the trial. *State v. Zamora*, 199 Wn.2d 698, 708, 512 P.3d 512 (2022). However, this court applies a heightened test for race-based prosecutorial misconduct. *State v. Bagby*, 200 Wn.2d 777, 788, 522 P.3d 982 (2023). "[W]hen a prosecutor *flagrantly or apparently intentionally* appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence, their improper conduct is considered per se prejudicial, and reversal of the defendant's convictions is required." *Id.* at 788-89. The defendant must demonstrate that the prosecutor's conduct was both improper and prejudicial using this standard. *Id.* at 790.

We use an objective observer lens when analyzing whether a prosecutor flagrantly or apparently intentionally appealed to one's racial bias. *Id.* at 791-92. The prosecutor's subjective intent is immaterial. *Id.* at 791. We ask whether an objective observer could view the prosecutor's comments as an appeal to potential prejudice, bias, or stereotypes that undermine the defendant's credibility or presumption of innocence. *Id.* at 793. An objective observer is one "who is aware of the history of race and ethnic discrimination in the United States and aware of implicit, institutional, and unconscious biases, in addition to purposeful discrimination." *Zamora*, 199 Wn.2d at 718.

In evaluating the prosecutor's statements, we consider "(1) the content and subject of the . . . comments, (2) the frequency of the remarks, (3) the apparent purpose of the statements, and (4) whether the comments were based on evidence or reasonable inferences in the record." *Bagby*, 200 Wn.2d at 794. In analyzing these factors, we acknowledge that appeals to racial

prejudice are not always obvious and that subtle biases can have a larger impact than explicit references to race. *Id.* 794-95. " 'Not all appeals to racial prejudice are blatant. . . . Like wolves in sheep's clothing, a careful word here and there can trigger racial bias.' " *Id.* at 794 (quoting *State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011)).

Here, Larry argues that the prosecutor's use of animal analogies was an improper reference to race. The use of animal analogies can be problematic because they can operate as a racist code. *State v. McKenzie*, 21 Wn. App. 2d 722, 730, 508 P.3d 205 (2022). Coded language cannot be condoned. *Id.* Animal analogies are "hurtful and silencing to those who readily understand the message. It can also trigger implicit bias for listeners who do not immediately register the significance of what has been said." *Id.* And even if an analogy does not have racial connotations, it can improperly dehumanize the defendant. *In re Pers. Restraint of Richmond*, 16 Wn. App. 2d 751, 755, 482 P.3d 971 (2021).

However, animal analogies are not always improper.

> [N]ot all human-animal comparisons are racist or dehumanizing. Some analogies are positive. It is a compliment to say someone is lionhearted, eagle-eyed, or busy as a bee. Other analogies are negative, though not in a particularly dehumanizing way. For example, calling someone a chicken has more to do with the anthropomorphism of gallinaceous birds than with human denigration. There are also analogies that are simply neutral. A politician who favors escalating military conflicts may be called a hawk; one with an opposite perspective being a dove. An official who is in the last portion of an elected term is a lame duck. An individual or group seeking to keep politicians (be they hawks, doves, lame ducks, or otherwise) accountable might be referred to as a watchdog.

*Id.* at 755-56. The court in *Richmond* stated, "Unless an analogy conveys racist sentiment or is otherwise dehumanizing, we should give breathing room for attorneys to connect with jurors and try their cases." *Id.* at 756.

The prosecutor in *McKenzie* analogized the defendant to a "gorilla pimp." 21 Wn. App. 2d at 727-28. The court concluded that this was an offensive term that served no purpose other

than to "dehumanize and demean" the defendant. *Id.* at 732-33. On the other hand, the court in *Richmond* held that it was not improper for the prosecutor to refer to the defendant as a "hornet's nest" to explain the defendant's behavior. 16 Wn. App. 2d at 757-59.

2. Application to Sentencing Hearing

The State suggests that although statements that implicitly appeal to racial bias may require reversal when used in a jury trial, they may not require reversal when used in a sentencing hearing. The State points out that judges are more sophisticated than jurors and receive significant training regarding implicit bias.

Larry does not cite any cases applying the heightened test for race-based prosecutorial misconduct to a sentencing hearing. But we decline to apply a different standard to comments made to a judge. Appeals to racial bias are improper regardless of the audience.

3. Analysis

Here, when discussing the peer pressure aspect of the mitigating factors of youth, the prosecutor referred to Larry as a "lone wolf." RP (Oct. 19-20, 2021) at 111. Larry argues that this statement dehumanized him and conjured an image of a wild animal prowling the streets. However, application of the four *Bagby* factors show that this statement was not improper.

First, and most important, the subject of the comment does not have a racial or dehumanizing connotation. The term "lone wolf" has had an accepted meaning for decades: "[a] person who prefers to work, act, or live alone." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1332 (1973). The term does not appear to reflect a code for any particular race. And the term is more neutral than negative.

The other three factors also indicate that the comment was not improper. The prosecutor used the term only once. The purpose of the statement was legitimate – to show that Larry acted

alone and therefore was not subjected to peer pressure, negating one of the mitigating factors of youth. And the comment was based on evidence that Larry planned the crime on his own.

Therefore, we hold that the prosecutor's comparison of Larry to a lone wolf did not constitute a flagrant or apparently intentional appeal to racial bias in a way that undermined Larry's credibility or presumption of innocence.

Larry also argues that the prosecutor's linking of gang affiliation to a "pack mentality", RP (Oct. 19-20, 2021) at 111, was improper. This statement may have been an improper analogy if the prosecutor had argued that Larry was in a gang. However, the prosecutor's point was that Larry was *not* in a gang and therefore was not influenced by peer pressure. As a result, this comment did not appeal to racial bias or dehumanize Larry.

Finally, the prosecutor did comment that he was "probably going to get labeled a racist for saying this." RP (Oct. 19-20, 2021) at 111. But that statement was made in conjunction with the prosecutor equating peer pressure to the pack mentality of gangs, not his calling Larry a "lone wolf."

We hold that the prosecutor's statements were not improper and therefore that Larry's prosecutorial misconduct claim fails.

B. ADMISSION OF DOC REPORT

Larry argues that the trial court's admission of Dr. Wentworth's report without an in-court testimony violated his due process right to be sentenced on reliable evidence. We hold that the invited error doctrine bars Larry from seeking appellate review of this issue.

Under the invited error doctrine, a defendant is precluded " 'from seeking appellate review of an error [they] helped create, even when the alleged error involves constitutional rights.' " *State v. Tatum*, 23 Wn. App. 2d 123, 128, 514 P.3d 763, *review denied*, 200 Wn.2d

1021 (2022) (quoting *State v. Carson*, 179 Wn. App. 961, 973, 320 P.3d 185 (2014)). The invited error doctrine is applicable when the defendant either affirmatively assents to the error, materially contributes to it, or benefits from it. *State v. Kelly*, 25 Wn. App. 2d 879, 885, 526 P.3d 39 (2023).

Here, Larry claims that Dr. Wentworth's report should not have been admitted for illustrative purposes without her in-court testimony. But Larry himself submitted Dr. Wentworth's report with other DOC records and certificates for the trial court to consider along with his resentencing memorandum. And at one point Larry offered to stipulate to the admissibility of the DOC materials he submitted. Even if the State had never moved to admit the report, the report was available to the trial court in *Larry's* materials. At sentencing, the trial court can consider all acknowledged facts, which include all facts presented during sentencing without objection. *State v. Grayson*, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005); *see also* RCW 9.94A.530(2).

If admission of Dr. Wentworth's report for illustrative purposes was an error as Larry contends, Larry materially contributed to that error by submitting the report to the court himself. Therefore, we hold that the invited error doctrine bars Larry from seeking appellate review of the admission of Dr. Wentworth's report.

C. IMPOSITION OF RESTITUTION

Larry argues that the trial court erred when it failed to consider his youth when imposing the same restitution previously ordered. We decline to consider this issue.

Under RAP 2.5(a), "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." The failure to object to the amount of restitution ordered

generally precludes review of the issue. *State v. Hassan*, 184 Wn. App. 140, 151, 336 P.3d 99 (2014).

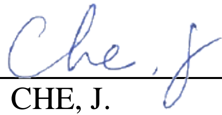
At resentencing, Larry did not ask the trial court to change the amount of restitution ordered. And he did not object when the court without discussion imposed the same restitution that had been ordered in the two previous sentencings. Therefore, he did not preserve his challenge to the restitution imposed and we decline to address this issue.[4]

CONCLUSION

We affirm Larry's sentence.

MAXA, J.

I concur:



CHE, J.

[4] RAP 2.5(a)(3) states that a party may raise a "manifest error affecting a constitutional right" for the first time on appeal. *Houston-Sconiers* is based on constitutional principles. But Larry does not reference RAP 2.5(a)(3) or make any showing that any error was manifest.

CRUSER, A.C.J. (dissenting in part)—I respectfully dissent from the Section C of the majority opinion which holds that trial courts have the authority to order the Department of Corrections (DOC), which is part of the executive branch, to permit an offender to earn early release time applicable to a firearm sentencing enhancement despite the legislature's express directive to the contrary and to dictate to DOC the percentage at which the earned early release time shall be calculated.

Former RCW 9.94A.150(1) (1996)[5] provided that

> [A]n offender who has been convicted of a felony committed after July 23, 1995, that involves any applicable deadly weapon enhancements under RCW 9.94A.310[6] (3) or (4), or both, shall not receive any good time credits or earned early release time for that portion of his or her sentence that results from any deadly weapon enhancements.

The statute went on to set out calculation parameters for those offenses that were eligible for reduction for earned early release.[7]

In this case, the trial court provided the following in its October 20, 2021 order on resentencing:

> The court is intentionally ordering statutory firearm enhancements of 60 months on Count I, Count II, Count III, and Count IV, consecutively to each other, but is intentionally ordering those enhancements **be subject to reduction for earned early release time at the same percentage as Count I and Count II (serious violent offenses committed in 1999)**, which is an exceptional sentence authorized by *Houston-Sconiers* and subsequent cases.

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[5] This statute has since been recodified as RCW 9.94A.729(2)(a). *See* LAWS OF 2001, ch. 10, § 6; LAWS OF 2009, ch. 455, §§ 2-3.

[6] RCW 9.94A.310 has since be recodified as RCW 9.94A.533. *See* LAWS OF 2001, ch. 10, § 6; LAWS OF 2002, ch. 290, §§ 10-11.

[7] Former RCW 9.94A.150(1) provided

> In the case of an offender convicted of a serious violent offense or a sex offense that is a class A felony committed on or after July 1, 1990, the aggregate earned early release time may not exceed fifteen percent of the sentence. In no other case shall the aggregate earned early release time exceed one-third of the total sentence.

CP at 374.

Because there is no statutory provision for the allowance of earned early release time for deadly weapon enhancements, the trial court arbitrarily ordered DOC to apply the earned early release calculation for serious violent offenses to all four of Larry's sentence enhancements, even though the base crime for the enhancements in Counts III and IV were not serious violent offenses.[8]

The State, in its cross appeal of this portion of the trial court's order, contends that the trial court lacked authority to order DOC to subject Larry's firearm sentence enhancements to reduction for earned early release. I agree.

During oral argument to this court, Larry's counsel argued that *State v. Houston-Sconiers,* 188 Wn.2d 1, 391 P.3d 409 (2017) is, essentially, a blank check to trial courts, allowing them to fashion any sentence they see fit for an eligible offender because, after all, *Houston-Sconiers* allows a trial court to impose *no incarceration at all* if it finds diminished culpability for an offense based on an offender's youth. The majority joins Larry in this reading, stating

> if a trial court can ignore the legislature's directive in RCW 9.94A.533(3)(e) that firearm sentencing enhancements are mandatory and must be run consecutively to all other sentencing provisions, *there is no reason why a trial court cannot also ignore the directive that firearm sentencing enhancements cannot receive earned early release time.*

Majority at 14 (emphasis added). This is an extraordinary statement.

The reason why the trial court cannot simply do anything it wants is because we have a separation of powers doctrine in Washington. As explained by our supreme court,

> The legislative branch writes laws, WASH. CONST. art. II, § 1, the executive branch faithfully executes those laws, WASH. CONST. art. III, § 5, and "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803); see also

[8] Pursuant to RCW 9.94A.030, both in 1999 and now, robbery in the first degree is not a serious violent offense.

> WASH. CONST. art. IV, § 1 (vesting the judicial power of the state in this court, superior courts, justices of the peace, and inferior courts created by the legislature).

*Colvin v. Inslee*, 195 Wn.2d 879, 892, 467 P.3d 953 (2020).

In the criminal sentencing context, the legislature has "plenary authority to set criminal punishments." *In re Pers. Restraint of Forcha-Williams*, 200 Wn.2d 581, 592, 520 P.3d 939 (2022). Our supreme court has "repeatedly stopped the judiciary from encroaching on the legislature's plenary authority to set criminal punishments." *Id.* And the court has stated " 'it is the function of the legislature and not of the judiciary to alter the sentencing process.' " *Id.* at 591 (quoting *State v. Monday*, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975), *overruled on other grounds by In re Pers. Restraint of Phelan*, 97 Wn.2d 590, 647 P.2d 1026 (1982)).

In *Forcha-Williams*, on which the ink is barely dry, our supreme court reversed the decision of Division One of this court that held that trial courts are permitted, under *Houston-Sconiers*, to convert indeterminant sentences into determinant sentences in the name of remediating an 8th Amendment violation. *Id.* at 598. In a decision that was unanimous as to that question, the Supreme Court held that trial courts have no such discretion. The court stated, "[W]ithout statutory authority, the judicial branch may alter the legislature's chosen punishment only when it violates the constitution." *Id.* at 593. *Forcha-Williams* demonstrates that *Houston-Sconiers* is far from a blank check.

With these principles in mind, it is apparent to me that where the legislature has promulgated a statute creating a system permitting earned early release, and it has set forth precise calculations of the earned early release,[9] if any, available for particular classes of crimes, it is not the prerogative of the judiciary to alter that statute under the guise of the mythical blank check of

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[9] *See* former RCW 9.94A.150(1) and (2).

*Houston-Sconiers*. The legislature, in former RCW 9.94A.150(1), empowered DOC, an executive agency, to reduce the term of confinement of an offender committed to a correctional facility "by earned early release time in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction in which the offender is confined." Not only is the availability of earned early release solely a matter of legislative grace, but the statute implementing earned early release is not in the true sense a sentencing statute because it does not change the sentence the trial court can impose but, rather, provides the DOC with a mechanism for incentivizing good behavior while an offender is serving a sentence. *See In re Pers. Restraint of West*, 154 Wn.2d 204, 212, 110 P.3d 1122 (2005) (the purpose of permitting DOC to award to deny good time is to promote disciplinary goals). This further supports my contention that the availability of earned early release is not within the power of the judiciary to prescribe.

The State refers us to *West*, 154 Wn.2d at 212, in which our supreme court held that a sentencing court has no authority to either grant or restrict earned early release time. The court stated

> Notably, the statutory language grants authority to determine a prisoner's earned early release time *to the correctional agency having jurisdiction over the offender*. This court has recognized that former RCW 9.94A.150 provides *no authority for the superior court to grant early release time*.

*Id.* (emphasis added).

Beyond merely mentioning the State's citation to *West*, the majority ignores this case. Instead, the majority falls back on the supposed *Houston-Sconiers* blank check that, in the majority's apparent view, permits a trial court to ignore the entirety of the criminal code when a prosecution is commenced in adult court against a juvenile offender.

The problem with the majority's analysis is immediately apparent from the order amending the judgment and sentence in this case. The trial court, having no statutory authority to order DOC

to allow Larry to earn early release credits, had no statutory guidance on what *calculation* to apply to the accrual of the credits. Should it be the "aggregate earned early release time" of 15 percent that was available, under former RCW 9.94A.150(1), to offenders "convicted of a serious violent offense or a sex offense that is a class A felony committed . . . after July 1, 1990?" *See* former RCW 9.94A.150(1). Or should it be the maximum allowable calculation of no more than "one-third of the total sentence" available to other offenders? *Id.* The trial court did not know, so it arbitrarily selected "the same percentage as Count I and Count II (serious violent offenses committed in 1999)." CP at 374. This might make some sense if each of the base crimes to which an enhancement was applied were serious violent offenses, but they are not.

It is certainly incongruous, as the majority notes, to allow a trial court to impose *no incarceration period* at all but not allow the trial court to dictate to DOC that they allow an offender to earn early release. But this incongruity is of no moment in our analysis. The judiciary has a lane, and we need to stay within it. Encroachment by one branch of government into a lane squarely occupied by another might seem appealing to those benefitting from the encroachment on a particular occasion. A different tune is typically sung, however, when the encroachment does not serve one's individual interest.[10]

Here, the trial court can accomplish its goal by sentencing Larry to a lesser period of incarceration than it imposed in its most recent judgment and sentence. Indeed, by asking us in this cross appeal to reverse the trial court's directive to DOC that it allow Larry to earn early release credits on his firearm enhancements, the State risked a decision by the trial court on remand to

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[10] The judicial branch, in particular, being the only branch of government without an independent enforcement mechanism for its pronouncements, ought to take care to stay in its lane. It is well noted that the judiciary has "no influence over either the sword or the purse." THE FEDERALIST NO. 78 (Alexander Hamilton). The judiciary is dependent entirely on the largesse of the other two branches for enforcement of its orders.

impose *no incarceration* time at all on these crimes and enhancements. The various potential outcomes on remand, however, have nothing to do with our role on appeal.

The trial court had no authority to order DOC to allow Larry to earn early release credits on his firearm enhancements under the holding in *West*, nor did it have the authority to arbitrarily select 15 percent as the percentage of the sentence available for earned early release. For these reasons, I respectfully dissent in part.

CRUSER, A.C.J.

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 56648-6-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: December 7, 2023

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