

FILED
SUPREME COURT
STATE OF WASHINGTON
8/5/2024 3:34 PM
BY ERIN L. LENNON
CLERK

No. 1032285
COA 38349-1-III

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

CURTIS BRIAN FISHER, Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

B. COURT OF APPEALS DECISIONS

At issue is the unpublished court of appeals decision filed on June 11, 2024 in Division Three of the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

1. Does the unpublished Court of Appeals decision finding the trial court erred in granting Fisher's CrR 7.8 motion to vacate his sentence meet the criteria for review under RAP 13.4(b)(3) or (4)?

D. STATEMENT OF THE CASE

On August 13, 1979, Curtis Brian Fisher was charged with first-degree premeditated murder in the death of John Rice. CP 1. Indeterminate Sentence Review Board (ISRB) records indicate that the victim allegedly owed Fisher money for drugs. CP 166. Fisher and two accomplices went with the victim to an area near the Yakima River where Fisher and a codefendant had the victim kneel on the ground before Fisher shot him in the chest. CP 166. When the victim got up and ran away, Fisher

and the codefendant followed him, firing additional shots. CP 166. At the time of the crime Fisher was six months shy of his eighteenth birthday. CP 1, 83. After a declination hearing, he was declined to Yakima County Superior Court. CP 12, 17, 22-24.

On September 18, 1979, Fisher entered a plea agreement to a reduced charge of second-degree murder. CP 2, 17, 166. He was informed that the maximum term was 20 years to life and that the prosecutor would recommend to the trial court, “indeterminate sentencing, life imprisonment.” CP 4. Fisher was sentenced to a maximum term of life, with the minimum term left up to the parole board. CP 5-6, 17.

On December 11, 1979, the Board of Prison Terms and Paroles set Fisher’s minimum term at 13 years. CP 6. At his 1400 Progress Review in 1987, it was reduced to 141 months, or 11.75 years. CP 8, 192. Over the years, the ISRB has increased Fisher’s minimum term because of his lack of rehabilitation. CP 190-92. Additional time was added to his

minimum term throughout the years after numerous hearings under RCW 9.95.100 where he was found to be not parolable. CP 8, 173-77, 191-92, 200-04.

Fisher has filed two personal restraint petitions; both were dismissed. CP 8-10, 12-15.

Over 41 years after his judgment and sentence was filed, on November 30, 2020, Fisher filed a CrR 7.8 motion to vacate and set aside his judgment and sentence in the trial court. CP 5, 16-21. Fisher argued that his age, lack of development, and mental capacity were not considered by the trial judge in 1979. CP 18. Fisher asked for a new sentencing, citing *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) and *State v. Houston-Sconiers*, 188 Wn.2d 1, 39 P.3d 409 (2017). CP 16-19. He raised his claim under the Eighth Amendment. CP 19-20, 67- 78. He asked to be resentenced under the new laws and rules as outlined in *Houston-Sconiers*. CP 21.

The trial court granted Fisher a resentencing hearing. CP 723, 748-49. The trial court found that the sentencing court did not consider the defendant's age or mitigating qualities of youth when it sentenced him in 1979. CP 748. The trial judge found this violated the Eighth Amendment and article 1, section 14 of the state constitution. CP 748-49. The trial judge made no findings as to prejudice. CP 748-49.

The State filed a motion for reconsideration. CP 80-701. Fisher then filed a supplemental memorandum in which he raised a state constitutional violation for the first time. CP 702-21. The State's motion for reconsideration was denied. CP 722. The State timely filed a notice of appeal. CP 734. The resentencing was stayed pending the appeal. CP 750.

While this appeal was pending, Fisher sought release under RCW 9.94A.730. *See* Appendix B attached to Fisher's Petition for Review, pgs. 84-91; *see also* CP 752-57. On December 21, 2021, the ISRB found:

Based on the burden of proof set out in RCW 9.94A.730 **or** RCW 10.95.030(3)(f) and the totality of evidence and information provided to the Board, the Board does find by a preponderance of the evidence that Mr. Fisher is more likely than not to commit a new criminal law violation if released on conditions. Consequently, the Board finds Mr. Fisher not releasable. Mr. Fisher can re-submit a petition for review in 24 months.

Appendix B attached to Fisher’s Petition for Review, pg. 86.

Subsequently, on March 1, 2022, a hearing was held under RCW 9.95.100. CP 752-57. Fisher’s release was denied and four more years were added to his minimum term. CP 754-57.

The ISRB also held a hearing under RCW 9.95.100 on July 6, 2023. *See* Appendix A, attached. An additional 36 months was added to Fisher’s minimum term. *See* Appendix A, attached.

In an unpublished opinion issued on June 11, 2024, the Court of Appeals reversed the trial court’s order granting Fisher a resentencing hearing. The Court of Appeals held “the trial court applied the incorrect legal standard when it found there

had been a significant change in the law material to Mr. Fisher's sentence, when it concluded that Mr. Fisher's motion was not time barred, and when it granted the motion absent a finding that Mr. Fisher was actually and substantially prejudiced by the alleged error." Slip Opinion, pg. 5. The Court of Appeals found:

Mr. Fisher is not serving a grossly disproportionate sentence for a juvenile offender. The trial court imposed a determinate sentence of 13 years that was later reduced to 11.75 years. Any subsequent period of incarceration beyond 11.75 years has been directly tied to Mr. Fisher's lack of rehabilitation.

Slip Opinion, pg. 10.

Judge Fearing filed a dissenting opinion.

Fisher filed a Petition for Review, arguing this Court should grant review because his sentence violates article 1, section 14.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

- 1. The unpublished Court of Appeals decision that the trial court erred in granting Fisher's CrR 7.8 motion to vacate his sentence does not meet the criteria for review under RAP 13.4(b)(3) or (4).**

Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Contrary to Fisher's assertion, the unpublished Court of Appeals decision that the trial court erred in granting his CrR 7.8 motion to vacate his sentence does not meet the criteria for review under RAP 13.4(b)(3) or (4). This Court has recently

addressed the questions presented here, and therefore, further guidance is not needed in this area. *See In re Pers. Restraint of Williams*, 200 Wn.2d 622, 520 P.3d 933 (2022); *In re Pers. Restraint of Forcha-Williams*, 200 Wn.2d 581, 520 P.3d 939 (2022).

Fisher argues his sentence is disproportionate because it is more than what an adult today would receive under a standard range sentence under the Sentencing Reform Act (SRA). *See* Petition for Review, pgs. 17-18. However, this is not the standard for testing disproportionality. Recent cases from this Court hold that any risk of disproportionality is alleviated because Fisher's release is directly tied to his rehabilitation. *See Williams*, 200 Wn.2d at 630-31; *Forcha-Williams*, 200 Wn.2d at 597-98.

In *Williams*, the defendant was sentenced to an indeterminate sentence of three months to life, for a sex offense. *Williams*, 200 Wn.2d at 627-28. In a personal restraint petition, the defendant challenged his mandatory indeterminate term of

life in prison. *Id.* at 631. This Court held that because an offender is not mandated to serve their maximum term, the maximum term of an indeterminate sentence does not raise the same risk of disproportionate punishment as the minimum term. *Id.* (citing *Forcha-Williams*, 200 Wn.2d at 597). Our Supreme Court reasoned that an indeterminate sentence provides the opportunity for release for those who demonstrate rehabilitation. *Id.*

In *Williams*, this Court pointed out that there is not only a possibility of release, but also a statutory presumption. *Id.* This Court held “[t]he connection between release and an offender’s rehabilitation alleviates any concerns that an indeterminate sentence beyond the minimum term will be disproportionate in light of the reduced culpability of juveniles.” *Id.* This Court concluded that the substantive rule of *Houston-Sconiers* was not implicated because disproportionate punishment is not triggered by a challenge to the maximum term. *Id.*; see also *Houston-Sconiers*, 188 Wn.2d

at 1. As such, the defendant was not able to claim a substantial and material change in the law. *Id.* at 633-34.

In *Forcha-Williams*, the defendant was sentenced to indeterminate sentence of 120 months to life, for a sex offense. *Forcha-Williams*, 200 Wn.2d at 584-85. This Court held that *Houston-Sconiers* does not give judges the discretion to impose a determinate sentence in lieu of an indeterminate sentence. *Id.* at 598. This Court reasoned that the setting of criminal penalties is the sole prerogative of the legislature. *Id.* at 590. This Court held, “[b]eyond imposing the minimum and maximum, the sentencing judge lacks the statutory authority to alter an indeterminate sentence or decide when the offender is released. This lack of express authority binds the sentencing judge’s hands.” *Id.* at 593 (citations omitted).

This Court then analyzed the law under the Eighth Amendment and held that where the substantive rule is not violated, no procedural mechanism is required. *Id.* at 597. The only mandatory portion of the sentence is the minimum term.

Id. As such, when sentenced, no one can say how long an individual will serve. *Id.* Thus, it cannot be said that any juvenile faces a sentence beyond the minimum term. *Id.* at 598.

This Court found “to the extent that a juvenile serves additional time beyond the minimum term, that period of incarceration is directly tied to their rehabilitation, which poses no facial disproportionality issue.” *Id.*

Here, Fisher’s sentence is an indeterminate sentence of 11.75 months to life. CP 5, 8, 192. Fisher not only has the possibility of release, he has the presumption of release, in hearings held under RCW 9.94A.730. *See* Appendix B attached to Fisher’s Petition for Review, pgs. 84-91; CP 752-57; RCW 9.94A.730(3) (stating “[t]he board shall order the person released under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released.”); *In re Pers.*

Restraint of Dodge, 198 Wn.2d 826, 829, 502 P.3d 349 (2022)

(acknowledging this presumption of release).

Like in *Williams* and *Forcha-Williams*, Fisher is not mandated to serve a maximum term. *See Williams*, 200 Wn.2d at 630-31; *Forcha-Williams*, 200 Wn.2d at 597-98. The only mandatory portion of his sentence was the 11.75 years set by the Board. CP 6, 8, 192. The connection between Fisher's release and rehabilitation alleviates the concern that a sentence beyond the minimum term will be disproportionate.

Fisher argues this Court should grant review under RAP 13.4(b)(3) or (4) because his sentence is grossly disproportionate in violation of article I, section 14, under the analysis set forth in *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980).

Fisher's reliance on *Fain* for his disproportionality argument is misplaced. *See Fain*, 94 Wn.2d at 387.

In *Fain*, our Supreme Court held that a life sentence for fraud convictions resulting in a financial loss of \$470 was

disproportionate to the seriousness of the defendant's crimes. *Id.* at 402. However, in *State v. Bassett*, this Court rejected the *Fain* analysis, which weighs the offense with the punishment, as ill-suited to a challenge based on the characteristics of the offender class, children. *State v. Bassett*, 192 Wn.2d 67, 83, 428 P.3d 343 (2018). Nonetheless, unlike the defendant in *Fain*, the trial court here did not sentence Fisher to life on minor predicate offenses. Fisher was convicted of second degree murder. He could have been out in 11.75 years. It cannot be said that his sentence is entirely disproportionate to the seriousness of his crime.

Fisher also argues that RCW 9.94A.730 does not provide an adequate remedy because he has "already been subject to 'unconstitutionally disproportionate punishment.'" Petition for Review, pg. 22. Again, as explained above, his argument fails because his sentence was not disproportionate. The connection between his release and rehabilitation alleviates the concern that a sentence beyond the minimum term will be disproportionate.

F. CONCLUSION

For the reasons stated above, the Court of Appeals' unpublished opinion does not meet the criteria in RAP 13.4(b)(3) or (4). This Court has recently addressed the questions presented here, and therefore, further guidance is not needed in this area. Fisher has not shown his sentence is grossly disproportionate, given the connection between his release and rehabilitation. As such, his petition for review should be denied.

WORD COUNT CERTIFICATION

This document contains 2,200 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 5th day of August, 2024.

s/ Jill S. Reuter
Jill S. Reuter WSBA No. 38374
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Yakima County, Washington

DECLARATION OF SERVICE

I, Jill S. Reuter, state that on August 5, 2024, having received prior permission, I emailed the State's Answer to Petition for Review to Lila J. Silverstein at lila@washapp.org and wapofficemail@washapp.org, via the Washington State Appellate Courts' Portal.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5th day of August, 2024 at Spokane,
Washington.

s/ Jill S. Reuter

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APPENDIX A



**Indeterminate Sentence Review Board
Decision and Reasons Summary**

Name: Fisher, Curtis	DOC#: 266558	Case Type: PAR	Date: 7/6/2023
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Note: This is a summary of the Decision and Reasons dated 7/24/2023, and should not be substituted for the full document.

Decision:

Not Parolable/Not Releasable. Add 36 months to Minimum Term

Next Action:

Schedule .100 hearing 120 days prior to PERD.

Recommendations:

- **Attend Sober Support Groups**
- **Other Programs, if eligible: Thinking for a Change, Non-Violent Communication, Stress/Anger Management.**
- **Remain infraction free and have positive interactions with staff.**
- **Participate in next Hearing.**
- **Other: No involvement with persons associated with a security threat group**



DECISION AND REASONS

NAME:	FISHER, Curtis
DOC #:	266558
FACILITY:	Monroe Correctional Complex - IMU
DATE OF HEARING:	July 6, 2023
TYPE OF HEARING:	.100
PANEL MEMBERS:	Lori Ramsdell-Gilkey & Jill Getty
FINAL DECISION DATE:	July 24, 2023

I. DECISION/LEGAL STANDARD

This matter came before the above-named Board Members of the Indeterminate Sentence Review Board (ISRB or the Board) for a .100 hearing in accordance with RCW 9.95.100. This statute directs the Board to not release an individual unless in the Board's opinion his or her rehabilitation has been completed and he or she is a fit subject for release. Consequently, the Board finds Curtis Fisher **not parolable** and adds 36 months to the minimum term.

At sentencing the Court and Prosecutor recommended a minimum of 20 years. Recently, the Yakima County Prosecutor submitted a letter and recommended that Curtis not be released.

NEXT ACTION: Schedule .100 Hearing 120 days prior to his PERD.

II. JURISDICTION

Curtis B. Fisher is under the jurisdiction of the Board on a September 18, 1979, conviction in Yakima County Cause #79-1-00613-6 for Murder in the Second Degree. The time start is September 18, 1979. The minimum term was set at 141 months from a Sentencing Reform Act (SRA) range of 144 to 192 months. The maximum term is Life. Mr. Fisher has served approximately 526 months in prison and 36 days of jail time.

III. LAST BOARD DECISION

The Board last met with Mr. Fisher on February 8, 2023 for a LTJUVBRD hearing. At that time, he was found to be not releasable and the Board noted that he was eligible to submit a Petition for Review in February of 2025. Due to his age at the time of the offense and the year he was convicted, Mr. Fisher is eligible to be seen as either a juvenile board case or a Pre .100 case. He has alternated between the two.

IV. OFFENSE DESCRIPTION

According to file material on August 17, 1979, Mr. Fisher, at the age of 17, along with two accomplices murdered an adult male by shooting him multiple times. Reportedly, the victim owed Mr. Fisher money for drugs.

V. OTHER RISK RELATED BEHAVIOR

Mr. Fisher self-reported that at his age of 15 he was arrested for Burglary and served three months of probation. Also, in 1976 he was arrested for car theft and placed on probation to run concurrent with the Burglary charge. In this incident, he and a friend stole his friend's father's car to go "joyriding." He also reported he was arrested twice for DWI. However, those charges were both dismissed.

VI. EVIDENCE CONSIDERED

The Board considered the evidence presented at the hearing and reviewed **Curtis Fisher's** ISRB file. The hearing was audio recorded and will be retained per retention schedules. Testimony was provided by the following individuals: **Classification Counselor Kristin Humble and Curtis Fisher.**

The file review included the following documents:

- ☐ End of Sentence Review Committee (ESRC) Reports: Dated
- ☒ Criminal case records: **Pre-sentence report**
- ☒ Psychological Evaluation: **Completed by Lisa Robtoy, Psy.D. on June 7, 2023**

- ☒ DOC Treatment and behavioral reports dated: **Substance Use Disorder Discharge Summary and Continued Care Plan dated July 6, 2022**
- ☒ Risk Assessments:
 - Hare Psychopathy Checklist-REVISED (PCL-R) indicates the extent to which the individual has psychopathic tendencies.
 - HCR-20v3 is an instrument that organizes known risk factors into three categories: historical, clinical, and risk management. Using past, present, and future factors the HCR-20v3 assesses dynamic risk for recidivism.
 - Personality Assessment Inventory (PAI) is a self-administered objective test of personality and psychopathology.
 - Violence Risk Assessment Guide-Revised (VRAG-R) is a 12-item actuarial scale designed to predict violent recidivism.
- ☒ Prior Decision & Reasons (D&R): **Dated December 27, 2021; March 15, 2022, and March 6, 2023.**
- ☒ DOC OMNI Records to include **infraction behavior.**
- ☒ Other: **Individual Release Plan submitted by Mr. Fisher**

VII. FINDINGS

1. In preparation for this hearing, on **January 11, 2023**, Mr. Curtis Fisher was advised of his hearing rights.
2. Curtis Fisher appeared by video conference. Curtis Fisher was represented by attorney Darrel Lahtinen.
3. The Board has considered all potential Conditions of Supervision it may lawfully impose, including all identified by the End of Sentence Review Committee (ESRC), DOC psychological evaluations, and RCW 9.94A.704. These conditions include, but are not limited to, the following:
 - DRUG / ALCOHOL RESTRICTIONS
 - ELECTRONIC MONITORING
 - GEOGRAPHIC RESTRICTIONS
 - MENTAL HEALTH TREATMENT COMPLIANCE
 - PARTICIPATION IN DRUG/ALCOHOL TREATMENT

- PROHIBITED CONTACTS
- SUBMIT TO POLYGRAPHS
- UNAPPROVED RELATIONSHIPS

4. The Board has considered the following evidence favorable to Curtis Fisher's release determination:

- ☒ Treatment/Programming. **Completed substance use disorder treatment at the level of 2.5, intensive day treatment. He also completed MRT twice, stress/anger management multiple times, Acceptance and Commitment Therapy (ACT), Getting it Right, Bridges to Life, Redemption and assorted business type classes.**
- ☒ Protective factors. **States he has job skills learned during incarceration that should assist with employment. In addition, he has already been accepted for sober housing at an Oxford House.**
- ☒ Risk Assessment Scores. **The HCR-20v3 indicates a moderate risk for future violence, low moderate risk for causing serious physical harm, and low risk for imminent violence.**
- ☐ Other evidence:

5. The Board has considered evidence against Curtis Fisher's conditional release (WAC 381-60-160), examples of adequate reasons for a finding of non-parolability include, but are not limited to:

- ☐ Active refusal to participate in available program or resources designed to assist and offender to reduce the risk of re-offense (e.g., anger management, substance abuse treatment).
- ☒ Serious and repetitive disciplinary infractions during incarceration. **Since he was last seen by the Board in 2022, he has incurred 2 new serious infractions and was placed in the Intensive Management Unit (IMU) where he remains as of this writing. This behavior occurred after the Board agreed to see him early based on his completion the substance use disorder treatment. The first serious infraction occurred on April 3 and the second on April 18th. Because the April 18 infraction involved physical contact with another inmate, he was placed in the IMU. His last serious infraction prior to this was in 2019 when he tested positive for THC, opiates and methamphetamine.**
- ☐ Evidence of an inmate's continuing intent or propensity to engage in illegal activity (e.g., victim harassment, criminal conduct while incarcerated, continued use of illegal substances).
- ☐ Statements or declarations by the inmate that he or she intends to re-offend or does not intend to comply with conditions of parole.

- ☒ Evidence that an inmate may present a substantial danger to the community if released. **Mr. Fisher was associated with a security threat group/gang throughout much of his incarceration. He indicated he was at the top of the hierarchy and called the shots. He claims to have disassociated himself as of 2017. However, the DOC information indicates he remains a “suspect” of one of the white supremacist groups.**
- ☒ Risk Assessment Scores: **According to the recent psychological evaluation, “Mr. Fisher received a score that places him in the high range in terms of possessing personality characteristics in common with psychopathy and/or antisocial personality disorder. His PCL-R score suggests that his personality structure could complicate his ability to succeed in less restrictive settings.” On the VRAG-R he his score fell within bin 8 of 9 which indicates a 58% likelihood of a violent offense within 5 years and 78% within 12 years.**
- ☒ Psychological Evaluations: **The most recent psychological evaluation completed by Lisa Robtoy, Psy.D. concluded Mr. Fisher is a “questionable” candidate for release to the community. He was assessed to be moderate to high moderate risk for violent recidivism in less restrictive settings.**

6. The Conditions of Supervision, and any favorable evidence noted above considered by the Board would not sufficiently reduce the likelihood of Curtis Fisher committing new offenses because:

- **The most recent Psychological Assessment completed for this hearing by Ph.D. Robtoy, dated 6-07-2023, is not favorable and indicates the following:**
 - **While he has shown improvement related to refraining from violence and aggression over the course of his incarceration, recent incidences suggest he may have additional room for growth and improvement.**
 - **Overall, Mr. Fisher is assessed to be moderate to high moderate risk for violent recidivism in less restrictive settings.**
 - **Mr. Fisher is a questionable candidate to be considered for release to the community.**
- **Mr. Fisher has been incarcerated for over 40 years. His behavior has often been noncompliant and he has received numerous serious infractions for abusing substances and inappropriate use of aggression resulting in numerous violations for assaults and fighting. At the time of this Board hearing, he has pending new serious infractions. This recent behavior resulted in him being moved to the Intensive Management Unit (IMU), where he resides at that time of this hearing. Research indicates inmates who demonstrate an inability to follow the rules in a correctional setting have worse outcomes and generally higher recidivism rates (Mooney, J. L., & Daffern, M. (2011).**

- **Mr. Fisher claims to have numerous positive individuals supporting him in the community. However, it appears most of them have a criminal history, including his current girlfriend whom he met through another inmate.**

7. Based on the requirements of RCW 9.95.009(3) and RCW 9.95.100 and after weighing all of the totality of the evidence, including the community custody conditions and any favorable evidence noted above by the Board, the Board finds that Mr. Fisher is not parolable.

This was a deferred decision following a full Board discussion, using a structured decision-making framework that takes into consideration; the statistical estimate of risk, criminal history, parole/release history, ability to control behavior, responsivity to programming, demonstrated offender change, release planning, discordant information, and other case specific factors based on the requirements of RCW 9.95.100.

VIII. RECOMMENDATIONS

- **Attend Sober Support Groups**
- **Other Programs, if eligible: Thinking for a Change, Non-Violent Communication, Stress/Anger Management.**
- **Remain infraction free and have positive interactions with staff.**
- **Participate in next Hearing.**
- **Other: No involvement with persons associated with a security threat group**

LRG: ts

7/26/2023

cc: Facility: MCC- IMU
Curtis Fisher, Incarcerated Individual
File



TO: Full Board

FROM: **LRG** (ts)

RE: FISHER, Curtis DOC # 266558

Panel recommends: **Not Parolable and add 36 months to the minimum term**

Next action: Schedule a .100 Hearing approximately 120 days prior to PERD

Agree	Disagree
Lori Ramsdell-Gilkey, 7.24.2023 Elyse Balmert, 7.24.2023 Jill Getty, 7.24.2023 Jeff Patnode, 7.24.2023 Kecia Rongen 7.24.2023	

YAKIMA COUNTY PROSECUTING ATTORNEY'S OFFICE

August 05, 2024 - 3:34 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Curtis Brian Fisher
Superior Court Case Number: 79-1-00613-6

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