Supreme Court No. _____
(Court of Appeals No. 38349-1-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CURTIS FISHER,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Curtis Fisher, petitioner here and respondent below, asks this Court to review the split opinion of the Court of Appeals filed June 11, 2024, attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

Article I, section 14 prohibits grossly disproportionate punishment. Curtis Fisher was convicted of one count of *second-degree* murder in 1979 when he was 17 years old. The court sentenced him to "not more than life" in prison, and Mr. Fisher is still in prison 45 years later. The law in effect since 1984 permits a sentence of no more than 19.5 years even for an adult who commits this crime.

The trial court granted a resentencing, but the Court of Appeals reversed in a split opinion. Should this Court grant review because Mr. Fisher's sentence is grossly disproportionate in violation of article I, section 14? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

1. *In 1979, Curtis Fisher was sentenced to "no more than life" in prison for a second-degree murder committed at age 17.*

Curtis Fisher was born on March 5, 1962. 1 RP 25. By the time he was a teenager, he was not living with his parents and was fending for himself. CP 23. He had some trouble with the law, but not much: his only two juvenile court adjudications were for second-degree burglary and taking a motor vehicle without permission, both of which occurred when he was 15 years old. CP 23.

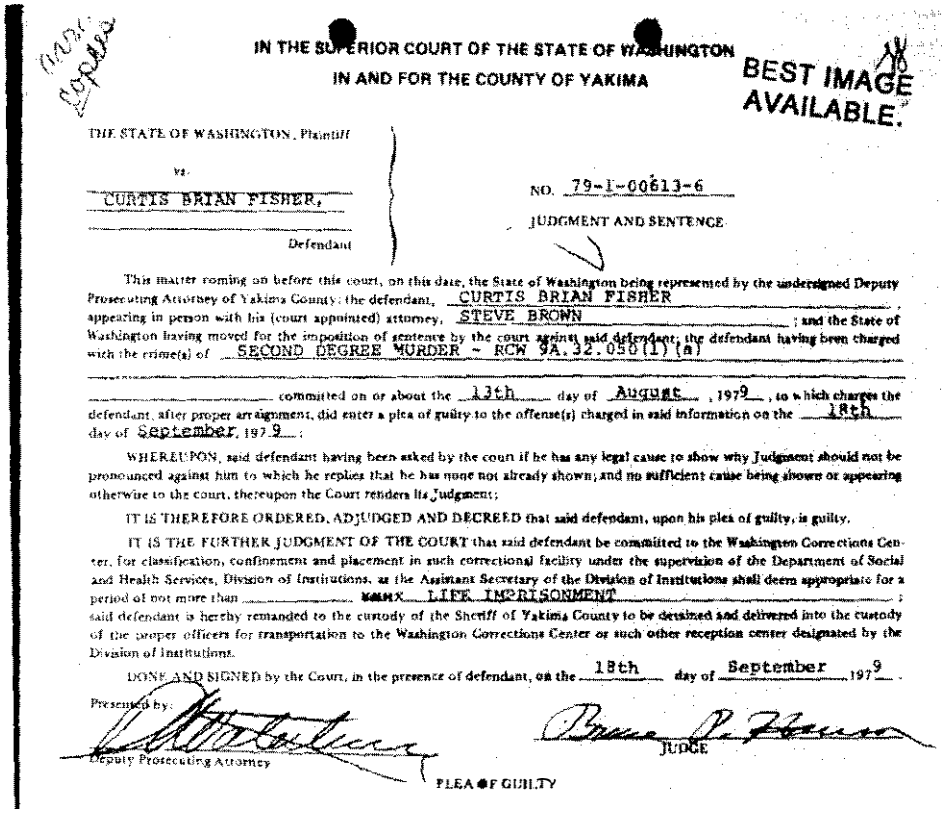
When he was 17 years old, he and some friends smoked cannabis and killed a person in a drug deal gone wrong. Appendix at 88-89.[1] On September 18, 1979, Mr. Fisher pleaded guilty to second-degree murder. CP 2, 4.

[1] Appendix B, pages 84-91 of the Appendix, is the ISRB's Decision and Reasons denying release under RCW 9.94A.730, following a hearing in December of 2021. The State discussed this hearing in its opening brief, *see* Br. of Appellant at 8, but did not designate it. Thus, it is attached here.

At that time, the Sentencing Reform Act (SRA) did not yet exist. Instead, the law required the trial court to set a maximum sentence, and the parole board would set a minimum term. *See* former RCW 9.95.010; RCW 9.95.020; RCW 9.95.040.[2] The parole board then had the authority to determine an actual release date anywhere between the minimum term and the maximum term, based on periodic reviews and parole hearings. Former RCW 9.95.040; RCW 9.95.052; RCW 9.95.110; Appendix at 92-107.

For second-degree murder, the trial court had the authority to set the maximum term anywhere between 20 years and life. Former RCW 9.95.010; RCW 9A.32.050; Appendix at 92-107. Despite the fact that Mr. Fisher was a child, the trial court set his maximum term at life, as was apparently done routinely at that time:

[2] For the Court's convenience, Mr. Fisher has attached the relevant 1979 statutes at Appendix C, pages 92-107 of the Appendix.



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

BEST IMAGE AVAILABLE.

THE STATE OF WASHINGTON, Plaintiff

vs.

CURTIS BRIAN FISHER,

Defendant

NO. 79-1-00613-6

JUDGMENT AND SENTENCE

This matter coming on before this court, on this date, the State of Washington being represented by the undersigned Deputy Prosecuting Attorney of Yakima County; the defendant, CURTIS BRIAN FISHER, appearing in person with his (court appointed) attorney, STEVE BROWN; and the State of Washington having moved for the imposition of sentence by the court against said defendant; the defendant having been charged with the crime(s) of SECOND DEGREE MURDER - RCW 9A.32.050(1)(a)

committed on or about the 13th day of August, 1979, to which charges the defendant, after proper arraignment, did enter a plea of guilty to the offense(s) charged in said information on the 18th day of September, 1979;

WHEREUPON, said defendant having been asked by the court if he has any legal cause to show why Judgment should not be pronounced against him to which he replies that he has none not already shown; and no sufficient cause being shown or appearing otherwise to the court, thereupon the Court renders its Judgment;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that said defendant, upon his plea of guilty, is guilty.

IT IS THE FURTHER JUDGMENT OF THE COURT that said defendant be committed to the Washington Corrections Center, for classification, confinement and placement in such correctional facility under the supervision of the Department of Social and Health Services, Division of Institutions, as the Assistant Secretary of the Division of Institutions shall deem appropriate for a period of not more than ~~XXXXX~~ LIFE IMPRISONMENT;

said defendant is hereby remanded to the custody of the Sheriff of Yakima County to be detained and delivered into the custody of the proper officers for transportation to the Washington Corrections Center or such other reception center designated by the Division of Institutions.

DONE AND SIGNED by the Court, in the presence of defendant, on the 18th day of September, 1979.

Presented by:

Deputy Prosecuting Attorney

JUDGE

PLEA OF GUILTY

CP 5.

The parole board (now the Indeterminate Sentence Review Board, or ISRB), set a minimum term and reviewed Mr. Fisher's case periodically, but has never authorized his release. *See* CP 754; Appendix at 84-91. Thus, Mr. Fisher has been in prison for 45 years for a single count of second-degree murder he committed as a child.

Meanwhile, in 1984, the SRA went into effect. *See* RCW ch. 9.94A. The SRA requires determinate sentences for most crimes, including second-degree murder, and the indeterminate life sentence Mr. Fisher received is no longer permissible. Indeed, under the SRA, even an adult convicted of second-degree murder, with the same criminal history as Mr. Fisher, could serve *no more* than 19.5 years in prison. RCW 9.94A.505; RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.525; RCW 9.94A.530 (maximum sentence for person convicted of second-degree murder with offender score of 1 is 234 months). Even assuming no good time, Mr. Fisher completed 19.5 years of his sentence in 1999.

2. *In 2021, the trial court granted a resentencing, but the State appealed.*

In 2020, Mr. Fisher filed a CrR 7.8 motion for resentencing pursuant to *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), *In re the Pers. Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 474 P.3d 524 (2020), and *In re the*

Pers. Restraint of Ali, 196 Wn.2d 220, 474 P.3d 507 (2020). CP 16-36, 67-79, 702-21.

The trial court granted the motion. CP 748-49. The court recognized that under these cases and others, the state and federal constitutional provisions prohibiting cruel punishment require courts to consider the mitigating qualities of youth when sentencing children. CP 749. The court noted that pre-SRA sentences are not exempt from these constitutional requirements. CP 749. The court further recognized that in 1979, a court would not have considered a defendant's age or the mitigating qualities of youth before imposing the customary maximum sentence of life. CP 748. The court concluded that Mr. Fisher "is entitled to a new sentencing hearing." CP 749.

3. *Although a dissenting judge noted Mr. Fisher's sentence "shocks the conscience," the two-judge majority reversed the trial court's grant of a resentencing.*

Instead of proceeding to resentencing, the State filed a notice of appeal. CP 734. It then moved to stay the case multiple times, pending four cases in this Court: *In re the Pers.*

Restraint of Carrasco, 1 Wn.3d 224 ,525 P.3d 196 (2023); *In re the Pers. Restraint of Hinton*, 1 Wn.3d 317, 525 P.3d 156 (2023); *In re the Pers. Restraint of Williams*, 200 Wn.2d 622, 520 P.3d 933 (2022); *In re the Pers. Restraint of Forcha-Williams*, 200 Wn.2d 581, 520 P.3d 939 (2022).

Nearly three years after the trial court granted a resentencing, the Court of Appeals reversed. Appendix at 1-12. The two-judge majority claimed Mr. Fisher's sentence was not disproportionate in light of *Forcha-Williams*, 200 Wn.2d at 596-97, a case involving the sex-offender provisions of the SRA. Appendix at 9-10. The majority averred that the maximum term of an indeterminate sentence could not be disproportionate because any failure of the ISRB to release Mr. Fisher was tied to lack of rehabilitation. *Id.* at 10.

The majority did not address Mr. Fisher's argument explaining why the sentence was substantively unconstitutional, and instead ruled he raised merely a procedural problem that "does not amount to a substantive challenge" and does not

demonstrate prejudice. *Compare* Br. of Resp't (filed 7/28/23) *with* Appendix at 7-12. The majority also opined that the 1979 court considered youth when it declined juvenile jurisdiction. *Id.* at 11-12. It did not acknowledge that the 1979 court essentially considered a child's living on his own without parents to be an aggravating circumstance, rather than appropriately recognizing it as mitigating. *See* Appendix at 46.

Judge Fearing dissented. He recognized the sentence was grossly disproportionate in light of the much shorter sentence an adult would serve for second-degree murder under the SRA. Appendix at 14, 52-53. The longest sentence a person could receive now for the same crime with the same offender score is 19.5 years, and the longest sentence a person in the same position could have received in 1984 is 14.83 years. *Id.* at 52-53. Thus, if Mr. Fisher's crime had occurred just five years later when he was a young adult, he would have been released no later than 1999, regardless of rehabilitation. *Id.* at 53. Yet, he is still incarcerated 45 years after he committed second-degree

murder at age 17. "This result shocks the conscience and violates anyone's standard of fairness." *Id.*

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Dissent was right. Mr. Fisher's sentence shocks the conscience. Contrary to the majority's opinion, this is not just a procedural problem, it is a substantive constitutional violation. Mr. Fisher necessarily shows actual and substantial prejudice because he is serving a grossly disproportionate sentence in violation of article I, section 14.

> **Mr. Fisher committed a single count of *second-degree* murder at age 17. His life sentence, of which he has served 45 years and counting, is grossly disproportionate, shocks the conscience, and violates article I, section 14.**

1. *Article I, section 14 of the Washington Constitution prohibits punishment that is grossly disproportionate to the crime or the juvenile defendant.*

Article I, section 14 of the Washington Constitution prohibits cruel punishment. Const. art. I, § 14. Like the Eighth Amendment, which prohibits cruel and unusual punishment,

article I, section 14 "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *State v. Fain*, 94 Wn.2d 387, 396–97, 617 P.2d 720 (1980) (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)).

Both provisions prohibit punishment that is grossly disproportionate to the crime or the defendant. *State v. Bassett*, 192 Wn.2d 67, 82-85, 428 P.3d 343 (2018); *Fain*, 94 Wn.2d at 395-96. But article I, section 14 provides even greater protection against disproportionate punishment than the Eighth Amendment. *Fain*, 94 Wn.2d at 393. It also provides greater protection than the Eighth Amendment in the context of juvenile sentencing. *State v. Moretti*, 193 Wn.2d 809, 818-19, 446 P.3d 609 (2019); *Bassett*, 192 Wn.2d at 82.

Even under the less-protective Eighth Amendment, this Court has held that because children are less culpable than adults, "[t]rial courts must consider the mitigating aspects of youth at sentencing" when children are tried in adult court,

"regardless of whether the juvenile is there following a decline hearing or not." *Houston-Sconiers*, 188 Wn.2d at 21. This rule is not limited to sentencings under the SRA, and instead applies when courts sentence children under any adult statute. *State v. Gilbert*, 193 Wn.2d 169, 175, 438 P.3d 133 (2019).

Our more-protective state constitution goes even further. For instance, under article I, section 14, even children who commit multiple counts of the most heinous crime possible—aggravated murder—cannot receive the same life-without-parole sentences adults receive. *Bassett*, 192 Wn.2d at 73.

Independent of the protections it provides in the context of juvenile sentencing, our constitution's Cruel Punishment Clause prohibits punishment that is grossly disproportionate to the crime itself. *Fain*, 94 Wn.2d at 402. To determine whether a punishment is unconstitutionally disproportionate, a court considers: "(1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the

punishment meted out for other offenses in the same jurisdiction." *Bassett*, 192 Wn.2d at 83 (citing *Fain*, 94 Wn.2d at 397). If, after an evaluation of these factors, the court concludes the punishment is disproportionate to the crime, the sentence must be reversed as cruel under article I, section 14. *Fain*, 94 Wn.2d at 402. The court need not reach all four factors to determine a sentence is unconstitutionally cruel. *Id.* at 401, n.7.

In *Fain*, the defendant was sentenced to an indeterminate sentence with a maximum term of life and a minimum term of 10 years, under a statute that dictated such a sentence for repeat offenders. *Id.* at 388-90 (citing former RCW 9.92.090). But the defendant's crimes were merely three thefts totaling $470 (approximately $2,500 in today's dollars), which the Court noted were "relatively minor" compared to crimes of violence. *Id.* at 398. Comparing Washington to other jurisdictions, the Court found that at that time, our state was one of only three that imposed similar sentences after three felonies. *Id.* at 399.

And in looking at sentences for other crimes in Washington, the Court noted that the only other crime for which our legislature mandated a maximum term of life was first-degree murder, and that those who had stolen more money during the commission of a single count of theft were subject to a maximum punishment of 10 years. *Id.* at 401. Thus, without even reaching the "legislative purpose" prong, *id.* at 401, n.7, the Court held the defendant's sentence violated article I, section 14 because it was "entirely disproportionate to the seriousness of his crimes." *Fain*, 94 Wn.2d at 402.

2. *Mr. Fisher's sentence is grossly disproportionate because he has served 45 years and counting for a second-degree murder he committed in 1979 at age 17, where even an adult in the same position after 1984 could serve no more than 19.5 years.*

Mr. Fisher's life sentence, of which he has served 45 years and counting, is grossly disproportionate in light of his youth and the seriousness of the crime. Appendix at 14, 49-59; Br. of Resp't at 11-15.

First, the nature of the offense is a second-degree murder committed by a child. Second-degree murder is the *third*-most serious homicide in Washington, after aggravated first-degree murder and first-degree murder. *See* RCW 10.95.020 (aggravated first-degree murder); former RCW 9A.32.040(1), (2) (aggravated first-degree murder in 1979); RCW 9A.32.030 (first-degree murder); RCW 9A.32.050 (second-degree murder); Appendix at 92-107. Although any loss of life is tragic, the crime involved a single victim and a gunshot, with no torture or prolonged suffering. CP 4. And it was committed by a child who was less culpable for his actions than an adult would be. *See Bassett*, 192 Wn.2d at 87-88; *Houston-Sconiers*, 188 Wn.2d at 22.

Second, the legislative purpose behind the punishment has evolved, and Mr. Fisher's sentence is inconsistent with contemporary legislative concerns. *See Fain*, 94 Wn.2d at 396-97 (noting importance of evolving standards of decency). "Before enactment of the SRA, the Legislature adhered to the

policy that actual time of imprisonment was best determined by the [Parole] Board." *Matter of Myers*, 105 Wn.2d 257, 262, 714 P.2d 303 (1986). But starting in 1984 with the SRA, "sentencing decisions … are within the sole province of trial judges." *Id.*

The SRA dictates the range within which trial judges must choose a sentence. RCW 9.94A.505(2)(a)(i). The purposes of the SRA include "(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history; (2) Promote respect for the law by providing punishment which is just; [and] (3) Be commensurate with the punishment imposed on others committing similar offenses." RCW 9.94A.010.[3]

[3] The other purposes are: "(4) Protect the public; (5) Offer the offender an opportunity to improve himself or herself; (6) Make frugal use of the state's and local governments' resources; and (7) Reduce the risk of reoffending by offenders in the community." RCW 9.94A.010.

These legislative purposes dovetail with the fourth *Fain* factor: whether the sentence imposed is proportionate in light of the punishment meted out for other offenses in the same jurisdiction. *Fain*, 94 Wn.2d at 397. Mr. Fisher was a child convicted of second-degree murder, but he received the same maximum sentence that an *adult* who committed *first-degree* murder would have received in 1979. Former RCW 9A.32.040(3); Appendix at 92-107. He has already served a de facto life without parole sentence ("LWOP")—a sentence normally reserved for *aggravated* murder and one that is unconstitutional for children who commit even that most heinous crime. *State v. Haag*, 198 Wn.2d 309, 329-30, 495 P.3d 421 (2021); *Bassett*, 192 Wn.2d at 73; Appendix at 44-46.[4]

[4] Although this Court reframed the *Haag* holding in *Anderson*, it did so in the context of a defendant who committed multiple first-degree murders and received the benefit of a resentencing hearing at which a court reconsidered the sentence in light of new evidence and case law. *State v. Anderson*, 200 Wn.2d 266, 516 P.3d 1213, 1215 (2022) (de facto LWOP sentence not unconstitutional for defendant who committed two first-degree murders and multiple assaults). Mr.

Most importantly, as noted above, the maximum possible punishment meted out for second-degree murder under the SRA is *less than half* what Mr. Fisher has already served. RCW 9.94A.505; RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.525; RCW 9.94A.530 (maximum sentence for person convicted of second-degree murder with offender score of 1 is 234 months). Thus, Mr. Fisher's sentence contravenes the legislative purposes of imposing proportionate sentences, promoting respect for the law by providing punishment which is just, and imposing sentences that are "commensurate with the punishment imposed on others committing similar offenses." RCW 9.94A.010.

This disproportionality is especially shocking given that Mr. Fisher was a child at the time of the crime. Even an adult who committed the same crime after 1984 could receive a sentence no higher than 19.5 years. RCW 9.94A.505; RCW

Fisher has never had a resentencing despite being convicted of a single count of a less-serious crime.

9.94A.510; RCW 9.94A.515; RCW 9.94A.525; RCW 9.94A.530. Yet Mr. Fisher, who was a 17-year-old child, was sentenced to life and has served 45 years and counting. Thus, without even reaching the third *Fain* factor, it is apparent that Mr. Fisher's sentence violates the Cruel Punishment Clause of the Washington Constitution. *See Fain*, 94 Wn.2d at 401, n.7 (three of four factors may be dispositive).[5]

3. *Contrary to the majority opinion, the ISRB's release decisions are irrelevant because Mr. Fisher has already served an unconstitutionally long sentence and must be released immediately.*

The majority in the Court of Appeals cited *Forcha-Williams* for the proposition that "the maximum term of an

[5] It may be that the third factor also goes to show disproportionality, but it would be nearly impossible to determine the punishment each state imposes for its third most serious homicide—and how that punishment may vary for children. Existing compilations are inaccurate, and compiling an accurate list would be prohibitively time-consuming. In any event, the shocking disparity between Mr. Fisher's sentence for second-degree murder and the maximum possible SRA sentence for second-degree murder resolves the issue and demonstrates an unconstitutional disproportionality.

indeterminate sentence does not create a risk of disproportionate punishment because the offender is not mandated to serve the maximum term." Appendix at 9-10 (citing *Forcha-Williams*, 200 Wn.2d at 597). The majority was incorrect.

A maximum sentence of life may not be unconstitutionally disproportionate for serious sex offenses, where the relevant statutes mandate a maximum sentence of life for *all* offenders, but the same is not true for second-degree murder. *See Forcha-Williams,* 200 Wn.2d at 585 ((citing RCW 9.94A.507(1) and (3)(b); RCW 9A.44.050(2); RCW 9A.20.021(1)(a)) (statutes mandate maximum term of life for class A and B sex offenses). As already noted, for second-degree murder the court in 1979 had the authority to set a maximum as low as 20 years. Former RCW 9.95.010; RCW 9A.32.050; Appendix at 92-107. In 1984 a court could not have imposed more than 14.83 years for someone with Mr. Fisher's offender score, and currently a court could not impose more

than 19.5 years for a defendant in this position. Appendix at 52-53. Thus, Mr. Fisher's life sentence is unconstitutionally disproportionate even though the sentence in *Forcha-Williams* was not. And the 45 years he has already served is itself unconstitutionally disproportionate, whereas the defendant in *Forcha-Williams* had served only three years before challenging his sentence as unconstitutional. *Forcha-Williams*, 200 Wn.2d at 584, 593.

Hinton is also instructive on this issue. Like Mr. Fisher, the defendant in *Hinton* committed second-degree murder at age 17. *Hinton*, 1 Wn.3d at 321-22. But that is where the similarities stop. Unlike Mr. Fisher, Hinton *also* committed a second-degree attempted murder against another person. *Id.* Yet, unlike Mr. Fisher, Hinton received a determinate sentence of only 37 years. *Id.* at 322. And following the string of cases recognizing children's reduced culpability, Hinton's sentence was automatically converted to an indeterminate sentence with

a maximum of 37 years and a minimum of 20. *Id.* at 331 (citing RCW 9.94A.730).

Despite the favorable change in his sentence, Hinton filed a CrR 7.8 motion for resentencing pursuant to *Houston-Sconiers*. *Id.* at 322-23. On review, this Court acknowledged "the core constitutional problem" presented: that "the harshest sentences designed for adults will often be grossly disproportionate punishments for juveniles." *Id.* at 327. But it held that on the facts of that case, RCW 9.94A.730 provided an adequate remedy because the ISRB could release Hinton after as little as 20 years, and it was required to release him after no more than 37 years. *Id.* at 331. This new sentence posed no constitutional concern. *Id.* at 334-35. At the same time, this Court recognized, "[of] course 'RCW 9.94A.730 cannot provide an adequate remedy under all circumstances' where a juvenile offender has been sentenced to an unconstitutionally disproportionate punishment." *Hinton*, 1 Wn.3d at 334, n. 7 (quoting *Ali*, 196 Wn.2d at 246).

Unlike Hinton, Mr. Fisher has already been subject to "unconstitutionally disproportionate punishment." *Id.* Mr. Fisher has already served seven years more than the *maximum possible* Hinton could serve, despite the fact that Hinton committed more serious crimes and had a more extensive criminal history. *See Hinton*, 1 Wn.3d at 321-22. Indeed, Mr. Fisher is essentially asking for a sentence that is longer than the one Hinton complained was too harsh, and the one this Court held was adequate: Mr. Fisher seeks an indeterminate sentence with a maximum of 45 years. Because even this term is already unconstitutionally disproportionate, an ISRB hearing is an inadequate remedy.

Finally, the two-judge majority's conclusion that an indeterminate sentence can never be unconstitutional is contrary to *Fain* itself. Appendix at 9-10. As noted earlier, that case, like this one, involved an indeterminate sentence with a maximum term of life. *Fain*, 94 Wn.2d at 388-90. Even though the defendant could have been released after as little as 10 years

based on a showing of rehabilitation, that mattered not: the maximum sentence of life was unconstitutional because it was grossly disproportionate to the crimes. *Id.* at 393-402.

The same is true here. The maximum sentence of life, where Mr. Fisher has served 45 years and counting, is unconstitutional because it is grossly disproportionate for a 17-year-old child convicted of one count of second-degree murder. The 45 years Mr. Fisher has already served is more than twice what an adult in the same position would serve under the SRA. The sentence shocks the conscience and violates article I, section 14. This Court should grant review. RAP 13.4(b)(3), (4).

E. CONCLUSION

Mr. Fisher's sentence "shocks the conscience and violates anyone's standard of fairness." Appendix at 53. This Court should grant review.

This petition is proportionately spaced using 14-point font equivalent to Times New Roman and contains approximately 3664 words (word count by Microsoft Word).

Respectfully submitted this 5th day of July, 2024.

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Supreme Court No. _____
(Court of Appeals No. 38349-1-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

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APPENDICES

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TABLE OF APPENDICES

APPENDIX A

Court of Appeals Opinions
(Majority and Dissent)

FILED
JUNE 11, 2024
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON,	)	
	)	No. 38349-1-III
Appellant,	)	
	)	
v.	)	
	)	
CURTIS BRIAN FISHER,	)	UNPUBLISHED OPINION
	)	
Respondent.	)	

C●●NEY, J. — Curtis Fisher was 17 years of age in 1979 when he was sentenced to 11.75 years to life in prison for second degree murder. Following our Supreme Court's decision in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), Mr. Fisher filed a CrR 7.8 motion to vacate his sentence. Without the benefit of the recent Supreme Court decisions in *In re Personal Restraint of Williams*, 200 Wn.2d 622, 520 P.3d 933 (2022), and *In re Personal Restraint of Forcha-Williams*, 200 Wn.2d 581, 520 P.3d 939 (2022), the trial court granted Mr. Fisher's motion and ordered "a full resentencing hearing." Clerk's Papers (CP) at 743-44.

The State appeals.

BACKGROUND

Mr. Fisher was born on March 5, 1962. On August 13, 1979, Mr. Fisher, who was 17 years old at the time, and three others traveled to an area near the Yakima River.

Among the quartet was John Rice, who was allegedly financially indebted to Mr. Fisher. At some point, an altercation erupted and Mr. Fisher obtained a firearm that had been in Mr. Rice's possession. Assisted by his two accomplices, Mr. Fisher forced Mr. Rice to kneel on the ground. Mr. Fisher then shot Mr. Rice in the chest. After being shot, Mr. Rice ran from Mr. Fisher and his companions. Mr. Fisher chased after Mr. Rice, firing additional shots. Eventually, Mr. Rice fell near the Yakima River's edge and expired.

The State charged Mr. Fisher with first degree murder. Following a declination hearing, the juvenile court remanded Mr. Fisher to the superior court to be tried as an adult. In declining jurisdiction, the juvenile court found that Mr. Fisher had not been living at home, was employed, was not attending school, and that he appeared to be taking care of himself while away from home. The juvenile court further found that Mr. Fisher, "appear[ed] to behave in a mature manner when with adults and to behave in an immature manner when with younger people." CP at 23.

On September 18, 1979, Mr. Fisher pleaded guilty to second degree murder. In the statement of defendant on plea of guilty, Mr. Fisher acknowledged that he could be sentenced to a maximum of 20 years to life of imprisonment. The statement further reflected his understanding that the State would recommend the court order a life sentence. Ultimately, the trial court sentenced Mr. Fisher to a minimum of 13 years and a maximum term of life imprisonment, subject to review by the Board of Prison Terms and Paroles.

Following the implementation of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, "[a] 1400 Progress Review was conducted [by the Indeterminate Sentencing Review Board (ISRB)] and Mr. Fisher's minimum term was set at 141 months [11.75 years]." CP at 8. At a later "parolability hearing," Mr. Fisher was found "not parolable" and 60 months were added to his sentence. CP at 8. In 1990, Mr. Fisher unsuccessfully challenged the ISRB's decision in a personal restraint petition (PRP) filed with this court. In denying the petition, we held that RCW 9.95.100 prohibited the parole board from releasing an inmate prior to their maximum term unless the offender's rehabilitation had been completed and the offender was fit for release.

In 2014, Mr. Fisher filed another PRP, this time citing the United States Supreme Court's opinion in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). We dismissed the petition, finding that the PRP was a mixed petition and that Mr. Fisher failed to meet any of the time bar exceptions of RCW 10.73.100(1)-(6).

In 2019, Mr. Fisher again appeared before the ISRB. Following a hearing, the ISRB determined Mr. Fisher was "not parolable and 36 months were added to his minimum term." CP at 156. The ISRB found that Mr. Fisher had a high level of psychopathy, severe antisocial disorder, and had a high risk of reoffending. The ISRB further justified the denial of Mr. Fisher's release due to his strong involvement in gang activity and his role as an organizer of a prison drug distribution scheme.

PROCEDURE

In 2020, Mr. Fisher filed a "CrR 7.8 Motion to Vacate and Set Aside Judgment and Sentence" in the Yakima County Superior Court. CP at 16 (some capitalization omitted). Mr. Fisher argued that state and federal appellate court decisions amounted to a significant change in the law and therefore constituted an exception to the one-year time bar limitation of RCW 10.73.090(1).[1] Mr. Fisher asserted that, in adherence to recent case law, the trial court was required to consider the mitigating qualities of his youth before it sentenced him. The State argued that Mr. Fisher's motion was time barred.

The trial court commented, "[T]his issue as a matter of first impression, having been unable to locate case law directly on point." CP at 743. It then concluded Mr. Fisher's motion was not time barred because *Houston-Sconiers* represented a significant change in the law. Accordingly, the court granted Mr. Fisher's motion and ordered a full resentencing. In reaching its decision, the trial court found that *Houston-Sconiers* applied retroactively despite Mr. Fisher being sentenced prior to the enactment of the SRA. Absent from the trial court's findings of fact, conclusions of law, and order is any

[1] *See Miller*, 567 U.S. 460; *Houston-Sconiers*, 188 Wn.2d 1; *In re Pers. Restraint of Ali*, 196 Wn.2d 220, 474 P.3d 507 (2020); *In re Pers. Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 474 P.3d 524 (2020); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

mention of Mr. Fisher being actually and substantially prejudiced by the sentencing court's alleged deficiencies.

The State timely appeals.[2]

ANALYSIS

On appeal, the State argues, among other contentions, that the trial court abused its discretion in finding there had been a significant change in the law material to Mr. Fisher's sentence, in concluding Mr. Fisher's motion was not time barred, and in neglecting to enter findings as to whether Mr. Fisher had been actually and substantially prejudiced by the alleged deficiencies of the sentencing court.

We hold that 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. Accordingly, we reverse.

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[2] During the pendency of this appeal, the ISRB held another hearing on Mr. Fisher's parolability. The ISRB found that Mr. Fisher's risk of reoffending had not changed from the 2019 assessment, that Mr. Fisher had committed two serious infractions since 2022 (physical contact with another inmate and testing positive for opiates, THC, and methamphetamine), recognized Mr. Fisher's potential ties with white supremacist groups in prison, and noted that Mr. Fisher's psychological evaluation found him to be a moderate to high risk for violent recidivism and that he was a questionable candidate for release. The ISRB concluded Mr. Fisher was not parolable and added an additional 36 months to his minimum term.

LEGAL PRINCIPLES

We review a trial court's ruling on a CrR 7.8 motion for abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). A trial court abuses its discretion if its decision is "'manifestly unreasonable or based upon untenable grounds or reasons.'" *Id.* (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A court's decision "'is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirement of the correct standard.'" *Id.* (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). The untenable grounds basis applies if the factual findings are unsupported by the record. *Id.* A court's decision is "'manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard.'" *Id.*

TIME BAR

The State contends Mr. Fisher's CrR 7.8 motion for postconviction relief is time barred because *Houston-Sconiers* is not material to his sentence. We agree.

A collateral attack is any form of "postconviction relief other than a direct appeal." RCW 10.73.090(2). When an offender brings a CrR 7.8 motion to collaterally attack a judgment, it will be governed by the same rules as collateral attacks filed with this court. *State v. Hubbard*, 1 Wn.3d 439, 451, 527 P.3d 1152 (2023). Therefore, the one-year time limit on collateral attacks of a judgment and sentence is applicable to CrR 7.8 motions. *Id.* (citing RCW 10.73.090). RCW 10.73.100 provides multiple exceptions to RCW

10.73.090's one-year time bar. Here, the trial court found that under RCW 10.73.100(6), *Houston-Sconiers* represented a significant change in the law material to Mr. Fisher's sentence.

The Washington State Supreme Court declared that the procedural mandates of *Houston-Sconiers*—requiring that trial courts consider the mitigating qualities of youth at sentencing and have discretion to impose a downward sentence---are not independently retroactive on appeal. *Williams*, 200 Wn.2d at 632. Procedural challenges are those "'designed to enhance the accuracy of a [conviction or] sentence by regulating the manner of determining the defendant's culpability.'" *Id.* at 630 (internal quotation marks omitted) (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 201, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016)). The Supreme Court established two procedural rules to assist courts with this objective. *In re Pers. Restraint of Ali*, 196 Wn.2d 220, 236-37, 474 P.3d 507 (2020). "First, sentencing courts must consider the mitigating qualities of youth, and second, they must have discretion to impose sentences below the SRA adult standard ranges." *Williams*, 200 Wn.2d at 630 (citing *Houston-Sconiers*, 188 Wn.2d at 21).

Unlike procedural challenges, the substantive rule established in *Houston-Sconiers* is retroactive and must be considered on collateral review. *Ali*, 196 Wn.2d at 236. A substantive challenge is one where the "'[s]ubstantive rules . . . set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose.'" *Id.* at 237 (alteration in original) (quoting

Montgomery, 577 U.S. at 201). *Houston-Sconiers* recognized a category of punishments that are beyond the State's power to impose-—"adult standard SRA ranges and enhancements that would be disproportionate punishment for juveniles who possess diminished culpability." *Id.* Accordingly, for *Houston-Sconiers* to be applied retroactively, a petitioner who brings a procedural challenge to an indeterminate sentence must also assert a substantive challenge. *Id.* at 240.

Here, Mr. Fisher presents a procedural challenge (that the sentencing court failed to consider the mitigating factors of his youth) as well as a substantive challenge (that his sentence constitutes disproportionate punishment of a juvenile offender). Although Mr. Fisher's claimed substantive challenge leans in favor of the retroactive application of *Houston-Sconiers*, we are not persuaded by the argument.

In *Forcha-Williams*, 200 Wn.2d at 596, the Supreme Court analyzed whether *Houston-Sconiers*' s directive, that a sentencing court has the discretion to impose a sentence below an adult standard range, applies to the maximum term of an indeterminate sentence. In doing so, the Supreme Court distinguished that the low end of a determinate sentence, because it represents the mandatory amount of time an offender must serve, from the maximum term of an indeterminate sentence. *Id.* at 597. The *Forcha-Williams* court concluded that the maximum term of an indeterminate sentence does not create a risk of disproportionate punishment because the offender is not mandated to serve the

maximum term. *Id.* Rather, "an indeterminate sentence provides an opportunity for release to those who demonstrate rehabilitation." *Id.*

Mr. Fisher asks us to retroactively review his term of confinement and find it disproportionate for a juvenile offender. We decline the request. The prison time Mr. Fisher has served beyond the minimum determinate sentence of 11.75 years is directly tied to his lack of rehabilitation. Periods of incarceration that are directly tied to an offender's rehabilitation do no implicate concerns of facial disproportionality. *Id.* at 598.

Mr. Fisher's argument that he received a disproportionate sentence does not amount to a substantive challenge. Based on the absence of a successful substantive challenge, the trial court abused its discretion in finding "that there has been a significant and material intervening change in the law." CP at 743. Consequently, Mr. Fisher's collateral attack against his sentence is time barred under RCW 10.73.090(1).

ACTUAL AND SUBSTANTIAL PREJUDICE

The State contends the trial court abused its discretion in granting Mr. Fisher's CrR 7.8 motion without a finding of actual and substantial prejudice. We agree.

"A petitioner must demonstrate by a preponderance of the evidence that he was actually and substantially prejudiced by the constitutional error in order to obtain relief on collateral review." *In re Pers. Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 267, 474 P.3d 524 (2020). Prejudice may be established if the petitioner can show by a preponderance of the evidence that the sentence they received would have been shorter if

the sentencing judge had complied with *Houston-Sconiers*. *Forcha-Williams*, 200 Wn.2d at 599. One factor used to determine the existence of prejudice is whether there is evidence that the sentencing judge was willing to consider mitigating factors that justify a lower sentence. *Id.* at 603. However, such a procedural *Houston-Sconiers* violation alone does not establish prejudice. Rather, a procedural *Houston-Sconiers* error must be accompanied by other evidence showing the sentencing judge would have imposed a lesser sentence. *Id.*

Here, not only did the trial court fail to make any findings related to prejudice, Mr. Fisher neglected to even allege that he suffered actual and substantial prejudice due to the sentencing court's alleged deficiencies. On review, Mr. Fisher asserts that his grossly disproportionate sentence constitutes actual and substantial prejudice.

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 the 11.75 years has been directly tied to Mr. Fisher's lack of rehabilitation. Further, Mr. Fisher failed to establish that the sentencing court did not consider mitigating factors of his youth. To the contrary, approximately two weeks prior to his sentencing, the trial court found:

> That the juvenile appears to be mature for his age at times while at other times he appears to be immature. That the juvenile appears to behave in a mature manner when with adults and to behave in an immature manner with younger people. That immediately prior to the commission of the alleged criminal offense, the juvenile was not living at home, that he was

> employed, that he was not attending school, and appeared to be taking care of himself away from his home.

CP at 23.

Lastly, assuming the sentencing court did not consider Mr. Fisher's mitigating factors of youth, Mr. Fisher has still failed to present any evidence showing the sentencing judge would have imposed a lesser maximum indeterminate sentence had it adequately consider the factors. The record simply reveals the sentencing court ordered a maximum indeterminate sentence of life imprisonment rather than the low end of 20 years.

The trial court abused its discretion when it granted Mr. Fisher's CrR 7.8 motion absent a finding of actual and substantial prejudice.

CONCLUSION

We reverse the trial court's order that granted Mr. Fisher's CrR 7.8 motion and ordered a full resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, J.

I CONCUR:

Pennell, J.

No. 38349-1-III

FEARING, J. (dissent) — The United States Supreme Court decisions in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) and *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016) and the Washington Supreme Court's decision in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017) brought promise for juvenile offenders to gain liberty. The decisions recognized the foolhardiness of sentencing juveniles as adults, and the rulings directed that youth already sentenced to long terms should have those sentences reviewed and reduced based on factors now known as *Miller* factors. The decisions brought hope to juvenile offenders for a mature life without constant caging accompanied by claustrophobia, physical and sexual deprivation, humiliation from corrections officers, threat of assault, fear of rape, undernourishment, stale food, limited access to healthcare and hygiene, pervasive smell of urine, and odor of disinfectant. That promise of freedom and hope for renewal for juvenile offenders has since become a hoax.

Judges at all levels of the criminal justice system decline to surmount the impulse to severely punish a heinous crime committed by a child. We thereby ignore undisputed neurological science that confirms incomplete development of adolescent brains with the

resultant inability of a youth to understand the consequences of criminal behavior and to fully comprehend the fragility and inherent worth of human life.

Respondent Curtis Fisher committed second degree murder in 1979 at age 17. Fisher remains in prison today. If he, even as an adult, had committed second degree murder on July 1, 1984, rather than on August 17, 1979, his sentence on the high-end standard range would be 14 years, and ten months. He has now served forty-four years, a de facto life sentence, and the State wishes to keep him detained indefinitely, if not for the rest of his life.

If Curtis Fisher had committed aggravated first degree murder, rather than second degree murder, at age 17 in 1979, he would be entitled to a new sentencing hearing before the superior court during which the law would demand the court delete his life imprisonment sentence unless the court found him to be the rare incorrigible and unredeemable youth. Nevertheless, the State refuses Fisher a resentencing hearing before the superior court and instead relegates him to periodic release hearings before the Indeterminate Sentence Review Board (ISRB), chapter 9.95 RCW during which the ISRB imprecisely assesses whether he would likely commit another crime, no matter the gravity of the crime. Something is wrong!

In an unpublished 2018 opinion in *State v. Gilbert*, No. 33794-4-III (Wash. Ct. App. Apr. 3, 2018) (unpublished), https://www.courts.wa.gov/opinions /pdf/337944_unp.pdf, *rev'd*, 193 Wn.2d 169, 438 P.3d 133 (2019), the dissenting judge listed thirty-six tactics employed by innumerable courts to ignore the letter and spirit of

the rulings in *Miller v. Alabama* and *Montgomery v. Louisiana*. Since then, decisions at all levels of the courts have confirmed the accuracy of the dissent's lengthy list and have added other tactics to the list to the end of an ongoing regime of long, indefinite, and life terms for juvenile offenders.

In this appeal by the State of the superior court's grant to Curtis Fisher of a resentencing hearing, the State repeats some of the *Gilbert* dissent's rollcall of wiles fabricated to keep juvenile offenders incarcerated interminably. First, the legislature possesses the sole prerogative of establishing sentences. Second, Curtis Fisher, like many other juvenile offenders, committed a heinous crime. Third, *Miller* does not preclude a life sentence as long as some agency periodically reviews the offender's status. Fourth, de facto life sentences are permissible. Fifth and related to the fourth argument arrayed, no standard exists to determine how long a term-of-years must be before it becomes the equivalent of life imprisonment so the courts need not concern themselves with de facto life sentences. Sixth, the juvenile offender carries the burden of proving transient immaturity rather than the State proving irreparable corruption. Finally, and seventh, no resentencing is needed if the original sentencing court mentions the offender's youth during the sentencing hearing regardless of whether the court weighed the *Miller* factors.

In this appeal, the State adds six tactics to the *Gilbert* dissent's extended catalog of strategies designed to destroy the promise of *Miller*. First, the State insists that a resentencing court cannot apply *Miller* factors to indeterminate sentences. Second, all

arguments forward by Curtis Fisher are procedural in nature and not addressable under the *Miller* factors. Third, the government and, in turn, any court faces difficulty in determining when an offender has been rehabilitated in accordance with the *Miller* factors such that no court should interfere in the government's decision whether to release an offender. Fourth, an ISRB hearing suffices for the *Miller* factors hearing before a superior court even though the ISRB does not evaluate the immaturity of the offender at the time of the crime. Fifth, the offender bears the burden of showing the sentencing court did not consider his youth even if the offender was sentenced during a time that judges never lowered sentences because of the offender's youth. Indeed, Curtis Fisher's judge needed to sentence him as if he was an adult prosecuted in adult court. Finally, and sixth, a challenge to an indeterminate sentence constitutes a challenge to the maximum sentence, which challenge is not subject to cruel punishment clause analysis.

The state of the law has not improved for Curtis Fisher and other juvenile offenders since the *Gilbert* dissent. In addition to new tactics devised by the State of Washington, Washington lower courts, and foreign courts to thwart the promise of *Miller*, the Washington Supreme Court has, since the issuance of *State v. Gilbert*, adopted a befuddling set of rules divorced from reality that preclude juvenile offenders from resentencing hearings. The recent Washington decisions complete the annihilation of the *Miller* promise by erecting a time bar, imposing a sophistic distinction between procedural and substantive challenges, and narrowly viewing prejudice. Atif Rafay,

Evading Haag*: How Courts Deny That Imprisoning Teens for Life Without Possibility of Parole Is Cruel*, 21 SEATTLE J. FOR SOC. JUST. 731 (2023).

The majority reverses the superior court's wise and humane decision to grant Curtis Fisher a sentencing rehearing that would fulfill the promise made in *Miller v. Alabama* based on the recognition of the vagaries of youth. For three reasons, I dissent from the majority and would either direct that Curtis Fisher presently be released from incarceration or at least affirm the superior court's grant of a resentencing hearing. First, the existence of a lower sentence today, even for adults convicted of second degree murder, renders Fisher's 1979 sentence irrational, surreal, disproportionate, and cruel. Second, the availability of a resentencing hearing before a superior court judge for juveniles convicted of aggravated first degree murder, but the denial of such a hearing to one convicted of second degree murder, leaves Fisher's sentence illogical and cruel, if not violative of the equal protection clause. Third, because the State has never shown Fisher's murder of John Rich, when Fisher was age seventeen, to be other than the result of transient immaturity, Fisher's sentence for forty-four years has reached a de facto lifetime sentence and must end under cruel punishment jurisprudence. The need to map the full mileage to which the State travels to abrogate *Miller v. Alabama*, *Montgomery v. Louisiana*, and *State v. Houston-Sconiers* prolongs this opinion.

1979 CRIME AND SENTENCING

Curtis Fisher sits in a Washington Department of Corrections prison as the result of his killing John Rich on August 17, 1979. Curtis Fisher was born February 5, 1962.

He is now 62 years of age.

At age fifteen, Curtis Fisher committed the crimes of second-degree burglary and taking a motor vehicle without permission. By age seventeen, Fisher had left his parents' home and resided on his own.

According to ISRB records, Curtis Fisher and his murder victim, John Rich, suffered a rancorous relationship. Rich had participated in an assault on one of Fisher's friends. Rich owed Fisher money for the purchase of narcotics.

On August 17, 1979, Curtis Fisher, age 17, and two accomplices retrieved John Rich. When Rich entered the vehicle, he carried a gun. The foursome attempted to locate an individual trafficking drugs. When they were unable to locate the seller, the four proceeded to the Yakima River. Rich, Fisher, and another of the quartet exited the vehicle. Fisher and the other gained possession of Rich's gun and demanded that Rich kneel on the ground. Fisher shot Rich in the side of the chest. Rich arose and ran from Fisher. Fisher and his colleague followed Rich, and Fisher fired additional shots. One bullet felled Rich at the river's edge. He died. According to Fisher, he and his friends had smoked marijuana and the killing resulted from a "drug deal gone wrong." Br. of Resp't at 3.

On August 14, 1979, the State of Washington charged Curtis Fisher with first degree murder, under RCW 9A.32.030(1)(a), a class A felony. The State filed the charge in superior court, without mentioning the juvenility of Fisher. The State alleged that Fisher shot and killed, with premeditated intent to cause death, John Rich.

In 1979, a first degree murder charge carried a mandatory life sentence. Former RCW 9A.32.040(3)(1977). Depending on the presence of aggravating circumstances and the lack of mitigating circumstances, the offender could also receive the death sentence or life without the opportunity of parole. Former RCW 9A.32.040(3)(1977).

On August 31, 1979, Yakima County Superior Court Judge Bruce Hanson declined juvenile court jurisdiction. Judge Hanson found as part of the order of declination:

> That the juvenile [Curtis Fisher] appears to be mature for his age at times while at other times he appears to be immature. That the juvenile appears to behave in a mature manner when with adults and to behave in an immature manner when with younger people. That immediately prior to the commission of the alleged criminal offense, the juvenile was not living at home, that he was employed, that he was not attending school, and appeared to be taking care of himself away from his home.

Clerk's Papers (CP) at 23.

On September 18, 1979, the State of Washington amended the information to charge second degree murder. In turn, Curtis Fisher pled guilty to second degree murder. In his signed statement on plea of guilty, Fisher conceded that he, with intent to kill, shot John Rich and Rich later expired. In the plea, Fisher recognized that the State would seek a life imprisonment sentence. He further acknowledged that the superior court would assess a twenty-year to life sentence.

In 1979, Washington state employed indeterminate sentencing. Chapter. 9.95 RCW. Under indeterminate sentencing, the trial court sentenced an offender to a maximum amount of time. In turn, the predecessor to the ISRB, the Board of Prison

Terms and Paroles (Board), established the minimum term and governed the amount of time the offender would actually serve. The Board possessed the authority to decide when to release the offender from incarceration. In 1979, the superior court could sentence an offender committing second degree murder to a maximum of anywhere between twenty years to life. RCW 9.95.010; former RCW 9A.32.050.

On September 18, 1979, Yakima County Superior Court Judge Bruce Hanson entered a judgment and sentence that committed and remanded Curtis Fisher to the Department of Social and Health Services, Division of Institutions, the predecessor of DOC, for a period not to exceed life imprisonment. The court did not impose a minimum term. On December 11, 1979, the Board fixed Curtis Fisher's minimum term at thirteen years.

INCARCERATION

As a teenager and young adult in Washington's penal system, Curtis Fisher incurred many prison infractions, including serious infractions, each year. The number of infractions has decreased with time such that, since 2016, Fisher has incurred two or less infractions each year.

After a parolability hearing in 1988, the Board of Prison Terms and Paroles, pursuant to RCW 9.95.100, denied Curtis Fisher parole. The law brands such hearings ".100 hearings." The Board instead extended Fisher's minimum sentence five years. The Board described the murder of John Rich as being in "cold blood." CP at 9. According to the Board, Fisher earned a "horrendous" "institutional infraction record." CP at 9.

Statistics show that nearly all youth in DOC incarceration accumulate horrendous infraction records until a time between the ages of 25 and 30. As the ISRB explained to the Washington State Senate regarding offenders subject to release under the *Miller* fix;

> In terms of the trauma that's imposed from their being imprisoned from a very young age…, it's very common for the first five to ten years for them to have horrific behavior in prison, a lot of infractions, fighting, STG [Security Threat Group] or gang-related affiliations, because they're trying to survive and they're literally fighting sometimes for their lives.

Hr'g on S.B. 5164. Before the S. Human Services, Reentry & Rehabilitation Comm., 66th Leg., Reg. Sess. (Wash. Jan. 24, 2019), at 86 min., 33 sec., *audio recording by* TVW, Washington State's Public Affairs Network, http://www.tvw.org.

At the time of the hearing, Fisher sat in administrative segregation due to confidential information that he possessed a weapon, with which he intended to stab another inmate. Fisher denied the allegation, and the Board admitted that correction officials failed to prove the allegation.

During later years, the Board of Prison Terms and Paroles and later the Board's successor agency, the ISRB, periodically and repeatedly denied Curtis Fisher parole. After a .100 hearing in 2019, the ISRB wrote that Fisher had garnered 228 infractions during his tenure. Since Fisher had been in prison for forty years by then, one may wonder if 228 infractions are high for this length of time. The ISRB concluded that Fisher constituted a 58 percent risk of reoffending within five years if released and a 78 percent risk within twelve years. The report stated that, in 2014 and 2015, Fisher served

as the prison banker for the sale of drugs to other prisoners by the Aryan Family. In 2019, a urinalysis tested positive for cannabis, opiates, and methamphetamine.

Some of the DOC records concerning Curtis Fisher are Aramaic to a layperson because of the acronyms and argot employed. Review notes from May 10, 2021 read that Fisher is employed as a custodian. He was not able to complete some objectives because of a postponement of offender programming. I do not know if this postponement is the result of the COVID pandemic.

A February 9, 2020 letter from Curtis Fisher to the ISRB claimed that he was infraction free. Fisher asserted that the Board had in the past deemed him conditionally parolable. He asked the Board to identify and enlist him in any program needed to gain parole.

On October 19, 2021, the ISRB conducted another .100 hearing. On December 21, 2021, the ISRB issued its decision, which again denied Curtis Fisher parole. The ISRB wrote that Fisher was likely to commit a new criminal law violation if released on conditions. The ISRB based its decision in part on Fisher's failure to complete substance abuse treatment. One witness indicated, however, that Fisher had begun to attend substance abuse treatment, but ended his participation because of a hearing impairment. Dr. Lisa Robtoy, after analyzing risk assessment tools, concluded that Fisher was a moderate to high risk for violent recidivism. According to the ISRB, Fisher lacked adequate community support. Fisher's last serious prison infraction occurred in 2019 and his last minor infraction occurred in 2017.

CrR 7.8 MOTION

In November 2020, Curtis Fisher filed a CrR 7.8 motion before the superior court to vacate his judgment and sentence. Despite the pleading stating Fisher wanted the superior court to vacate his judgment, Fisher effectively asked for his prison sentence to end. The motion emphasized Fisher's age of 17 at the time of the commission of his crime. Fisher argued that the 1979 sentencing court failed to consider his immaturity at the time of the crime and the time of his sentence. Fisher asked to be sentenced under the rules announced by the Washington Supreme Court in *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017).

Washington treats CrR 7.8 motions the same as personal restraint petitions. *State v. Larry*, 28 Wn. App. 2d 678, 685, 538 P.3d 297 (2023). In this opinion, I apply personal restraint petition rules to Fisher's CrR 7.8 motion. I will often refer to Fisher's motion as a petition.

In his CrR 7.8 motion, Curtis Fisher asserted that the one-year time bar, found in RCW 10.73.090(1) and controlling personal restraint petitions, did not preclude his motion because of a change in law. According to Fisher, under *In re Personal Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 474 P.3d 524 (2020) and *In re Personal Restraint of Ali*, 196 Wn.2d 220, 474 P.3d 507 (2020), both decided by the Washington Supreme Court on September 17, 2020, the rules, announced in *State v. Houston-Sconiers* apply retroactively to juvenile sentencing. Those rules demand his resentencing before a

superior court, during which resentencing the court must find him incorrigible at the time of the crime or else the DOC must release him from prison.

Against the State of Washington's objection, the superior court granted Curtis Fisher's request for resentencing. The court found that the 1979 superior court failed to consider Fisher's age and the mitigating qualities of youth. Resentencing has never occurred because of this appeal by the State. The court has yet to assess whether it should reduce Fisher's sentence. Fisher remains behind bars.

After the State appealed the superior court's decision, Curtis Fisher, pursuant to a Washington *Miller* fix statute, RCW 9.94A.730, sought release. Supplemental report filed April 14, 2022. The ISRB denied the request.

In July 2023, the ISRB held another .100 hearing. The ISRB again denied release. By that date, Curtis Fisher had completed substance use disorder treatment. He also completed stress and anger management treatment among other courses. The ISRB statistics showed Fisher's recidivism risk had decreased to "a moderate risk for future violence, low moderate risk for causing serious physical harm, and low risk for imminent violence." Appellant's Reply Br., Appendix A at 5. He had recently committed an infraction because of physical contact with another inmate. The ISRB's July 2023 decision does not state that Fisher will likely commit a crime if released.

CRUEL PUNISHMENT

Curtis Fisher bases his motion for relief from incarceration on the constitutional theory of cruel punishment. Under the United States Constitution's Amendment Eight:

> Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.

(Emphasis added.) The Eighth Amendment applies to the states by application of the due process clause of the Fourteenth Amendment to the United States Constitution. *Robinson v. California*, 370 U.S. 660, 675, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

The Washington Constitution's analog, article I, section 14, declares:

> Excessive bail shall not be required, excessive fines imposed, *nor cruel punishment inflicted*.

(Emphasis added.) Section 14 purposely omitted the word "unusual" from the punishment clause. *State v. Fain*, 94 Wn.2d 387, 393, 617 P.2d 720 (1980). Under the federal constitution, the punishment could be cruel, but not unusual, and avoid scrutiny. Washington's article I, section 14 sometimes affords greater protection for the offender than the Eighth Amendment. *State v. Bassett*, 192 Wn.2d 67, 78-79, 428 P.3d 343 (2018).

The Eighth Amendment and, in turn, article I section 14 bar not only barbaric punishments but also punishments disproportionate to the crime committed. *Coker v. Georgia*, 433 U.S. 584, 591-92, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977); *In re Personal Restraint of Hinton*, 1 Wn.3d 317, 326, 525 P.3d 156 (2023). The law has expanded the proportionality doctrine beyond its origins with the death penalty to noncapital cases to help courts decide whether sentences of ordinary imprisonment are commensurate with the crimes for which such sentences are imposed. *State v. Fain*, 94 Wn.2d 387, 396 (1980). Courts view the notion of proportionality less through a historical prism than

according to the evolving standards of decency that mark the progress of a maturing society. *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *State v. Fain*, 94 Wn.2d 387, 397 (1980). Inappropriate disparity in sentencing results in justified bitterness and lack of respect for the law by persons who have been the recipients of unequal sentences. *State v. Hurst*, 5 Wn. App. 146, 149, 486 P.2d 1136 (1971).

Only punishment grossly disproportionate to the gravity of the offense violates the state and federal constitutional guarantee. *State v. Bowen*, 51 Wn. App. 42, 47, 751 P.2d 1226 (1988). To be "grossly disproportionate" punishment must shock the general conscience and violate principles of fairness. *State v. Smith*, 93 Wn.2d 329, 344-45, 610 P.2d 869 (1980); *State v. LaRoque*, 16 Wn. App. 808, 810, 560 P.2d 1149 (1977).

A defendant may challenge the proportionality of his sentence in two different ways under both the Eighth Amendment and Washington article I, section 14. *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *State v. Moen*, 4 Wn. App. 2d 589, 598, 422 P.3d 930 (2018). Curtis Fisher implicitly relies on both forms of challenges.

Under the first method of employing cruel punishment jurisprudence, a defendant may assert a categorical challenge by arguing that an entire class of sentences is disproportionate based on the nature of the offense or the characteristics of a class of offenders. *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010). This categorical bar analysis first reviews any objective indicia of a national consensus against the sentencing

practice at issue. *State v. Bassett*, 192 Wn.2d 67, 83 (2018). The analysis then employs the court's own independent judgment based on the standards elaborated by controlling precedents and by the court's own understanding and interpretation of the cruel punishment provision's text, history, and purpose. *State v. Bassett*, 192 Wn.2d 67, 83 (2018). The categorical approach requires consideration of the culpability of the offender in light of his crimes and characteristics, the severity of the punishment in question, and the punishment's relationship to legitimate penological goals. *Graham v. Florida*, 560 U.S. 48, 67 (2010); *State v. Reynolds*, 2 Wn.3d 195, 207, 535 P.3d 427 (2023).

The second method of challenging the length of a sentence is to argue the sentence is grossly disproportionate given the offender's circumstances. *State v. Moen*, 4 Wn. App. 2d 589, 598 (2018). Courts refer to this second variety of challenge as an "as-applied" challenge. *United States v. Shill*, 740 F.3d 1347, 1355 (9th Cir. 2014).

When responding to an as-applied challenge to the length of the sentence, the Washington Supreme Court employs the *Fain* test or factors announced in *State v. Fain*, 94 Wn.2d 387 (1980). *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014); *State v. Bassett*, 192 Wn.2d 67, 73 (2018). The *Fain* proportionality test considers (1) the gravity of the offense and the harshness of the penalty, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. *State v. Fain*, 94 Wn.2d 387, 396 (1980). These are only factors to consider, and no one factor is dispositive. *State v. Gimarelli*, 105 Wn. App. 370, 380-81,

20 P.3d 430 (2001). The *Fain* factors enhance the proposition that "a punishment clearly permissible for some crimes may be unconstitutionally disproportionate for others." *State v. Fain*, 94 Wn.2d 387, 397 (1980).

The first step of the *Fain* proportionality test focuses on the harm caused and the culpability of the offender. *Solem v. Helm*, 463 U.S. 277, 292, 103 S. Ct. 3001, 77 L.Ed.2d 637 (1983). As to the fourth step, the court compares the sentence to sentences given for related crimes such as different degrees of the same crime. *State v. Gonzalez*, 326 Or. App. 587, 534 P.3d 289, 295 (2023), *review granted*, No. S070433 (Or. Dec. 7, 2023). The carrying of a less severe sentence by a more serious crime indicates disproportionality, particularly when considering the penalties imposed for other crimes that have similar characteristics to the crime at issue. *State v. Lara-Vasquez*, 310 Or. App. 99, 108, 484 P.3d 369 (2021).

The *Fain* test may be inherently difficult to apply. *State v. Fain*, 94 Wn.2d 387, 396 (1980). Nevertheless, the challenges posed by the application of the test do not warrant rejecting it. *State v. Gonzalez*, 534 P.3d 289, 292 (2023).

YOUTHFULNESS

In 1979, the year of seventeen-year-old Curtis Fisher's sentencing, and for decades thereafter, American jurisprudence treated teenage murderers the same as adult murderers. Juvenile courts rotely declined jurisdiction over a teenager accused of murder, and the adult courts prosecuted and sentenced teenagers as if adults. A fifteen-

year-old, who committed a crime, was deemed as blameworthy as a fifty-year-old, who committed the same crime. *In re Boot*, 130 Wn.2d 553, 569-70, 925 P.2d 964 (1996).

Beginning in 2005, the United States Supreme Court acknowledged advances in neurological science. The United States Supreme Court thereafter issued landmark decisions, under the Eighth Amendment's cruel and unusual punishment clause, concerning juvenile offender sentencing. *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *Graham v. Florida*, 560 U.S. 48(2010); *Miller v. Alabama*, 567 U.S. 460 (2012); and *Montgomery v. Louisiana*, 577 U.S. 190, (2016).

According to the United States Supreme Court, the cruel and unusual punishment clause demands that the penal system treat offenders under the age of eighteen differently. Children's lack of maturity and underdeveloped sense of responsibility lead to recklessness, impulsivity, and heedless risk taking. *Miller v. Alabama*, 567 U.S. 460, 471 (2012). Children are more vulnerable to negative influence and outside pressure from family and peers, have limited control over their environments, and lack the ability to extricate themselves from horrific, crime-producing settings. *Miller v. Alabama*, 567 U.S. 460, 471 (2012). Adolescent brains are not yet fully mature in regions and systems related to higher order executive functions such as impulse control, planning, and risk avoidance. *Miller v. Alabama*, 567 U.S. 460, 475 n.5 (2012). All of these features impact a tendency to commit a crime. *Miller v. Alabama*, 567 U.S. 460, 473 (2012). Commonsense, parental knowledge, physical science, and social science confirm these observations. *Miller v. Alabama*, 567 U.S. 460, 472 n.5 (2012). Because a child's

character is not as well formed as an adult's, the child's traits are less fixed, and his actions are less likely to be evidence of depravity. *Miller v. Alabama*, 567 U.S. 460, 471 (2012). Only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

According to the United States Supreme Court, the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. *Miller v. Alabama*, 567 U.S. 460, 472 (2012). Deterrence supplies a flawed rationale for punishment because of juveniles' impulsivity and inability to consider the consequences of their actions. *Miller v. Alabama*, 567 U.S. 460, 472 (2012). Retribution's focus on blameworthiness also does not justify a lengthy sentence because juveniles have severely diminished moral culpability. *Miller v. Alabama*, 567 U.S. 460, 472 (2012). Incapacitation fails to justify a long sentence because adolescent development diminishes the likelihood that an offender forever will be a danger to society. *Miller v. Alabama*, 567 U.S. 460, 472-73 (2012).

With a new understanding of juvenile brain development, the United States Supreme Court established strictures on harsh and long sentences for teenagers, even youth committing murder. The Eighth Amendment's cruel and unusual punishment clause compelled these sentencing restrictions.

Because of the constitutional nature of children, including teenagers, the United States Supreme Court, in *Miller v. Alabama*, 567 U.S. 460 (2012), mandated that a

sentencer follow a process that incorporates consideration of the offender's chronological age and its hallmark features and other mitigating features before imposing life without parole. The attended characteristics include: chronological age, immaturity, impetuosity, failure to appreciate risks and consequences, the surrounding family and home environment, the circumstances of the offense, including the extent of the offender's participation in the offense and any pressures from friends or family affecting him, the inability to deal with police officers and prosecutors, incapacity to assist an attorney in his or her defense, and the possibility of rehabilitation. *Miller v. Alabama*, 567 U.S. 460, 477-78 (2012). Courts now call these characteristics "the *Miller* factors."

In *Miller v. Alabama*, the Court struck down state laws mandating life without parole sentences for juveniles found guilty of even aggravated first degree murder. The Court strongly inferred, if not held, that no juvenile could receive a lifetime sentence for any crime unless the sentencing court finds the juvenile to be a "rare juvenile offender whose crime reflects irreparable corruption." *Miller v. Alabama*, 567 U.S. 460, 479-80 (2012). The Court noted that the appropriate occasion for sentencing a juvenile homicide offender to life without parole will be "uncommon." *Miller v. Alabama*, 567 U.S. 460, 479 (2012). Life without parole is constitutional only for "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery v. Louisiana*, 577 U.S. 190, 209 (2016). Conversely, the Eighth Amendment mandates parole eligibility for juvenile murderers whose crimes reflect only transient immaturity. The opportunity for release will be afforded to those who demonstrate the truth of

Miller's central intuition that children who commit even heinous crimes are capable of change.

In *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the high Court readdressed the subject of life without parole sentences for juvenile homicide offenders. *Montgomery* held that *Miller* applied retroactively to offenders who were juveniles when they committed their crimes. Against contentions that the *Miller* ruling only imposed a procedure for resentencing, the Court announced that *Miller* established a substantive rule that juveniles, whose crimes reflect "only transient immaturity" and who have since matured, will not be forced to serve a life without parole sentence. *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016). Under the cruel and unusual punishment clause, sentencing courts must exercise their discretion at the time of sentencing itself with regard to the youth of the offender, regardless of what opportunities for discretionary release may occur in the future. *Miller v. Alabama*, 567 U.S. 460, 477-83 (2012); *State v. Houston-Sconiers*, 188 Wn.2d 1, 20 (2017).

In *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017), our Supreme Court addressed *Miller v. Alabama*'s applicability to juvenile defendants who received lengthy mandatory sentences for crimes other than homicide. The Evergreen high court held that the Eighth Amendment and *Miller* require that sentencing courts possess absolute discretion to depart as far as desired below the otherwise applicable Sentencing Reform Act of 1981 (SRA), ch. 9.94 RCW, ranges when sentencing juveniles in adult court. Sentencing courts also may exercise the prerogative to reduce or ignore sentencing

enhancements. To the extent Washington sentencing statutes had been interpreted to bar such discretion with regard to juveniles, the high court deemed the statutes unconstitutional.

The requisite sentencing hearing for a juvenile in adult court, under Washington jurisprudence, is no longer an ordinary sentencing proceeding. *State v. Ramos*, 187 Wn.2d 420, 443, 387 P.3d 650 (2017). *Miller v. Alabama* establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered. *State v. Ramos*, 187 Wn.2d 420, 443 (2017). A court must do more than simply recite the differences between juveniles and adults and do more than render conclusory statements that the offender has not justified an exceptional downward sentence. *State v. Ramos*, 187 Wn.2d 429, 443 (2017). The sentencing court must thoroughly explain its reasoning, specifically considering the differences between juveniles and adults identified by the *Miller* Court and how those differences apply to the case presented. *State v. Ramos*, 187 Wn.2d 443, 444 (2017).

In addition to the Washington Supreme Court taking action in response to the *Miller v. Alabama*, the state legislature, in 2014, enacted changes to juvenile sentencing statutes. Washington courts denominate the statute as the *Miller*-fix statute. LAWS OF 2014, ch. 130. The statute now lies in three discrete sections in the Washington code: RCW 9.94A.730, RCW 10.95.030, and RCW 10.95.035. All three provisions loom critical in this appeal.

In 2014, former RCW 10.95.030 (3)(a)(ii) declared:

> Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. *A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release*.
>
> (b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

(Some emphasis added.). Note that the statute still allowed the superior court to impose a life without the opportunity of parole sentence as long as the court considered the *Miller* factors.

The 2014 *Miller*-fix legislation also designated a resentencing process for juvenile offenders convicted of aggravated first degree murder and sentenced, before June 1, 2014, to mandatory terms of life without the possibility of parole. LAWS OF 2014, ch. 130. As a result of the legislation, former RCW 10.95.035 2014 declared in part:

> (1) A person, who was sentenced prior to June 1, 2014, under this chapter or any prior law, to a term of life without the possibility of parole for an offense committed prior to their eighteenth birthday, shall be returned to the sentencing court or the sentencing court's successor for sentencing consistent with RCW 10.95.030. Release and supervision of a person who receives a minimum term of less than life will be governed by RCW 10.95.030.

Note that the resentencing occurs before the superior court, not the ISRB, and the superior court must consider the *Miller* factors when resentencing. This opportunity for

resentencing before the superior court under the *Miller* factors does not extend to those convicted of lesser crimes such as second degree murder.

The final section of the *Miller*-fix statute, RCW 9.94A.730, includes a provision authorizing juvenile offenders imprisoned from crimes other than aggravated first degree murder to petition the ISRB for early release after serving at least twenty years of confinement. The statute reads:

> (1) Notwithstanding any other provision of this chapter, any person convicted of one or more crimes committed prior to the person's eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than twenty years of total confinement, provided the person has not been convicted for any crime committed subsequent to the person's eighteenth birthday, [and] the person has not committed a disqualifying serious infraction as defined by the department in the twelve months prior to filing the petition for early release . . .
>
> . . . .
>
> (3) No later than one hundred eighty days from receipt of the petition for early release, the department shall conduct, and the offender shall participate in, an examination of the person, incorporating methodologies that are recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the person will engage in future criminal behavior if released on conditions to be set by the board. . . . The board 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.* The board shall *give public safety considerations the highest priority when making all discretionary decisions regarding the ability for release and conditions of release.*
>
> . . . .
>
> (6) An offender whose petition for release is denied 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.

If the ISRB grants release, the offender remains subject to supervision by DOC, under community custody, for a period of time determined by the Board. RCW 9.94A.730(5).

A hearing before the ISRB under RCW 9.94A.730 is not a resentencing. *In re Personal Restraint of Brooks*, 197 Wn.2d 94, 102, 480 P.3d 399 (2021). Instead, an early release hearing under the statute looks to the future and focuses on one's likelihood of reoffending. *In re Personal Restraint of Brooks*, 197 Wn.2d 94, 102 (2021). *Miller* and *Montgomery* demand resentencing wherein the resentencing court determines whether the juvenile offender was incorrigible at the time of the original sentencing. Unlike RCW 9.94A.730, RCW 10.95.030 and .035 demand that the resentencing court seriously contemplate and apply the *Miller* factors.

To repeat, RCW 10.95.030 initially allowed the resentencing court to commit a juvenile offender to life without the opportunity of parole after considering the *Miller* factors. In *State v. Bassett*, 192 Wn.2d 67, 73 (2018), the Washington Supreme Court held that sentencing juvenile offenders to life without parole or early release, even if discretionary rather than mandatory, constitutes cruel punishment and therefore is unconstitutional under article I, section 14 of the Washington Constitution. In turn, the Washington Supreme Court declared unconstitutional that portion of RCW 10.95.030 that permitted the imposition of life imprisonment without parole. *State v. Bassett*, 192 Wn.2d 67, 73 (2018).

In 1995, when Brian Basset was sixteen years old, he lived in a shack with a friend after Bassett's parents expelled him from home. With assistance from his friend, Bassett

returned home, shot and killed his mother and father, and drowned his brother in a bathtub. The superior court convicted Bassett of three counts of aggravated first degree murder. The superior court deemed Bassett a walking advertisement for the death penalty, but sentenced him to three consecutive terms of life in prison without parole.

In 2015, Brian Bassett returned to superior court for the resentencing, under RCW 10.95.030 and .035, required for those convicted of aggravated first degree murder. The superior court again sentenced him to three consecutive life without parole sentences. The Court of Appeals adjudged the sentence in RCW 10.95.030 permitting a life sentence without parole unconstitutional. The Supreme Court accepted review.

On appeal, Brian Bassett argued that RCW 10.95.030(3), one section of the *Miller*-fix statute, was unconstitutional under Washington's cruel punishment clause because it permitted life sentences for juveniles convicted of aggravated first degree murder. The Washington Supreme Court faced the initial question of whether to apply a grossly disproportionate sentence analysis or a categorical bar analysis. In the end it did not matter, since the court declared RCW 10.95.030(3) unconstitutional under either approach. Nevertheless, the court deemed the categorical bar analysis more suitable.

The Supreme Court, in *Bassett*, observed that the *Fain* disproportionality framework focuses away from the characteristics of the offender class. The *Fain* test instead weighs the offense with the punishment. Thus, the *Fain* framework uncomfortably analyzes a claim of cruel punishment based on the offender class of youth. The categorical bar analysis, on the other hand, directs a court to consider the nature of

children. The 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. Issues of culpability, the severity of the punishment, and whether penological goals are served all allow the court to include youth-specific reasoning into the analysis. When addressing punishment of children, the court generally does not focus on the severity of the crime.

The Washington Supreme Court, in *State v. Bassett*, applied the categorical bar analysis and found RCW 10.95.030 constitutionally wanting. The court agreed with Brian Bassett that the direction of change in the United States unmistakably and steadily moves toward abandoning the practice of putting child offenders in prison for their entire lives. This observation did not control but weighed in favor of finding that sentencing juvenile offenders to life without parole is cruel punishment under article I, section 14. RCW 10.95.030, a portion of the *Miller*-fix statute, allowed children to be sentenced to the extremely severe punishment of life without parole.

The Washington Supreme Court adopted the United States Supreme Court's characterization in *Graham v. Florida* of permitting a juvenile to die in prison as harsh. Life without parole alters the offender's life with an irrevocable forfeiture and deprives individuals of the most basic liberties without giving hope of restoration. The sentence is especially harsh for children, who will on average serve more years and a greater percentage of their lives in prison than an adult offender. The juvenile should not be

deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.

The Washington Supreme Court, in *State v. Bassett*, reflected that a life sentence does not serve the penological goals of retribution, deterrence, incapacitation, or rehabilitation in the context of youth committing even heinous crimes. The distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders. The heart of retribution relates to an offender's blameworthiness, and children have diminished culpability. Deterrence lacks effect in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—render them less likely to consider potential punishment. Rehabilitation is not supported by a juvenile life sentence because the sentence forswears altogether the rehabilitative ideal. Incapacitation is not well served by sentencing juveniles to life without parole because deciding that a juvenile offender forever will be a danger to society would require a judgment that he is incorrigible, but incorrigibility is inconsistent with youth. The penological goal of incapacitation is especially concerning given the fact that the sentence makes an irrevocable judgment about that person at odds with what we know about children's capacity for change.

The Washington Supreme Court, in *State v. Bassett*, while recognizing that, under United States Supreme Court precedent, only the rarest of children who are incorrigible can spend life in prison, discerning who is subject to this extreme punishment is arduous,

if not unfeasible. While RCW 10.95.030(3)(b) required sentencing courts to consider youth's chances of becoming rehabilitated, courts face extreme difficulty in making that determination. Even expert psychologists confront impossibility when differentiating between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. Although the Supreme Court did not declare such, this observation should render any life sentence, regardless of availability of release, unconstitutional. A judge can only issue imprecise and subjective judgments regarding transient immaturity and irreparable corruption. The same factor that one sentencing judge might consider material in releasing the juvenile offender could lead another judge to consider the offender incorrigible and unrehabilitated and not amenable to release.

The *Bassett* court noted that Brian Bassett's sentencing court concluded that Bassett's living apart from his parents evidenced his maturity. Another judge, however, could deem the homelessness as evidence of instability and insecurity thereby leaving Bassett less able to control his emotions and actions. Because of the whims that can motivate the sentencing court's decision and the discretion afforded the court when rendering a decision, the difference between living the rest of one's life in prison or having a chance to return to society becomes too great of a risk to leave to a court, let alone expert children's psychologists.

The Washington Supreme Court, in *State v. Bassett*, observed that, even if it applied the *Fain* proportionality test, it would still find that sentencing a juvenile offender

to life without parole violated article I, section 14. Undoubtedly, aggravated first degree murder formed the most serious criminal offense. The legislature, in RCW 10.95.030, announced the purpose of requiring sentencing courts to "take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller*." LAWS OF 2014, ch. 130, § 9(3)(b). Thus, the first two factors warranted a serious punishment for aggravated murder. The third factor, the punishment juveniles would receive in other jurisdictions, weighed in favor of finding juvenile life without parole sentences cruel punishment and unconstitutional. Lastly, the fourth factor directed the court to look at the punishment juveniles would receive for other offenses in the same jurisdiction. Juveniles in Washington could be sentenced to life without parole only if convicted of aggravated first degree murder. RCW 10.95.030. If a juvenile was convicted of any other crime or combination of crimes, he or she would be eligible for release after 20 years, unless he or she has committed a disqualifying infraction in the prior year. RCW 9.94A.730(1). The punishment was extreme in comparison to the sentence Washington would impose for other crimes. Thus, life without parole was a disproportionate sentence for juvenile offenders rendering RCW 10.95.030(3)(a)(ii) unconstitutional under article I, section 14. The court remanded sentencing back to the superior court for resentencing in light of Bassett's immaturity at the time of his murders.

Under the categorical bar analysis adopted in *State v. Bassett*, Curtis Fisher's sentence must end. The same factors and reasoning that preclude a life without parole sentence and invalidated one provision in RCW 10.95.030 demands the release of Fisher.

Fisher has reached age 62. His sentence, now forty-four years and persisting, has matured into a life sentence. Nothing in *State v. Bassett* restricts its holding to *statutorily* mandatory life without parole sentences. *State v. Anderson*, 200 Wn.2d 266, 296, 516 P.3d 1213 (2022) (Gonzalez, C.J., dissenting). *Bassett* held that, under article I, section 14 of our constitution, any life-without-parole sentence for a juvenile offender is unconstitutional. *State v. Anderson*, 200 Wn.2d 266, 296 (2022) (Gonzalez, C.J., dissenting). The decision's reasoning extends to any life spent in prison by a juvenile offender regardless of whether the sentence results from a mandatory sentence or a never-ending indeterminate sentence. *State v. Bassett* created no exception to the prohibition on a life sentence for those unrehabilitated. The nature of a life sentence for a juvenile remains cruel no matter the type or characteristics of the sentence imposed and no matter if the offender remains unremorseful, difficult, troubled, and naughty. A life sentence remains cruel regardless if the offender enjoys the opportunity for parole if he obeys prison staff.

As hinted in the previous paragraph, by demanding that Curtis Fisher gain parole acceptance from the ISRB, the State in essence imposes a de facto life sentence on Fisher. In *Sam v. State*, 2017 Wy 98, 401 P.3d 834, 842 (Wyo. 2017), the Wyoming high court ruled that a sentence imposed on Phillip Sam of a minimum fifty-two years with possible release at age seventy constituted a de facto life sentence. In *Bear Cloud v. State*, 2014 WY 113, 334 P.3d 132, 136 (WYO. 2014), the same western court adjudged a sentence of a minimum of forty-five years, with possible release at age sixty-one, as the

functional equivalent of life without parole. In *State v. Williams-Bey*, 167 Conn. App. 744, 144 A.3d 467 (2016), the court remanded for a new hearing a sentence that would not release a juvenile offender convicted of murder until age fifty-two.

Most courts that have considered the issue agree that a lengthy term of years for a juvenile offender will become a de facto life sentence at some point. *Casiano v. Commissioner of Corrections*, 317 Conn. 52, 115 A.3d 1031, 1044 (2015). The United States Supreme Court viewed the concept of "life" in *Miller* and *Graham* more broadly than biological survival and implicitly endorsed the notion that an individual is effectively incarcerated for life if he will have no opportunity to truly reenter society or have any meaningful life outside of prison. *Casiano v. Commissioner of Corrections*, 115 A.3d 1031, 1047 (2015). The Supreme Court's *Miller* decision intended to allow juvenile offenders the opportunity to live a part of their lives in society, not simply to leave prison in order to die. *State v. Moore*, 149 Ohio St. 3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, 1137 (2016).

Washington follows the majority view. In *State v. Ramos*, 187 Wn.2d 420 (2017), our high court wrote:

> [Similarly,] we also reject the notion that *Miller* applies only to literal, not de facto, life-without-parole sentences. Holding otherwise would effectively prohibit the sentencing court from considering the specific nature of the crimes and the individual's culpability before sentencing a juvenile homicide offender to die in prison, in direct contradiction to *Miller*. Whether that sentence is for a single crime or an aggregated sentence for multiple crimes, we cannot ignore that the practical result is the same.

State v. Ramos, 187 Wn.2d 420, 438-39 (2017). Also, *Bassett* held that, under article I, section 14 of our constitution, any life-without-parole sentence for a juvenile offender is unconstitutional even if by a de facto imposition. *State v. Anderson*, 200 Wn.2d 266, 296 (2022) (Gonzalez, C.J., dissenting).

Two Washington decisions compel a release of Curtis Fisher from incarceration because of his decades in prison. In *State v. Ronquillo*, 190 Wn. App. 765, 361 P.3d 779 (2015), this court deemed a 51.3-year sentence for murder and other violent, gang-motivated crimes as a de facto life sentence. The sentence contemplated Ronquillo remaining incarcerated until the age of 68. This court deemed the de facto life sentence to have impermissibly categorized Ronquillo as irredeemable, a characterization inconsistent with *Miller v. Alabama*. Before a court can sentence a youth offender to a functional equivalent of a life sentence, the court must consider how children are different and assess whether the offender was irrevocably corrupt. This court remanded to the superior court to resentence Brian Ronquillo, who committed the crimes at age sixteen.

The most compelling decision in the context of Curtis Fisher's petition is *State v. Haag*, 198 Wn.2d 309, 495 P.3d 421 (2021). Timothy Haag experienced a troubled upbringing. In 1994, Haag, at age 17, killed a seven-year-old neighbor girl. A jury convicted Haag of first degree aggravated murder. The superior court then sentenced him to mandatory life without parole. During more than two decades in prison, Haag showed tremendous growth and maturity. An expert concluded that Haag was a low risk for

reoffending. In 2018, the superior court resentenced Haag under the *Miller*-fix provisions of RCW 10.95.030 and .035. After the hearing, the resentencing court found that Haag is not irretrievably depraved or irreparably corrupt. Nevertheless, after hearing from the victim's family of the need to keep a child killer behind bars and that such a man is incapable of reform, the superior court resentenced Haag to forty-six years to life. The resentencing court mentioned that Haag, weighing three hundred pounds at the time of the homicide, strangled a sixty-five-pound defenseless child during a heinous multi-step strangulation. With the resentence, the earliest release date for Haag was age 63.

On appeal to the Supreme Court, the court reversed Timothy Haag's resentencing because the superior court emphasized retribution over mitigation. RCW 10.95.030 demands that the sentencing court place greater emphasis on mitigation factors than on retributive factors. The court repeated the presumption that youth possess diminished culpability. Only the rare offender is irreparably corrupt. The court also characterized the first possible release date of age 63 as comprising a de facto life sentence. A minimum sentence of forty-six years also constituted a de facto life sentence. Article 1, section 14 and *Miller* applies to juvenile homicide offenders facing de facto life sentence not just literal life without the opportunity of parole sentences. The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a meaningful opportunity to demonstrate the maturity and rehabilitation required to obtain release and reenter society as required by *Graham v. Florida*.

Curtis Fisher's case differs from Timothy Haag's case because Fisher has failed to show the growth that Haag experienced in a correctional system differing markedly from the dismal environment to which Fisher needed to adapt in order to survive. *Concrete Mama: Prison Profiles from Walla Walla* (University of Washington Press, 2d ed. 2018). Experts worry about public safety if Fisher is released. Still, *Haag* shows that Fisher is now serving a de facto life sentence without any court having determined that he was irreparably depraved in 1979. The State will not even agree to a resentencing during which Fisher could present his own expert witnesses for review by the court. Fisher has yet to benefit from the requirement that a judge determining release must focus on the mitigating factors of youth.

The State mentions the 1979 juvenile court's finding at the time of its decline of juvenile court jurisdiction. The juvenile court noted that Fisher lived away from home and worked. The State, with this comment, may wish to promote Fisher, at age seventeen, as an adult. *State v. Bassett* addresses such an argument. Living on one's own does not mean maturity. Later one dissenting Washington Supreme Court justice also acknowledged the discord between attributing maturity with living on one's own. The dissenter characterized the trial court's conclusion as a "profound misinterpretation of the evidence." *State v. Anderson*, 200 Wn.2d 266, 302 (2022) (Gonzalez, C.J., dissenting).

The State claims Curtis Fisher committed cold-blooded murder. Nevertheless, Fisher pled guilty to second degree murder, not first degree premeditated murder. More importantly, a finding that the juvenile offender committed murder deliberately and with

premeditation means little when determining whether the crime resulted from transient immaturity. *Commonwealth v. Batts*, 640 Pa. 401, 163 A.3d 410, 437 (2017), *abrogated by Jones v. Mississippi*, 593 U.S. 98, 141 S. Ct. 1307, 209 L. Ed. 2d 390 (2021). Such a finding would require an imposition of life without parole on any juvenile offender convicted of first degree murder. *Commonwealth v. Batts*, 163 A.3d 410, 437 (2017). The most egregious facts presented by a particular case cannot automatically negate a juvenile homicide offender's right to resentencing under the *Miller* factors. *State v. Ramos*, 187 Wn.2d 420, 438 (2017). Instead, all doubts should be resolved in favor of conducting a *Miller* hearing.

In his findings justifying declination from juvenile court, Yakima County Superior Court Judge Bruce Hanson wrote:

> That the juvenile [Curtis Fisher] appears to be mature for his age at times while at other times he appears to be immature. That the juvenile appears to behave in a mature manner when with adults and to behave in an immature manner when with younger people.

CP at 23. This passage shows Fisher succumbed to peer pressure, a factor commensurate with intransient immaturity.

Assuming Curtis Fisher to be unrehabilitated, Washington's criminal justice, by sentencing him as an adult to an adult prison, shares blame with Fisher for any failure to reform. Imprisonment results in a traumatic and dangerous existence, not a learning and maturation experience. Washington State has only recently adopted other state and national efforts to reform policies that incarcerate youth and young adults in the adult

criminal system. *State v. Reynolds*, 2 Wn.3d 195, 218 (2023) (Whitener, J., dissenting). In 2019, the Washington State Legislature wrote:

> The legislature acknowledges that transferring youth and young adults to the adult criminal justice system is not effective in reducing future criminal behavior. Youth and young adults incarcerated in the adult criminal justice system are more likely to recidivate than their counterparts housed in juvenile facilities.

LAWS OF 2019, ch. 322, § 1. Curtis Fisher entered the prison system at age 17 and has remained incarcerated since.

Court decisions fail to mention that incarceration decreases one's life expectancy. Michael Massoglia & William Alex Pridemore, *Incarceration and Health*, 41 ANN. REV. SOCIO. 291 (2015). According to a study conducted by Vanderbilt University and data from New York, for every year spent behind bars, overall life expectancy decreases two years. Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State, 1989-2003*, 103 Am. J. Pub. Health 523 (2013); Nick Straley, Miller*'s Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 986 n.142 (2014).

I already concluded that Curtis Fisher's sentence fails constitutional muster under the categorical bar analysis. Fisher's sentence also falls under the *Fain* proportionality test, as applied in *State v. Bassett*. Second degree murder is a serious offense, but less so that the three counts of aggravated first degree murder committed by Brian Bassett. The legislative purpose factor weighs in favor of serious punishment. But the third factor, the punishment juveniles would receive in other jurisdictions, weighs in favor of finding

forty-five years in prison cruel and unconstitutional punishment. The fourth factor directs the court to look at the punishment juveniles would receive for other offenses in the same jurisdiction. Juveniles in Washington otherwise face life without parole for aggravated first degree murder. The 1979 sentencing court could have sentenced Fisher to a maximum of thirty years instead of a lifetime. Because of Fisher's juvenility, the four decades serves no penological purpose.

DISPROPORITIONALITY TO SRA SECOND DEGREE MURDER SENTENCE

I have already concluded that the categorical bar analysis and the *Fain* proportionality test demand release of Curtis Fisher from prison. I move now to two other disproportionate sentence analyses. First, Fisher's unrelenting sentence is disproportionate to a sentence meted on even an adult since 1984. Second, Fisher's treatment is disproportionate to the treatment of other youth who committed aggravated first degree murder.

The State fails to recognize that Curtis Fisher's assertion of cruel punishment does not rest solely on his youth at the time of his crime. Fisher also emphasizes the quirks in the pre-SRA sentencing law when compared to sentencing reform act statutes. His 1979 sentence of life imprisonment violates the grossly disproportionate element of the cruel punishment clause of the Washington constitution when compared to current adult sentences for second degree murder.

In 1981, the Washington State Legislature replaced the state's indeterminate sentencing system, under which the superior court sentenced Curtis Fisher, with a

determinate sentencing scheme with the SRA. To repeat, before the implementation of the SRA, the trial court sentenced an offender to the maximum amount of time that could be served for the crime. In turn, the Board of Prison Terms and Paroles established the minimum term and governed the amount of time the offender would actually serve. The Board possessed the authority to decide when to release the offender from incarceration. Curtis Fisher was sentenced under the indeterminate sentence scheme, which has resulted in his unending imprisonment.

The SRA applies to crimes committed after June 30, 1984. RCW 9.94A.905. The SRA imposed a regime of structured discretion for the courts. *State v. Hubbard*, 1 Wn.3d 439, 445, 527 P.3d 1152 (2023). The act eliminated parole hearings for most offenders. The SRA created the ISRB and directed the Board to attempt to render parole decisions, for those sentenced under the former indeterminate sentencing system still incarcerated after June 1984, reasonably consistent with the SRA, including standard ranges imposed in the SRA. RCW 9.95.009(2). The ISRB replaced the Board of Prison Terms and Paroles. RCW 9.95.001.

The SRA did not apply its new sentencing ranges to pre-act offenses. Also, nothing in RCW 9.95.011 requires a court to follow SRA sentencing procedures. *In re Personal Restraint of Whitesel*, 111 Wn.2d 621, 635, 763 P.2d 199 (1988). Nevertheless, the transition statute of RCW 9.95.009(2) instructed the Board to consider the purposes, standards and sentencing ranges set for in the SRA and to attempt to make its decisions regarding pre-SRA offenders reasonably consistent with SRA ranges and standards. *In re*

Personal Restraint of Irwin, 110 Wn.2d 175, 178-79, 751 P.2d 289 (1988). In reviewing minimum terms of such offenders, the Board must impose sentences reasonably consistent with the SRA. *In re Personal Restraint of Myers*, 105 Wn.2d 257, 263, 714 P.2d 303 (1986).

No evidence suggests that the ISRB has attempted to follow the SRA with regard to the second degree murder conviction of Curtis Fisher. The State does not argue to the contrary. Thus, the ISRB fails to comply with this important section of the SRA.

A court performs sentencing, under the SRA, through a grid that supplies a range of months for the offender depending on the level of seriousness of the pending conviction and the defendant's offender score. The court calculates the offender score by counting the prior and current felony convictions in accordance with the rules for each offense. RCW 9.94A.525. The offender score is the sum of points accrued under RCW 9.94A.525 rounded down to the nearest whole number. A backdrop to the sentencing range is the maximum sentence for the classification of the crime, which maximum is almost always significantly higher than even the high end of the standard range.

Second degree murder is a class A felony. RCW 9A.32.050(2). The maximum sentence for a class A felony, under the sentencing reform act, is life imprisonment. RCW 9A.20.021(1)(b). Nevertheless, although the law of cruel punishment speaks in terms of the maximum sentence for a crime as the measuring factor for disproportionate sentences, courts consider actual sentencing practices in its inquiry of constitutionality.

Graham v. Florida, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551, 572 (2005). Penalties actually imposed provide a more accurate picture of the legal landscape for purposes of cruel punishment. *State v. Santiago*, 318 Conn. 1, 122 A.3d 1, 22 (2015). Punishments implicating the Eighth Amendment include the sentences actually handed down by the sentencing courts. *Anderson v. Kingsley*, 877 F.3d 539, 543 (4th Cir. 2017). In this appeal, the State employs the high end of Curtis Fisher's standard range, not the maximum possible sentence, when assessing disproportionality.

In 1979, the superior court sentenced Curtis Fisher to a lifetime of imprisonment with the possibility, but not certainty, of parole. Under the SRA, a sentencing court cannot impose an indeterminate sentence of a maximum of life imprisonment for second degree murder. Second degree murder bears a serious level of XIV for purposes of the sentencing grid. According to Fisher, the standard range sentence for one convicted of second degree murder, who has an offender score of one, is 134 to 234 months, or nineteen years and six months. RCW 9.94A.505; RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.525; RCW 9.94A.530. Br. of Resp't at 4-5. Thus, if he committed the murder five years later at a more mature age, he would have only been sentenced, under Fisher's calculation, to at most nineteen years and six months.

The State supplies an even lower sentence calculation. According to the State, Fisher had two earlier juvenile felony convictions, second-degree burglary and taking a motor vehicle without permission. Under the 1984 Sentencing Guidelines his offender

score would be one point, a half-point for each of the nonviolent felonies. In turn, his sentencing range would have been 134 to 178 months or 11.16 to 14.83 years.

Under his calculation, Curtis Fisher would have been released from prison in early 2004, and, under the State's measurement, Fisher would have been released from prison in 1999 even on the assumption that his crime occurred five years later and regardless of the ISRB's view of a lack of rehabilitation. According to Fisher's math, he has now spent 536 months in prison, which is 2.29 times the highest sentence in his standard range. Under the State's arithmetic, Fisher has served 3.01 times the highest point in his standard range. This result shocks the conscience and violates anyone's standard of fairness. The law should evolve towards humaneness, not toward harshness. Had Fisher committed his crimes today, his sentencing range would be even lower considering that adjudications of guilt pursuant to Title 13 RCW, which are not murder in the first or second degree or Class A felony sex offenses, may not be included in the offender score. RCW 9.94A.525(1)(b).

Statutory revisions may render a punishment constitutionally disproportionate and cruel. *Wells-Yates v. People*, 2019 CO 90M, 454 P.3d 191, 206 (Colo. 2019). Consideration of the statutory changes is the most valid indicia of a state's evolving standards of decency. *Humphrey v. Wilson*, 282 Ga. 520, 652 S.E.2d 501, 507 (2007). During a proportionality review, the court should consider any relevant legislative amendments enacted after the dates of those offenses, even if the amendments do not apply retroactively. *People v. McRae*, 2019 CO 91, 451 P.3d 835, 839 (Colo. 2019).

Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time. *Graham v. Florida*, 560 U.S. 48, 85 (2010) (Stevens, J., concurring).

Some Washington decisions illustrate the grossly disproportionate second degree murder sentence imposed on Curtis Fisher of forty-years and counting. In *State v. Gilmer*, 96 Wn. App. 875, 981 P.2d 902 (1999), the superior court sentenced George Gilmer to 212 months, or 17.3 years, for second degree felony murder. In *State v. Gregg*, 196 Wn.2d 473, 474 P.3d 539 (2020), the superior court sentenced Sebastian Gregg to 37 years for first degree murder, burglary, and arson. In *In re Personal Restraint of Hinton*, 1 Wn.3d 317 (2023), James Hinton received a thirty-seven-year sentence for second degree murder and attempted murder committed at age seventeen.

Because of Curtis Fisher's sentence grossly exceeding what his sentence would be today, I have not exhaustively researched the penalties imposed in other states for second degree murder. Shorter sentences in some jurisdictions are not dispositive. *State v. Moretti*, 193 Wn.2d 809, 833, 446 P.3d 609 (2019). Nevertheless, I note that in Arizona, second degree murder is punishable for up to twenty-five years. ARIZ. REV. STAT. ANN. § 13-1104. In Arkansas, the penalty is between 6 to 30 years. ARK. CODE ANN. § 5-10-103. Florida penalizes second degree murder with up to thirty years in prison. FLA. STAT. § 782.04.

In *People v. Elizondo*, 2021 IL App (1st) 161699, 191 N.E.3d 677, 455 Ill. Dec. 370, the State convicted Alvaro Elizondo with second degree murder. He received, under

Illinois statute, a twenty-four-year prison term. Ordinarily second degree murder in Illinois carried a sentencing range of nine to twenty years, but, based on Elizondo's criminal record, the court raised the penalty to twenty-four years.

In *State v. Suskiewich*, 2016-NMCA-004, 363 P.3d 1247 (2015), the defendant was convicted of second degree murder and given a sentence of twelve years. Under a New Mexico statute, the basic sentence for second degree murder was fifteen years. NMSA 1978, § 30-2-1(B) (1994).

The majority writes that Curtis Fisher's forty-five year and counting prison sentence cannot be considered a grossly disproportionate sentence because the sentence is tied to his lack of rehabilitation in prison. The majority cites no law for the proposition that the failure to rehabilitate in prison transforms a disproportionate sentence into a permissible sentence.

In short, when a child commits the crime of murder, the federal and state constitutions, the enactments of the Washington State Legislature, and Washington case law demand that the sentencing court treat the child differently from an adult. *State v. Haag*, 198 Wn.2d 309, 312 (2021). Curtis Fisher's sentence treats him far worse than how the law now treats adults.

DISPROPORTIONALITY TO AGGRAVATED FIRST DEGREE MURDER FOR JUVENILES

The State did not convict Curtis Fisher of the most serious crime of aggravated first degree murder. The State convicted him of a crime two steps lower, second degree

murder. Two of the trio of *Miller*-fix statute sections, RCW 10.95.030 and .035, address one who received a life without the opportunity of parole sentence when committing aggravated first degree murder below the age of eighteen. I previously cited the two statutes. RCW 10.95.035 grants the offender the right to resentencing before a superior court, during which hearing his transient immaturity at the time of the crime controls the resentencing outcome. Whether he might commit another crime has little, if any, bearing. But uniquely, one who commits a lesser offense that did not warrant a life without parole sentence receives no rehearing before the superior court. Instead, because of a second degree murder conviction, Fisher can only gain release by convincing a majority of the ISRB of his rehabilitation and unlikelihood of committing any new crime. This sentencing scheme is backwards.

RCW 9.94A.730(3) demands that the ISRB "give public safety the highest priority when making all discretionary decisions regarding the ability for release and conditions of release." If Curtis Fisher had been sentenced under the sentencing reform act, he would have been released at the end of sentence regardless of public safety. The statute grants the Board discretion when granting or denying release, whereas a determinate sentence affords no discretion to any agency. For pre-SRA prisoners, the ISRB can make decisions about release "'for a variety of reasons and [such decisions] often involve no more than informed predictions as to what would best serve correctional purposes or the safety and welfare of the inmate.'" *In re Personal Restraint of Dyer*, 157 Wn.2d 358, 363, 139 P.3d 320 (2006), quoting *Meachum v. Fano*, 427 U.S. 215, 225, 96 S. Ct. 2532,

49 L. Ed. 2d 45 (1976). In other words, the ISRB engages to some extent in guesswork. No mathematical formula aids in rendering a decision, and no set of facts mandates a decision favorable to the offender. *In re Personal Restraint of Dodge*, 198 Wn.2d 826, 844, 502 P.3d 349 (2022).

RCW 9.94A.010(1) lists one of the purposes behind Washington's criminal justice system is to ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history. This purpose must extend to a lesser or equal, but not greater, punishment for others committing more serious crimes.

The fourth and final factor we consider when undergoing the *Fain* proportionality analysis is the punishment imposed for similar offenses in the same jurisdiction. *State v. Ritchie*, 24 Wn. App. 2d 618, 647, 520 P.3d 1105 (2022), *review denied*, 1 Wn.3d 1006, 526 P.3d 851 (2023). To repeat, the phenomenon of a more severe crimes carrying a less severe sentence suggests disproportionality, particularly when considering the penalties imposed for other crimes with similar characteristics to the crime at issue. *State v. Lara-Vasquez*, 310 Or. App. 99, 108 (2021).

I previously reviewed the facts in *State v. Haag*, 198 Wn.2d 309 (2021). A jury convicted Timothy Haag of aggravated first degree murder committed while a teen. Haag received a new resentencing, under RCW 10.95.030 and .035, during which the resentencing court failed to emphasize the mitigating nature of Haag's youth and instead underscored the need for retribution. The Supreme Court readily reversed.

Haag illustrates the disparate treatment of youth convicted of second degree murder from those convicted of aggravated first degree murder. Appellate review of a resentencing under RCW 10.95.030 is strict and favorable to the offender, whereas the appellate courts reticently overturn a release decision by the ISRB. *State v. Delbosque*, 195 Wn.2d 106, 456 P.3d 806 (2020) also illustrates the Washington Supreme Court has aggressively reviewed a trial court decision under RCW 10.95.035 to determine if the court truly applied the *Miller* factors and if the crime and the offender were permanently incorrigible and irretrievably depraved. The Supreme Court recognizes that irreparable corruption is rare. *State* v. *Bassett*, 192 Wn.2d 67, 89 (2018). The prohibition on juvenile life without parole sets a high standard for concluding that a juvenile is permanently incorrigible. *State v. Delbosque*, 195 Wn.2d 106, 118 (2020). Under the ISRB regime, Fisher does not get the benefit of this presumption even though he committed a lesser crime.

Even offenders convicted of first degree murder, rather than aggravated first degree murder, receive lower sentences than Curtis Fisher. In *In re Personal Restraint of Dodge*, 198 Wn.2d 826 (2022), the trial court convicted David Dodge of first degree murder, rape and burglary for crimes committed when he was 17 years old. The superior court sentenced Dodge under the sentencing reform act and meted a sentence of fifty years in prison. The Department of Corrections will need to release Dodge after five more years regardless of his rehabilitation. In five more years, Curtis Fisher will have

spent fifty years in prison, with perhaps no end in sight, despite committing a lesser crime.

The State blames Curtis Fisher for failing to identify at what time his sentence became grossly disproportionate. The difficulty in identifying the exact year, month, day, hour, or second at which time the sentence passed from being constitutional to unconstitutional should not detract from a ruling that 44 years is disproportionate. At some time before the present, the sentence passed that illegitimate line.

TIME BAR

The State erects many barriers to Curtis Fisher's resentencing by the superior court. First, the State argues that a time bar precludes any relief. Second, the State contends that Fisher enjoys an alternate remedy. Third, the State maintains that Fisher has suffered no prejudice because he cannot prove the 1979 Yakima County Superior Court judge would have imposed any different sentence other than a maximum life sentence with the possibility of parole. Fourth, the State insists that Fisher challenges a maximum penalty, which penalty is not subject to review for disproportionate sentencing. Fifth and finally, the State contends Fisher seeks an impermissible determinative sentence. I address these obstacles in such order.

Most, if not all obstacles, collapse when considering that they apply only to challenges based on the offender's youth. Curtis Fisher challenges his life sentence not only on the basis of his youth but on the independent grounds of the gross disproportionality of his sentence to those convicted of second degree murder since 1984

and the distorted beneficial treatment granted those convicted of aggravated first degree murder over those convicted of second degree murder.

Curtis Fisher filed his motion to vacate sentence in 2020, forty-one years after his sentencing. The State thus contends the limitation period bars the motion.

The personal restraint petition time bar lies in RCW 10.73.090. The statute declares:

> (1) No petition or *motion* for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
>
> (2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, *a motion to vacate judgment*, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(Emphasis added.) A related statute lists some exceptions to the one-year limitation period, one of which exception Curtis Fisher forwards. RCW 10.73.100 reads:

> The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:
>
> . . . .
>
> (6) There has been a *significant change in the law, whether substantive or procedural*, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that *the change in the law is to be applied retroactively*, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

(Emphasis added.) The statutory exception requires that the change in law apply retroactively. Note that RCW 10.73.100 does not require that the collateral attacker file his motion or petition within one year of the significant change in law.

Curtis Fisher contends he fulfills the change in law exception because *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017), reformed the law and the Washington Supreme Court has declared the teachings of *Houston-Sconiers* to apply retroactively. *In re Personal Restraint of Ali*, 196 Wn.2d 220, 226 (2020). I agree. I also conclude that *State v. Haag*, which deems Fisher's forty plus years and counting indeterminate unconstitutional, should apply retroactively because of its substantive ruling prohibiting a life sentence for youthful offenders.

In *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017), our Supreme Court held that the Eighth Amendment, *Miller v. Alabama*, and *Montgomery v. Louisiana* prohibit a court from imposing any criminal sentence on a juvenile without the court considering the juvenile's transient immaturity. The decision demanded that the sentencing court recognize children as different. In effectuating this substantive standard, the Washington Supreme Court announced two new procedural rules. First, the sentencing court "must consider mitigating qualities of youth at sentencing." *State v. Houston-Sconiers*, 188 Wn.2d 1, 21 (2017). These mitigating qualities include a juvenile defendant's age, immaturity, impetuosity, and failure to appreciate risks and consequences. Second, the sentencing court "must have discretion to impose any sentence below the otherwise

applicable" sentencing range and any sentencing enhancement. *State v. Houston-Sconiers*, 188 Wn.2d 1 21 (2017).

In 2020, the Washington Supreme Court, in companion cases *In re Personal Restraint of Ali*, 196 Wn.2d 220 (2020) and *In re Personal Restraint of Domingo-Cornelio*, 196 Wn.2d 255 (2020) addressed whether the requirements of *Houston-Sconiers* apply retroactively on collateral review. The court held that *Houston-Sconiers* constituted a significant and material change in the law that required retroactive application. Thus, a personal restraint petitioner could raise a *Miller* and *Houston-Sconiers* violation despite filing the petition more than one year after sentencing.

Nothing in either *Ali* or *Domingo-Cornelio* suggested that any of the rulings in *Houston-Sconiers* did not enjoy retroactive effect. In *In re Personal Restraint of Ali*, the Washington high court applied retroactively all components of the *State v. Houston-Sconiers* ruling to offenders such as Curtis Fisher, sentenced before issuance of the Supreme Court's decision in *Houston-Sconiers*. *Houston-Sconiers* followed *Miller v. Alabama* and its progeny, which centered on the substantive guaranty of the Eighth Amendment: punishment proportionate to culpability. To that end, the court must, on a showing of prejudice, resentence the offender and, on resentencing, consider all mitigating circumstances related to the defendant's youth.

In steps that thwart the promise of *Miller v. Alabama*, the Washington Supreme Court has since characterized *Houston-Sconiers* as entailing procedural and substantive aspects. In turn, the state high court has limited retroactivity to the substantive ruling in

Houston-Sconiers, despite RCW 10.73.100(6) referencing both procedural and substantive changes in the law.

The Washington Supreme Court, in *In re Personal Restraint of Forcha-Williams*, 200 Wn.2d 581, 520 P.3d 939 (2022), dissected the *Houston-Sconiers* ruling into one substantive rule that bars standard adult SRA ranges as being disproportionate punishment for juveniles who possess diminished capacity. In turn, the high state court identified and separated from the substantive rule two *Houston-Sconiers* procedural rules. First, sentencing courts must consider the mitigating qualities of youth. Second, courts must possess discretion to impose sentences below what the SRA mandates. The court characterized a procedural *Houston-Sconiers* violation as not necessarily causing the offender prejudice.

In Curtis Fisher's appeal, the State argues that *In re Personal Restraint of Forcha-Williams* held that a procedural *Houston-Sconiers* violation is not subject to retroactivity. But the Supreme Court did not venture that far. The Supreme Court instead, in a 5 to 4 ruling, only declared that a procedural violation does not constitute per se prejudice. *Forcha-Williams* did not hold that a procedural violation cannot be applied retroactively. The Supreme Court dismissed Derrius Forcha-Williams' personal restraint petition because, despite the State conceding *Houston-Sconiers* procedural violations, Forcha-Williams failed to establish that, if the sentencing court had considered the *Miller* mitigating factors and exercised its unlimited discretion, it would have imposed a lower sentence. In part, the Supreme Court relied on the harsh words uttered by the superior

court during the sentencing hearing and the court having mentioned Forcha-Williams' youth as suggesting a resentencing would not change the outcome.

Assuming *In re Personal Restraint of Forcha-Williams* stood for the principle that procedural rules arising from *Houston-Sconiers* do not survive the one-year time bar, the majority ruling must be criticized. The symbiotic procedural and substantive aspects of *Houston-Sconiers* do not subsist without one another. The procedural aspect of the decision lacks any importance but for the substantive aspect of gaining a lower sentence. The substantive aspect cannot be fulfilled without the procedure of reviewing evidence of immaturity and possessing discretion to resentence based on juvenile immaturity. Under state law, courts do not usually apply a new procedural rule retroactively. But, if a substantive constitutional rule coincides with a crucial procedural mechanism that implements that substantive rule, that procedural mechanism must also apply retroactively. *In re Personal Restraint of Ali*, 196 Wn.2d 220, 240 (2020).

The four dissenters, in *In re Personal Restraint of Forcha-Williams*, observed that the majority strayed from the court's decision, in *In re Personal Restraint of Domingo-Cornelio*, that a PRP petitioner shows actual and substantial prejudice by identifying a violation of only one of the *Houston-Sconiers* mandates. In fact, the dissent in *Domingo-Cornelio* had faulted the majority for recognizing the importance of both of the dual mandates. The dissent, in *Forcha-Williams*, also concluded that Derrius Forcha-Williams showed prejudice because, although the resentencing court referred to Forcha-Williams

as a young man, the court never explored the implications of Forcha-Williams' immaturity, impetuosity, and inability to understand risks.

In re Personal Restraint of Carrasco, 1 Wn.3d 224 (2023) followed *In re Personal Restraint of Forcha-Williams*. Erik Carrasco Ramos served a 93-year sentence imposed in 2012 without any consideration of his youth. In April 2010, while a gang member and at the age of 17, he committed second degree murder, four counts of first degree assault, and second degree unlawful possession of a firearm. In 2018, Carrasco filed a personal restraint petition that sought resentencing. The Supreme Court accepted the State's contention that Carrasco enjoyed an alternative remedy to resentencing under RCW 9.94A.730(1) due to the statutory presumption of release by the ISRB after serving twenty years of confinement. In doing so, the court followed *Forcha-Williams*' distinction between the procedural and substantive aspects of *Houston-Sconiers*.

Three dissenters in *In re Personal Restraint of Carrasco* wisely criticized the attempt to distinguish between the procedural requirements and substantive requirements of *Houston-Sconiers*. Both requirements must be applied retroactively because the two intertwine. A court cannot determine whether a youth offender's sentence substantively violates the cruel punishment clause without engaging in the procedure of analyzing the *Miller* factors and then exercising discretion to resentence the youth. The procedures of reviewing the *Miller* factors and exercising resentencing discretion serve no purpose except to enforce the promises and protections of the cruel punishment clause. *Houston-Sconiers* never separated its rulings into distinct categories for purposes of retroactivity.

The erroneous rulings in *In re Personal Restraint of Carrasco* and *In re Personal Restraint of Forcha-Williams* do not harm Curtis Fisher. Despite the imperative of this intermediate appellate court following Washington Supreme Court precedent, the State fails to recognize that Fisher, although accusing his sentencing court of violating the procedures established in *Houston-Sconiers*, principally relies on the substantive rule announced in *Houston-Sconiers*. Fisher's 1979 sentencing court breached the cruel punishment clause when imposing a standard adult sentence and a de facto life sentence on a juvenile with diminished capacity.

Curtis Fisher's argument also relies on the new substantive principle announced in *State v. Bassett*, 192 Wn.2d 67 (1998) that imposing a life sentence on a youth without a finding of irreparable depravity constitutes cruel punishment. The *Bassett* rule, as a substantive rule, must also apply retroactively in favor of Fisher. Finally, Fisher relies on a combination of the *Bassett* and *Houston-Sconiers* substantive rulings to the effect that he need not show rehabilitation in order to gain release from prison.

The State fails to recognize that Curtis Fisher's assertion of cruel punishment also does not rest solely on his youth at the time of his crime. Fisher also emphasizes the quirks in the pre-SRA sentencing law when compared to sentencing reform act statutes. His 1979 sentence of life imprisonment violates the grossly disproportionate element of the cruel punishment clause of the Washington Constitution. His sentence only recently became a de facto life sentence because of the running of time without release from incarceration.

If the petitioner asserts multiple claims after the one-year period expires and if at least one of the claims is time barred, the petition must be dismissed. *In re Personal Restraint of Williams*, 200 Wn.2d 622, 632, 520 P.3d 933 (2022). Although Curtis Fisher advances a handful of nuanced arguments, they all derive from the principal assertion that his sentence violates Washington's cruel punishment clause. The State does not characterize Fisher's motion as a mixed petition.

To repeat, Curtis Fisher also asserts that his sentence now amounts to a grossly disproportionate sentence and thus is unconstitutional regardless of the sentence being imposed while a youth. A challenge based on cruel and unusual punishment presents a challenge to an illegal sentence, which is not subject to any limitation period for postconviction relief. *State v. Ragland*, 812 N.W.2d 654, 656 (Iowa 2012).

ALTERNATIVE REMEDY

The State seeks to defeat Curtis Fisher's motion with the availability of an alternative remedy. A court will grant relief by a personal restraint petition only if other remedies available to the petitioner are inadequate under the circumstances. RAP 16.4(d).

The State argues that Washington's *Miller*-fix statute, RCW 9.94A.730, affords an adequate remedy because it allowed Curtis Fisher to petition for early release after serving twenty years of his lifetime sentence. Not true.

RCW 9.94A.730 declares:

> (1) Notwithstanding any other provision of this chapter, *any person convicted of one or more crimes committed prior to the person's eighteenth birthday* may petition the *indeterminate sentence review board* for early release after serving no less than twenty years of total confinement, provided the person has not been convicted for any crime committed subsequent to the person's eighteenth birthday, the person has not committed a disqualifying serious infraction as defined by the department in the twelve months prior to filing the petition for early release, and the current sentence was not imposed under RCW 10.95.030 [aggravated first degree murder] or 9.94A.507 [certain sex offenders].
>
> . . . .
>
> (3) . . . The board shall order the person released under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, *it is more likely than not that the person will commit new criminal law violations if released*. The board shall give public safety considerations the highest priority when making all discretionary decisions regarding the ability for release and conditions of release.
>
> . . . .
>
> (6) An offender whose petition for release is denied 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.

(Emphasis added.)

At the outset, RCW 9.94A.730 only provides relief to youthful offenders confined under the sentencing reform act, Chapter 9.94A. RCW. In recognizing such, the ISRB does not accept petitions for early release from pre-SRA offenders such as Curtis Fisher, who already fall under the ISRB's jurisdiction.

Curtis Fisher has remained imprisoned for over four decades due to the ISRB's application of RCW 9.95.100, which unlike the *Miller*-fix statutes, does not afford a presumption of release. Instead, the ISRB decides an offender's fate based on a variety

of reasons, and such decisions entail no more than informed predictions of best serving correctional purposes. *In re Dyer*, 157 Wn.2d 358, 363, 139 P.3d 320 (2006).

PREJUDICE

The State presents one more excuse not to follow the promise of *Miller* by arguing that Curtis Fisher fails to show that, if the 1979 sentencing court had considered the mitigating factors of youth, the judge would have imposed a lesser maximum sentence of life imprisonment. This argument places an undue and unfair burden on someone subjected to an unconstitutional sentence. The Kafkaesque argument fails to recognize that no judge in 1979 considered brain science not developed until this century. The argument also fails to note that a reasonable judge, who now understands brain science, would likely impose a lower sentence on Fisher after performing his or her constitutional duty to thoroughly consider the immaturity, impetuosity, recklessness, and tragic background of the seventeen-year-old Fisher.

To be awarded relief, a personal restraint petitioner must show, by a preponderance of evidence, actual and substantial prejudice by the constitutional error. *In re Personal Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 267 (2020). Thus, Fisher must show his initial sentencing more likely than not would have been shorter had the alleged error not occurred. *In re Personal Restraint of Meippen*, 193 Wn.2d 310, 316, 440 P.3d 978 (2019). Actual and substantial prejudice is not limited to circumstances when defense counsel makes an argument not legally available and the sentencing court explicitly states that it cannot deviate from sentencing rules. *In re Personal Restraint of*

Domingo-Cornelio, 196 Wn.2d 255, 267 (2020). The movant establishes sufficient prejudice if the sentencing court failed to consider mitigating factors related to youthfulness. *In re Personal Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 268 (2020).

Under other settings of constitutional violations, such as ineffective assistance of counsel, the defendant, to establish prejudice, must "prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). This principle suggests that the accused must establish that he likely would have been acquitted. Nevertheless, the standard is lower than a preponderance standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *State v. Gregory*, 192 Wn.2d 1, 22, 427 P.3d 621 (2018). A court could lack confidence in the outcome without concluding that the defendant likely would have been acquitted without the constitutional breach.

Contrary to other constitutional claims, no Washington court has modified the standard applied to personal restraint petition challenges to sentencing by stating that the standard is less than a preponderance. No court has ruled that the reviewing court need only maintain an undermined confidence in whether the sentencing court would have imposed the same sentence. I discern no valid reason to decline to impose the undermined confidence standard in the setting of cruel and unusual punishment clause

challenges to lengthy juvenile sentences. The cruel and unusual punishment clause holds as much importance as other constitutional provisions. Regardless, I need not employ the lesser standard to rule in Curtis Fisher's favor.

The three dissenters, in *In re Personal Restraint of Carrasco*, 1 Wn.3d 224 (2023), sagely noted the need for trial courts, not the ISRB, to resentence all youth, even those sentenced as an adult. Every personal restraint petitioner shows prejudice when his or her sentencing court failed to sentence under the *Miller* factors and failed to comply with the procedural and substantive mandates of *Houston-Sconiers*. Therefore, a reviewing court cannot know if the sentencing court appropriately imposed an adult standard range on the juvenile offender. A reviewing court cannot be sure if the original sentence was unconstitutionally disproportionate unless a resentencing court follows the dual mandates of *Houston-Sconiers*.

In *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017), the Washington Supreme Court, without extensive analysis, held that two offenders suffered prejudice even though defense counsel at sentencing argued mitigating factors based on youth. The Washington Supreme Court remanded the two combined cases for resentencing.

In *In re Personal Restraint of Ali*, 196 Wn.2d 220 (2020), the Washington Supreme Court held that the offender demonstrated actual and substantial prejudice. Seventeen-year-old Said Ali committed numerous robberies and a first degree assault. The State requested a high-end standard sentence of 390 months. Ali's defense counsel requested an exceptional downward sentence of ten years. Counsel emphasized that Ali

was a young adolescent at the time of the crimes and little would be gained by crushing his hope and spirit by sending him away for two lifetimes, which the State sought. Ali presented letters and testimony from members of his community, who referenced his age, inexperience, and susceptibility to peer pressure. The sentencing judge ruled that she lacked the discretion to impose an exceptional sentence downward based on those mitigating factors.

In *In re Personal Restraint of Ali*, the Washington Supreme Court held that Said Ali had demonstrated prejudice by a preponderance of the evidence. The sentencing judge imposed 312 months, the minimum sentence she had discretion to impose under the SRA. The high court remanded the case for resentencing. In *In re Personal Restraint of Domingo-Cornelio*, 196 Wn.2d 255 (2020), the Supreme Court also remanded for resentencing because the sentencing judge had ordered the lowest possible sentence within the standard range.

I contrast *State v. Houston-Sconiers* and *In re Personal Restraint of Ali* with *In re Personal Restraint of Meippen*, 193 Wn.2d 310 (2019). In the latter case, the state high court held that sixteen-year-old Time Meippen failed to show the likelihood of a lower sentence because the sentencing court imposed a sentence in the high-end of the standard range despite recognizing the court had discretion to order a lower sentence within the standard range. Defense counsel argued for a sentence in the low-end of the standard range because the youth's age prevented him from understanding the full nature of his

robbing a store and shooting the clerk. The sentencing court deemed Meippen's actions to be cold and calculated.

The ruling in *Personal Restraint of Meippen* should be criticized. Although Time Meippen's sentencing court held discretion to impose a lower sentence and instead imposed a higher sentence in the standard range, the sentencing court still lacked any knowledge about juvenile brain development studies that scientists released only after Meippen's sentencing. Reviewing the brain studies should have significantly impacted the sentencing judge if she had sentenced Meippen years later. Just because the sentencing judge imposed a high sentence, despite discretion to the contrary, does not mean the court would not have significantly shortened the sentence after scientific enlightenment, after knowing it must consider the immaturity of the teenager when sentencing, and after understanding it must exercise discretion in possibly granting an exceptional downward sentence. A reading of recent case law could have and should have convinced the sentencing judge that it possessed complete discretion in sentencing based on new data of teenage brain development. On resentencing, the judge would have had available for the first-time instructions from the United States Supreme Court and Washington Supreme Court from the last two decades that impose a mandatory duty on the sentencing court to seriously consider the lack of maturity of a seventeen-year-old when sentencing.

The Washington Supreme Court's summary dismissal of Time Meippen's petition, based on a high sentence and based on scattered comments from the sentencing judge,

downplays the important lessons taught by United States Supreme Court in *Montgomery v. Louisiana*, 577 U.S. 190 (2016); *Miller v. Alabama*, 567 U.S. 460 (2012); *Roper v. Simmons*, 543 U.S. 551 (2005); and *Graham v. Florida*, 560 U.S. 48 (2010). The ruling against Meippen curbs the imperative created by the United States Supreme Court and the Washington Supreme Court to seriously consider the youth of the offender. The denial of Meippen's petition demeans the ability of Washington's astute superior court judges to change their minds about sentencing when faced with compelling science data and instructions from higher courts. The teachings of *Miller v. Alabama* and its United States Supreme Court and Washington Supreme Court progeny did not simply demand quantitatively changed sentences by a few months or a few years. The decisions reshaped the whole landscape of juvenile sentencing and demanded an entirely new approach to sentencing. I underwent a sea change in attitude toward juvenile sentencing when studying the scientific literature and reading the United States Supreme Court decisions.

Those facts critical to the Washington Supreme Court's denial of Time Meippen's petition are absent in Curtis Fisher's sentencing. Fisher's defense counsel, during the 1979 sentencing, never argued mitigating factors based on youth. Fisher's sentencing court did not impose a high sentence within a standard range. Instead, the court merely followed rote practice.

In re Personal Restraint of Ali and *In re Personal Restraint of Meippen* direct the reviewing court to decide whether the initial sentence would have been lower by

attempting to divine what the earlier sentencing judge would do. We do not resolve the petition by asking what the typical judge would do. Nor do we ask what the resentencing judge should do, as opposed to what the judge would likely do. One might wonder if the reviewing court should consider the reputation of the sentencing judge as a harsh or lenient sentencer, when the appeals court grants or denies the petition for resentencing. More importantly in this petition, one might wonder whether we should speculate what Curtis Fisher's initial sentencing judge would do when the judge has been dead for eighteen years and any resentencing will proceed before another judge.

Curtis Fisher's sentencing judge was Yakima County Superior Court Judge Bruce Hanson. Judge Hanson retired from the bench in 1990 and died in 2006. I many times appeared before and I tried one lengthy trial before Judge Hanson. Judge Hanson was as patient, gracious, and understanding as any judge I appeared before. He would accept and understand the vagaries of being a teenager living away from his parents. He also would follow Supreme Court instructions to consider a child's immaturity when sentencing. Any suggestion to the contrary demeans my memory of Judge Hanson.

Of course, a skeptic would consider my prediction of rulings by Judge Bruce Hanson to be speculative. One could also accuse me of catering to my personal views of another rather than relying on unbiased evidence of Judge Hanson. But any claim of speculation and bias illustrates the inanity of requiring the offender to prove to this court, on a preponderance of evidence standard, forty-five years after sentencing that the

sentence would have been different if the sentencing judge knew of the scientific data and the change in the law.

We can be certain that Judge Bruce Hanson did not consider the youth of Curtis Fisher when sentencing Fisher in 1979 because no judge entertained such a consideration then. Judge Hanson exercised no discretion at all, but instead followed the mandatory indeterminate sentencing statutes.

The State faults Curtis Fisher for failing to procure a transcript of the 1979 sentencing hearing or affidavits from someone present at the hearing. I question whether any transcript can be procured or whether anyone present at the hearing would have a memory of what occurred 45 years ago. Since the State seeks to establish that the court considered the *Miller* factors during the 1979 hearing, contrary to history establishing that courts never did so in 1979, it seeks to show the remarkable and the positive of some conduct. Although Fisher may have the burden of establishing prejudice, the State should bear the burden of showing that the trial court specifically contemplated a lower sentence based on Fisher's teendom since the State seeks to show the affirmative of a fact. *Gillingham v. Phelps*, 11 Wn.2d 492, 501, 119 P.2d 914 (1941). Of course, the 1979 superior court, even if it heard argument about Fisher's youth, would not have allowed the argument to influence his decision because, under indeterminate sentencing, the court only established a maximum sentence.

The State emphasizes that the superior court in its 2021 ruling granting a resentencing hearing never found actual and substantial prejudice by the alleged

sentencing error. Common sense dictates that all sentencing courts in 1979 did not consider the offenders youth such that error is automatic and prejudice established. Common sense dictates that the 1979 sentencing court would have issued a lower sentence to preclude a minor from a lifetime, let alone forty-four years in prison. Anyway, the superior court has yet to even conduct its resentencing hearing and any failure by the superior court to find prejudice can be addressed on remand.

CHALLENGE OF MAXIMUM SENTENCE

The State contends that Curtis Fisher's petition challenges the maximum sentence of a lifetime in prison and under Supreme Court precedent the maximum sentence is not subject to review under a categorical bar analysis or the *Fain* proportionality test. The State cites *In re Personal Restraint of Williams*, 200 Wn.2d 622 (2022).

In 2001, Li'Anthony Williams, at age 17, pled guilty to assault in the second degree with sexual motivation and was sentenced under the indeterminate sentencing scheme for sex offenders. As of 2017, the ISRB had not found Williams to be releasable. Williams filed a personal restraint petition on the basis that his maximum term of a life sentence, under the sexual crime indeterminate sentencing scheme, was unconstitutional. The State argued that his petition was time barred under the one-year rule found in RCW 10.73.100(6). Williams responded that he based his claim on *Houston-Sconiers*, which must be applied retroactively.

The Supreme Court, in *In re Personal Restraint of Williams*, dismissed the petition as time barred because Li'Anthony Williams' sentence did not violate the *Houston-*

Sconiers substantive rule. Under the 2001 indeterminate sentencing scheme for sex offenders, the court imposes the statutory maximum term and sets the minimum term within the standard range for the offense. RCW 9.94A.507(1). After serving the minimum term, the offender remains in DOC custody until the ISRB determines the release date. The Board grants release if it determines the offender is unlikely to commit another sex offense if released.

Curtis Fisher's predicament diverges from the situation of Li'Anthony Williams. Williams' petition impacted a current indeterminate sentencing scheme under the SRA. Just as important, Fisher was sentenced twenty-two years before the sentencing of Williams. With the passage of forty-four years, Fisher's sentence has transformed into a de facto life sentence in violation of *Miller v. Alabama*, *State v. Bassett*, and *State v. Houston-Sconiers*. Under the State's theory that the maximum length in an indeterminate sentence cannot be challenged, the State could impose indeterminate life sentences for any and all crimes and thereby avoid the cruel punishment clause in total.

INDETERMINATE SENTENCE INTO DETERMINATE SENTENCE

Through his cruel punishment clause argument, Curtis Fisher seeks a ruling imposing a deadline for his release, which deadline has already passed or will arrive any day. Thus, according to the State, Fisher in essence asks for a determinative sentence. Based on *In re Personal Restraint of Forcha-Williams*, 200 Wn.2d 581 (2022), the State argues that the superior court may not convert an indeterminate life sentence to a determinate sentence for a limited number of years.

In 2015, a jury found Derrius Forcha-Williams guilty of second degree rape for an incident that occurred when he was 16 years old. Under two SRA provisions, RCW 9.94A.507(1) and (3)(b), nonpersistent offenders convicted of rape in the second degree must be sentenced to an indeterminate sentence of the maximum statutory sentence for the offense and a minimum term within the standard range for the offense. The indeterminate sentences for rape and other crimes with a sexual motivation run contrary to the determinative sentences under the SRA. This factor alone distinguishes *Forcha-Williams* from Curtis Fisher's case. The superior court sentenced Forcha-Williams to an indeterminate sentence with a minimum term of 120 months and a maximum term of life. In a collateral attack, the Court of Appeals ruled that the sentencing court possessed discretion to impose a determinate sentence to an indeterminate sentence.

The Washington Supreme Court, in a 5 to 4 decision, disagreed with the Court of Appeals in *In re Personal Restraint of Forcha-Williams*. The court read RCW 9.94A.507(1) and (3)(b) to demand an indeterminate sentence. The court then wrote that its ruling in *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017) did not grant the superior court discretion to alter an indeterminate sentence because such action would rely on the procedural aspect of the *Houston-Sconiers* decision. The maximum amount of the sentence did not raise disproportionality concerns because the offender might be released before serving the entire term.

The Supreme Court wrote in *Forcha-Williams* that "to the extent 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." *In re Personal Restraint of Forcha-Williams*, 200 Wn.2d 581, 598 (2022). The court cited no case law for this proposition. The court did not struggle with the question of what happens if the juvenile serves under a maximum of a lifetime sentence and never gains release. The court did not face a sentence that had aged into a de facto life sentence. Derrius Forcha-Williams had only served seven years at the time of Supreme Court review. An offender kept indefinitely in prison under an indeterminate sentence suffers cruel punishment as much as one who has a grossly disproportionate long determinate sentence.

The four dissenters in *In re Personal Restraint of Forcha-Williams* noted that Derrius Forcha-Williams did not challenge the maximum term of his sentence, but rather his minimum term. So the majority's analysis was immaterial. The dissenters then faulted the majority for ignoring the court's precedent in *In re Personal Restraint of Domingo-Cornelio*, 196 Wn.2d 255 (2020) and *In re Personal Restraint of Ali*, 196 Wn.2d 220 (2020). Regardless of the disregard of *Ali* and *Domingo-Cornelio*, Forcha-Williams complained of both a substantive violation and procedural violation of *Houston-Sconiers*.

When considering that Curtis Fisher argues he has already served a disproportionate sentence and should be released, Fisher does not seek a determinative

sentence. A determinative sentence imposes a date certain in the future for release. Fisher deserves release now.

Derrius Forcha-Williams' request violated a current statute. Although the 1979 court sentenced Fisher under an indeterminate sentencing scheme, that scheme has been repealed. The sentencing reform act now demands determinative sentences for second degree murder. Thus, Fisher's request does not violate current law.

OTHER STATE CONTENTIONS

The State argues that the retroactivity rules announced in *Houston-Sconiers* do not apply to pre-SRA sentences. *In re Personal Restraint of Brooks*, 197 Wn.2d 94 (2021), a rare unanimous Supreme Court opinion on the subject of juvenile sentencing, defeats this contention. The State's argument would also implicate the equal protection clause since no rational basis could distinguish between applying *Houston-Sconiers* to juveniles sentenced before July 1, 1984 and those sentenced thereafter.

The State contends that the superior court lacks inherent authority to sentence outside the confines of the statutes. But the State does not explain why a superior court cannot grant a new sentencing hearing based on constitutional rulings by the United States Supreme Court and the Washington Supreme Court. Both courts directed sentencing courts to resentence juvenile offenders. Superior courts must possess authority to immediately release prisoners subject to a grossly disproportionate sentence.

RCW 10.95.035 directs resentencing of those convicted of aggravated first degree murder. As already mentioned, denying one convicted of second degree murder such a

resentencing hearing would violate the Washington State cruel punishment clause and equal protection clause. A superior court has both the power and the duty to correct an erroneous sentence. *In re Personal Restraint of Carle*, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). The State in essence argues that Washington lower courts cannot follow a United States Supreme Court constitutional directive or a Washington Supreme Court constitutional imperative if no Washington statute authorizes the lower court to do so.

In human terms, Curtis Fisher deserves a lengthy, if not lifetime sentence, for the killing of another human being. Fisher has often not acted admirably in prison, but he is not unique among those imprisoned in their teens. Regardless of Fisher's behavior while maturating in the department of corrections, the cruel punishment clause compels government and society to act nobly and with mercy. A lengthy sentence of despair, degradation, and dehumanization imposed on Fisher does not serve the purposes behind punishment of crime.

The ultimate value behind the United States Constitution's Eighth Amendment cruel and unusual punishment clause is the affirmation of the dignity of humankind. *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958). The state must accept the human attributes even of those who commit serious crimes. *Graham v. Florida*, 560 U.S. 48, 59 (2010). Curtis Fisher, an immature teenager, disrespected the dignity of man and the value of life. Society,

nonetheless, need not retaliate against Fisher by disrespecting his dignity and devaluing the entirety of the rest of his life.

I respectfully dissent.

Fearing, J.

APPENDIX B

ISRB Decision and Reasons
December, 2021

STATE OF WASHINGTON

DEPARTMENT OF CORRECTIONS
INDETERMINATE SENTENCE REVIEW BOARD

P.O. BOX 40907, OLYMPIA, WA 98504-0907

DECISION AND REASONS

NAME:	FISHER, Curtis
DOC #:	266558
FACILITY:	Monroe Correctional Center- TRU
DATE OF HEARING:	December 8, 2021
TYPE OF HEARING:	Lt JuvBrd
PANEL MEMBERS:	TaTeasha Davis & Elyse Balmert
FINAL DECISION DATE:	December 21, 2021

This matter came before the above named Board Members of the Indeterminate Sentence Review Board (ISRB or the Board) for a release hearing in accordance with RCW 9.94A.730 **or** RCW 10.95.030. In preparation for the hearing, the Board reviewed Mr. Fisher's ISRB file. Mr. Fisher appeared in person and was represented by attorney Jeffrey Meyers. Testimony was provided by Department of Corrections (DOC) Classification Counselor (CC) Andre Poirier.

October 6, 2021 Yakima County Prosecuting Attorney Joseph A. Brusic requested the Board allow time for a release decision to be made by the Court of Appeals, Division III before holding a .100 Hearing and that any release decision should be made after resentencing.

LAST BOARD DECISION:

The Board last met with Mr. Fisher and his attorney for a .100 hearing on October 19, 2021. At that tie a continuance was granted as the Board accepted Mr. Fisher's and his attorney's request for a hearing under RCW 9.94A.730 (Juvenile Board Hearing).

CURRENT BOARD DECISION:

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.

NEXT ACTION:

Schedule a .100 hearing ASAP, March 2022. Mr. Fisher will be past his PERD.

REASONS FOR DECISION:

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 9.94A.730 **or** RCW 10.95.030 the Board finds Mr. Fisher is more likely than not to commit a new crime if released with conditions that are designed to help better prepare him for a successful re-entry into society. Mr. Fisher is determined to be not releasable based on the following:

- Mr. Fisher has not completed substance abuse treatment since his last relapse in 2019
- He has been assessed by PCL-R as High range for psychopathy, RLC-High Drug, VRAG- Bin 8 of 9 indicating that he is high risk to reoffend. Dr. Robtoy noted, "The risk assessment tools used in this evaluation consider Mr. Fisher a moderate high risk for violent recidivism."
- Dr. Robtoy recommended, "Mr. Fisher is less likely to engage in criminal activity in the presence of strong family and positive per connections." However, Mr. Fisher testified that his strongest peer support comes from his former drug dealer girlfriend and his ex-wife who assisted him in smuggling drugs into the prison. Mr. Fisher does not have adequate pro-social community support.
- Mr. Fisher has incurred 166 serious infractions over his prison term which illustrates his inability to cooperate with supervision and be successfully supervised in the community.

RECOMMENDATIONS:

Mr. Fisher should participate and complete chemical dependency treatment and create and detailed release plan.

JURISDICTION:

RCW 9.94A.730, enacted in 2014, allows offenders who were under the age of 18 when they committed their crime(s) and were sentenced as adults to petition the Board for consideration of early release consideration after serving no less than 20 years of total confinement. Mr. Fisher's petition resulted in the hearing on this date.

Mr. Fisher is under the jurisdiction of the Board on a September 18, 1979 conviction of Murder in the Second Degree in Yakima County Cause #79-1-00613-6. His time start is September 18, 1979. His minimum term was set at 141 months from a Sentencing Reform Act (SRA) range of 144 to 192 months. His maximum term is Life. He has served approximately 507 months plus 36 days of jail time credit.

OFFENSE DESCRIPTION:

According to file material Mr. Fisher, at the age of 17 along with two accomplices murdered an adult male victim.

PRIOR RISK RELATED/ CRIMINAL CONDUCT:

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.

PROGRESS/BEHAVIOR:

This is Mr. Fisher's first Board hearing under RCW 9.94A.730.

CC Andre Poirier provided an overview of Mr. Fisher's prison behavior and progress. Mr. Fisher was not programming, nor was he employed at the time of the hearing. He participated in Substance Abuse Intensive Day Treatment 2.5 for one hour. It appears that his hearing impairment interfered with his ability to participate in treatment; however, there is a current referral for Substance Abuse Intensive Day treatment. Mr. Fisher has incurred 166 serious infractions over the course of his prison term and 19 minor infractions. There is a significant pattern of drug use and violence/intimidation in his infractions. His last major infraction was received in 2019 which suggest his behavior is improving. His last minor infraction was received in 2017. Mr. Fisher testified that his serious infractions decreased when he became inactive in his gang which occurred in August 2017. Mr. Fisher has significant hearing impairment that has caused some difficulty in completing programing, but Mr. Fisher was able to hear and communicate effectively for the hearing. He plans to either release to Lacy, Washington and live in his travel trailer, or release to Monroe to a transitional home.

It should be noted that two of the women Mr. Fisher stated will provide him support in the community are his current girlfriend and ex-wife. His current girlfriend, Rebecca Higgins, is the former drug dealer of his old cellmate. He met her through his cellmate. He testified that they've been in a relationship for two years and she completed her Drug Offender Sentencing Alternative (DOSA) requirements. He also stated she's been clean and sober since completing DOSA, but this Board member is unable to verify the veracity of his statement because she has not been subject to drug testing for over a year. Mr. Fisher's ex-wife also serves as his community support, they speak on a weekly basis. When asked whether his ex-wife was complicit in helping him smuggle drugs into the prison, he replied, "Yes."

When asked about his Index Offense Mr. Fisher testified that it was a drug related crime. The victim owed him money and so he and two accomplices decided to "address the issue the way we thought it needed to be handled". Mr. Fisher described his crime in a very matter of fact

manner. He testified that he was smoking marijuana that day but was not able to provide any depth of insight about what why he committed the crime.

Mr. Fisher has a very long history of drug and alcohol abuse and it's paramount that he receives the highest level of chemical dependency treatment prior to release into the community. He reported his last use of Heroine and Methamphetamine was February 2019. Mr. Fisher testified that he completed chemical dependency five times in prison. The most recent completion was February 1998. He attempted chemical dependency in 2019 but could not continue due to hearing problems. Since then, he's been supplied with a hearing aide.

TD:TS

December 16, 2021

cc: MCC-TRU
Jeffrey Meyers
File

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
INDETERMINATE SENTENCE REVIEW BOARD
P.O. BOX 40907, OLYMPIA, WA 98504-0907

TO: Full Board

FROM: TaTeasha Davis (Teresa)

RE: FISHER, Curtis DOC # 266558

Panel recommends: Not releasable – Re-petition in 24 months

Next action: Schedule .100 Hearing ASAP, March 2022.

Agree	Disagree
TaTeasha Davis 12-21-2021 **Elyse Balmert 12-21-2021** **Lori Ramsdell-Gilkey 12-21-2021** **Jeff Patnode 12-21-2021** **Kecia Rongen 12-21-2021**	

Schmidt, Teresa M. (DOC)

From: Schmidt, Teresa M. (DOC)
Sent: Monday, December 27, 2021 4:20 PM
To: Poirier, Andre A. (DOC); Mills, Sonia J. (DOC); Flick, Jeffrey E. (DOC); jeff@jsbrownlaw.net; DOC DL MCC RECORDS; DOC EOSR; DOC Victim Services; Hanson, Shelly A. (DOC); Lopez, Albert (DOC); McNeil, Kerri A. (DOC); paosvpstaff@kingcounty. gov (paosvpstaff@kingcounty.gov); Riley, Robin L. (DOC); Robinson, Lindsey L. (DOC); Sowers, Louis C. (DOC); Trombley, Kathleen A. (DOC)
Subject: D&R FISHER, Curtis 266558 TRU 12-8-2021
Attachments: FISHER, Curtis 266558 TRU 12-8-2021.docx

Hello,
Attached is the Decision and Reasons for Curtis Fisher. Please make copies as needed.

The Board requests that the assigned classification counselor or designee discuss the attached Decision and Reasons with the above individual immediately and provide him with a copy of this decision at that time. The purpose of this is so the appropriate assessments and referrals can be made if necessary, as the decision may be upsetting to the inmate. Also, this information is put into OMNI and will result in an automatic notification of any change to the ERD going to the individual within 24 hours via the kiosk. We want the inmate to be informed of hearing decision before seeing it on the Kiosk.

Please take special note of any programming the Board has recommended the inmate complete and ensure the appropriate referrals and/or transfers take place so this programming can occur.

If there are any questions or problems please let me know. Thank you for your assistance.

Thank you,
Teresa Schmidt
ISRB CRT for MCC
ORP's A – F
Cell: 360-789-1043
ISRB
INDETERMINATE
SENTENCE REVIEW BOARD

APPENDIX C

1979 Statutes

9.94.047 Posting of perimeter of premises of institutions covered by RCW 9.94.040–9.94.049. The perimeter of the premises of correctional institutions covered by RCW 9.94.040 through 9.94.049 shall be posted at reasonable intervals to alert the public as to the existence of RCW 9.94.040 through 9.94.049. [1979 c 121 § 5.]

9.94.049 "State correctional institution" defined for purposes of RCW 9.94.043 and 9.94.045. For the purposes of RCW 9.94.043 and 9.94.045, "state correctional institution" means the: Washington corrections center, Washington state penitentiary, Washington state reformatory, Purdy treatment center for women, Larch corrections center, Indian Ridge treatment center, Firland correctional center, Clearwater corrections center, Pine Lodge correctional center and other state correctional facilities used solely for the purpose of confinement of convicted felons. [1979 c 121 § 6.]

9.94.050 Officers and guards as peace officers. All officers and guards of state penal institutions, while acting in the supervision and transportation of prisoners, and in the apprehension of prisoners who have escaped, shall have the powers and duties of a peace officer. [1955 c 241 § 5.]

Chapter 9.95
PRISON TERMS, PAROLES AND PROBATION

Sections

Commitments and executions: Chapter 10.70 RCW

Correctional institution for male felons——Reception and classification center: Chapter 72.13 RCW.

Counties may provide probation and parole services: RCW 36.01.070

Probation and parole, transfer of certain powers, duties: Chapter 72.04A RCW

Form of sentence to penitentiary: RCW 10.64.060.

Interstate parole and probation hearing procedures: Chapter 9.95B RCW

Leaves of absence for inmates: RCW 72.01.370, 72.01.380.

State penitentiary: Chapter 72.08 RCW

State reformatory: Chapter 72.12 RCW

Victims of crimes, reimbursement by convicted person as condition of work release or parole: RCW 7.68.120.

Western interstate corrections compact, board members may hold hearings: RCW 72.70.040

9.95.001 Board of prison terms and paroles——Created. There shall be a board of prison terms and paroles. [(i) 1935 c 114 § 1; RRS § 10249–1. (ii) 1947 c 47 § 1; Rem. Supp. 1947 § 10249–1a. Formerly RCW 43.67.010.]

9.95.003 Board of prison terms and paroles——Appointment of members——Qualifications——Salaries and travel expenses——Employees. The board of prison terms and paroles shall consist of a chairman and six other members, each of whom shall be appointed by the governor with the consent of the senate. Each member shall hold office for a term of five years, and until his successor is appointed and qualified: *Provided*, That the two additional members to be appointed to the board shall serve initial terms ending April 15, 1972 and 1974 respectively. The terms shall expire on April 15th of the expiration year. Vacancies in the membership of the board shall be filled in the same manner in which the original appointments are made. In the event of the inability of any member to act, the governor shall appoint some competent person to act in his stead during the continuance of such inability. The members shall not be removable during their respective terms except for cause determined by the superior court of Thurston county. The governor in appointing the members shall designate one of them to serve as chairman at the governor's pleasure.

The members of the board of prison terms and paroles and its officers and employees shall not engage in any other business or profession or hold any other public office; nor shall they, at the time of appointment or employment or during their incumbency, serve as the representative of any political party on an executive committee or other governing body thereof, or as an executive officer or employee of any political committee or association. The members of the board of prison terms and paroles shall each severally receive salaries, payable in monthly installments, as may be fixed by the governor in accordance with the provisions of RCW 43.03.040, and in addition thereto, travel expenses incurred in the discharge of their official duties in accordance with RCW 43.03.050 and 43.03.060 as now existing or hereafter amended.

The board may employ, and fix, with the approval of the governor, the compensation of and prescribe the duties of a secretary and such officers, employees, and assistants as may be necessary, and provide necessary quarters, supplies, and equipment. [1975–'76 2nd ex.s. c 34 § 8; 1969 c 98 § 9; 1959 c 32 § 1; 1955 c 340 § 9. Prior: 1945 c 155 § 1, part; 1935 c 114 § 8, part; Rem. Supp. 1945 § 10249–8, part. Formerly RCW 43.67.020.]

Effective date——Severability——1975–'76 2nd ex.s. c 34: See notes following RCW 2.08.115.

Severability——1969 c 98: "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1969 c 98 § 10.] This applies to RCW 9.95-.003, 9.95.120 through 9.95.126, and 72.04A.090.

Effective date——1969 c 98: "This act shall take effect on July 1, 1969." [1969 c 98 § 11.] This applies to RCW 9.95.003, 9.95.120 through 9.95.126, and 72.04A.090.

9.95.005 Board of prison terms and paroles——Meetings——Quarters at institutions. The board of prison terms and paroles shall meet at the penitentiary and the reformatory at such times as may be necessary for a full and complete study of the cases of all convicted persons whose terms of imprisonment are to be determined by it or whose applications for parole come before it. Other times and places of meeting may also be fixed by the board.

The superintendent of the different institutions shall provide suitable quarters for the board and assistants while in the discharge of their duties. [1959 c 32 § 2; 1955 c 340 § 10. Prior: 1945 c 155 § 1, part; 1935 c 114 § 8, part; Rem. Supp. 1945 § 10249–8, part. Formerly RCW 43.67.030.]

9.95.007 Board of prison terms and paroles——May transact business in panels——Action by full board. The board of prison terms and paroles may meet and transact business in panels. Each board panel shall consist of at least two members of the board. In all matters concerning the internal affairs of the board and policy making decisions, a majority of the full board must concur in such matters. The chairman of the board with the consent of a majority of the board may designate any two members to exercise all the powers and duties of the board in connection with any hearing before the board. If the two members so designated cannot unanimously agree as to the disposition of the hearing assigned to them, such hearing shall not be reheard by the full board. All actions of the full board shall be by concurrence of a majority of the board members. [1975–'76 2nd ex.s. c 63 § 1; 1959 c 32 § 3. Formerly RCW 43.67.035.]

9.95.010 Court to fix maximum sentence. When a person is convicted of any felony, except treason, murder in the first degree, or carnal knowledge of a child under ten years, and a new trial is not granted, the court shall sentence such person to the penitentiary, or, if the law allows and the court sees fit to exercise such discretion, to the reformatory, and shall fix the maximum term of such person's sentence only.

The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term. If the law does not provide a maximum term for the crime of which such person was convicted the court shall fix such maximum term, which may be for any number of years up to and including life imprisonment but in any case where the maximum term is fixed by the court it shall be fixed at not less than twenty years. [1955 c 133 § 2. Prior: 1947 c 92 § 1, part; 1935 c 114 § 2, part; Rem. Supp. 1947 § 10249–2, part.]

Punishment: Chapter 9.92 RCW.

9.95.015 Finding of fact or special verdict establishing defendant armed with deadly weapon. In every criminal case wherein conviction would require the board of prison terms and paroles to determine the duration of confinement and wherein there has been an allegation and evidence establishing that the accused was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused was armed with a deadly weapon, as defined by RCW 9.95.040, at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find the defendant guilty, also find a special verdict as to whether or not the defendant was armed with a deadly weapon, as defined in RCW 9.95-.040, at the time of the commission of the crime. [1961 c 138 § 1.]

9.95.020 Duties of superintendents of penal institutions. If the sentence of a person so convicted is not suspended by the court, the superintendent of the penitentiary or the superintendent of the reformatory shall receive such person, if committed to his institution, and imprison him until released under the provisions of this chapter or through the action of the governor. [1955 c 133 § 3. Prior: 1947 c 92 § 1, part; 1935 c 114 § 2, part; Rem. Supp. 1947 § 10249–2, part.]

9.95.030 Facts to be furnished board of prison terms and paroles. After the admission of such convicted person to the penitentiary or reformatory, the board of prison terms and paroles shall obtain from the sentencing judge and the prosecuting attorney, a statement of all the facts concerning the convicted person's crime and any other information of which they may be possessed relative to him, and the sentencing judge and the prosecuting attorney shall furnish the board of prison terms and paroles with such information. The sentencing judge and prosecuting attorney shall indicate to the board of prison terms and paroles, for its guidance, what, in their judgment, should be the duration of the convicted person's imprisonment. [1955 c 133 § 4. Prior: 1947 c 92 § 1, part; 1935 c 114 § 2, part; Rem. Supp. 1947 § 10249–2, part.]

9.95.031 Statement of prosecuting attorney. Whenever any person shall be convicted of a crime and who shall be sentenced to imprisonment or confinement in the Washington state penitentiary or the Washington state reformatory, it shall be the duty of the prosecuting attorney who prosecuted such convicted person to make a statement of the facts respecting the crime for which the prisoner was tried and convicted, and include in such statement all information that he can give in regard to the career of the prisoner before the commission of the crime for which he was convicted and sentenced, stating to the best of his knowledge whether the prisoner was industrious and of good character, and all other facts and circumstances that may tend to throw any light upon the question as to whether such prisoner is capable of again becoming a good citizen. [1929 c 158 § 1; RRS § 10254.]

Reviser's note: This section and RCW 9.95.032 antedate the 1935 act (1935 c 114) which created the board of prison terms and paroles. They were not expressly repealed thereby, although part of section 2 of the 1935 act (RCW 9.95.030) contains similar provisions. The effect of 1935 c 114 (as amended) upon other unrepealed prior laws is discussed in Lindsey v. Superior Court, 33 Wn. (2d) 94 at pp 99–100.

9.95.032 Statement of prosecuting attorney——Delivery of statement. Such statement shall be signed by the prosecuting attorney and approved by the judge by whom the judgment was rendered and shall be delivered to the sheriff, traveling guard or other officer executing the sentence, and a copy of such statement shall be furnished to the defendant or his attorney. Such officer shall deliver the statement, at the time of the prisoner's commitment, to the superintendent of the institution to which such prisoner shall have been sentenced and committed. The superintendent shall make such statement available for use by the parole board. [1929 c 158 § 2; RRS § 10255.]

Reviser's note: The title of the act (1929 c 158) indicates that the above words "parole board" referred to the parole boards of the state penitentiary and the state reformatory. Those boards were created by the administrative code (1921 c 7 § 45; RRS § 10803) and abolished by the 1935 act relating to the board of prison terms and paroles (1935 c 114 § 9) which repealed RRS § 10803.

9.95.040 Board to fix duration of confinement——Minimum terms prescribed for certain cases. Within six months after the admission of a convicted person to the penitentiary, reformatory, or such other state penal institution as may hereafter be established, the board of prison terms and paroles shall fix the duration of his confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense of which he was convicted or the maximum fixed by the court where the law does not provide for a maximum term.

The following limitations are placed on the board of prison terms and paroles with regard to fixing the duration of confinement in certain cases, notwithstanding any provisions of law specifying a lesser sentence, to wit:

(1) For a person not previously convicted of a felony but armed with a deadly weapon at the time of the commission of his offense, the duration of confinement shall not be fixed at less than five years.

(2) For a person previously convicted of a felony either in this state or elsewhere and who was armed with a

deadly weapon at the time of the commission of his offense, the duration of confinement shall not be fixed at less than seven and one-half years.

The words "deadly weapon," as used in this section include, but are not limited to, any instrument known as a blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

(3) For a person convicted of being an habitual criminal within the meaning of the statute which provides for mandatory life imprisonment for such habitual criminals, the duration of confinement shall not be fixed at less than fifteen years. The board shall retain jurisdiction over such convicted person throughout his natural life unless the governor by appropriate executive action orders otherwise.

(4) Any person convicted of embezzling funds from any institution of public deposit of which he was an officer or stockholder, the duration of confinement shall be fixed at not less than five years.

Except when an inmate of the reformatory, penitentiary or such other penal institution as may hereafter be established, has been convicted of murder in the first or second degree, the board may parole an inmate prior to the expiration of a mandatory minimum term, provided such inmate has demonstrated a meritorious effort in rehabilitation and at least two-thirds of the board members concur in such action: *Provided*, That any inmate who has a mandatory minimum term and is paroled prior to the expiration of such term according to the provisions of this chapter shall not receive a conditional release from supervision while on parole until after the mandatory minimum term has expired. [1975-'76 2nd ex.s. c 63 § 2; 1961 c 138 § 2; 1955 c 133 § 5. Prior: 1947 c 92 § 1, part; 1935 c 114 § 2, part; Rem. Supp. 1947 § 10249-2, part.]

9.95.052 Redetermination and refixing of minimum term of confinement. At any time after the board of prison terms and paroles has determined the minimum term of confinement of any person subject to confinement in a state correctional institution, the board may request the superintendent of such correctional institution to conduct a full review of such person's prospects for rehabilitation and report to the board the facts of such review and the resulting findings. Upon the basis of such report and such other information and investigation that the board deems appropriate the board may redetermine and refix such convicted person's minimum term of confinement. [1972 ex.s. c 67 § 1.]

9.95.055 Reduction of sentences during war emergency. The board of prison terms and paroles is hereby granted authority, in the event of a declaration by the governor that a war emergency exists, including a general mobilization, and for the duration thereof only, to reduce downward the minimum term, as set by the board, of any inmate confined in the Washington state penitentiary or reformatory, who will be accepted by and inducted into the armed services: *Provided*, That a reduction downward shall not be made under this section for those inmates who are confined for treason, murder in the first degree or carnal knowledge of a female child under ten years: *And provided further*, That no such inmate shall be released under this section who is found to be a sexual psychopath under the provisions of and as defined by chapter 71.12 RCW. [1951 c 239 § 1.]

9.95.060 When sentence begins to run. When a convicted person appeals from his conviction and is at liberty on bond pending the determination of the appeal by the supreme court or the court of appeals, credit on his sentence will begin from the date such convicted person is returned to custody. The date of return to custody shall be certified to the department of social and health services, the Washington state board of prison terms and paroles, and the prosecuting attorney of the county in which such convicted person was convicted and sentenced, by the sheriff of such county. If such convicted person does not appeal from his conviction, but is at liberty for a period of time subsequent to the signing of the judgment and sentence, or becomes a fugitive, credit on his sentence will begin from the date such convicted person is returned to custody. The date of return to custody shall be certified as provided in this section. In all other cases, credit on a sentence will begin from the date the judgment and sentence is signed by the court. [1979 c 141 § 1; 1971 c 81 § 46; 1967 c 200 § 10; 1955 c 133 § 7. Prior: 1947 c 92 § 1, part; 1935 c 114 § 2, part; Rem. Supp. § 10249-2, part.]

9.95.062 Appeal stays execution——Credit for time in jail pending appeal. An appeal by a defendant in a criminal action shall stay the execution of the judgment of conviction.

In case the defendant has been convicted of a felony, and has been unable to furnish a bail bond pending the appeal, the time he has been imprisoned pending the appeal shall be deducted from the term for which he was theretofore sentenced to the penitentiary, if the judgment against him be affirmed. [1969 ex.s. c 4 § 1; 1969 c 103 § 1; 1955 c 42 § 2. Prior: 1893 c 61 § 30; RRS § 1745. Formerly RCW 10.73.030, part.]

9.95.063 Conviction upon new trial——Former imprisonment deductible. If a defendant who has been imprisoned during the pendency of any post-trial proceeding in any state or federal court shall be again convicted upon a new trial resulting from any such proceeding, the period of his former imprisonment shall be deducted by the superior court from the period of imprisonment to be fixed on the last verdict of conviction. [1971 ex.s. c 86 § 1; 1971 c 81 § 47; 1955 c 42 § 4. Prior: 1893 c 61 § 34; RRS § 1750. Formerly RCW 10-.73.070, part.]

9.95.070 Time credit reductions for good behavior. Every prisoner who has a favorable record of conduct at the penitentiary or the reformatory, and who performs in a faithful, diligent, industrious, orderly and peaceable

manner the work, duties, and tasks assigned to him to the satisfaction of the superintendent of the penitentiary or reformatory, and in whose behalf the superintendent of the penitentiary or reformatory files a report certifying that his conduct and work have been meritorious and recommending allowance of time credits to him, shall upon, but not until, the adoption of such recommendation by the board of prison terms and paroles, be allowed time credit reductions from the term of imprisonment fixed by the board of prison terms and paroles. [1955 c 133 § 8. Prior: 1947 c 92 § 1, part; 1935 c 114 § 2, part; Rem. Supp. 1947 § 10249–2, part.]

9.95.080 Revocation and redetermination of minimum for infractions. In case any convicted person undergoing sentence in the penitentiary, reformatory, or other state correctional institution, commits any infractions of the rules and regulations of the institution, the board of prison terms and paroles may revoke any order theretofore made determining the length of time such convicted person shall be imprisoned, including the forfeiture of all or a portion of credits earned or to be earned, pursuant to the provisions of RCW 9.95.110, and make a new order determining the length of time he shall serve, not exceeding the maximum penalty provided by law for the crime for which he was convicted, or the maximum fixed by the court. Such revocation and redetermination shall not be had except upon a hearing before the board of prison terms and paroles. At such hearing the convicted person shall be present and entitled to be heard and may present evidence and witnesses in his behalf. [1972 ex.s. c 68 § 1; 1961 c 106 § 1; 1955 c 133 § 9. Prior: 1947 c 92 § 1, part; 1935 c 114 § 2, part; Rem. Supp. 1947 § 10249–2, part.]

9.95.090 Labor may be required under rules and regulations. The board of prison terms and paroles shall require of every able bodied convicted person imprisoned in the penitentiary or the reformatory as many hours of faithful labor in each and every day during his term of imprisonment as shall be prescribed by the rules and regulations of the institution in which he is confined. [1955 c 133 § 10. Prior: 1947 c 92 § 1, part; 1935 c 114 § 2, part; Rem. Supp. § 10249–2, part.]

Labor by prisoners: Chapter 7264 RCW.

9.95.100 Prisoner released on serving maximum term. Any convicted person undergoing sentence in the penitentiary or the reformatory, not sooner released under the provisions of this chapter, shall, in accordance with the provisions of law, be discharged from custody on serving the maximum punishment provided by law for the offense of which such person was convicted, or the maximum term fixed by the court where the law does not provide for a maximum term. The board shall not, however, until his maximum term expires, release a prisoner, unless in its opinion his rehabilitation has been complete and he is a fit subject for release. [1955 c 133 § 11. Prior: (i) 1947 c 92 § 1, part; 1935 c 114 § 2, part; Rem. Supp. 1947 § 10249–2, part. (ii) 1939 c 142 § 1, part; 1935 c 114 § 4, part; RRS § 10249–4, part.]

9.95.110 Parole of prisoners. The board of prison terms and paroles may permit a convicted person to leave the buildings and enclosures of the penitentiary or the reformatory on parole, after such convicted person has served the period of confinement fixed for him by the board, less time credits for good behavior and diligence in work: *Provided*, That in no case shall an inmate be credited with more than one–third of his sentence as fixed by the board.

The board of prison terms and paroles may establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary or the reformatory on parole, and may return such person to the confines of the institution from which he was paroled, at its discretion. [1955 c 133 § 12. Prior: 1939 c 142 § 1, part; 1935 c 114 § 4, part; RRS § 10249–4, part.]

9.95.115 Parole of life term prisoners. The board of prison terms and paroles is hereby granted authority to parole any person sentenced to the penitentiary or the reformatory, under a mandatory life sentence, who has been continuously confined therein for a period of twenty consecutive years less earned good time: *Provided*, The superintendent of the penitentiary or the reformatory, as the case may be, certifies to the board of prison terms and paroles that such person's conduct and work have been meritorious, and based thereon, recommends parole for such person: *Provided*, That no such person shall be released under parole who is found to be a sexual psychopath under the provisions of and as defined by chapter 71.12 RCW. [1951 c 238 § 1.]

9.95.117 Parolees subject to supervision of division of probation and parole——Progress reports. See RCW 72.04A.080.

9.95.119 Plans and recommendations for conditions of supervision of parolees. See RCW 72.04A.070.

9.95.120 Suspension, revision of parole——Powers and duties of probation officers——Hearing——Retaking of parole violator——Reinstatement. Whenever the board of prison terms and paroles or a probation and parole officer of this state has reason to believe a convicted person has breached a condition of his parole or violated the law of any state where he may then be or the rules and regulations of the board of prison terms and paroles, any probation and parole officer of this state may arrest or cause the arrest and detention and suspension of parole of such convicted person pending a determination by the board whether the parole of such convicted person shall be revoked. All facts and circumstances surrounding the violation by such convicted person shall be reported to the board of prison terms and paroles by the probation and parole officer, with recommendations. The board of prison terms and paroles, after consultation with the secretary of the department of social and health services, shall make all rules and regulations concerning procedural matters, which shall include the time when state probation and parole officers shall

file with the board reports required by this section, procedures pertaining thereto and the filing of such information as may be necessary to enable the board to perform its functions under this section. On the basis of the report by the probation and parole officer, or at any time upon its own discretion, the board may revise or modify the conditions of parole or order the suspension of parole by the issuance of a written order bearing its seal which order shall be sufficient warrant for all peace officers to take into custody any convicted person who may be on parole and retain such person in their custody until arrangements can be made by the board of prison terms and paroles for his return to a state correctional institution for convicted felons. Any such revision or modification of the conditions of parole or the order suspending parole shall be personally served upon the parolee.

Any parolee arrested and detained in physical custody by the authority of a state probation and parole officer, or upon the written order of the board of prison terms and paroles, shall not be released from custody on bail or personal recognizance, except upon approval of the board of prison terms and paroles and the issuance by the board of an order of reinstatement on parole on the same or modified conditions of parole.

All chiefs of police, marshals of cities and towns, sheriffs of counties, and all police, prison, and peace officers and constables shall execute any such order in the same manner as any ordinary criminal process.

Whenever a paroled prisoner is accused of a violation of his parole, other than the commission of, and conviction for, a felony or misdemeanor under the laws of this state or the laws of any state where he may then be, he shall be entitled to a fair and impartial hearing of such charges within thirty days from the time that he is served with charges of the violation of conditions of his parole after his arrest and detention. The hearing shall be held before one or more members of the parole board at a place or places, within this state, reasonably near the site of the alleged violation or violations of parole.

In the event that the board of prison terms and paroles suspends a parole by reason of an alleged parole violation or in the event that a parole is suspended pending the disposition of a new criminal charge, the board of prison terms and paroles shall have the power to nullify the order of suspension and reinstate the individual to parole under previous conditions or any new conditions that the board of prison terms and paroles may determine advisable. Before the board of prison terms and paroles shall nullify an order of suspension and reinstate a parole they shall have determined that the best interests of society and the individual shall best be served by such reinstatement rather than a return to a penal institution. [1979 c 141 § 2; 1969 c 98 § 2; 1961 c 106 § 2; 1955 c 133 § 13. Prior: 1939 c 142 § 1, part; 1935 c 114 § 4, part; RRS § 10249–4, part.]

Severability——Effective date——1969 c 98: See notes following RCW 9.95.003.

Violations of parole or probation——Revision of parole conditions——Rearrest——Detention: RCW 72.04A.090.

9.95.121 On-site parole revocation hearing——Procedure when waived. Within fifteen days from the date of notice to the department of social and health services of the arrest and detention of the alleged parole violator, he shall be personally served by a state probation and parole officer with a copy of the factual allegations of the violation of the conditions of parole, and, at the same time shall be advised of his right to an on–site parole revocation hearing and of his rights and privileges as provided in RCW 9.95.120 through 9.95.126. The alleged parole violator, after service of the allegations of violations of the conditions of parole and the advice of rights may waive the on–site parole revocation hearing as provided in RCW 9.95.120, and admit one or more of the alleged violations of the conditions of parole. If the board accepts the waiver it shall either, (1) reinstate the parolee on parole under the same or modified conditions, or (2) revoke the parole of the parolee and enter an order of parole revocation and return to state custody. A determination of a new minimum sentence shall be made within thirty days of return to state custody which shall not exceed the maximum sentence as provided by law for the crime of which the parolee was originally convicted or the maximum fixed by the court.

If the waiver made by the parolee is rejected by the board it shall hold an on–site parole revocation hearing under the provisions of RCW 9.95.120 through 9.95.126. [1979 c 141 § 3; 1969 c 98 § 3.]

Reviser's note: The term "this 1969 amendatory act" has been changed to RCW 9.95.120 through 9.95.126. Technically the term also includes RCW 9.95.003, 72.04A.090 and the effective date and severability sections footnoted following RCW 9.95.003.

Severability——Effective date——1969 c 98: See notes following RCW 9.95.003.

9.95.122 On-site parole revocation hearing——Representation for alleged parole violators——Compensation. At any on–site parole revocation hearing the alleged parole violator shall be entitled to be represented by an attorney of his own choosing and at his own expense, except, upon the presentation of satisfactory evidence of indigency and the request for the appointment of an attorney by the alleged parole violator, the board may cause the appointment of an attorney to represent the alleged parole violator to be paid for at state expense, and, in addition, the board may assume all or such other expenses in the presentation of evidence on behalf of the alleged parole violator as it may have authorized: *Provided*, That funds are available for the payment of attorneys' fees and expenses. Attorneys for the representation of alleged parole violators in on–site hearings shall be appointed by the superior courts for the counties wherein the on–site parole revocation hearing is to be held and such attorneys shall be compensated in such manner and in such amount as shall be fixed in a schedule of fees adopted by rule of the board of prison terms and paroles. [1969 c 98 § 4.]

Severability——Effective date——1969 c 98: See notes following RCW 9.95.003.

9.95.123 On-site parole revocation hearing——Conduct——Witnesses——Subpoenas, enforcement. In conducting on-site parole revocation hearings, the board of prison terms and paroles shall have the authority to administer oaths and affirmations, examine witnesses, receive evidence and issue subpoenas for the compulsory attendance of witnesses and the production of evidence for presentation at such hearings. Subpoenas issued by the board shall be effective throughout the state. Witnesses in attendance at any on-site parole revocation hearing shall be paid the same fees and allowances, in the same manner and under the same conditions as provided for witnesses in the courts of the state in accordance with chapter 2.40 RCW as now or hereafter amended. If any person fails or refuses to obey a subpoena issued by the board, or obeys the subpoena but refuses to testify concerning any matter under examination at the hearing, the board of prison terms and paroles may petition the superior court of the county where the hearing is being conducted for enforcement of the subpoena: *Provided*, That an offer to pay statutory fees and mileage has been made to the witness at the time of the service of the subpoena. The petition shall be accompanied by a copy of the subpoena and proof of service, and shall set forth in what specific manner the subpoena has not been complied with, and shall ask an order of the court to compel the witness to appear and testify before the board. The court, upon such petition, shall enter an order directing the witness to appear before the court at a time and place to be fixed in such order and then and there to show cause why he has not responded to the subpoena or has refused to testify. A copy of the order shall be served upon the witness. If it appears to the court that the subpoena was properly issued and that the particular questions which the witness refuses to answer are reasonable and relevant, the court shall enter an order that the witness appear at the time and place fixed in the order and testify or produce the required papers, and on failing to obey said order, the witness shall be dealt with as for contempt of court. [1969 c 98 § 5.]

Severability——Effective date——1969 c 98: See notes following RCW 9.95.003.

9.95.124 On-site parole revocation hearing——Who may attend——Rules governing procedure. At all on-site parole revocation hearings the probation and parole officers of the department of social and health services, having made the allegations of the violations of the conditions of parole, may be represented by the attorney general. Only such persons as are reasonably necessary to the conducting of such hearings shall be permitted to be present: *Provided*, That other persons may be admitted to such hearings at the discretion of the board and with the consent of the alleged parole violator. The hearings shall be recorded either manually or by a mechanical recording device. An alleged parole violator may be requested to testify and any such testimony shall not be used against him in any criminal prosecution. The board of prison terms and paroles shall adopt rules governing the formal and informal procedures authorized by this chapter and make rules of practice before the board in on-site parole revocation hearings, together with forms and instructions. [1979 c 141 § 4; 1969 c 98 § 6.]

Severability——Effective date——1969 c 98: See notes following RCW 9.95.003.

9.95.125 On-site parole revocation hearing——Board's decision——Reinstatement or revocation of parole. After the on-site parole revocation hearing has been concluded, the members of the board having heard the matter shall enter their decision of record within ten days, and make findings and conclusions upon the allegations of the violations of the conditions of parole. If the member, or members having heard the matter, should conclude that the allegations of violation of the conditions of parole have not been proven by a preponderance of the evidence, or, those which have been proven by a preponderance of the evidence are not sufficient cause for the revocation of parole, then the parolee shall be reinstated on parole on the same or modified conditions of parole. If the member or members having heard the matter should conclude that the allegations of violation of the conditions of parole have been proven by a preponderance of the evidence and constitute sufficient cause for the revocation of parole, then such member or members shall enter an order of parole revocation and return the parole violator to state custody. Within thirty days of the return of such parole violator to a state correctional institution for convicted felons the board of prison terms and paroles shall enter an order determining a new minimum sentence, not exceeding the maximum penalty provided by law for the crime for which the parole violator was originally convicted or the maximum fixed by the court. [1969 c 98 § 7.]

Severability——Effective date——1969 c 98: See notes following RCW 9.95.003.

9.95.126 On-site parole revocation hearing——Cooperation in providing facilities for hearings. All officers and employees of the state, counties, cities and political subdivisions of this state shall cooperate with the board of prison terms and paroles in making available suitable facilities for conducting parole revocation hearings. [1969 c 98 § 8.]

Severability——Effective date——1969 c 98: See notes following RCW 9.95.003.

9.95.130 When parole revoked prisoner deemed escapee until return to custody. From and after the suspension, cancellation, or revocation of the parole of any convicted person and until his return to custody he shall be deemed an escapee and a fugitive from justice and no part of the time during which he is an escapee and fugitive from justice shall be a part of his term. [1955 c 133 § 14. Prior: 1939 c 142 § 1, part; 1935 c 114 § 4, part; RRS § 10249-4, part.]

9.95.140 Record of parolees——Cooperation by officials and employees. The board of prison terms and paroles shall cause a complete record to be kept of every prisoner released on parole. Such records shall be organized in accordance with the most modern methods of

filing and indexing so that there will be always immediately available complete information about each such prisoner. The board may make rules as to the privacy of such records and their use by others than the board and its staff.

The superintendent of the penitentiary and the reformatory and all officers and employees thereof and all other public officials shall at all times cooperate with the board and furnish to the board, its officers, and employees such information as may be necessary to enable it to perform its functions, and such superintendents and other employees shall at all times give the members of the board, its officers, and employees free access to all prisoners confined in the penal institutions of the state. [1955 c 133 § 15. Prior: 1939 c 142 § 1, part; 1935 c 114 § 4, part; RRS § 10249–4, part.]

Washington state patrol, identification section: RCW 43.43.700–43.43.765.

9.95.150 Rules and regulations. The board of prison terms and paroles shall make all necessary rules and regulations to carry out the provisions of this chapter not inconsistent therewith, and may provide the forms of all documents necessary therefor. [1955 c 133 § 16. Prior: 1939 c 142 § 1, part; 1935 c 114 § 4, part; RRS § 10249–4, part.]

9.95.160 Governor's powers not affected——He may revoke paroles granted by board. This chapter shall not limit or circumscribe the powers of the governor to commute the sentence of, or grant a pardon to, any convicted person, and the governor may cancel or revoke the parole granted to any convicted person by the board of prison terms and paroles. The written order of the governor canceling or revoking such parole shall have the same force and effect and be executed in like manner as an order of the board of prison terms and paroles. [1955 c 133 § 17. Prior: 1939 c 142 § 1, part; 1935 c 114 § 4, part; RRS § 10249–4, part.]

9.95.170 Board to inform itself as to each convict——Department of social and health services to make records available to board. To assist it in fixing the duration of a convicted person's term of confinement, and in fixing the condition for release from custody on parole, it shall not only be the duty of the board of prison terms and paroles to thoroughly inform itself as to the facts of such convicted person's crime but also to inform itself as thoroughly as possible as to such convict as a personality. The department of social and health services and the institutions under its control shall make available to the board of prison terms and paroles on request its case investigations, any file or other record, in order to assist the board in developing information for carrying out the purpose of this section. [1979 c 141 § 5; 1967 c 134 § 13; 1935 c 114 § 3; RRS § 10249–3.]

9.95.190 Application of RCW 9.95.010 through 9.95.180 to inmates previously committed. The provisions of RCW 9.95.010 to 9.95.180, inclusive, as enacted by chapter 114, Laws of 1935, insofar as applicable, shall apply to all convicted persons serving time in the state penitentiary or reformatory on June 12, 1935, to the end that at all times the same provisions relating to sentences, imprisonments and paroles of prisoners shall apply to all inmates thereof.

Similarly the provisions of said sections, as amended by chapter 92, Laws of 1947, insofar as applicable, shall apply to all convicted persons serving time in the state penitentiary or reformatory on June 11, 1947, to the end that at all times the same provisions relating to sentences, imprisonments and paroles of prisoners shall apply to all inmates thereof. [1955 c 133 § 18. Prior: (i) 1939 c 142 § 1, part; 1935 c 114 § 4, part; RRS § 10249–4, part. (ii) 1947 c 92 § 2, part; Rem. Supp. 1947 § 10249–2a, part.]

9.95.195 Final discharge of parolee——Restoration of civil rights——Governor's pardoning power not affected. See RCW 9.96.050.

9.95.200 Probation by court——Secretary of social and health services to investigate. After conviction by plea or verdict of guilty of any crime, the court upon application or its own motion, may summarily grant or deny probation, or at a subsequent time fixed may hear and determine, in the presence of the defendant, the matter of probation of the defendant, and the conditions of such probation, if granted. The court may, in its discretion, prior to the hearing on the granting of probation, refer the matter to the secretary of social and health services or such officers as the secretary may designate for investigation and report to the court at a specified time, upon the circumstances surrounding the crime and concerning the defendant, his prior record, and his family surroundings and environment. [1979 c 141 § 6; 1967 c 134 § 15; 1957 c 227 § 3. Prior: 1949 c 59 § 1; 1939 c 125 § 1, part; 1935 c 114 § 5; Rem. Supp. 1949 § 10249–5a.]

Rules of court: ER 410

Severability——1939 c 125: "If any section or provision of this act shall be adjudged to be invalid or unconstitutional, such adjudication shall not affect the validity of this act as a whole, or of any section, provision or part thereof not adjudged invalid or unconstitutional." [1939 c 125 § 3 p 356.] This applies to RCW 9.95.200–9.95.250.

Suspending sentences: RCW 9.92.060.

9.95.210 Conditions may be imposed on probation (as amended by 1979 c 29). The court in granting probation, may suspend the imposing or the execution of the sentence and may direct that such suspension may continue for such period of time, not exceeding the maximum term of sentence, except as hereinafter set forth and upon such terms and conditions as it shall determine.

The court in the order granting probation and as a condition thereof, may in its discretion imprison the defendant in the county jail for a period not exceeding one year or may fine the defendant any sum not exceeding one thousand dollars plus the costs of the action, and may in connection with such probation impose both imprisonment in the county jail and fine and court costs. The court may also require the defendant to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary (1) to comply with any order of the court for the payment of family support, (2) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question, and (3) to pay such fine as may be imposed and court costs, including reimbursement of the state for costs of extradition if return to this state by extradition was required, and may require bonds for the faithful observance of any and all conditions imposed in the probation. The

court shall order the probationer to report to the supervisor of the division of probation and parole of the department of institutions or such officer as the supervisor may designate and as a condition of said probation to follow implicitly the instructions of the supervisor of probation and parole. If the probationer has been ordered to make restitution, the officer supervising the probationer shall make a reasonable effort to ascertain whether restitution has been made. If restitution has not been made as ordered, the officer shall inform the prosecutor of that violation of the terms of probation not less than three months prior to the termination of the probation period. The supervisor of probation and parole with the approval of the director of institutions will promulgate rules and regulations for the conduct of such person during the term of his probation: *Provided*, That for defendants found guilty in justice court, like functions as the supervisor of probation and parole performs in regard to probation may be performed by probation officers employed for that purpose by the board of county commissioners of the county wherein the court is located. [1979 c 29 § 2; 1969 c 29 § 1; 1967 c 200 § 8; 1967 c 134 § 16; 1957 c 227 § 4. Prior: 1949 c 77 § 1; 1939 c 125 § 1, part; Rem. Supp. 1949 § 10249–5b.]

Restitution as alternative to fine: RCW 9A.20.030.

Restitution as condition to suspending sentence: RCW 9.92.060.

9.95.210 Conditions may be imposed on probation (as amended by 1979 c 141). The court in granting probation, may suspend the imposing or the execution of the sentence and may direct that such suspension may continue for such period of time, not exceeding the maximum term of sentence, except as hereinafter set forth and upon such terms and conditions as it shall determine.

The court in the order granting probation and as a condition thereof, may in its discretion imprison the defendant in the county jail for a period not exceeding one year or may fine the defendant any sum not exceeding one thousand dollars plus the costs of the action, and may in connection with such probation impose both imprisonment in the county jail and fine and court costs. The court may also require the defendant to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary (1) to comply with any order of the court for the payment of family support, (2) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question, and (3) to pay such fine as may be imposed and court costs, including reimbursement of the state for costs of extradition if return to this state by extradition was required, and may require bonds for the faithful observance of any and all conditions imposed in the probation. The court shall order the probationer to report to the secretary of social and health services or such officer as the secretary may designate and as a condition of said probation to follow implicitly the instructions of the secretary. The secretary of social and health services will promulgate rules and regulations for the conduct of such person during the term of his probation: *Provided*, That for defendants found guilty in justice court, like functions as the secretary performs in regard to probation may be performed by probation officers employed for that purpose by the board of county commissioners of the county wherein the court is located. [1979 c 141 § 7; 1969 c 29 § 1; 1967 c 200 § 8; 1967 c 134 § 16; 1957 c 227 § 4. Prior: 1949 c 77 § 1; 1939 c 125 § 1, part; Rem. Supp. 1949 § 10249–5b.]

Reviser's note: RCW 9.95.210 was amended twice during the 1979 regular session of the legislature, each without reference to the other.

For rule of construction concerning sections amended more than once at the same legislative session, see RCW 1.12.025.

Termination of suspended sentence, restoration of civil rights: RCW 9.92.066

Violations of probation conditions, rearrest, detention: RCW 72.04A.090.

9.95.215 Counties may provide probation and parole services. See RCW 36.01.070.

9.95.220 Violation of probation——Rearrest——Imprisonment. Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer may rearrest any such person without warrant or other process. The court may thereupon in its discretion without notice revoke and terminate such probation. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed. [1957 c 227 § 5. Prior: 1939 c 125 § 1, part; RRS § 10249–5c.]

9.95.230 Court revocation or termination of probation. The court shall have authority at any time during the course of probation to (1) revoke, modify, or change its order of suspension of imposition or execution of sentence; (2) it may at any time, when the ends of justice will be subserved thereby, and when the reformation of the probationer shall warrant it, terminate the period of probation, and discharge the person so held. [1957 c 227 § 6. Prior: 1939 c 125 § 1, part; RRS § 10249–5d.]

9.95.240 Dismissal of information or indictment after probation completed. Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, may at any time prior to the expiration of the maximum period of punishment for the offense for which he has been convicted be permitted in the discretion of the court to withdraw his plea of guilty and enter a plea of not guilty, or if he has been convicted after a plea of not guilty, the court may in its discretion set aside the verdict of guilty; and in either case, the court may thereupon dismiss the information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right in his probation papers: *Provided*, That in any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed. [1957 c 227 § 7. Prior: 1939 c 125 § 1, part; RRS § 10249–5e.]

Gambling commission——Denial, suspension, or revocation of license, permit——Other provisions not applicable: RCW 9.46.075.

Juvenile courts, probation officers: RCW 13.04.040, 13.04.050.

9.95.250 Probation and parole officers. In order to carry out the provisions of this chapter 9.95 RCW the parole officers working under the supervision of the secretary of social and health services shall be known as

probation and parole officers. [1979 c 141 § 8; 1967 c 134 § 17; 1957 c 227 § 8. Prior: 1939 c 125 § 1, part; RRS § 10249–5f.]

Juvenile courts, probation officers: RCW 13.04.040, 13.04.050

9.95.260 Board to pass on representations made in applications for pardons and restoration of civil rights——Department of social and health services to assist board——Supervise conditionally pardoned persons. It shall be the duty of the board of prison terms and paroles, when requested by the governor, to pass on the representations made in support of applications for pardons for convicted persons and to make recommendations thereon to the governor.

It will be the duty of the secretary of social and health services to exercise supervision over such convicted persons as have been conditionally pardoned by the governor, to the end that such persons shall faithfully comply with the conditions of such pardons. The board of prison terms and paroles shall also pass on any representations made in support of applications for restoration of civil rights of convicted persons, and make recommendations to the governor. The department of social and health services shall prepare materials and make investigations requested by the board of prison terms and paroles in order to assist the board in passing on the representations made in support of applications for pardon or for the restoration of civil rights. [1979 c 141 § 9; 1967 c 134 § 14; 1935 c 114 § 7; RRS § 10249–7.]

9.95.265 Report to governor and legislature. The board of prison terms and paroles shall transmit to the governor and to the legislature, as often as the governor may require it, a report of its work, in which shall be given such information as may be relevant. [1977 c 75 § 5; 1955 c 340 § 11. Prior: 1945 c 155 § 1, part; 1935 c 114 § 8, part; Rem. Supp. 1945 § 10249–8, part. Formerly RCW 43.67.040.]

9.95.267 Transfer of certain powers and duties of board to division of probation and parole. See RCW 72.04A.050.

9.95.270 Compacts for out-of-state supervision of parolees or probationers——Uniform act. The governor of this state is hereby authorized to execute a compact on behalf of the state of Washington with any of the United States legally joining therein in the form substantially as follows:

A compact entered into by and among the contracting states, signatories hereto, with the consent of the congress of the United States of America, granted by an act entitled "An Act granting the consent of congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes."

The contracting states solemnly agree:

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a state, party to this compact, (herein called "sending state"), to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact, (herein called "receiving state"), while on probation or parole, if

(a) Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there;

(b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state: *Provided, however*, That if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.

(5) That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within such state, the form of execution to be in accordance with the laws of the executing state.

(7) That this compact shall continue in force and remain binding upon each executing state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until

retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other states, party hereto. [1937 c 92 § 1; RRS § 10249-11.]

Severability——1937 c 92: "If any section, sentence, subdivision or clause of this act is for any reason held invalid or to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act." [1937 c 92 § 2 p 382.] This applies to RCW 9.95.270.

Short title——1937 c 92: "This act may be cited as the Uniform Act for Out-of-State Supervision." [1937 c 92 § 3 p 382.] This applies to RCW 9.95.270.

Interstate compact on juveniles: Chapter 13.24 RCW.

Interstate parole and probation hearing procedures: Chapter 9.95B.

9.95.280 Return of parole violators from without state——Deputizing out-of-state officers. The board of prison terms and paroles is hereby authorized and empowered to deputize any person (regularly employed by another state) to act as an officer and agent of this state in effecting the return of any person who has violated the terms and conditions of parole or probation as granted by this state. In any matter relating to the return of such a person, any agent so deputized shall have all the powers of a police officer of this state. [1955 c 183 § 1.]

9.95.290 Return of parole violators from without state——Deputization procedure. Any deputization pursuant to this statute shall be in writing and any person authorized to act as an agent of this state pursuant hereto shall carry formal evidence of his deputization and shall produce the same upon demand. [1955 c 183 § 2.]

9.95.300 Return of parole violators from without state——Contracts to share costs. The board of prison terms and paroles is hereby authorized to enter into contracts with similar officials of any other state or states for the purpose of sharing an equitable portion of the cost of effecting the return of any person who has violated the terms and conditions of parole or probation as granted by this state. [1955 c 183 § 3.]

9.95.310 Assistance for parolees and discharged prisoners——Declaration of purpose. The purpose of RCW 9.95.310 through 9.95.370 is to provide necessary assistance, other than assistance which is authorized to be provided under the vocational rehabilitation laws, Title 28A RCW, under the public assistance laws, Title 74 RCW or the department of employment security or other state agency, for parolees, discharged prisoners and persons convicted of a felony and granted probation in need and whose capacity to earn a living under these circumstances is impaired; and to help such persons attain self-care and/or self-support for rehabilitation and restoration to independence as useful citizens as rapidly as possible thereby reducing the number of returnees to the institutions of this state to the benefit of such person and society as a whole. [1971 ex.s. c 31 § 1; 1961 c 217 § 2.]

9.95.320 Assistance for parolees and discharged prisoners——Secretary or designee may provide subsistence——Terms and conditions. The secretary of the department of social and health services or his designee may provide to any parolee, discharged prisoner and persons convicted of a felony and granted probation in need and without necessary means, from any funds legally available therefor, such reasonable sums as he deems necessary for the subsistence of such person and his family until such person has become gainfully employed. Such aid may be made under such terms and conditions, and through local parole or probation officers if necessary, as the secretary of the department of social and health services or his designee may require and shall be supplementary to any moneys which may be provided under public assistance or from any other source. [1971 ex.s. c 31 § 2; 1961 c 217 § 3.]

9.95.330 Assistance for parolees and discharged prisoners——Department may accept gifts and make expenditures. The department of social and health services may accept any devise, bequest, gift, grant, or contribution made for the purposes of RCW 9.95.310 through 9.95.370 and the secretary of the department of social and health services or his designee may make expenditures, or approve expenditures by local parole or probation officers, therefrom for the purposes of RCW 9.95.310 through 9.95.370 in accordance with the rules of the department of social and health services. [1971 ex.s. c 31 § 3; 1961 c 217 § 4.]

9.95.340 Assistance for parolees and discharged prisoners——Use of funds belonging to absconders, repayment by benefited prisoner or parolee——Repayment of funds to prisoners and parolees. Any funds in the hands of the department of social and health services, or which may come into its hands, which belong to discharged prisoners, parolees or persons convicted of a felony and granted probation who absconded, or whose whereabouts are unknown, shall be deposited in the parolee and probationer revolving fund. Said funds shall be used to defray the expenses of clothing and other necessities and for transporting discharged prisoners, parolees and persons convicted of a felony and granted probation who are without means to secure the same. All payments disbursed from these funds shall be repaid, whenever possible, by discharged prisoners, parolees and persons convicted of a felony and granted probation for whose benefit they are made. Whenever any money belonging to discharged prisoners, parolees and persons convicted of a felony and granted probation is so paid into the revolving fund, it shall be repaid to them in accordance with law if a claim therefor is filed with the department of social and health services within five years of deposit into said fund and upon a clear showing of a legal right of such claimant to such money. [1971 ex.s. c 31 § 4; 1961 c 217 § 5.]

9.95.350 Assistance for parolees and discharged prisoners——Accounting, use, disposition of funds or property which is for prisoner or parolee. All money or other property paid or delivered to a probation or parole

officer or employee of the department of social and health services by or for the benefit of any discharged prisoner, parolee or persons convicted of a felony and granted probation shall be immediately transmitted to the department of social and health services and it shall enter the same upon its books to his credit. Such money or other property shall be used only under the direction of the department of social and health services.

If such person absconds, the money shall be deposited in the revolving fund created by RCW 9.95.360, and any other property, if not called for within one year, shall be sold by the department of social and health services and the proceeds credited to the revolving fund.

If any person, files a claim within five years after the deposit or crediting of such funds, and satisfies the department of social and health services that he is entitled thereto, the department of social and health services may make a finding to that effect and may make payment to the claimant in the amount to which he is entitled. [1971 ex.s. c 31 § 5; 1961 c 217 § 6.]

9.95.360 Assistance for parolees and discharged prisoners——Parolee and probationer revolving fund——Composition——Disbursements——Deposits——Security by depository. The department of social and health services shall create, maintain, and administer outside the state treasury a permanent revolving fund to be known as the "parolee and probationer revolving fund" into which shall be deposited all moneys received by it under RCW 9.95.310 through 9.95.370 and any appropriation made for the purposes of RCW 9.95.310 through 9.95.370. All expenditures from this revolving fund shall be made by check or voucher signed by the secretary of the department of social and health services or his designee. The parolee and probationer revolving fund shall be deposited by the department of social and health services in such banks or financial institutions as it may select which shall give to the department of social and health services a surety bond executed by a surety company authorized to do business in this state, or collateral eligible as security for deposit of state funds in at least the full amount of deposit. [1971 ex.s. c 31 § 6; 1961 c 217 § 7.]

9.95.370 Assistance for parolees and discharged prisoners——Agreement by recipient to repay funds. The secretary of the department of social and health services or his designee shall enter into a written agreement with every person receiving funds under RCW 9.95.310 through 9.95.370 that such person will repay such funds under the terms and conditions in said agreement. No person shall receive funds until such an agreement is validly made. [1971 ex.s. c 31 § 7; 1961 c 217 § 8.]

Chapter 9.95A
SPECIAL ADULT SUPERVISION PROGRAMS

Sections

9.95A.010 Legislative intent. It is the intention of the legislature in enacting this chapter to increase the protection afforded the citizens of this state, to permit a more even administration of justice in the courts, to rehabilitate adult offenders, and to reduce the necessity for commitment of adults to either state or county institutions for convicted persons by developing, strengthening and improving both public and private resources available in the local communities and counties and the care, treatment and supervision of adults placed in "special adult supervision programs" by the courts of this state. [1973 1st ex.s. c 123 § 1.]

9.95A.020 State to share in costs. From any state moneys made available for such purpose, the state of Washington, through the department of social and health services, shall, in accordance with this chapter, share in the cost of supervising and providing services for persons processed in the courts as nondangerous adults who could otherwise be committed by the superior courts to the custody of the department of social and health services, but who are instead granted probation and placed in "special adult supervision programs". [1973 1st ex.s. c 123 § 2.]

9.95A.030 Definitions. As used in this chapter:

(1) "Secretary" means the secretary of the department of social and health services.

(2) "Department" means the department of social and health services.

(3) "Special adult supervision program" means a program (a) directly operated by the county or (b) provided for by the county by purchase, contract or agreement, or (c) a combination of subsections (a) and (b), which embodies a degree of supervision substantially above or better than the usual, individualized so as to deal with the individual and his family in the context of his total life, or which embodies the use of new techniques in addition to, or instead of, routine supervision techniques or those otherwise or ordinarily available in the applying county, and which meets the standards prescribed pursuant to this chapter. A person may only be placed in a special adult supervision program pursuant to court order. The court is hereby authorized to make such order.

(4) "Deferred prosecution" means a special supervision program, for an individual, ordered for a specified period of time by the court prior to a guilty plea to, or a trial on, a felony charge, pursuant to either:

(a) A written agreement of the prosecuting attorney, defendant, and defense counsel, with concurrence by the court; or

(2) If the maximum sentence of imprisonment authorized by law upon conviction of such felony is eight years or more but less than twenty years, such felony shall be treated as a class B felony for purposes of this title;

(3) If the maximum sentence of imprisonment authorized by law upon conviction of such felony is less than eight years, such felony shall be treated as a class C felony for purposes of this title. [1975 1st ex.s. c 260 § 9A.28.010.]

9A.28.020 Criminal attempt. (1) A person is guilty of an attempt to commit crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime.

(2) If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

(3) An attempt to commit a crime is a:

(a) Class A felony when the crime attempted is murder in the first degree;

(b) Class B felony when the crime attempted is a class A felony other than murder in the first degree;

(c) Class C felony when the crime attempted is a class B felony;

(d) Gross misdemeanor when the crime attempted is a class C felony;

(e) Misdemeanor when the crime attempted is a gross misdemeanor or misdemeanor. [1975 1st ex.s. c 260 § 9A.28.020.]

9A.28.030 Criminal solicitation. (1) A person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a crime, he offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed.

(2) Criminal solicitation shall be punished in the same manner as criminal attempt under RCW 9A.28.020. [1975 1st ex.s. c 260 § 9A.28.030.]

9A.28.040 Criminal conspiracy. (1) A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

(2) It shall not be a defense to criminal conspiracy that the person or persons with whom the accused is alleged to have conspired:

(a) Has not been prosecuted or convicted; or

(b) Has been convicted of a different offense; or

(c) Is not amenable to justice; or

(d) Has been acquitted; or

(e) Lacked the capacity to commit an offense.

(3) Criminal conspiracy is a:

(a) Class A felony when an object of the conspiratorial agreement is murder in the first degree;

(b) Class B felony when an object of the conspiratorial agreement is a class A felony other than murder in the first degree;

(c) Class C felony when an object of the conspiratorial agreement is a class B felony;

(d) Gross misdemeanor when an object of the conspiratorial agreement is a class C felony;

(e) Misdemeanor when an object of the conspiratorial agreement is a gross misdemeanor or misdemeanor. [1975 1st ex.s. c 260 § 9A.28.040.]

Chapter 9A.32
HOMICIDE

Sections

9A.32.010 Homicide defined. Homicide is the killing of a human being by the act, procurement or omission of another and is either (1) murder, (2) manslaughter, (3) excusable homicide, or (4) justifiable homicide. [1975 1st ex.s. c 260 § 9A.32.010.]

Excusable homicide: RCW 9A.16.030.
Justifiable homicide: RCW 9A.16.040 and 9A.16.050.

9A.32.020 Premeditation——Limitations. (1) As used in this chapter, the premeditation required in order to support a conviction of the crime of murder in the first degree must involve more than a moment in point of time.

(2) Nothing contained in this chapter shall affect RCW 46.61.520. [1975 1st ex.s. c 260 § 9A.32.020.]

9A.32.030 Murder in the first degree. (1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he causes the death of such person or of a third person; or

(b) Under circumstances manifesting an extreme indifference to human life, he engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or

(c) He commits or attempts to commit the crime of either (1) robbery, in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first degree, or (5) kidnaping, in the first or second degree, and; in the course of and in

furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the first degree is a class A felony. [1975-'76 2nd ex.s. c 38 § 3; 1975 1st ex.s. c 260 § 9A.32.030.]

Effective date——Severability——1975-'76 2nd ex.s. c 38: See notes following RCW 9A.08.020.

9A.32.040 Murder in the first degree——Sentences. Notwithstanding RCW 9A.32.030(2), any person convicted of the crime of murder in the first degree shall be sentenced as follows:

(1) If, pursuant to a special sentencing proceeding held under RCW 10.94.020, the jury finds that there are one or more aggravating circumstances and that there are not sufficient mitigating circumstances to merit leniency, and makes an affirmative finding on both of the special questions submitted to the jury pursuant to RCW 10.94.020(10), the sentence shall be death;

(2) If, pursuant to a special sentencing proceeding held under RCW 10.94.020, the jury finds that there are one or more aggravating circumstances but fails to find that there are not sufficient mitigating circumstances to merit leniency, or the jury answers in the negative either of the special questions submitted pursuant to RCW 10.94.020(10), the sentence shall be life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this subsection shall not have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner nor reduce the period of confinement. The convicted person shall not be released as a result of any type of good time calculation nor shall the department of social and health services permit the convicted person to participate in any temporary release or furlough program; and

(3) In all other convictions for first degree murder, the sentence shall be life imprisonment. [1977 ex.s. c 206 § 3; 1975 1st ex.s. c 260 § 9A.32.040.]

Severability——1977 ex.s. c 206: See RCW 10.94.900.

9A.32.045 Murder in the first degree——Aggravating circumstances——Mitigating circumstances. (1) In a special sentencing proceeding under RCW 10.94.020, the following shall constitute aggravating circumstances:

(a) The victim was a law enforcement officer or fire fighter and was performing his or her official duties at the time of the killing and the victim was known or reasonably should have been known to be such at the time of the killing.

(b) At the time of the act resulting in the death, the defendant was serving a term of imprisonment in a state correctional institution or had escaped or was on authorized or unauthorized leave from a state correctional institution, or was in custody in a local jail and subject to commitment to a state correctional institution.

(c) The defendant committed the murder pursuant to an agreement that the defendant receive money or other thing of value for committing the murder.

(d) The defendant had solicited another to commit the murder and had paid or agreed to pay such person money or other thing of value for committing the murder.

(e) The murder was of a judge, juror, witness, prosecuting attorney, a deputy prosecuting attorney, or defense attorney because of the exercise of his or her official duty in relation to the defendant.

(f) There was more than one victim and the said murders were part of a common scheme or plan, or the result of a single act of the defendant.

(g) The defendant committed the murder in the course of, in furtherance of, or in immediate flight from the crimes of either (i) robbery in the first or second degree, (ii) rape in the first or second degree, (iii) burglary in the first degree, (iv) arson in the first degree, or (v) kidnaping in which the defendant intentionally abducted another person with intent to hold the person for ransom or reward, or as a shield or hostage, and the killing was committed with the reasonable expectation that the death of the deceased or another would result.

(h) The murder was committed to obstruct or hinder the investigative, research, or reporting activities of anyone regularly employed as a newsreporter, including anyone self-employed in such capacity.

(2) In deciding whether there are mitigating circumstances sufficient to merit leniency, the jury may consider any relevant factors, including, but not limited to, the following:

(a) The defendant has no significant history of prior criminal activity;

(b) The murder was committed while the defendant was under the influence of extreme mental disturbance;

(c) The victim consented to the homicidal act;

(d) The defendant was an accomplice in a murder committed by another person and the defendant's participation in the homicidal act was relatively minor;

(e) The defendant acted under duress or under the domination of another person;

(f) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect; and

(g) The age of the defendant at the time of the crime calls for leniency. [1977 ex.s. c 206 § 4; 1975–'76 2nd ex.s. c 9 § 1 (Initiative Measure No. 316 § 1).]

Severability——1977 ex.s. c 206: See RCW 10.94.900.

9A.32.046 Murder in the first degree——Conditions under which death penalty mandatory. Once a person is found guilty of murder in the first degree under RCW 9A.32.030(1)(a) with one or more aggravating circumstances and without sufficient mitigating circumstances to merit leniency and the jury has made affirmative findings on both of the special questions submitted pursuant to RCW 10.94.020(10), neither the court nor the jury shall have the discretion to suspend or defer the imposition or execution of the sentence of death. The time of such execution shall be set by the trial judge at the time of imposing sentence and as a part thereof. [1977 ex.s. c 206 § 5; 1975–'76 2nd ex.s. c 9 § 2 (Initiative Measure No. 316 § 2).]

Severability——1977 ex.s. c 206: See RCW 10.94.900.

9A.32.047 Murder in the first degree——Life imprisonment, when. In the event that the governor commutes a death sentence or in the event that the death penalty is held to be unconstitutional by the United States supreme court or the supreme court of the state of Washington the penalty under RCW 9A.32.046 shall be imprisonment in the state penitentiary for life without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner nor reduce the period of confinement. The convicted person shall not be released as a result of any type of good time calculation nor shall the department of social and health services permit the convicted person to participate in any temporary release or furlough program. [1977 ex.s. c 206 § 6; 1975–'76 2nd ex.s. c 9 § 3 (Initiative Measure No. 316 § 3).]

Severability——1977 ex.s. c 206: See RCW 10.94.900.

9A.32.050 Murder in the second degree. (1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he causes the death of such person or of a third person; or

(b) He commits or attempts to commit any felony other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the second degree is a class A felony. [1975–'76 2nd ex.s. c 38 § 4; 1975 1st ex.s. c 260 § 9A.32.050.]

Effective date——Severability——1975–'76 2nd ex.s. c 38: See notes following RCW 9A.08.020.

9A.32.060 Manslaughter in the first degree. (1) A person is guilty of manslaughter in the first degree when:

(a) He recklessly causes the death of another person; or

(b) He intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child.

(2) Manslaughter in the first degree is a class B felony. [1975 1st ex.s. c 260 § 9A.32.060.]

9A.32.070 Manslaughter in the second degree. (1) A person is guilty of manslaughter in the second degree when, with criminal negligence, he causes the death of another person.

(2) Manslaughter in the second degree is a class C felony. [1975 1st ex.s. c 260 § 9A.32.070.]

Abortion: Chapter 9.02 RCW

9A.32.900 Severability——RCW 9A.32.045–9A.32.047. If any provision of RCW 9A.32.045 through 9A.32.047, or its application to any person or circumstance is held invalid, the remainder of RCW 9A.32.045 through 9A.32.047, or the application of the provision to other persons or circumstances is not affected. [1975–'76 2nd ex.s. c 9 § 4 (Initiative Measure No. 316 § 4).]

Reviser's note: Phrase "this act" [1975–'76 2nd ex.s. c 9 (Initiative Measure No. 316)] has been translated to "RCW 9A.32.045 through 9A.32.047" for purposes of this section and RCW 9A.32.901, which were both part of said original act.

9A.32.901 Sections captions——RCW 9A.32.045–9A.32.047. The section captions as used in RCW 9A.32.045 through 9A.32.047 are for organizational purposes only and shall not be construed as part of the law. [1975–'76 2nd ex.s. c 9 § 5 (Initiative Measure No. 316 § 5).]

Reviser's note: See note following RCW 9A.32.900.

Chapter 9A.36

ASSAULT AND OTHER CRIMES INVOLVING PHYSICAL HARM

Sections

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. 38349-1-III**, 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 or residence address as listed on ACORDS:

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Date: July 5, 2024

WASHINGTON APPELLATE PROJECT

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