No. _____

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TAYLOR TOM CONLEY,

Appellant.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Taylor Conley, Appellant/Petitioner, asks this court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

The Court of Appeals affirmed Mr. Conley's sentence in an opinion dated March 11, 2025. A copy is attached.

III. ISSUES PRESENTED FOR REVIEW

1.a. Does a defendant have the right to be present at a contested hearing to determine if he will be required to wear a shock device during his sentencing hearing?

1.b. Can a defendant's right to be present at hearing on the use of a security device be deemed waived when a defendant, who does not know and is

not told that such a hearing has taken place in his absence, fails to object?

1.c. Where a judge finds only that the courtroom is crowded and makes no finding that the defendant poses any risk is the use of a security measure, here a shock device, justified?

2. Did the resentencing court err when it held that LWOP was the presumptive sentence and placed a burden on Mr. Conley to justify a lesser sentence?

3. Did the resentencing court place too much emphasis on the crime, too little emphasis on rehabilitation, while using a too narrow framework of the "mitigating qualities of youth"?

4. Should LWOP be categorically barred for anyone under 21 at the time of the crime?

5. Is LWOP unconstitutional when imposed on someone who has demonstrated rehabilitative efforts and the capacity for future full rehabilitation?

IV. STATEMENT OF THE CASE

Taylor Conley appeals from his resentencing hearing where the court "maintain[ed]" LWOP as a sentence. RP II 16.

Mr. Conley was convicted of the aggravated first-degree murder of Brian Swehla. Swehla was killed in his house, after being beaten and shot. *State v. Conley*, 156 Wash. App. 1027 (2010). Conley, who was 20 years old at the time of the crime, was sentenced to LWOP.

Following the decision in *Matter of Monschke*, 197 Wash. 2d 305, 482 P.3d 276 (2021), the parties agreed that Conley was entitled to be resentenced. The sentencing hearing consisted of an evidentiary portion (RP), the announcement of its sentence (RP II), along

with the entry of Findings of Fact and Conclusions of Law (F●F).

Before the start of the evidentiary hearing and before Taylor was brought to court, a jail officer asked the Court for approval to restrain Mr. Conley for his sentencing. RP 3. The jail officer asked the court :

> CAPT. LUX: So, we would request that he be brought over in restraints. He's already been convicted. It's-it's not a trial, so we would request that he-we be allowed to bring him over in restraints.

RP 3.

Defense counsel objected to the use of restraints. RP 4. After a brief discussion focusing on Conley's lack of recent infractions and favorable "classification" in prison (RP 4-6), the judge noted that the courtroom was crowded, although the court did not inquire or indicate who the spectators were there to support. RP 6

("I have to look that we have a very packed courtroom, and that is of concern in-as far as safety.").

The court acknowledged it had been "quite some time since there has been an infraction," and then, without any facts or finding that Conley presented any risk, allowed the use of a shock device .

> And so, what I am going to do at this time is not require the full shackles, but what I do want is just the-the stun.

RP 6. See also RP 6 ("CAPT. LUX: Yeah. It's a stun cuff.").[1]

The hearing sentencing hearing largely consisted of testimony from Conley's witnesses focused on the statutory considerations found in RCW 10.95.030, the so-called "mitigating qualities of youth. The court found:

> Defendant's surrounding environment and family circumstances which included: his parents

[1] https://www.corrections1.com/stun-cuff

> divorced at a young age and there was domestic violence in the home, he started using alcohol at a young age, and he ran away at the age of 12 due to being expelled from school for selling marijuana. The Defendant also stated that he was sent to a program for "behavior modification" and spoke to extreme non-compliance treatment. Following that, the Defendant reportedly got into using hard drugs, was transient, and subsequently had a "breakdown" for which he was hospitalized.

F●F 5. Regarding Conley's neurodevelopmental functioning:

> Dr. Megan Carter, a forensic psychologist, submitted a twenty-three-page report and testified on behalf of the Defendant. Dr. Carter spoke to many of these issues and concluded that "considering known factors related to youthful development and culpability, in addition to scientific literature recognizing the continuation of brain development well into young adulthood and the relative immaturity of those with a history of childhood maltreatment, in my professional opinion, it appears that, as a result of his overall mental condition (e.g., dysmaturity, significant substance abuse that contributed to poor mental health, exposure to childhood maltreatment, etc.), Mr. Conley's capacity to fully appreciate the consequences of his choices and conduct was likely significantly impaired during the time of the alleged offenses, based on the

> known course of brain development and his exposure to adverse childhood experiences."

F●F 6. Voluminous testimony was presented describing Mr. Conley's numerous efforts over many years to improve himself and his community. RP 50-89. The sentencing judge found:

> The majority of the testimony and supporting statements presented on behalf of the Defendant speak to his rehabilitation. The court acknowledges the information presented that the Defendant appears to be doing positive things as he has naturally matured.…

F●F 11 (Rehabilitation). That finding continues:

> …but the court cannot find he is rehabilitated. The court cannot ignore that at the time of the sentencing the Defendant denied any responsibility for the murder. The court questions the Defendant's sincerity when he now claims to accept responsibility for the murder in light of the fact that in May of 2020 he denied responsibility and maintained his innocence.

Id. The judge also faulted the defense expert's testimony.

> The court finds Dr. Carter's lack of knowledge of the facts of the case to be of major concern because it is of utmost importance to look at the actions of a Defendant at the time of the commission of a crime - that timeframe is important to know and understand how a Defendant was functioning at that point in time.

FOF 8. The Court then concluded (COL):

> 1. This matter is properly before the court for resentencing.
>
> 2. The standard of review is that the Defendant must show a basis to mitigate the sentence by a preponderance of the evidence.
>
> 3. The Defendant has not demonstrated by a preponderance of the evidence that his crime reflects the mitigating qualities of youth. Additionally, there are no substantial and compelling reasons to justify an exceptional sentence.
>
> 4. Whether by preponderance of the evidence, or just an application of mitigation of factors, this court cannot find Defendant's culpability was diminished as a result of his age and/or applicable considerations of youth.
>
> 5. The court maintains the sentence of life without the possibility of parole.

V. REASONS TO GRANT REVIEW

Introduction

This Court's decision in *Matter of Monschke*, 197 Wash.2d 305, 482 P.3d 276 (2021), like the preceding juvenile-class cases, resulted in a new rule that some trial judges were uncertain how to apply. Although *State v. Carter*, 3 Wash.3d 198,548 P.3d 935 (2024), provided guidance regarding the sentencing options, uncertainty and imprecision remained—as this case demonstrates.

There are several reasons this Court should accept review. Taylor Conley was resentenced to life without parole (LWOP), after a shackles hearing conducted in his absence, after which he was ordered to wear a shock device despite the absence of any facts or finding that he presented an imminent risk of danger or disruption. Despite Conley's remarkable record of

rehabilitation, the judge reimposed life without parole by placing the burden on Conley to justify a lesser sentence and after primarily focusing on the facts of the crime. The Court of Appeals affirmed in an opinion that consistently misapplies this Court's caselaw. RAP 13.4(b).

Not only is Conley entitled to a third sentencing, but this Court should also hold that he cannot be sentenced to LWOP or *de facto life* at that hearing, because the former sentence is categorically barred for someone under 21 or because the latter sentence is prohibited for someone who has shown either a change of rehabilitation or actual rehabilitation—both standards that he satisfies.

A. After a Hearing Where Conley was not Present, the Sentencing Court Unjustifiably Ordered Conley to Wear a Shock Device Without Any Evidence or a Finding that He Posed Any Danger

Without Conley present, the sentencing judge decided that cost of admission for Mr. Conley to attend his sentencing would be for Conley to endure the constant threat of a painful and debilitating shock. The order requiring Conley to wear a stun cuff was not based on facts showing that Conley was disruptive, a danger in the courtroom, or a risk of escape, but only because the judge was concerned the courtroom was crowded, although the judge did not bother to learn who was in the crowd or seek to move to larger courtroom.

The Court of Appeals held that Conley "did not have a right to attend the restraint hearing, and "even if he did, Conley waived appellate review" when he "failed to object to his absence after arriving at court for the resentencing hearing"—a hearing Conley knew

nothing about. *Opinion* at 6-7. "That's some catch, that Catch-22." Heller, Joseph, *Catch-22* (1961).

Over the last decade or more, this Court's has instructed trial and the lower appellate courts that requiring a defendant to wear a security device is only merited when the judge conducts a hearing that focuses on whether a defendant presents an immediate risk of danger, disruption, or escape in the courtroom. See *State v. Jackson*, 195 Wash. 2d 841, 854, 467 P.3d 97, 103–04 (2020) ("A trial court must engage in an individualized inquiry into the use of restraints prior to every court appearance.") (emphasis in original).

The trial court did not apply that rule. Neither did the Court of Appeals. This Court should accept review, reverse, and hold:

1. a defendant has a right to be present at hearing where the court determines whether he should be forced to wear a security device and does not waive the right

when he is not told that the hearing has taken place; and

2. a finding that the courtroom is crowded is insufficient as a matter of law to justify the use of a security device where there is no showing that the defendant presents a risk of danger, disruption, or escape.[2]

This Court Should Expressly Recognize the Right to be Present at a Restraint Hearing

The right of a criminal defendant to be personally present in the courtroom at every stage of the proceedings is fundamental to our system of justice and protected under the due process clause of the Fourteenth Amendment to the United States Constitution and article I, section 22 of the Washington

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[2] This Court should also accept review and outright ban the use of stun cuffs and other shock devices as unconstitutionally cruel. See *Wrinkles v. State*, 749 N.E.2d 1179, 1193 (Ind. 2001); *People v. Mar,* 52 P.3d 95, 103 (Cal. 2002) (and research cited therein). See also Philip H. Yoon, T*he "Stunning" Truth: Stun Belts Debilitate, They Prejudice, and They May Even Kill*, 15 Cap. Def. J. 383 (2003).

Constitution. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." *Lewis v. United States*, 146 U.S. 370, 372 (1892). This principle has been consistently upheld and continually reaffirmed. See *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (a defendant can lose his right to be present at trial if, after he has been warned by the judge, he nevertheless insists on conducting himself in a manner "so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.").

The core of this right is "the right to be present when evidence is being presented or whenever the defendant's presence has 'a relation, reasonably substantial,' to the opportunity to defend against the charge." *State v. Bremer*, 98 Wash. App. 832, 834, 991

P.2d 118 (2000) (quoting *In re Pers. Restraint of Lord*, 123 Wash.2d 296, 306, 868 P.2d 835 (1994)). "(A)t all stages of the proceedings where fundamental fairness might be thwarted by [the defendant's] absence," there is a right to be present. *Faretta v. California,* 422 U.S. 806, 816 (1975).

Although ignored by the trial judge and lower appellate court in this case, a defendant has a significant personal interest in the decision whether he will face the constant threat of being shocked as a requirement of attending his sentencing. A contested hearing to determine whether to require the defendant to be restrained in the courtroom may not always require a formal evidentiary hearing. However, when the law is followed, a restraint hearing necessarily involves the presentation of facts related to a defendant's behavior in and out of court. Those facts

are well known to a defendant, who not only could reasonably assist counsel, but could also seek to testify to his lack of danger, his fear of being electrocuted by a stun cuff and how it may negatively impact his demeanor and/or ability to consult with counsel.

Just as importantly, the decision whether a defendant presents a risk in the courtroom has a close relationship to the issues at sentencing. A judge's finding that a defendant needs to be physically restrained in court has profound implications for his sentence, especially when the prospect of rehabilitation is one of the statutory and constitutional factors that a judge must consider in determining what sentence to impose.

Given that a defendant's bodily autonomy is directly implicated in a restraint hearing, this Court should hold that a defendant has the right to be

present whenever a judge is considering the use of any restraint.

The Court of Appeals held that Conley did not have a right to be present reasoning that a restraint hearing is not a "critical stage of a criminal proceeding," at least where "the facts considered by the court were undisputed by the parties." *Opinion* at 7. While the facts may not have been disputed in this case the defense objected to the use of the stun cuff and the judge's findings did not justify the use of that or any restraint.

Caselaw provides strong support for the right to be present at a restraint hearing. An "individualized" hearing cannot be conducted in the absence of the individual at issue. In order to justify the use of restraints, facts must be presented that support the conclusion that the defendant presents an imminent

danger in the courtroom. If those facts are untrue or inaccurate, a defendant is in the best position to offer rebuttal.

Here, the State did not allege that Conley had ever disrupted court or had disobeyed the instructions of court security staff. However, that demonstrates the insufficient findings, not that a Conley's presence at the hearing would have been useless.

Neither Counsel Nor Conley Waived his Presence

Although a defendant can sometimes waive his right to be present, either through an express waiver or by disruptive behavior, caselaw strongly supports the conclusion that the right cannot be waived for a defendant by counsel's failure to object. *Russell v. State,* 230 Ga.App. 546, 547, 497 S.E.2d 36 (1998) (inaction on the part of counsel does not constitute a waiver for the defendant). Likewise, it turns

constitutional waiver analysis on its head to conclude, as the court below did, that a defendant waives his right to be present through silence, when a defendant was not present at the time of the supposed waiver and was not informed of the hearing conducted in his absence. See *United States v. Gagnon*, 470 U.S. 522, 528–29 (1985) (holding that defendant waived his right to be present at an in-camera hearing when no objection was made by defendant who was informed that the judge intended to conduct a hearing in his absence).

What suffices for waiver depends on the nature of the right at issue." *New York v. Hill,* 528 U.S. 110 (2000). Reviewing courts differentiate between:

a) certain fundamental rights, which require a defendant's personal waiver, and

b) other decisions pertaining to the conduct of the trial, which the attorney may make and to which the defendant is deemed bound.

The right to be present at a hearing where a defendant's bodily autonomy is implicated falls into the former category. Consistent with the duty imposed on judges to hold individualized hearings, this Court should accept review and expressly hold that a defendant's right to be present at a restraint hearing requires a knowing, intelligent, and voluntary waiver by the defendant.

The lower court decision is contrary to the jurisprudence discussed above because it concluded that counsel waived Conley's right to be present because "Conley's counsel made no mention of Conley's absence at the restraint hearing," a fact that would have been obvious to all. *Opinion* at 7. Finding a waiver of a constitutional right personal to a defendant when counsel objected to the use of a restraint but did

not also object to the defendant's absence contradicts the nature of the right.

The lower court also faulted Conley for failing to object. However, he was not present when the hearing was held, and the judge did not inform Conley that the hearing had been conducted in his absence. This is vastly different from *State v. Slert*, 186 Wash. 2d 869, 876, 383 P.3d 466 (2016), where the defendant was present in the court when the court indicated its plan to excuse jurors biased against Slert in chambers and where Slert did not contemporaneously object. "We found that by waiting, the defendant waived the claim." *Id.*

The record here shows only that Conley was uninvited, and the restraint hearing was unknown to him. Conley did not wait until the end of the sentencing hearing to object. He did not know the

court had conducted a hearing in his absence. After all, Cowlitz County, where Conley was sentenced, has a history of using security measures without holding any hearing. *State v. Luthi*, 549 P.3d 712, 713 (Wash. 2024) (Cowlitz County case that asked "whether a criminal defendant may be required to appear for nonjury proceedings from an 'in-court holding cell' without an individualized inquiry justifying such a restraint. The answer is no.").

The Findings Did Not Justify Restraint

Here, the court's only purported justification for requiring Conley to wear a shock device was because the courtroom was "very packed" and "safety [was] of the upmost concern to the court." RP I at 5-6; *Opinion* at 8. Those findings fall far short of the necessary justification.

Conley agrees that safety should be a primary concern of the court. However, the safety of attendees is only implicated if facts are presented giving rise to a reasonable inference that the defendant presents an imminent risk of danger to others in the courtroom. The fact of conviction alone is insufficient. After all, most of the caselaw requiring findings are murder and capital cases. See *State v. Finch,* 137 Wash. 2d 792, 853, 975 P.2d 967 (1999) ("The trial court's decision to shackle Mr. Finch during the trial and sentencing was clearly an abuse of discretion." "Mr. Finch was never disruptive in court, he was not an escape risk and he posed no threat to anyone.").

A defendant's right to appear in court free from unjustified restraints protects "the constitutional right to a fair trial" which is implicated by shackling and restraints at "nonjury" due, in part, to the racist

history of shackling and "the unknown risks of prejudice" from "implicit bias" and how it can impair decision-making. *Luthi*, 549 P.3d at 715. Compelling a defendant to appear for court in a restraint provides "unmistakable indications of the need to separate a defendant from the community at large," implying "that [the defendant] is particularly dangerous or culpable." *Luthi,* 549 P.3d at 716.

Of course, dangerousness and culpability are central factors that must be carefully considered and weighed at a sentencing. Because of the prejudice that inheres in the use of restraints, such devices must be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent escape. *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981).

The record in this case is utterly devoid of any facts or any finding that Conley posed any imminent danger in the courtroom. In fact, the judge acknowledged Conley's lack of any recent infractions in prison. A "crowded" courtroom does not make Conley a likely danger, especially where the judge did not inquire who was in the that crowd. A crowd of supporters would likely decrease any inference of danger. However, the court did not inquire.

The use of a "stun cuff," as opposed to shackles, is not a less restrictive device. Instead, it increased the prejudice to Conley. It is a "remotely operated electronic restraint device designed to "disorient, temporarily immobilize[,] and stun a person." *Hawkins v. Comparet-Cassani,* 251 F.3d 1230, 1234 (9th Cir. 2001). Activation, intentional or accidental, can cause "immediate and uncontrolled defecation and

urination," and "leave welts on the wearer's skin requiring as long as six months to heal." *People v. Mar*, 52 P.3d 95, 103 (Cal. 2002) (internal citation and quotation marks omitted). Amperage of this magnitude may be capable of triggering fatal cardiac arrhythmia. See Shelley A. Nieto Dahlberg, *The React Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use Is Permissible Under the United States and Texas Constitutions*, 30 ST. MARY'S L.J. 239, 251-52 (1998).

A defendant facing a possible life sentence for an aggravated murder who is forced to wear a shock device may not only feel impaired in his ability to consult with counsel, but the device may also result in a flattened effect–which could be viewed by the judge as a lack of remorse. Moreover, given that the judge

was the factfinder, she was obviously aware that Conley was wearing the device.

To be sure, Conley agrees that a judge may employ extreme measures as a last resort to "protect the court and its processes, and to attend to the safety and security of those in the courtroom." *United States v. Nicholson,* 846 F.2d 277, 279 (5th Cir. 1988); See also *State v. Lundstrom*, 6 Wash. App. 2d 388, 394, 429 P.3d 1116 (2018).

Here, the court abused its discretion in ordering Conley to wear a shock device without any facts to base the conclusion that he posed an imminent risk of danger or disruption in the courtroom. Because the trial judge's insufficient finding, upheld below, conflicts with numerous cases from this Court, review is merited.

B. The Sentencing Court Erred by Treating LWOP as the Presumptive Sentence requiring Conley to Prove a Mitigating Factor by a Preponderance of the Evidence.

The discretionary range in a *Monschke*-class resentencing is LWOP "or anything less than LWOP." *State v. Carter*, __ Wash.3d __, 548 P.3d 935, 947 (2024). LWOP is not the presumptive sentence. LWOP is simply the maximum possible punishment. Because all possible sentences fall within the discretionary range, a defendant does not have to prove by a preponderance (or any other standard) that the evidence is sufficient to justify a departure less than LWOP. This Court should accept review because the decision below conflicts with *Carter*.

The Court of Appeals summarized Conley's argument:

> Conley argues that the court erred by treating LWOP "as the presumptive sentence" and requiring him to prove mitigating factors beyond

> a preponderance of the evidence. *Br. of App.* at 33-37. Relatedly, in his reply brief, Conley asserts that the court failed to consider that it had the discretion to impose a sentence ranging from zero days to LWOP under our Supreme Court's recent decision in *Carter*. *Rep. Br. of App.* at 6.

The lower court held:

> We conclude the court did not err by requiring Conley to prove mitigating factors by a preponderance of the evidence because it also considered the factors with no burden (as in any other sentencing).

Opinion at 13. See also *id*. at 14 ("the court analyzed the issue under two frameworks: one that placed the burden on the defendant, and the other where it considered the factors without any burden."). The Court of Appeals misread and misunderstood the trial judge's ruling. The judge considered the *Miller*-derived "mitigating factors of youth" and the list found in the SRA but concluded that Conley had not proved any factor by a preponderance of the evidence requiring the judge to "maintain" LWOP. This was error.

The judge stated:

> The Defendant has not demonstrated by a preponderance that his crime reflects the mitigating qualities of youth. There are no substantial and compelling reasons to justify an exceptional sentence. Even if it was just the consideration of mitigating factors, the Court still finds no basis when considering all the various factors to mitigate the sentence.

RP 15-16. The judge did not conclude that LWOP was the correct sentence even if Conley did not have a burden of proof. Instead, the sentencing judge's comments referred to two possible sources of mitigation—one in the SRA and one derived from *Miller* and found in 10.95 RCW. When the judge mentioned the "consideration of mitigating factors," he was referencing the SRA, not removing the burden of proof he previously applied.

The trial judge repeatedly states that Conley did not prove by a preponderance of the evidence either the "mitigating qualities of youth" or any of the

mitigating factors in the SRA. The judge's other comments make it clear that he applied the erroneous "preponderance" standard. See RP II 10 ("The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by the preponderance of the evidence, RCW 9.94A.535(1)."); RP II 11 ("The Court finds it is well-established and no supporting law is contrary to such that preponderance of the evidence applies to consideration of mitigation of a sentence."); RP II 15 ("The Court does find that the Defendant does have to meet preponderance of the evidence to show a basis to mitigate the sentence."). The findings are in accord. FOF 2 ("The standard of review is that the Defendant must show a basis to mitigate the sentence by a preponderance of the evidence.").

The judge's statements are consistent with the State's argument:

> …if the Court does believe that the Defense carried their burden of showing by a preponderance that youthfulness is a mitigating factor, then the Court is free to impose a determinate sentence.
>
> RP I 13.

While it badly misread the judge's ruling, to its credit the Court of Appeals recognized "(h)ad the court relied solely on the preponderance standard, that would have been error." This is so because there is no such thing as an exceptional sentence in this instance. See *Carter,* 3 Wn.3d at 216. See also *State v. Delbosque*, 195 Wash. 2d 106, 124, 456 P.3d 806, 816 (2020) ("We agree with the trial court that the statute does not allocate a burden of proof, and we decline to write one in."). Saddling Conley with a burden of proof was contrary to this Court's caselaw. Review is merited.

C. The Sentencing Court Placed Too Much Emphasis on Retribution, Not Enough on Rehabilitation and Construed the Mitigating Qualities of Youth Too Narrowly.

When resentencing an adolescent pursuant to 10.95 RCW, a court must not only consider the mitigating qualities of youth, a "trial court must place greater emphasis on mitigation factors than on retributive factors." *State v. Haag,* 198 Wash. 2d 309, 317, 495 P.3d 241(2021). The lower court disagreed and held that although a judge must consider all factors, they can place their focus on the past and not the future. *Opinion* at 11. This Court should accept review of this important constitutional issue and reaffirm *Haag* in the context of a *Monschke*-class resentencing.

There is a simple way to illustrate that the sentencing judge's primary focus was on retribution. The judge discussion of the crime commands eight pages of the transcript. His discussion of rehabilitation

takes less than a page. The judge then justifies his life sentence by returning to the crime and his conclusion that Conley did not prove factors that mitigate the crime by a preponderance of the evidence. RP II 15-16.

However, it is not so much the counting of pages, but the trial judge's fundamental misapplication of the mitigating qualities of youth that reveals the extent that the judge departed from the requirement to treat children as different.

Although the sentencing court gave lip-service to Conley's numerous rehabilitative accomplishments, the judge's remarks, as well as the sentence imposed, show that the judge afforded those facts little to no weight. In contrast, the facts of the crime and the retributive goal became the primary, if not sole focus of the court. The court made numerous findings regarding the commission of the crime. While the consideration and

weighing of crime related factors was proper, there is absolutely no indication in the written or oral record that the judge employed a forward-looking frame.

Moreover, the judge's findings are limited to actual rehabilitation accomplished at the time of sentencing, rather than the chance of additional rehabilitation. This is important because the judge used what it viewed as recent acceptance of responsibility for the homicide as proof of lack of current rehabilitation.[3] While the judge did not explain

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[3] Treating Conley's pursuit of relief in the courts as negating any claim of rehabilitation is highly problematic. Assertions of innocence do not preclude or negate rehabilitation efforts. Convictions of innocent people still occur, including with adolescents. The sentencing judge's rationale is reminiscent of psychiatric testimony in death penalty cases that a person who claims innocence presents a higher risk of future danger. To the contrary, sometimes those individuals are innocent. See Joanmarie Ilaria Davoli, *Psychiatric Evidence on Trial*, 56 SMU L. Rev. 2191, 2193 (2003); Morris, E., *The Thin Blue Line,* Miramax Films (1988).

why Conley's failure to confess earlier negates his current state of rehabilitation, the proper framework is whether Conley was on the path to full rehabilitation. Here, the judge implicitly found that he was, but imposed LWOP reasoning that he should have arrived at that stage at some earlier but undefined point-in-time.

Next, the court improperly drew a negative inference from Conley's failure to sufficiently prove a fact-based nexus between his past and the crime. This type of showing exceeds the boundaries of neuroscience. Instead, caselaw directs the parties to present and the court to consider how the common deficits of neurodevelopment may be magnified by adverse factors, including a person's social history.

The vulnerabilities of youth are rarely illuminated by the offender's premeditation/planning,

thought processes during the period proximate to the offense, wrongful awareness, and/or steps taken to avoid apprehension, although that is exactly how the sentencing judge viewed those facts. A sentencing analysis of youthfulness as mitigation is distinct from an insanity test (*i.e.*, wrongful awareness) or evaluation of culpable mental state for the offense (*i.e.*, premeditated, or intentional). Quite the contrary, sentencing for a particular crime only occurs with offenders who are presumed to have the capacity for wrongful recognition and for the culpable mental state(s). The impetuosity of youth is not reflected in behaviors that are spontaneous and unreflective unless the youth in question is a preschooler. Rather teen impetuosity involves their *judgment* impulsivity. See Insel, Catherine, et. al., *White Paper on the Science of*

Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers, (2022).

The resentencing court's misunderstanding of how the mitigating qualities of youth inform assessments of culpability and the inversion of the rehabilitative/retributive balance clearly misapplies precedent, amounting to reversible error. Like *Haag*, Conley's "claim amounts to more than a simple disagreement about the sentence. It shows how the resentencing court erroneously applied our precedent," thereby committing reversible error. *Haag,* 198 Wash. 2d at 327.

Just as retribution cannot take precedence in juvenile sentencing (*Haag*, 198 Wash. 2d at 321), it cannot do so for late adolescents. Instead, a court "must consider the measure of rehabilitation that has occurred since a youth was originally sentenced to life

without parole." *Id., citing Delbosque*, 195 Wash.2d at 121. Just as *Miller*-fix hearings must be forward looking, not backward looking, the same is true in this instance. *Haag*, 198 Wash. 2d at 322–23. In fact, the statute directs the court to consider a defendant's "chances" of rehabilitation—an obviously forward looking requirement. RCW 10.95.030(2)(b).

Like in *Haag*, Conley's "claim amounts to more than a simple disagreement about the sentence. It shows how the resentencing court erroneously applied our precedent," thereby committing reversible error. *Haag,* 198 Wash. 2d at 327.

D. The Cruel Punishment Clause Bars LWOP for Someone 18-20 at the Time of the Crime.

This Court was first in the Nation to prohibit the mandatory imposition of life without the possibility of parole for individuals eighteen to twenty years of age convicted of aggravated murder. *In Matter of the*

Personal Restraint of Monschke, 197 Wash. 2d 305, 482 P.3d 276 (2021), this Court considered evolving standards of decency, updated brain science, and precedent to conclude that mandatory sentences of life without parole violate the Washington Constitution when meted out to those under twenty-one when they committed the crime. *Id.* at 325-326.

One year later, the Supreme Court of Michigan followed this Court's lead holding that mandatorily subjecting an eighteen-year-old defendant to life in prison is "unusually excessive imprisonment and thus a disproportionate sentence that constitutes 'cruel or unusual punishment' under [the Michigan Constitution]." *People v. Parks*, 510 Mich. 225, 234, 255, 987 N.W.2d 161 (2022).

In 2024, the Massachusetts Supreme Court took the logical next step. "Our comprehensive review

informs us that Supreme Court precedent, as well as our own, dictates that youthful characteristics must be considered in sentencing, that the brains of emerging adults are not fully developed and are more similar to those of juveniles than older adults, and that our contemporary standards of decency in the Commonwealth and elsewhere disfavor imposing the Commonwealth's harshest sentence on this cohort." "Consequently, we conclude that a sentence of life without the possibility of parole for emerging adult offenders violates" the state constitutional guarantee against cruel punishment. *Commonwealth v. Mattis,* 493 Mass. 216, 234–35, 224 N.E.3d 410, 428 (2024).

This Court should adopt the holding of *Mattis* under our own constitution. Contrary to the reasoning of the lower court, this Court has not rejected the claim. It has never considered it.

Likewise, a categorical bar of LWOP for defendants 18-20 does not "undercut" the reasoning of *Monschke* that there will be neurodevelopmental differences between 18, 19, and 20 years olds. Not every young adult will exhibit the characteristics articulated in *Miller* (197 Wn.2d at 326), but neither will all juveniles. Nevertheless, both cases were founded on the unacceptable risk that sentencing a member of the cohort to LWOP will be disproportionate—even after a judge considers the evidence and imposes sentence, as this case unfortunately demonstrates.

In any event, the lower court passed the issue to this Court. "Because existing precedent is dispositive of this issue, efforts to extend Bassett to young adults must be resolved by our Supreme Court." *Opinion* at 10. This Court should accept review.

This Court should hold that the state constitution always prohibits the imposition of LWOP on a late adolescent. The rule that Conley seeks is found at the intersection of three recent decisions involving the sentencing of juveniles and late adolescents. The rule that Conley seeks is the next step in what has been historically defined as the "evolving standards of decency that mark the progress of a maturing society." *State v. Gregory*, 192 Wash. 2d 1, 38, 427 P.3d 621 (2018) (Johnson, J., concurring).

First, this Court categorically banned LWOP as violative of the state constitutional protection against cruel punishment for all juveniles sentenced in adult court. *State v. Bassett*, 192 Wash. 2d 67, 428 P.3d 343 (2018). To eliminate "the unacceptable risk that children undeserving of a life without parole sentence will receive one," the court announced a categorical bar

prohibiting the imposition of LWOP sentences on all juvenile offenders. *Id*. at 90 (emphasis added). "We hold that sentencing juvenile offenders to life without parole or early release constitutes cruel punishment and, therefore, RCW 10.95.030(3)(a)(ii) is unconstitutional, insofar as it allows such a sentence, under article I, section 14 of Washington Constitution." Id. at 91.

Second, in *State v. Haag,* 198 Wash. 2d 309, 495 P.3d 241 (2021), this Court expanded the reach of the constitutional rule by additionally recognizing that de facto LWOP sentences are disproportionate punishments for juvenile offenders whose crimes reflect the mitigating characteristics of youth. *Id*. at 329-30. In that case, the court determined that Haag's 46-year minimum term sentence "amounts to a de facto life sentence" and that therefore his sentence is

unconstitutional because the resentencing court expressly found Haag was 'not irretrievably depraved nor irreparably corrupt.' " *Id*. The Court did not read *Bassett* as confined to mandatory LWOP. Instead, and for the same reasoning advanced in *Bassett*, the court determined that "Haag's de facto life sentence is also unconstitutional under article I, section 14." *Id.* at 330 (citing *Bassett*, 192 Wash.2d at 91).

State v. Anderson (Tonelli), 200 Wash. 2d 266, 279–80, 516 P.3d 1213 (2022), clarified that, unlike *Bassett*, the prohibition on de facto life sentences in *Haag* applies only in cases where no "mitigating qualities of youth" are found. In sum, the rule is now that no juvenile can be sentenced to LWOP, and no juvenile can receive a de facto life sentence without a finding by the sentencing court that no mitigating qualities of youth apply.

Third, late adolescents (defined therein as 18-20) cannot be sentenced to mandatory LWOP. *Matter of Monschke*, *supra*. Just as *Houston-Sconiers* followed from the holding of *Miller* and *Haag* from the holding of *Bassett*, the rule announced in *Monschke* followed based on the recognition in those cases that "children are different" because their immature brains make them less culpable than their adult counterparts.

Monschke is premised on the factual acknowledgement that neurodevelopment contains past a person's 18th birthday. Given that factual predicate—that late adolescents are "different" in the same way juveniles are "different," "we deem these objective scientific differences between 18- to 20-year-olds (covering the ages of the two petitioners in this case) on the one hand, and persons with fully developed brains on the other hand, to be

constitutionally significant under article I, section 14." For that reason, the Washington Supreme Court held that the state cruel punishment protection "extends to youthful defendants older than 18." *Monschke*, 197 Wash. 2d at 324–25. *Monschke*'s holding was premised on the characteristics shared by all adolescents decrease culpability, while simultaneously recognizing:

> …the difficulty of analyzing individual adolescent brains, they support the petitioners' position that there is no distinctive scientific difference, in general, between the brains of a 17-year-old and an 18-year-old. Richard J. Bonnie & Elizabeth S. Scott, The Teenage Brain: Adolescent Brain Research & the Law, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 158, 161 (2013) ("So far, neuroscience research provides group data showing a developmental trajectory in brain structure and function during adolescence and into adulthood."); Maroney, supra, at 94 ("Rather than raising deep and likely unsolvable questions about human agency, [neuroscience] simply reinforces the (once) noncontroversial idea that, as a group, young people differ from adults in systematic ways directly relevant to their relative culpability, deterrability, and potential for rehabilitation."); B.J. Casey & Kristina Caudle, The Teenage Brain: Self Control, 22

> CURRENT DIRECTIONS IN PSYCHOL. SCI. 82 (2013) (discussing overgeneralizations of adolescent brains but never mentioning what age is meant by "adolescence").

Id. at 322–23. See also *id*. at 326 ("What they have shown is that no meaningful neurological bright line exists between age 17 and age 18 or, as relevant here, between age 17 on the one hand, and ages 19 and 20 on the other hand."); *id*. at 312 ("These petitioners argue that the protection against mandatory LWOP for juveniles should extend to them because they were essentially juveniles in all but name at the time of their crimes…(W)e agree.").

The *Monschke* Court was not faced with a request and consequently did not decide whether to erect a categorical bar on LWOP for 18-20-year-olds. Instead, *Monschke* held that the individualization requirement of the cruel punishment clause made mandatory LWOP unconstitutional as applied to that cohort. In

Monschke, this Court recognized it "need not decide whether new constitutional protections apply in this case because the petitioners do not ask for new constitutional protections. Rather, they ask us to apply the existing constitutional protections of *Miller* to an enlarged class of youthful offenders older than 17." *Id.* at 312. Here, Conley seeks to apply the existing constitutional protection of *Bassett* to an enlarged class of youthful offenders.

Accepting that late adolescents share the same class characteristics as juveniles ineluctably leads to the conclusion that there is likewise an unacceptable risk of a constitutionally disproportionate sentence unless LWOP is barred for all late adolescents. What follows from this confluence of precedent is the rule sought by Conley: LWOP is categorically prohibited for

any person convicted in adult court for a crime committed prior to their 21st birthday.

The first step in the categorical bar analysis is to determine whether there is a national consensus against sentencing juveniles to life without parole by looking at " 'objective indicia of society's standards, as expressed in legislative enactments and state practice.'" *Bassett*, 192 Wash. 2d at 85. Here, there is an unmistakable trend away from imposing LWOP on late adolescents—legislatively, judicially, and in the exercise of prosecutorial discretion.

Legislatively, jurisdictions are tackling the task of providing late adolescents with the opportunity for a second look based on the reduced culpability associated with their stage of development. Washington, DC passed legislation in 2020 to provide people who committed crimes when they were under 25 years old

(expanded from 18) a chance at sentence reduction. D.C. Code § 24-403. When resentencing a defendant, a court "shall not impose a sentence of life imprisonment without the possibility of parole or release." *Id.* In January 2023, Illinois Governor J.B. Pritzker signed into law a bill that ends LWOP for most individuals under 21 years old, permitting review after 40 years. Illinois Public Act 102-1128. In July 2020, Vermont Governor Phil Scott signed Senate Bill 232 into law, making it the first state to retain people under 19 years old in juvenile court, with plans to add 19- and 20-year-olds in later years.

In contrast, Conley is not aware of any legislation subjecting late adolescents to harsher punishment or removing a "second look" or "early release" condition.

This list of courts prohibiting mandatory LWOP, although currently short, will likely grow over the next

few years as challenges premised on the increasing recognition, by scientists and courts, of the relationship between brain and behavior for still-maturing individuals reach state high courts.

There is also an unmistakable trend away from LWOP sentences imposed on late adolescents. LWOP sentences imposed on people under age 26 peaked in 1998 but stabilized until 2009, from which time the imposition of these sentences declined 37%, even while LWOP for individuals 26 and older has risen. Ashley Nellis and Niki Monazzam. *Left to Die in Prison, Emerging Adults 25 and Younger Sentenced to Life without Parole* at sentencingproject.org.

Although Mr. Conley is white, it is important to note the racial disparity for LWOP. Nationally, two thirds (66%) of emerging adults sentenced to LWOP are Black. *Id.*

The second step in the categorical bar analysis, the judicial exercise of independent judgment, 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 challenged sentencing practice serves* legitimate penological goals." Bassett, 192 Wash. 2d at 87. Of course, that analysis has already been conducted in the aforementioned caselaw. However, it bears repeating that LWOP is "especially harsh" for adolescents and means the "denial of hope;" and that "good behavior and character improvement are immaterial." *Id*. at 87–88. In sum, these factors all augur in favor of striking down LWOP for late adolescents.

So do the penological goals served by this sentence. Once again, Washington caselaw repeatedly

and consistently recognizes that LWOP, the harshest punishment available in Washington, is entirely inconsistent with the ability of adolescents to change as they mature.

In sum, both caselaw and an examination of the categorical exemption factors all support the conclusion urged by Mr. Conley: LWOP violates the state constitution when imposed on a late adolescent.

E. A Life Sentence is Unconstitutional Where There is a "Chance" of Rehabilitation.

If not *Bassett*, then *Haag* should be extended and dictates that Conley's life sentence is unconstitutional. *Haag,* 198 Wash. 2d at 329 (46-year sentence imposed on juvenile is unconstitutional because the resentencing court expressly found Haag was "not irretrievably depraved nor irreparably corrupt.").

Much like the analysis advanced by Conley herein, *Haag* did not announce a new constitutional

rule but was the result of expanding the factual definition of life to a term of years to the previous rule that a juvenile could not be sentenced to life. *Id*. at 327 ("A 46-year sentence for Haag results in his losing meaningful opportunities to reenter society and to have a meaningful life.").

Prior to imposing a new term, resentencing courts "must consider the measure of rehabilitation that has occurred since a youth was originally sentenced to life without parole." *Haag,* 198 Wash. 2d at 322. In fact, *Haag* holds that the "key question" is whether "defendant is capable of change." Id. at 323.

Anderson does not alter the rule. It only makes the exception—not applicable here—clear. Only after considering, weighing, and rejecting as mitigating "all of Anderson's evidence," including evidence Anderson contended showed "his rehabilitation while in prison,"

was the court justified in imposing a de facto life sentence. *Anderson*, 200 Wash. 2d at 269–70.

Conley's case is easily distinguished from *Anderson*. Here, the sentencing judge found that Conley had consistently engaged in numerous rehabilitative efforts during his incarceration. FOF 11. As a result, his actual life sentence must be stricken as unconstitutional. This case should further be remanded with instructions to impose a less than de facto life term.

VI. CONCLUSION

This Court should reverse and remand for a new sentencing.

WORD COUNT

This Petition for Review has 7866 words.

DATED this 9th day of April 2025

RESPECTFULLY SUBMITTED:

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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TAYLOR TOM CONLEY, Appellant.	No. 57797-6-II UNPUBLISHED OPINION

VELJACIC, A.C.J. — Taylor Conley was convicted of aggravated murder in the first degree on June 11, 2008. He was sentenced to mandatory life in prison without the possibility of release or parole (LWOP) under RCW 10.95.030(1). He was 20 years old at the time of the crime. Following our Supreme Court's decision in *In re Personal Restraint of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021), Conley, pursuant to CrR 7.8, moved to be resentenced. The resentencing court maintained Conley's LWOP sentence.

Conley raises several errors on appeal: (1) he argues that he was denied his right to be present at the hearing where the trial court considered whether he would be restrained at his resentencing hearing; (2) he asserts that he was unjustifiably required to wear a stun cuff at his resentencing hearing; (3) he maintains that discretionary LWOP under RCW 10.95.030(1) for young adults[1] between the ages 18 to 20 is unconstitutional under article 1, section 14 of the

[1] There are several terms used to describe 18-to-20-year-olds. They include late adolescents, young adults, and youthful offenders.

Washington State Constitution; (4) he argues that discretionary LWOP is also unconstitutional when a young adult exhibits the chance of rehabilitation; (5) he argues that the resentencing court failed to give adequate weight to his rehabilitative efforts while serving his sentence; (6) he alleges that the court erred by requiring Conley to prove mitigating factors to warrant a lesser sentence and failed to consider that it had the discretion to impose a sentence less than LWOP; and (7) he asserts that the court erred by not considering an indeterminate sentence.

We conclude that: (1) Conley did not have a right to be present at the restraint hearing, but even if he did, the issue was waived; (2) the court did not abuse its discretion by requiring Conley to wear the stun cuff at his resentencing hearing; (3) article 1, section 14 of the Washington State Constitution does not proscribe discretionary LWOP for young adults between the ages of 18 and 20; (4) article I, section 14 of the Washington State Constitution does not prohibit discretionary LWOP for young adults who exhibit the possibility of rehabilitation; (5) the court meaningfully considered the mitigating qualities of Conley's youth and rehabilitation when imposing its sentence; (6) the court did not err regarding the burden of proof because it considered the mitigating factors under two frameworks, one of which was correct; and (7) indeterminate sentences may not be imposed under RCW 10.95.030. We affirm Conley's sentence.

FACTS

I. BACKGROUND[2]

On the morning of March 31, 2006, around 8:30 a.m., Conley and Ronald Weller-Childers (Childers) went to the home of Brian Swehla. They drove to Swehla's house in James Zebley's

[2] The record pertaining to the underlying facts of Conley's conviction are not in the record before this court. We rely on our unpublished opinion in *State v. Conley*, noted at 156 Wn. App. 1027 (2010) [hereinafter *Conley* I] and the summary of facts provided by the State and the resentencing court.

truck, which Conley had borrowed earlier that morning.[3] Conley and Childers were armed with weapons previously stolen from Conley's father three days prior, including an old 12-gauge pellet shotgun, a .22 caliber automatic rifle, a Winchester semiautomatic .22 caliber firearm, and a Winchester 12-gauge shotgun.

The two broke into Swehla's home by kicking in a door to an attached garage. Swehla was inside, and a struggle ensued. While Swehla was running down a hall, Childers shot Swehla. After being shot, Swehla crawled into a bedroom containing a large safe. Conley and Childers tried to open the safe, but were unsuccessful.

In an apparent effort to get Swehla to open the safe, Conley and Childers struck Swehla several times with a jack handle. They also strangled Swehla and hit him with brass knuckles. Eventually, Conley forced Swehla to his knees and shot him in the back of his head. Conley and Childers took several items from the home and left.

Conley returned to his mother's house with Childers around 10:30 a.m. When Conley was returning the truck, Zebley observed guns rolled up in a blanket in the truck bed. Conley warned Zebley that he "might not want the truck back because [Conley] had committed some burglaries with it." Rep. of Proc. (RP) (Dec. 9, 2022) at 8. Conley offered to purchase the truck, but Zebley declined. Conley, still driving Zebley's truck, dropped off Zebley and Childers in Kelso. Conley agreed to return the truck but never did.[4]

Conley attempted to get rid of the evidence connecting him to the crime. He destroyed his clothing that he wore that day. And investigators later found partially burned shotgun shell casings

[3] Conley invited Zebley to participate in the burglary, but Zebley declined the offer.

[4] Zebley found the truck abandoned on the side of the road three days later.

in a sauna furnace in an unattached outbuilding at Conley's mother's house. Conley also contacted Josh Derum, asking "whether he wanted to buy some stolen guns, one [Conley] described as a nickel-plated 12-guage shotgun." *State v. Conley* I, noted at 156 Wn. App. 1027, slip op. at 3 (2010). Derum explained that he was not interested. Conley responded that "he needed some money to get out of town because he just put a hole in somebody's head." *Id.*

Several days later, Conley contacted Derum again, offering to sell a pool table and a "Deuce," which Derum understood to mean a .22 caliber rifle. *Id.*, slip op. at 5. Then, Conley contacted Robert Courser, explaining that he had some items to sell and was trying to leave town because deputies had questioned him about a murder. Conley also mentioned that he "wanted to find [Childers] before the deputies found him" because he "had some . . . loose ends" to take care of. RP (Dec. 9, 2022) at 9. Childers was the only eyewitness to the death of Swehla.

Conley was eventually taken into custody and charged with aggravated murder in the first degree or, in the alternative, felony murder in the first degree. While in custody, Conley told several other inmates of what he had done, which was ultimately relayed to the police. Childers initially told police that Conley was the one with him on March 31, "but refused to name [Conley] in court." RP (Dec. 9, 2022) at 7. "Childers actually named someone else as his partner and subsequently pled guilty to [p]erjury in the [f]irst [d]egree for lying in court about who was with him" that day. RP (Dec. 9, 2022) at 7.

A jury found Conley guilty of aggravated murder in the first degree, and he was sentenced to mandatory LWOP pursuant to RCW 10.95.030. On the date of the crime, Conley was seven months away from turning 21. After our Supreme Court's decision in *Monschke*, 197 Wn.2d 305, Conley, pursuant to CrR 7.8, moved to be resentenced, which was granted.

II. RESENTENCING

A. Restraint Hearing

On October 28, 2022, the court convened for Conley's resentencing hearing. Prior to Conley's arrival, the court addressed the jail's request to have Conley "brought over in restraints," which originally came to the court's attention through e-mail the day prior. RP (Oct. 28, 2022) at 3. The State had no preference either way and deferred to the individualized analysis required for restraining defendants. The State, however, said that it was "hard-pressed to point to an aggravated set of circumstances where [it] would advocate for restraints. RP (Oct. 28, 2022) at 4. Defense counsel requested that Conley "be allowed in the courtroom without restraints," noting that he had "been well behaved" at the Department of Corrections (DOC) and infraction free for four to five years. Defense counsel also explained that Conley was in "minimum custody at DOC, which [was] a really big event for an individual with a life without parole sentence." RP (Oct. 28, 2022) at 4.

After hearing from both sides, the court listed the variety of factors required in the individualized analysis to restraint a defendant.[5] The court emphasized that "courtroom safety [was] of the upmost concern." RP (Oct. 28, 2022) at 5. The court also noted that Conley was "found guilty of Aggravated Murder in the First Degree," was in minimum custody, and his last infraction at DOC was on September 15, 2017. RP (Oct. 28, 2022) at 5. The court, however, later

[5] The court referenced the factors articulated in *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (1981):

> [S]eriousness of the present charge, the Defendant's temperament and character, his age and physical attributes, his past record, past escapes or attempted escapes, threat to harm, self-destructive tendencies, risk of mob violence, possibility of rescue by other offenders, the size and mood of the audience, the nature of physical security of the courtroom, and adequacy and availability of alternative remedies.

RP (Oct. 28, 2022) at 5.

explained that there was "a very packed courtroom, and that [was] of concern in-as far as safety." RP (Oct. 28, 2022) at 6.

The court concluded that it was not going to "require the full shackles," but was going to require Conley to wear a stun cuff. RP (Oct. 28, 2022) at 6. The basis for the court's decision was based primarily on the fact that the courtroom was small and there were many people in attendance for the hearing. At no point did defense counsel object to Conley's absence at this hearing.[6]

B. Resentencing Hearing

At the resentencing hearing, defense counsel, for the first time, explained that the RCW 10.95.030(1), the applicable statute for aggravated murder in the first degree, existed outside the Sentencing Reform Act of 1981. And because there was no standard range for the offense, the court could apparently "impose some determinate sentence anywhere from zero days or . . . an indeterminate sentence of life in prison with [the] possibility of parole." RP (Oct. 28, 2022) at 11. As a result, Conley did not have the burden "to show mitigating circumstances to go below the standard sentencing range, because the standard sentencing range [did] not exist." RP (Oct. 28, 2022) at 11. The State did not agree with Conley's understanding of RCW 10.95.030, explaining that the defendant bore "the burden of showing by a preponderance of the evidence that . . . there is a substantial and compelling reason to justify a sentence other than [LWOP,] the sentence that the legislature required." RP (Oct. 28, 2022) at 13. The court did not address the issue at that time and required additional briefing on the issue.

After discussing the matter with counsel, the court proceeded to hear victim statements from several individuals. Then, defense counsel called Dr. Megan Carter, a forensic psychologist, to testify. On direct examination, Dr. Carter explained the underlying science behind brain

[6] Neither Conley nor defense counsel objected to his absence at the resentencing hearing.

development in adolescents and young adults. And based on the information provided to Carter, she concluded that at the time off the offense, Conley "was functioning at a less developed, less mature level than others would expect."[7] RP (Oct. 28, 2022) at 31. This was based, in part, on Conley's history of child maltreatment, substance abuse, mental health problems, and negative influence by his peers.

On cross-examination, the State inquired into Dr. Carter's familiarity with the underlying facts of the case. Dr. Carter explained she believed that she reviewed the sentencing transcript. Dr. Carter, however, was unsure whether she had reviewed any other materials, such as the police reports, trial transcript, victim statements, crime scene photos. When the State asked whether Dr. Carter, when interviewing Conley, delved into "his conduct in committing the offense," Dr. Carter replied, "I did not." RP (Oct. 28, 2022) at 40. And when talking about the youthfulness factors and how they applied to the case, this exchange took place:

> Q: . . . And you don't have any information from the evidence adduced at trial that [Conley] succumbed to some sort of peer pressure in committing this particular crime.
>
> A: I don't know that I can speak to that. Again, I didn't ask [Conley] directly about the circumstances, and I don't recall that specific information from the court proceeding transcripts that I had.

[7] In Carter's report, she explained that,

> [A]s a result of [Conley's] overall mental condition (e.g., dysmaturity, significant substance abuse that contributed to poor mental health, exposure to childhood maltreatment, etc.), Mr. Conley's capacity to fully appreciate the consequences of his choices and conduct was likely significantly impaired during the time of the alleged offenses, based on the known course of brain development and his exposure to adverse childhood experiences.

Clerk's Papers (CP) at 48.

RP (Oct. 28, 2022) at 45. On redirect, Dr. Carter noted that when conducting an analysis on an individual's behavior, they generally "focus on . . . an overall functioning assessment, not necessarily . . . any one moment." RP (Oct. 28, 2022) at 47-48.

After Dr. Carter's testimony, the court heard from several witnesses about Conley, his rehabilitative efforts during confinement, and the positive impact Conley had on their lives. Conley's wife, for example, testified how Conley was heavily involved with social programs organized through the prison and that he started his own social enterprise, helping people who are currently or formerly incarcerated. And when Conley himself testified, he expressed remorse, emphasizing that he could not reverse his actions, but he could help others avoid making the same mistakes in the future.

Following testimony from all of the parties' witnesses, the court heard closing arguments. Defense counsel argued that Conley's youthfulness, substance abuse, and exposure to a "criminal lifestyle at a very young age" diminished "[h]is capacity to fully appreciate the consequences of his choices . . . during the time of the offense." RP (Oct. 28, 2022) at 90. Defense counsel then requested the court to impose a sentence of 16 1/2 years in custody.

During the State's closing argument, the State noted that Conley submitted a personal restraint petition (PRP) two years earlier where Conley "emphatically asserted that he was not guilty." RP (Oct. 28, 2022) at 96. The State explained that it was referencing the PRP solely to illustrate the stark contrast between Conley's outlook at that time and resentencing. Then, the State focused on the burden of proof regarding mitigating factors, reiterating that Conley had the burden to show a mitigating factor beyond a preponderance of the evidence. The State went on to summarize the underlying facts of the case, arguing that the "hallmark features of youth . . . immaturity, impetuosity, and failure to appreciate risks and consequences" did not affect Conley's

behavior on the day of the offense. RP (Oct. 28, 2022) at 106. Ultimately, the State requested that the court "maintain the original sentence of life without parole." RP (Oct. 28, 2022) at 115.

C. Resentencing Court's Decision

On December 9, 2022, the court reconvened to announce its resentencing decision. Before announcing its decision, the court noted the various factors that must be taken into consideration at a *Monschke* resentencing.[8] The court then acknowledged Conley's troubled childhood, referencing his substance abuse and maltreatment.

Turning to Dr. Carter's report, the court took issue with Dr. Carter "not knowing much in the way of the facts of the case." RP (Dec. 9, 2022) at 6. The court went onto explain that this was of "major concern" to the court because it was "of upmost . . . importance to look at the actions of a defendant at the time of the commission of a crime. That time is important to know and understand how [Conley] was functioning at that point in time." RP (Dec. 9, 2022) at 6.

After summarizing the underlying facts of the crime, the court addressed the burden of proof issue regarding mitigating circumstances. The court concluded that "it is well-established and no supporting law is contrary to such that preponderance of the evidence applies to consideration of mitigation of a sentence." RP (Dec. 9, 2022) at 11. As a result, Conley had "to meet preponderance of the evidence to show a basis to mitigate the . . . sentence." RP (Dec. 9, 2022) at 15.

[8] The court recognized it must consider factors "related to the Defendant's youth, including age and its hallmark features such as the juvenile's immaturity, impetuosity, and failure to appreciate risk and consequences," as well as "the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, the way familial and peer pressure may have affected him, and how youth impacted any legal defense, along with any factors suggesting there might be successful rehabilitation." RP (Dec. 9, 2022) at 4-5.

The court then turned to "the three general differences between juveniles under 18 and adults identified in *Monschke*." RP (Dec. 9, 2022) at 11. The court acknowledged that Conley was 20 years and 5 months old at the time of the offense, "seven months short of his 21st birthday." RP (Dec. 9, 2022) at 11. With respect to "[i]petuosity and [the] extent of participation," the court reasoned that this factor was not applicable as Conley's behavior was "an intentional, deliberate act." RP (Dec. 9, 2022) at 11-12. The court referenced the fact that the crime was "a planned-out attack over three days," and there was "no showing of peer pressure."[9] RP (Dec. 9, 2022) at 12. Additionally, the court reasoned that Conley's independence was supported through his actions "after the murder when [Conley was] trying to get out of town" and expressing his intent to "clean up the loose end, meaning Childers." RP (Dec. 9, 2022) at 12.

Next, the court addressed "risk and consequences." RP (Dec. 9, 2022) at 12. The court determined that this factor was also inapplicable, noting that there was "no question . . . [that Conley] knew the risk and consequences . . . at the time or future consequences." RP (Dec. 9, 2022) at 13. This was based on Conley's actions where he tried to "get money to get out of town" and destroy the evidence connecting him to the crime. RP (Dec. 9, 2022) at 13.

The court did not find any mitigating factors related to legal defense and then turned to rehabilitation. The court noted that while the "majority of the testimony and supporting statements [spoke] to the rehabilitation of [Conley]," it could not "ignore . . . that at the time of [his original] sentencing[, Conley] denied any responsibility for the murder." RP (Dec. 9, 2022) at 14-15. The court focused on the fact that Conley also denied responsibility in the PRP filed two years earlier, which raised questions about his sincerity. To that end, the court stated, "Does the Court see

[9] The court explained that "Childers . . . would not shoot Swehla, but it was [Conley] that stepped in." RP (Dec. 9, 2022) at 12.

[Conley] appears to be doing positive things as he has naturally matured? No doubt. But, the Court cannot find he is rehabilitated." RP (Dec. 9, 2022) at 15.

Turning back to the burden of proof issue, the court concluded that Conley did not demonstrate "by a preponderance [of the evidence] that his crime reflect[ed] the mitigating qualities of youth." RP (Dec. 9, 2022) at 15-16. As a result, the court held that there was "no substantial and compelling reason[] to justify an exceptional sentence." RP (Dec. 9, 2022) at 16. Alternatively, the court also explained that "[e]ven if it was just the consideration of mitigating factors, the Court" would still have found "no basis when considering all the various factors to mitigate the sentence." RP (Dec. 9, 2022) at 16. This was also reflected in the court's findings of fact and conclusions of law. There, the court explained:

> 3. [Conley] has not demonstrated by a preponderance of the evidence that his crime reflects the mitigating qualities of youth. Additionally, there are no substantial and compelling reasons to justify an exceptional sentence.
>
> 4. Whether by preponderance of the evidence, *or just an application of the mitigation factors*, this court cannot find [Conley's] culpability was diminished as a result of his age and/or applicable considerations of youth.

CP at 256 (emphasis added). At the hearing, the court, after concluding the mitigating factors did not apply, went on to comment that "[t]his was a planned act of torture and the murder of an innocent man" and Conley, "based on his actions before, during, and after the murder, knew exactly what he was doing. . . . [I]t was not impetuous, no peer pressure was involved, but was instead the person in control directing the actions, [and] knew exactly the risks and consequences, be it at the present time or the future." RP (Dec. 9, 2022) at 16. Consequently, the court "maintain[ed] its sentence of life without the possibility of parole." RP (Dec. 9, 2022) at 16.

Conley appeals his sentence.

ANALYSIS

I. CONLEY WAS NOT DENIED HIS RIGHT TO BE PRESENT AT THE "RESTRAINTS HEARING"

For the first time on appeal, Conley argues that the court violated his right to be present at the hearing where it determined if he would wear a stun cuff at his resentencing hearing. The State argues that the preliminary matter in determining Conley should be restrained does not implicate his right to be present. Alternatively, even if Conley had a right to be present, the State alleges that he waived appellate review by failing to object at the hearing. We conclude that Conley did not have a right to attend the restraint hearing. And even if he did, Conley waived appellate review.

Generally, courts do not consider issues raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); RAP 2.5(a). An issue, however, may be raised for the first time on appeal if there is (1) a "lack of trial court jurisdiction," (2) a "failure to establish facts upon which relief can be granted," or (3) a "manifest error affecting a constitutional right." RAP 2.5(a); *McFarland*, 127 Wn.2d at 332-33. "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Not all constitutional issues are subject to appellate review under RAP 2.5(a)(3). *See State v. Burns*, 193 Wn.2d 190, 210-11, 438 P.3d 1183 (2019); *State v. Anderson*, 19 Wn. App. 2d 556, 561-62, 497 P.3d 880 (2021), *abrogated on other grounds by State v. Schlenker*, 31 Wn. App. 2d 921, 553, P.3d 712 (2024).

Whether a defendant's constitutional right to be present has been violated is a question of law we review de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). A criminal defendant has a fundamental right to be present at all critical stages of a proceeding under both the due process clause of the Fourteenth Amendment to the United States Constitution and article 1, section 22 of the Washington State Constitution. *Id*. A critical stage of a criminal proceeding is

one where a defendant's "'presence has a relation, reasonably substantial, to the fulness of [their] opportunity to defend against the charge.'" *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)); *State v. Houston-Sconiers*, 188 Wn.2d 1, 29, 391 P.3d 409 (2017). "'The core of the constitutional right to be present is the right to be present when evidence is being presented.'" *State v. Slert*, 186 Wn.2d 869, 875, 383 P.3d 466 (2016) (quoting *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994)). This right, however, is not absolute. *Irby*, 170 Wn.2d at 881. A defendant "does not have a right to be present when his or her 'presence would be useless, or the benefit but a shadow.'" *Id.* (quoting *Snyder*, 291 U.S. 106-07).

Here, Conley's counsel made no mention of Conley's absence at the restraint hearing. And neither Conley nor his counsel made any mention of the issue at any other stage of his resentencing hearing. Conley's assignment of error does not implicate a constitutional right because a restraint hearing is not a critical stage of a criminal proceeding. This is so because all of the facts considered by the court were undisputed by the parties.[10] As a result, Conley's presence was unnecessary because there was no evidence being presented. *See Irby*, 170 Wn.2d at 880-81; *Slert*, 186 Wn.2d at 875. Consequently, there was no error because, on these facts, the restraints hearing was not a critical stage at which Conley was entitled to attend. But even if Conley had such a right, defense counsel waived Conley's presence.

Conley relies on *Bustamonte v. Eyman*, 456 F.2d 269, 274 (9th Cir. 1972), for the proposition that "[t]he right to be present is a personal constitutional right." Reply Br. of Appellant

[10] The court recognized that Conley was convicted of aggravated murder in the first degree in 2008 and was serving a life sentence, he had been infraction free since 2017, he was in minimum custody, and the courtroom was small and had a large audience in attendance.

at 3. As such, "defendant's counsel cannot waive the right, especially by silence." Reply Br. of Appellant at 3. Ninth Circuit precedent is only persuasive authority, and we are not persuaded by *Bustamonte*. *See State v. Pippin*, 200 Wn. App. 826, 837, 403 P.3d 907 (2017) ("[W]e *may* utilize well-reasoned, persuasive authority from federal courts and sister jurisdictions to resolve a question.") (emphasis added). Our Supreme Court has previously explained that the right to be present at all critical stages of a criminal proceeding can be waived by failing to object, and therefore, is not reviewable under RAP 2.5(a)(3). *Burns*, 193 Wn.2d at 211 (discussing cases which concluded that the right to be present may be waived by failure to object); *State v. Jones*, 185 Wn.2d 412, 426-28, 372 P.3d 755 (2016) (holding that the defendant waived his right-to-presence challenge by failing to raise a timely objection); *Slert*, 186 Wn.2d at 876 (holding that the defendant's "failure to timely object prevented" appellate review).

Even if it were the case that a defendant must personally waive their right to be present, Conley waived his right. Like *Slert* and *Jones*, Conley failed to object to his absence after arriving at court for the resentencing hearing. *See Jones*, 185 Wn.2d 416-20; *Slert*, 186 Wn.2d at 876. Therefore, even if this was a critical stage of the proceedings, we conclude that Conley waived appellate review of this issue.

II. THE COURT DID NOT ABUSE ITS DISCRETION BY REQUIRING CONLEY TO WEAR A STUN CUFF AT HIS RESENTENCING HEARING

After concluding Conley waived review of his absence at the restraint hearing, we next address the court's determination that Conley needed to be restrained by a stun cuff. Conley argues that the court's decision to have him wear a stun cuff was an abuse of discretion. The State argues that the court properly considered the restraint factors articulated in *State v. Hartzog*, 96 Wn.2d 383, 635 P.2d 694 (1981), and did not abuse its discretion. And even if the court's decision was

an abuse of discretion, the error was harmless. We conclude that the court's decision to restrain Conley was not an abuse of discretion.

We review a trial court's decision to restrain a criminal defendant for an abuse of discretion. *State v. Jackson*, 195 Wn.2d 841, 850, 467 P.3d 97 (2020). "A trial court abuses its discretion when its 'decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.'" *Id.* (internal quotation marks omitted) (quoting *State v. Turner*, 143 Wn.2d 715, 724, 23 P.3d 499 (2001)).

A criminal defendant is entitled to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *Jackson*, 195 Wn.2d at 852. To ensure the right to a fair trial, "'[i]t is well settled that a defendant in a criminal case is entitled to appear at trial free from all bonds or [restraints] except in extraordinary circumstances.'" *Id.* (quoting *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999) (plurality opinion)). This constitutional right extends to nonjury pretrial hearings. *Jackson*, 195 Wn.2d at 852. "Restraints are viewed with disfavor because they may abridge important constitutional rights, including the presumption of innocence, privilege of testifying in one's own behalf, and right to consult with counsel during trial." *Hartzog*, 96 Wn.2d at 398.

"[T]he right to be free from restraint," however, "is not absolute, and trial court judges are vested with [broad] discretion to determine measures that implicate courtroom security, including whether to restrain a defendant in some capacity in order to prevent injury." *Jackson*, 195 Wn.2d at 852; *Hartzog*, 96 Wn.2d at 401. In exercising its discretion, "[a] trial court *must* engage in an individualized inquiry into the use of restraints prior to every court appearance." *Jackson*, 195 Wn.2d at 854. This inquiry "'must be founded upon a factual basis set forth in the record.'" *Id.*

at 853 (quoting *Hartzog*, 96 Wn.2d at 400). The trial court should consider the following factors before ordering the use of restraints in the courtroom:

> [T]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

Jackson, 195 Wn.2d at 853 (internal quotation marks omitted) (quoting *State v. Hutchinson*, 135 Wn.2d 863, 887-88, 959 P.2d 1061 (1998)). A trial court abuses its discretion and commits constitutional error by requiring a defendant to be restrained without an individualized inquiry into its need. *Jackson*, 195 Wn.2d at 855. Restraints should "'be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape.'" *Finch*, 137 Wn.2d at 846 (quoting *Hartzog*, 96 Wn.2d at 398).

Here, the court required Conley to wear a stun cuff at his resentencing hearing. The court came to this conclusion after determining that the hearing was in a small courtroom that was "very packed" and "safety [was] of the upmost concern to the court." RP (Oct. 28, 2022) at 5-6. This was not manifestly unreasonable or based on untenable grounds, so the decision was not an abuse of discretion. Unlike existing precedent relied on by Conley, the court conducted an individualized analysis, referencing the restraint factors in *Hartzog*. *Jackson*, 195 Wn.2d at 855 (holding that the court abused its discretion by requiring "Jackson to be shackled under a blanket jail policy at his pretrial proceedings without an individualized inquiry into its need."); *State v. Luthi*, 3 Wn.3d 249, 263, 549 P.3d 712 (2024) (holding that the court's failure to "engage in an individualized inquiry before requiring Luthi appear from the in-court holding cell for her hearing" amounted to constitutional error).

Therefore, we conclude that the court did not abuse its discretion by requiring Conley to wear a stun cuff at the resentencing hearing.

III. ARTICLE 1, SECTION 14 OF THE WASHINGTON STATE CONSTITUTION DOES NOT PROSCRIBE DISCRETIONARY LWOP FOR YOUNG ADULTS BETWEEN THE AGES 18-20

Conley challenges the constitutionality of RCW 10.95.030(1), arguing that discretionary LWOP for young adults between the ages of 18 and 20 is prohibited under article 1, section 14 of the Washington State Constitution. The State argues that such practice is constitutional. We agree with the State.

Article 1, section 14 of the Washington State Constitution prohibits "cruel punishment." And the Eighth Amendment to the United States Constitution protects a criminal defendant from "cruel and unusual punishments."

We review the constitutionality of a statute de novo. *State v. Bassett*, 192 Wn.2d 67, 77, 428 P.3d 343 (2018). "We presume statutes are constitutional," and the defendant "has the burden to prove otherwise beyond a reasonable doubt." *Id.*

A Background

Juvenile sentencing has been a rapidly changing area of the law. In 2005, the United States Supreme Court barred the death penalty for defendants "under the age of 18 when their crimes were committed." *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). And in 2010, it held unconstitutional life sentences without parole for nonhomicide offenses as violative of the Eighth Amendment. *Graham v. Florida*, 560 U.S. 48, 74, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). In *Graham*, the Court noted that "[l]ife without parole is an especially harsh punishment for a juvenile," because "[u]nder this sentence a juvenile offender will on average serve more years and a greater percentage of [his or her] life in prison than an adult offender." *Id.*

at 70. And such a sentence was "not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability." *Id.* at 74.

In *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the Supreme Court went a step further. The Court held unconstitutional *mandatory* life without parole for juvenile homicide offenders because it denied consideration of a defendant's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Id.* at 477. Consequently, the Court explained that in order to impose LWOP, "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest penalty possible for juveniles," leaving open the possibility of *discretionary* LWOP. *Id.* at 489.

In 2017, our Supreme Court adopted the reasoning in *Miller*, explaining that "sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal system." *Houston-Sconiers*, 188 Wn.2d at 21. And in 2018, our Supreme Court went even further. In *Bassett*, the court imposed a categorical bar on LWOP, both mandatory and discretionary, for juveniles. 192 Wn.2d at 90. Our Supreme Court explained that because "states are rapidly abandoning juvenile life without parole sentences, children are less criminally culpable than adults, and the characteristics of youth do not support the penological goals of a life without parole sentence," RCW 10.95.030 constituted "cruel punishment" under article 1, section 14 of the Washington State Constitution. *Id.*

Up until 2021, defendants between the ages of 18 and 20 were treated as adults under RCW 10.95.030, meaning they were subject to mandatory LWOP for aggravated murder in the first degree. That changed in *Monschke*, as our Supreme Court held unconstitutional mandatory LWOP for young adults. 197 Wn.2d at 326. The court's holding was premised on the understanding "that

no meaningful neurological bright line exists between age 17 and age 18." *Id*. As a result, it was imperative that "sentencing courts must have discretion to take the mitigating qualities of youth—those qualities emphasized in *Miller and Houston-Sconiers*—into account for defendants younger and older than 18." *Id.* at 326. The court in *Monschke*, however, noted that "[n]ot every 19- and 20-year-old will exhibit these mitigating characteristics." *Id.* Consequently, the court left "it up to sentencing courts to determine which individual defendants merit leniency for the" characteristics of youth. *Id.* The court later explained that *Monschke* did not stand for a categorical bar of LWOP for young adults; rather, it was adopting a similar framework articulated in *Miller*. *In re Pers. Restraint of Kennedy*, 200 Wn.2d 1, 23, 513 P.3d 769 (2022).

B. Courts in Washington Have Rejected a Categorical Bar on LWOP for Young Adults

RCW 10.95.030(1) provides, in part, that

> [A]ny person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment 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 indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

Under current precedent, a defendant between the ages of 18 and 20 who is found guilty of aggravated murder in the first degree cannot be sentenced to *mandatory* LWOP. *Monschke*, 197 Wn.2d at 326. They can, however, be sentenced to *discretionary* LWOP if the sentencing court, after considering the characteristics of youth and other factors, determines that LWOP is warranted. *Id.*

Efforts to extend *Monschke* have been previously considered and rejected by this court. *See State v. Kreuger*, 28 Wn. App. 2d. 549, 540 P.3d 126 (2023), *review denied*, 2 Wn.3d 1034

(2024); *State v. Lauderdale*, No. 39441-7-III, (Wash. Ct. App. June 13, 2024) (unpublished), http://www.courts.wa.gov/opinions.pdf, *review denied*, 3 Wn.3d 1031 (2024). This is based on the fact *Monschke* recognized that "[n]ot every 19- and 20-year old" exhibits the mitigating characteristics of youth. 197 Wn.2d at 326. And our Supreme Court reiterated that *Monschke* did not conclude "LWOP is categorically barred for young adults" and stated that *Monschke* did not announce a decision similar to *Bassett*. *Kennedy*, 200 Wn.2d at 23.

A categorical bar of LWOP for defendants like Conley undercuts the reasoning of *Monschke*. While it may be true "that no meaningful neurological bright line exists between," a juvenile and a young adult, the court in *Monschke* acknowledged that not every young adult will exhibit the mitigating characteristics articulated in *Miller*. 197 Wn.2d at 326. This illustrates the necessity to maintain discretionary LWOP: allowing sentencing courts to consider each defendant's situation and determine whether such a sentence is or is not warranted. Because existing precedent is dispositive of this issue, efforts to extend *Bassett* to young adults must be resolved by our Supreme Court.

Therefore, we conclude that article 1, section 14 of the Washington State Constitution does not proscribe *discretionary* LWOP for defendants between the ages of 18 and 20.[11]

IV. ARTICLE 1, SECTION 14 OF THE WASHINGTON STATE CONSTITUTION DOES NOT PROHIBIT LWOP FOR DEFENDANTS WHO HAVE A CHANCE OF REHABILITATION

Relying on *State v. Haag*, 198 Wn.2d 309, 495 P.3d 241 (2021), Conley also argues that LWOP is unconstitutional for young adult defendants who have the possibility of rehabilitation. The State argues that *Haag* is inapplicable because the case dealt solely with juvenile offenders,

[11] Because *Monschke* is dispositive on the issue, we decline to conduct the categorical bar analysis to determine whether article 1, section 14 of the Washington State Constitution prohibits discretionary LWOP for young adults.

and such a holding would "undercut well settled law requiring . . . courts [to] consider a multitude of factors" surrounding a defendant's circumstances. Br. of Resp't at 44. We agree with the State.

In *Haag*, our Supreme Court considered the constitutionality of a de facto life sentence imposed on a juvenile under former RCW 10.95.030(3) (2015). 198 Wn.2d at 313. Ultimately, the court reversed Haag's sentence because the resentencing court placed too much "emphasis on retributive factors than on mitigation factors." *Id.* at 330. The court explained that among the "mitigating qualities of youth and its attendant circumstances," resentencing courts must "also 'consider the measure of rehabilitation that has occurred *since* a youth was originally sentenced to life without parole.'" *Id.* at 322 (emphasis in original) (quoting *State v. Delbosque*, 195 Wn.2d 106, 122, 456 P.3d 806 (2020)). Consequently, "*Miller*-fix hearings must be forward looking, not backward looking," and the "'key question is whether the [juvenile] defendant is capable of change.'" *Id.* at 322-23 (alteration in original) (quoting *Delbosque*, 195 Wn.2d at 122).

Haag, however, is not applicable. Conley does not fall within the same provision considered in *Haag* because he was a young adult (20) at the time of the offense; instead, his resentencing is governed by the nonstatutory, constitutional factors set forth in *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017). Under *Ramos*, a sentencing court "must meaningfully consider how juveniles are different from adults" and "how those differences apply to the facts of the case." 187 Wn.2d at 434-35. While "*Miller* requires courts to consider the *capacity* for rehabilitation when making an initial sentencing decision," *id.* at 449, "they must also consider the facts of the particular case, including those that counsel in favor of punishment," *Anderson*, 200 Wn.2d at 286. And "evidence of *actual* 'demonstrated maturity and rehabilitation'" is left to "the discretion of the trial court in each case." *Ramos*, 187 Wn.2d at 449 (internal quotation marks omitted) (quoting *Miller*, 567 U.S. at 479).

Therefore, we conclude that *Haag* is inapplicable, and article 1, section 14 of the Washington State Constitution does not prohibit LWOP for *young adults* when there is a "chance" of rehabilitation.

V. THE COURT PROPERLY CONSIDERED ALL MITIGATING FACTORS

Conley argues that the court improperly weighed retribution over other mitigating factors, including rehabilitation. The State claims that the court properly considered all factors and acted within its discretion. We conclude that the court properly considered all factors and did not abuse its discretion.

We review a sentencing court's decision for an abuse of discretion. *State v. Carter*, 3 Wn.3d 198, 212, 548 P.3d 935 (2024). "A trial court abuses its discretion when its 'decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.'" *Jackson*, 195 Wn.2d at 850 (internal quotation marks omitted) (quoting *State v. Turner*, 143 Wn.2d 715, 724, 23 P.3d 499 (2001)). "Untenable grounds consist of factual findings that are unsupported by the record." *Carter*, 3 Wn.3d at 212. Factual findings are reviewed for substantial evidence, "which 'exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.'" *Haag*, 198 Wn.2d at 317 (internal quotation marks omitted) (quoting *Delbosque*, 195 Wn.2d at 116).

As previously explained, at resentencing, a court must "meaningfully consider" numerous factors. *Ramos*, 187 Wn.2d at 434-35. Among them include those articulated in *Miller* and *Houston-Sconiers*, including "'immaturity, impetuosity, and failure to appreciate the risks and consequences,' as well as 'the nature of the juvenile's surrounding environment and family circumstances, the way familial and peer pressures may have affected them, and any factors suggesting that the child might be successfully rehabilitated.'" *Carter*, 3 Wn.3d at 221 (internal

quotation marks omitted) (quoting *Houston-Sconiers*, 188 Wn.2d at 23). While "[c]ourts must 'consider the *capacity* for rehabilitation when making an initial sentencing decision' involving LWOP, . . . 'evidence of *actual* demonstrated maturity and rehabilitation is generally considered later,'" and within the discretion of trial courts. *Id.* (internal quotation marks omitted) (quoting *Ramos*, 187 Wn.2d at 449). "While sentencing courts must focus on these mitigating qualities of youth, they must also consider the facts of the particular case, including those that counsel in favor of punishment." *Anderson*, 200 Wn.2d at 286.

A. The Court's Findings of Fact Were Supported by Substantial Evidence[12]

Conley argues that finding of fact 11, dealing with the consideration of the youthful characteristics, was inconsistent with the evidence. We conclude that the court's findings were supported by substantial evidence.

The court first concluded that Conley's actions were not impetuous. The facts in the record support this conclusion. The events of March 31, 2006 were not the product of an impulsive, hastily executed decision. As noted by the court, Conley burglarized his father's boat three days prior, taking weapons that were ultimately used to kill Swehla. And Swehla was no stranger to Conley; there was an existing relationship between the two, and Conley knew that there was a safe in the residence. These facts support the notion that Conley's efforts were thought out in advance, not impetuous.

Next, the court concluded that there was "no showing of peer pressure." CP at 254. Again, the record supports this conclusion. Throughout all stages, there was no indication that anyone

[12] There was no dispute over the court's finding that Conley fit "within the age range to be considered," and there were no mitigating circumstances regarding legal defenses. CP at 254.

was exerting pressure over Conley to commit this crime. Instead, it was Conley leading the way. And ultimately, it was Conley, not Childers, who killed Swehla.

The court then determined that Conley's age did not "impact[] his ability to appreciate the risks and consequences of his actions." CP at 254. The record supports this conclusion. The days following Swehla's death are of particular relevance here. After killing Swehla, Conley destroyed evidence connecting him to the crime. He got rid of his clothes and attempted to burn the used shotgun shells. He tried to get rid of the weapons. He also warned Zebley of the fact that he would not want his truck back because Conley used it to commit a burglary. Conley even suggested that he needed to tie up loose ends, referring to Childers, as Childers was the only eye-witness to the murder.

In sum, the findings of the court that the youthful characteristics did not affect Conley's actions on the day of the offense were supported by substantial evidence.

B. The Court Properly Considered All Mitigating Factors and Did not Abuse its Discretion

In the court's findings of fact and conclusions of law, the court recognized all of the factors that needed to be considered.[13] The court considered Carter's opinion that Conley was not "functioning as a fully developed responsible adult," and was affected by his youthful characteristics. RP (Oct. 28, 2022) at 42. The court acknowledged Conley faced "many challenges as a youth growing up." CP at 255. The court also considered all of the testimony and supporting statements regarding Conley's rehabilitative efforts during confinement. And the court considered

[13] The court considered "youth and its hallmark features" (immaturity, impetuosity, and failure to appreciate risks and consequences), Conley's "surrounding environment and family circumstances, the extent of the person's participation in the crime, the way familial and peer pressures may have affected him, and how youth impacted any legal defense, along with factors suggesting there might be successful rehabilitation." CP at 251.

the underlying facts of the case. Again, rehabilitation is not the sole factor for a court to consider. *See Ramos*, 187 Wn.2d at 434-35; *Anderson*, 200 Wn.2d at 286. The court concluded that the mitigating factors did not warrant a lower sentence, which was a decision within its discretion.[14]

Therefore, we conclude that the court properly considered all mitigating factors and did not abuse its discretion.

VI. THE COURT DID NOT ERR REGARDING THE BURDEN OF PROOF BECAUSE IT DETERMINED THAT LWOP WAS APPROPRIATE UNDER EITHER FRAMEWORK

Conley argues that the court erred by treating LWOP "as the presumptive sentence" and requiring him to prove mitigating factors beyond a preponderance of the evidence. Br. of App. at 33-37. Relatedly, in his reply brief, Conley asserts that the court failed to consider that it had the discretion to impose a sentence ranging from zero days to LWOP under our Supreme Court's recent decision in *Carter*. Rep. Br. of App. at 6. The State argues that the court applied the correct standard, and in the alternative, the State also asserts that the court correctly concluded that LWOP was appropriate under either standard. We conclude the court did not err by requiring Conley to prove mitigating factors by a preponderance of the evidence because it also considered the factors with no burden (as in any other sentencing). Also, we conclude that even though the court did not have the benefit of knowing it could impose a sentence of zero days to LWOP, it properly concluded that LWOP was warranted.

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[14] For example, the court determined that Carter's opinion did not shed light on how Conley was affected by his youthful characteristics at the time of the offense because Carter lacked knowledge of the underlying facts. This was within the court's discretion. *See Kreuger*, 28 Wn. App. 2d at 560 (explaining that "[t]here is no requirement that the court agree with the expert witness" regarding the impact of youthfulness on a defendant). Also, the court referenced the fact that just two years earlier, Conley disputed his guilt in a PRP. This was a reasonable factor for the court to consider with respect to Conley's sincerity towards his rehabilitation and accountability for the crime. *See Ramos*, 187 Wn.2d at 449 ("[E]vidence of actual 'demonstrated maturity and rehabilitation'" is within a court's discretion to consider) (internal quotation marks omitted) (quoting *Miller*, 567 U.S. at 479) (emphasis omitted).

We review a sentencing court's decision for an abuse of discretion. *Carter*, 3 Wn.3d at 212. "An appellate court will reverse a sentencing court's decision only if it finds a clear abuse of discretion or misapplication of the law." *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

Courts have placed the burden to establish mitigating factors on the defendant when they are seeking an exceptional sentence. In *Ramos*, for example, our Supreme Court explained that defendants seeking resentencing had to establish mitigating factors beyond a preponderance of the evidence to support that "substantial and compelling reasons . . . justify an exceptional sentence." 187 Wn.2d at 435. This holding was reiterated in subsequent cases. *State v. Gregg*, 196 Wn.2d 473, 482, 474 P.3d 539 (2020) ("We have held that trial courts, when sentencing juveniles, have discretion to impose a sentence below the standard range and may, where required, disregard mandatory enhancements when supported by evidence presented at sentencing as to mitigating qualities of youth."); *Anderson*, 200 Wn.2d at 285 ("[A] juvenile offender must show that their immaturity, impetuosity, or failure to appreciate risks and consequences—characteristics of youth that suggest a juvenile offender may be less culpable than an adult offender—contributed to the commission of their crime.").

Before *Monschke*, the only possible sentence for young adults convicted of aggravated murder in the first degree was mandatory LWOP. 197 Wn.2d at 308. Of course, this changed, and sentencing courts were afforded more discretion. *See id.* at 329; *Carter*, 3 Wn.3d at 216. And in *Carter*, our Supreme Court made clear that after *Monschke*, the available range for aggravated assault in the first degree for young adults was zero days in confinement to LWOP. *Carter*, 3 Wn.3d at 216.

As here, when a court grants a CrR 7.8 motion, it "has the effect of vacating the original" judgment and sentence. *State v. Vasquez*, ___ Wn.3d ___, 560 P.3d 853, 856 (2024). Consequently, "'until the trial court exercise[s] its independent judgment by imposing a new judgment and sentence, there is 'no sentence,' and . . . the resentencing order 'effectively vacat[es] the judgment.'" *Id.* at 856 (internal quotation marks omitted) (quoting *State v. McWhorter*, 2 Wn.3d 324, 328, 535 P.3d 880 (2023)). Because of this, a court at resentencing has broad discretion that "can be exercised either for or against" the defendant. *Id.* at 857.

In light of the doubts raised by Conley's defense counsel at resentencing regarding the burden of proof, the court analyzed the issue under two frameworks: one that placed the burden on the defendant, and the other where it considered the factors without any burden. With the understanding of *Carter*, and the fact that Conley moved to be resentenced pursuant to CrR 7.8, it is now apparent that the court had broad discretion to impose a sentence ranging from zero days to LWOP. *Carter*, 3 Wn.3d at 216; *Vasquez*, 560 P.3d at 856. Had the court relied solely on the preponderance standard, that would have been error. This is so because there is no such thing as an exceptional sentence in this instance. *See Carter*, 3 Wn.3d at 216.

But that is not what happened here. Critically, the court explained that it felt that LWOP was appropriate under either standard. Specifically, the court said:

> [Conley] has not demonstrated by a preponderance [of the evidence] that his crime reflects the mitigating qualities of youth. There are no substantial and compelling reasons to justify an exceptional sentence. *Even if it was just the consideration of mitigating factors, the Court still finds no basis when considering all the various factors to mitigate the sentence.* Quite the opposite.

RP (Dec. 9, 2022) at 15-16 (emphasis added). Because the court analyzed the factors under both standards, the court acknowledged it could have the discretion to impose a sentence less than LWOP. In fact, Conley's attorney argued, correctly as it turned out, that after *Monschke*, courts

had the authority to resentence a defendant from zero days to LWOP. And even with that understanding, the court declined to do so. By considering the factors and acknowledging the authority to impose a sentence less than LWOP, the court made its decision in line with the proper framework articulated in *Carter*, 3 Wn.3d at 216. As a result, the court's decision does not amount to an abuse of discretion because it was based on either standard, one of which was correct.

Therefore, we conclude that even though the court did not have the benefit of *Carter*, it did not abuse its discretion by sentencing Conley to LWOP because the court considered the mitigating factors under both frameworks and was aware it could give a sentence less than LWOP.

VII. THE COURT DID NOT ERR IN FAILING TO CONSIDER AN INDETERMINATE SENTENCE

Conley argues that the court erred by not considering an indeterminate sentence, abusing its discretion. The State disagrees, arguing that *Carter* prohibits a court from imposing an indeterminate sentence. We agree with the State.

In *Carter*, our Supreme Court considered the indeterminate sentences of two young adult defendants. 3 Wn.3d at 214-15. The court ultimately concluded that the only sentence available for young adults sentenced under RCW 10.95.030 is a determinate sentence of zero days to LWOP. *Id.* at 216. This was based, in part, on the fact that an indeterminate sentence was unworkable as "Washington is a state largely without parole." *Id.* at 214.

Therefore, we conclude that the court did not err in not considering an indeterminate sentence.

CONCLUSION

Accordingly, we affirm Conley's sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, A.C.J.

We concur:

Maxa J.

Price, J.

ALSEPT & ELLIS

April 09, 2025 - 8:51 AM

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