SUPREME COURT NO. 96393-2
C.O.A. No. 49474-4-II
Cowlitz Co. Cause No. 15-1-01036-8

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CLEON MOEN,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney, Cowlitz County Prosecuting Attorney's Office.

II. COURT OF APPEALS' DECISION

The outcome of the Court of Appeals' decision was correct. The Respondent respectfully requests this Court deny review of the July 31, 2018, Court of Appeals' decision in *State of Washington vs. Cleon Moen*, Court of Appeals No. 49474-4-II.

III. ISSUES PRESENTED FOR REVIEW

Does Moen's petition raise a significant question of constitutional law or present a substantial issue of public interest under RAP 13.4(b)(3)(4), when the evidence did not support his claim of dementia and when he was not a child when he murdered his wife?

IV. STATEMENT OF THE CASE

Michelle Moen lived at 295 Robertson Road in Longview with her husband Cleon Moen. RP 334-35, 394-95. On June 16, 2014, Michelle called 911, and the Cowlitz County Sheriff's Office responded. RP 266-67, 394-95. Moen was arrested for fourth degree assault domestic violence. RP 269, 396. On November 10, 2014, the case proceeded to jury trial. Michelle testified as a witness for the State. RP 270, 278-79, 281-82. The jury was

unable to reach a verdict and a mistrial was declared. RP 279, 283. Moen obtained a shotgun and attempted suicide by shooting himself in the face. RP 284-86, 1219-20. Moen was unsuccessful. RP 737.

Michelle and Moen began divorce proceedings. RP 290, 337-38. In January 2015, Michelle was granted sole occupancy of the home at 295 Robertson Road. RP 290-91, 338. Moen moved into a residence at 610 Sightly Road in Toutle. RP 304, 338. During the divorce process, Moen felt he was being forced to pay double and stopped paying. RP 1259-60. Michelle's attorney filed a motion for a contempt hearing. RP 292-94, 297.

On September 3, 2015, Michael Gillman served Moen with notice of the hearing at 610 Sightly Road. RP 303-06, 1229. That night or early the next morning, Moen drove to Whitewater Road which was near, but out of sight of, 295 Robertson Road. RP 310-11, 354, 357, 363, 370. On September 5, 2015, Moen spent the night in a trailer behind the main residence at 295 Robertson Road. RP 649, 932, 1262. In the morning of September 6, 2015, Michelle left the home. RP 931-32, 1304. Moen snuck into the house and removed and loaded two handguns from a safe. RP 932, 1264-66. Moen brought a backpack that contained the contempt paperwork he had been served with. RP 1263. He also brought an axe and a stiff, red, heavy-gauge electrical wire. RP 880, 1263-64, 1269-70. Moen hid in a spare bedroom. RP at 932-33. When Michelle returned, Moen continued

to hide in the spare bedroom for about an hour. RP 933, 1304. Eventually, Michelle entered the bathroom. RP 929, 933.

Once Michelle was in the bathroom, Moen entered with the axe. RP 933. Moen struck Michelle in the head with the axe. RP 933, 1267. He then punched her repeatedly in the face. RP 933, 1267. They struggled on the bathroom floor. RP 942. In addition to her facial injuries, Michelle's arms were covered in bruises, and her ribs were broken. RP 1268. At one point during the struggle, Michelle told Moen she loved him; Moen responded by punching her in the face. RP 943. Michelle told Moen to let her live; Moen responded by telling her he was going to kill her. RP 934. After a 30-45 minute struggle, Moen got up on Michelle's shoulders and wrapped the heavy-gauge wire around her neck. RP 944-45. On the ends of the wire Moen had twisted thumb loops that allowed the ends to be pulled tightly in opposite directions. RP 1269. Moen pulled the wire around Michelle's neck, strangling her until she was dead. RP 945, 1269-70.

After killing Michelle, Moen went outside and backed Michelle's pickup truck up to a pumphouse on the property. RP 946, 1242. Moen attached an accordion-type dryer hose to the tailpipe of the truck and placed the other end in the pumphouse. RP 388, 1242. Moen turned on the truck ignition, entered the pumphouse, closed the door, and sat breathing in carbon monoxide in an attempt to kill himself. RP 580, 1242-43.

A neighbor discovered Moen in the pumphouse, and police were called. RP 388-89, 1243. Police arrived, apprehended Moen, and found Michelle's body on the bathroom floor with the stiff electrical wire still tightly around her neck. 398-410, 473, 481, 883. On the date of her death, Michelle was 57-years-old, and Moen was 73-years-old. RP 776, 1205. Moen was taken to the hospital and treated for carbon monoxide poisoning. RP 551, 573. Moen told police things had not been the same since his domestic violence arrest, and that he wanted to show Michelle what domestic violence really was. RP 552-53. He said the hung jury had not been good enough because he wanted to show Michelle what domestic violence looked like. RP 561. Moen said he would not let Michelle live because she "f***ing lies." RP 934. He said every time he closed his eyes he saw Michelle's bloody body and felt sick but then felt at peace. RP 619. He said he had a plan to tie Michelle up in the barn because that was where she had set him up. RP 582-83. Moen said he brought the wire to choke Michelle. RP 581. And, Moen stated: "It's all premediated, I planned the whole f***ing thing." RP 932.

Moen was charged with aggravated first degree murder – domestic violence. CP 46. The case proceeded to trial. During trial, Moen called radiologist Hazan Ozgur to testify about computerized tomography ("CT") scans he reviewed of Moen after his gunshot wound. RP 1186, 1192. Dr.

Ozgur testified that although these studies showed extensive injuries to Moen's face as a result of his gunshot wound, they showed no evidence of injury to his brain. RP 1196-97, 1200. Dr. Ozgur testified that while there was slight frontal substance loss to Moen's brain, it was "within normal limits" for a person Moen's age. RP 1200-01. Dr. Ozgur testified slight substance loss did not necessarily indicate a person had dementia, and he was not qualified to diagnose Moen with dementia. RP at 1201. Dr. Ozgur testified that a neurologist was required to diagnose a person with dementia based on a CT scan. RP 1197, 1201.

Neuropsychologist Robert Stanulis, who was not a neurologist, testified on Moen's behalf. RP 800. Although Dr. Stanulis conflated his experience with that of a medical doctor, he ultimately admitted that he did not have the necessary skills of a brain surgeon. RP 832. Dr. Stanulis diagnosed Moen with "frontal temporal dementia." RP 810. Yet, Dr. Stanulis admitted that Moen's CT scans "were not done for diagnosis of dementia" and did not show damage to his frontal lobes. RP 821. Further, Dr. Stanulis testified that dementia starts with short-term memory problems but did not describe Moen as having any short-term memory loss. RP 818.

Moen also called his friend, local physician Michael Grubbs as a witness. RP 1082-83. Dr. Grubbs visited Moen multiple times after his suicide attempt at the courthouse. RP 1087-89. In his practice Dr. Grubbs

had dealt with patients with dementia. RP 1090. Dr. Grubbs did not observe Moen to have any of the symptoms of dementia. RP 1090, 1092.

In rebuttal, the State called psychologist Ray Hendrickson from Western State Hospital regarding his evaluation of Moen for diminished capacity. RP 1277-78, 1281. Dr. Hendrickson noted that Moen had no evidence of delusions, and that his thought process was goal-directed, coherent, and rational. RP 1289-90. He also found Moen was logical and exhibited good formal judgment. RP 1291, 1293. Dr. Hendrickson observed Moen's memory was good after conducting tests on Moen's short-term and long-term memory. RP 1291-93. Based his interview of Moen, medical records, the reports of Dr. Ozgur and Dr. Stanulis, and the police reports, Dr. Hendrickson diagnosed Moen with depression. RP 1295.

Dr. Hendrickson did not diagnose Moen with dementia and saw no evidence of Moen suffering from dementia currently or on the date of the murder. RP 1297-98. Dr. Hendrickson explained that dementia means overall memory difficulty. RP 1297. Dr. Hendrickson also explained that the memory loss associated with dementia does not cause a person to lose the ability to form intent. RP at 1319-20. Dr. Hendrickson saw no indication of Moen having any memory problems. RP 1297. Dr. Hendrickson testified: "There were no symptoms of depression that significantly impaired his ability or capacity to form the intent, nor did any

symptoms that he might have had impair[] his ability to reflect or to premediate." RP at 1320-21. The jury found Moen guilty of aggravated murder in the first degree - domestic violence. RP 1536-37.

At sentencing, Moen's attorney argued that the statute requiring the court to sentence Moen to life without parole was unconstitutional because it did not consider mitigation based on advanced age and mental problems, but he did not specifically mention dementia during his in-court argument. RP 1581. Moen's attorney did not present any evidence of dementia at sentencing. RP 1581-83. Conversely, the State presented Dr. Hendrickson's report showing that Moen had the ability to appreciate the wrongfulness of his actions. RP 1571, 1604. Prior to sentencing Moen, the court considered trial evidence of mental health issues and stated:

> I do not find in my judgment that that comes near the position where a juvenile might be in their brain development or does it go to the level of intellectual disability that would be – would touch upon or even come close to violating the Eighth and the Fourteenth Amendments.

RP 1602. The court also considered Dr. Hendrickson's report, observing that Moen had completed a crime of planning to exact revenge, and that he paused, thought calmly, and took action. RP 1602-03. The court found the sentence required by the statute did not conflict with the constitution because there was "such a strong showing of premeditation and absolute

lack of any compassion or mercy or kindness." RP 1603. The court then sentenced Moen to life without the possibility of parole. RP 1603.

Despite failing to present any evidence of dementia at sentencing, Moen appealed, arguing his sentence of life without parole was categorically-barred as cruel punishment because he maintained that he belonged to a class labeled "elderly persons with age-related mental infirmities." Slip Opinion at 7 n.4. Moen maintained that he suffered from dementia and therefore belonged to this class. Moen reasoned that "elderly persons with age-related mental infirmities" who are convicted of aggravated first degree murder are like children; therefore they should be categorically-barred from being sentenced to life without the possibility of parole. The Court of Appeals rejected Moen's argument that the categorical bar of life without parole sentences for children should also be applied to him.[1] The court found Moen failed to meet his burden of showing RCW 10.95.030(1) was unconstitutional beyond a reasonable doubt; therefore, it affirmed his sentence of life without parole for the crime of aggravated murder in the first degree. Slip Opinion at 7, 13.

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[1] Rather than address Moen's claim directly, the Court of Appeals elected to "address only the narrow issue of whether it is cruel to sentence a person diagnosed with dementia to mandatory life imprisonment without the possibility of parole." Slip Opinion at 7 n.4. Because the Court of Appeals held life without parole sentences are not categorically barred for those with dementia who commit aggravated murder in the first degree, it did not explore the issue of whether Moen was actually a member of the class he claims.

V. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION

Because Moen's petition fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

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

Moen claims his petition involves a significant question of law under the Constitution of the State of Washington or of the United States under RAP 13.4(b)(3) and presents an issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4). While the Court of Appeals arrived at the correct conclusion in finding the categorical bar of life sentences without the possibility of parole for children should not be extended to all adults claiming dementia, it bypassed the issue of whether the evidence actually showed Moen had dementia at the time he committed the crime. Neither the facts of Moen's case nor the law he relies upon reach a constitutional question or an issue of substantial public interest. His claim of dementia was weakly supported at trial and no

additional evidence was presented at sentencing. Further his reasoning based on *State v. Bassett*, --- Wn.2d ---, 428 P.3d 343, 346 (2018), ignores that *Bassett* is specific to the unique characteristics of children. Thus, his petition does not meet any of the criteria for review under RAP 13.4(b).

A. THE EVIDENCE DID NOT SUPPORT MOEN'S CLAIM THAT HE SUFFERED FROM DEMENTIA AND NO SUCH EVIDENCE WAS PRESENTED AT HIS SENTENCING.

When he murdered his wife Moen did not have dementia; therefore, this Court should not render a decision on the application of the statute to those who actually suffer from dementia. "In order to challenge the constitutionality of a statute, the person challenging must show that the complained statute has operated to his own prejudice." *State v. Bohanon*, 62 Wn.App. 462, 469, 814 P.2d 694 (1991) (citing *State v. Farmer*, 116 Wn.2d 414, 421, 805 P.2d 200 (1991)). Moen asserts that a sentence of life without the possibility of parole for a person who commits aggravated murder in the first degree is cruel punishment if that person has dementia. However, despite arguing his sentence is unconstitutional on this basis, Moen presented no evidence that he suffered from dementia at sentencing. Further, at trial there was minimal evidence that Moen suffered from dementia, and this evidence was strongly rebutted. Accordingly, the facts of Moen's case do not present a constitutional issue or a substantial issue of public interest for this Court to review.

"One who is not adversely affected by a rule or statute does not have standing to contest its validity." *State v. MacKenzie*, 114 Wn. App. 687, 700-01, 60 P.3d 607 (2002). "'[A] litigant does not have *standing* to challenge a statute on constitutional grounds unless the litigant is harmed by the particular feature of the statute which is claimed to be unconstitutional.'" *State v. Cates*, 183 Wn.2d 531, 540, 354 P.3d 832 (2015) (quoting *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992))(emphasis added by *Cates*). Tests for constitutionality of a law are inspected by the facts of the case before a court and "not by examining hypothetical situations." *City of Bremerton v. Spears*, 14 Wn.2d 141, 159, 949 P.2d 347 (1998).

A person who is not a member of a class he or she claims cannot show prejudice based on how a statute applies to others. *See Farmer*, 116 Wn.2d at 423 (1991). Determining whether a party has standing may require consideration beyond a mere claim. For example, courts consider multiple factors when determining whether a defendant held a legitimate expectation of privacy to establish standing to challenge a search. *See, e.g., State v. Link*, 136 Wn. App. 685, 692-94, 150 P.3d 616 (2007). Of course, statutes are presumed constitutional and a defendant challenging has the burden of proving otherwise beyond a reasonable doubt. *Bassett*, 428 P.3d at 348.

Here, at trial Moen's evidence of dementia was both weakly supported and strongly rebutted, and at sentencing he failed to present any evidence of dementia. Dementia involves overall memory difficulty. RP 1297. While Dr. Stanulis diagnosed Moen with dementia and agreed dementia starts with memory loss, he did not provide any testimony that he had tested Moen for memory loss or that Moen suffered any memory loss. He did not provide any evidence of dementia in Moen's medical records. Alternatively, Dr. Hendrickson tested Moen's memory and determined Moen not to have dementia. RP 1291-97. Dr. Stanulis based his claim on a CT scan of Moen's brain. Yet, Dr. Ozgur testified that Moen's slight brain loss was within normal limits for his age, and that a person could have this slight brain loss without dementia. RP 1201.

Additionally, Dr. Grubbs had dealt with dementia patients, was well-acquainted with Moen, and had visited with him multiple times after his initial suicide attempt. RP 1083, 1087, 1090. Dr. Grubbs did not observe Moen to have any symptoms of dementia. RP 1090. Moen's testimony was also inconsistent with dementia. He provided a vivid and detailed description of the murder and events leading up to it. Much of his description of the event was strongly corroborated by the evidence. It is also noteworthy that the jury found the crime was aggravated because Moen murdered his wife for being a former witness against him in his earlier

domestic violence trial. Thus, even the aggravating factor, which the jury found unanimously, indicated Moen had a well-functioning memory.

At sentencing, Moen claimed his sentence was unconstitutional based on advanced age and mental problems but only mentioned dementia in a memorandum. RP 1581-83. Moen did not present any additional evidence of dementia or evidence that dementia contributes to an inability to form premeditated intent or to understand the wrongfulness of his actions. The State admitted the Western State Hospital report of Dr. Hendrickson. RP 1571, 1604; CP 30-45. This report included a diagnosis that Moen suffered from Adjustment Disorder and Major Depressive Disorder, and a conclusion that Moen's symptoms did not impair his "*ability* to perceive the nature and quality of the act, know right from wrong, or to form the requisite elements of intent or premeditation." CP at 34, 44 (emphasis in original).

The court even considered whether Moen had a condition similar to a juvenile or one with intellectual disability. The court found Moen's issues neither came near where a juvenile would be in brain development nor reached the level of intellectual disability. The court found the sentence to be imposed did not "even come close" to being unconstitutional. RP 1602. Having presented no evidence of dementia at sentencing and weak, rebutted evidence at trial, Moen did not meet the burden of showing the statute mandating a life sentence was unconstitutional beyond a reasonable doubt.

While there is good reason to sympathize with those who suffer from dementia, Moen did not actually suffer from dementia when he brutally murdered his wife. The Court of Appeals correctly found the categorical bar of life sentences without the possibility of parole for children should not be extended to those with dementia. *Infra* Part V-B. However, with the weak evidence of dementia in the record, it was unnecessary to reach this issue. Because no reasonable consideration of the evidence showed Moen suffered from dementia when he murdered his wife, the facts of his case do not present a constitutional issue or one of substantial public interest.

B. MOEN'S CLAIM DOES NOT PRESENT A CONSTITUTIONAL ISSUE OR AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Moen's life sentence for aggravated murder in the first degree was not made unconstitutional by his dementia claim. With regard to a conviction for aggravated first degree murder, "[w]here aggravating circumstances are found by the jury it does not violate the Eighth Amendment and Const. art. 1, § 14, to sentence to life imprisonment without the possibility of release or parole without further consideration of mitigating circumstances." *State v. Grisby*, 97 Wn.2d 493, 498, 647 P.2d 6 (1982). Moen maintains that he has dementia and that all with dementia who commit aggravated murder in the first degree should be categorically barred from sentences of life without parole. Because the categorical bar to

life without parole sentences was applied to children for youth-specific reasons, it has no application to claims of dementia.

The United States Supreme Court has explained the distinction between intentional first-degree murder and nonhomicide crimes: "The latter crimes may be devastating in their harm, as here, but 'in terms of moral depravity and injury to the person and to the public' they cannot compare to murder in their 'severity and irrevocability.'" *Kennedy v. Louisiana*, 554 U.S. 407, 438, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (quoting *Coker v. Georgia*, 433 U.S. 584, 598, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977)). "Life is over for the victim of the murderer." *Coker*, 433 U.S. at 598. "[T]here is no doubt that aggravated first degree murder is the most serious criminal offense." *State v. Bassett*, 428 P.3d 343 (2018). For adults, "the mandatory sentence of life imprisonment without parole for aggravated first degree murder does not constitute cruel and unusual punishment." *State v. Dictado*, 102 Wn.2d 277, 296, 687 P.2d 172 (1984) *abrogated on other grounds by State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986).

Several United States Supreme Court decisions have impacted juvenile sentencing. A juvenile may not receive the death penalty. *Roper v. Simmons*, 543 U.S. 551, 578-79, 125 S.Ct. 1183, 161 L.Ed.2d. 1 (2005). A juvenile who is not convicted of homicide may not receive a sentence of life without parole. *Graham v. Florida*, 560 U.S. 48, 82, 130 S.Ct. 2011,

176 L.Ed.2d 825 (2010). A juvenile convicted of homicide may not receive a sentence of life without parole unless an individualized sentencing decision is made that considers any mitigation. *Miller v. Alabama*, 567 U.S. 460, 489, 132 S.Ct. 2455, 183 L.Ed. 407 (2012). RCW 10.95.030 was altered in an attempt to comport with the decision in *Miller*. RCW 10.95.030(3)(b). Recently, this Court held this "*Miller*-fix" violated art. I, § 14 of the Washington State Constitution; therefore a juvenile convicted of aggravated murder may not receive a sentence of life without parole under any circumstances. *Bassett*, 428 P.3d at 346.

Bassett was solely concerned the constitutionality of sentencing juvenile offenders to life in prison without the possibility of parole. *Id.* at 345. Applying *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), the Court found, in the context of juvenile life without parole sentences, article I § 14 provided greater protection than the Eighth Amendment. *Id.* at 348-50. In conducting this analysis, the Court recognized—as the United States Supreme Court had in *Miller*—the practical reality that "'children are different.'" *Id.* at 349 (quoting *Miller*, 567 U.S. at 481).

The *Bassett* Court applied the categorical bar analysis to determine the constitutionality of sentencing children to life without parole. *Id.* at 350-51. The categorical bar approach was preferable because it allowed the Court to "consider the nature of children." *Id.* at 351. Moreover, the Court

found "adopting a framework that considers the characteristics of youth is in line with the *Miller* reasoning[.]" *Id.* Because, "[i]ssues of culpability, the severity of the punishment, and whether penological goals are served all allow the court to include youth-specific reasoning in its analysis." *Id.*

The categorical bar considers (1) whether there is objective indicia of a national consensus against the sentencing practice at issue, and (2) the court's own independent judgment based on "'the court's own understanding and interpretation of the cruel punishment's provision's text, history, ... and purpose.'" *Id.* at 350-51 (quoting Graham 560 at 61 (quoting *Kennedy v. Lousiana*, 554 U.S. 407, 421, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008))). The Court noted among other changes for juveniles since *Miller* that, including the District of Columbia, the number of states that banned life without parole sentences for juveniles had risen from four to 20. *Id.* at 352. The Court recognized a "clear trend of states rapidly abandoning or curtailing juvenile life without parole sentences." *Id.*

The Court then exercised its independent judgment to determine the constitutionality of sentencing a child to life without parole. *Id.* at 352. The Court noted, as the United States Supreme Court had in *Miller*, *Roper*, and *Graham*, that "children are criminally less culpable than adults." *Id.* As compared with adults, children have less maturity, an underdeveloped sense of responsibility, are more vulnerable to negative influences and outside

pressures including peer pressure, and their characters are not as well-formed." *Id.* at 353 (citing *Graham*, 560 U.S. at 68). The Court concluded because children have "'lessened culpability they are less deserving of severe punishments.'" *Id.* (quoting *Graham*, 560 U.S. at 68).

Perhaps most consequentially, life without parole sentences are "'especially harsh' for children, who will 'on average spend more years and a greater percentage of their lives in prison than an adult offender.'" *Id.* (quoting *Graham*, 560 U.S. at 70). Penological goals are not furthered due to a child's lesser culpability, immaturity, recklessness, and impetuosity, resulting in less consideration of potential punishment. *Id.* And, a life without parole sentence requires finding a child to be incorrigible when incorrigibility is inconsistent with youth. *Id.* This is at odds with "children's capacity for change." *Id.*

Under this categorical bar analysis, the Court found states were rapidly abandoning life without parole sentences for children, children were less culpable than adults, and the characteristics of youth did not support the penological goals of life without parole sentences. *Id.* at 354. The Court then held sentencing children to life without parole was cruel punishment and was unconstitutional under article I § 14. *Id.*

Here, Moen claims to raise a constitutional issue and one of substantial public interest. He asserts that all who commit aggravated

murder in the first degree and claim dementia should be treated like children. However, *Bassett*, as do "*Graham* and *Miller* unmistakably rest[s] on the differences between children and adults and the attendant propriety of sentencing children to life in prison without the possibility of release." *State v. Witherspoon*, 180 Wn.2d 875, 890, 329 P.3d 888 (2014). There are a multitude of characteristics that distinguish children from adults. The flaw in Moen's reasoning is the failure to recognize that foundational to *Bassett* was that children broadly share unique characteristics. To eliminate the youth-specific reasoning from the *Bassett* decision is to eliminate the constitutional question that was posed. Children are different. With this reality in mind, the issue in *Bassett* was whether a life without parole sentence constituted cruel punishment for a child.

While there are adults who develop dementia in their later years, Moen provides no evidence showing there is a large class of individuals who suffer from dementia and have been convicted of aggravated murder in the first degree. There are obvious distinctions between children and adults with dementia who commit aggravated first degree murder. An older adult suffering from memory loss does not lack maturity or have an underdeveloped sense of responsibility. Unless an adult is mentally incapacitated, that adult retains control over environment and is less vulnerable to peer pressure than a child. And, an older adult's character is

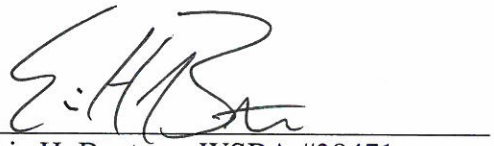
already well-formed; thus, when an adult commits a premediated murder this provides greater evidence of depravity than it would for a child.

Moreover, if life without parole sentences are more severe for children due to having to spend a greater percentage of their lives in prison, it necessarily follows that a life without parole sentence is much less severe for an elderly adult. Further, while a child's capacity for change suggests a hope of rehabilitation, this is much less likely to exist with an older adult. For example, Moen committed the premediated murder of his wife as punishment for testifying against him in a domestic violence trial to show her "what domestic violence really was." This crime, committed at 73-years-old, reflected both depravity and incorrigibility. Because Moen does not merit the same consideration as a child, he fails to raise a constitutional issue or an issue of substantial public interest. Therefore, his petition for review should be denied.

VI. CONCLUSION

Because the petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

Respectfully submitted this 4th day of January, 2019.



Eric H. Bentson, WSBA #38471
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CERTIFICATE OF SERVICE

I, David Phelan, certifies the Response to Petition for Review was served electronically via portal to the following:

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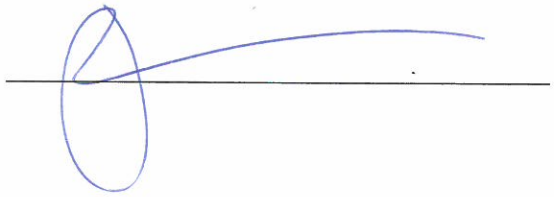
I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington January 4, 2019.



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