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SUPREME COURT  
STATE OF WASHINGTON  
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CLERK

Sup. Ct. No. 99330-1  
Court of Appeals No. 77134-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BRANDON BACKSTROM,

Petitioner.

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PETITION FOR REVIEW

---

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## I. IDENTITY OF PETITIONER AND DECISION BELOW

Brandon Backstrom, seeks review of a published Court of Appeals decision, issued on date, opinion affirming his conviction and sentence. *State v. Backstrom*, No. 77134-5-I, 2020 WL 6867960 (Nov. 2, 2020). See Appendix 1.

## II. INTRODUCTION

Youth matters. Individuals who commit crimes while under 18 are less culpable than adult offenders and are presumed to have the capacity for rehabilitation. The Court held in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), that a court may not sentence a juvenile offender to life imprisonment without the possibility of parole unless he or she is permanently incorrigible. *Id.* at 479-480. The Court also explained juvenile life without parole sentences should be rare, because very few juvenile offenders are permanently incorrigible. The Court reaffirmed the *Miller* rule in *Montgomery v. Louisiana*, - U.S. -, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), and applied that rule retroactively to cases pending on collateral review. *Id.* at 732.

In *State v. Bassett*, 192 Wn. 2d 67, 91, 428 P.3d 343, 355 (2018), this Court held that under the Washington State Constitution, sentencing juvenile offenders to life without parole or early release constitutes cruel punishment. This Court has again granted review in a juvenile sentencing matter in *State v. Haag*, 10 Wn. App. 2d 1014, *review granted*, 195 Wn. 2d 1023, 467 P.3d 953 (2020) to consider whether a 46 year sentence is an unconstitutional de facto life sentence. This case raises similar issues and this Court should either grant review or stay the petition pending *Haag*.

Further, despite the Supreme Court's guidance in *Miller*, and this Court's repeated reversal of unconstitutionally cruel juvenile sentences in *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017), *State v. Bassett*, and *State v. Delbosque*, 195 Wn.2d 106, 456 P.3d

806 (2020), courts do not engage in the analysis *Miller* requires. In particular, courts often base sentences of life imprisonment without parole solely on the egregiousness of the offenses, even though that alone has little to do with permanent incorrigibility.

The trial court here erred by focusing on the “horrific” nature of the crime and discounting the evidence of Backstrom’s ability to change. The published decision of the Court of Appeals conflicts with the *Miller*, *Bassett*, *Delbosque* and the unpublished decision in on this issue *State v. Collins*, #51511-3-II, (filed December 15, 2020). RAP 13.4(b)(2).

### **III. ISSUES PRESENTED FOR REVIEW**

1. Is a sentence of 42 years for a juvenile defendant convicted in adult court an unconstitutional de fact life sentence? RAP 13.4(b)(3).

2. Did the sentencing judge err when she failed to fully acknowledge the forward looking evidence of Brandon’s capacity for change and instead gave great weight to the “horrific” nature of the murders? RAP 13.4(b)(1), (3), (4).

### **IV. STATEMENT OF THE CASE**

In 1998, Brandon was charged with two counts of aggravated first degree murder with deadly weapon allegations. CP 217-18. Because of the charge, Brandon was “auto-declined” into adult court. The State also charged his adult cousin, Jacob Whited. But on the eve of trial, Whited entered a plea in exchange for a sentence of 29.5 years. Brandon was convicted as charged and sentenced to two terms of life imprisonment without the possibility of parole. CP 207-16.

Brandon’s sentence was remanded to the sentencing court for resentencing under RCW 10.95.030 and *Miller*. The court heard evidence of Brandon’s childhood in a dysfunctional family with an abusive stepfather and inattentive mother. CP 56-59; RP 84-

93. There was also evidence of Brandon's use of alcohol at a very early age to salve his emotional pain. CP 60; RP 96-97. In addition, Brandon presented evidence of his homelessness to escape his dysfunctional and abusive family. CP 58-59; RP 88-90. The court received written reports and extensive testimony from Dr. Kenneth Muscatel, a licensed forensic psychologist, and Janelle Wagner, a mitigation specialist, regarding the impact of these issues on Brandon's youth. CP 50-62.

Following the hearing, the parties agreed the court had complete discretion in setting the minimum term. RP 128-29. The State agreed a life sentence was too harsh and advocated for a term of no less than 40 years. RP 165-66. Brandon urged the court to impose a sentence of 29.75 years, which was the same sentence imposed on his older cousin who had pleaded guilty. RP 11.

In imposing the sentence, the court began by acknowledging the "great pain" the victims' family had suffered. RP 176. The Court then acknowledged Brandon was "young" and, at the time of the crime, "had very poor decision-making abilities and poor judgment." RP 181. The court noted he had a "neglectful family." *Id.*

The sentencing judge made a clear finding that Brandon had changed:

In terms of his rehabilitation, there's no question in my mind that the person who sits here today is very, very different than the person of 20 years ago. There's no question that Mr. Backstrom has made a good adjustment to prison after a difficult but not surprising start. And, if Dr. Muscatel is correct, that success in prison translates to a good chance of success in society if released, then his prospects for rehabilitation and reintegration into society are fairly strong.

RP 184.

The court stated, however, that upon reviewing the trial transcript, it concluded Brandon's participation was "significantly greater than his co-defendant." RP 182. The court also stated Brandon's youth did not "impact his legal defense" because he was

“articulate. He was clear. He had his version of events that he clearly stuck to at that point in time.” RP 184. The court said:

There is nothing in the facts that I reviewed that I would find would have precluded an ability to be responsible for his actions. By all accounts and all the evidence I have reviewed, he was an intelligent and capable 17 year old.

RP 185.

The court opined, however, that the facts of this crime were “horrific.” RP 186.

The court said:

I have to say that the terms of fairness and justice and what is right ring very hollow when consideration is given to the facts of this case the ripple effects that it has had ...for all these individuals.

RP 187.

The court concluded:

I am mindful of the cases that I read, which were instructive, and they clearly dictate that in a case such as this that while, as [the prosecutor] said, perhaps Mr. Backstrom is deserving of spending the rest of his life in prison, that the decision has been made that life in prison is just not an appropriate sentence for someone who was as young as he was when these crimes were committed.

Having given the matter much thought and consideration, I am sentencing Mr. Backstrom to 42 years as a minimum sentence with life as a maximum sentence. I am imposing that sentence on each count with the terms to run concurrently. In reaching that sentence, I considered and took into account both the actual minimum under the statute of the 25 years and I took into account the enhancements, but I agree that I believe the Court has, in the end, discretion in these cases and that is the number that I arrived at.

The Court of Appeals affirmed Brandon’s challenge to the new sentence because “the trial court carefully and meaningfully considered the mitigating evidence presented, including his potential for rehabilitation, and had complete and absolute discretion to weight it when fashioning a proportionate sentence, Backstrom fails to show the court

abused its discretion.” *State v. Backstrom*, No. 77134-5-I, 2020 WL 6867960, at \*3 (Wash. Ct. App. Nov. 2, 2020).

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

### 1. A MINIMUM TERM OF 42 YEARS IS A DE FACTO UNCONSTITUTIONAL LIFE SENTENCE FOR BRANDON.

This is an important question of constitutional law, and this question is pending in this Court in *State v. Haag*, #97766-6. Because the length of the sentence here is virtually the same length as the sentence in *Haag*, this Court should stay further consideration of this Petition until the decision in *Haag* is published.

The court erroneously concluded that the trial court had complete discretion at the resentencing for a juvenile convicted of aggravated homicide. However, after the decision in *Bassett*, that is no longer true. Although *Miller* did not categorically bar a sentence of life in prison for a juvenile convicted of homicide, this Court categorically barred a sentence of life in prison in *Bassett*.

Contrary to the sentencing court’s belief, it did not possess unfettered discretion in determining Brandon’s sentence. . It may impose a sentence so long as that sentence is not a life term. But the sentencing court re-imposed minimum term of 42 years. Brandon will be ineligible to appear before the Indeterminate Sentencing Review Board (ISRB) until he is 58 years old. This is an unconstitutional de facto life sentence.

The United States Supreme Court viewed the concept of "life" in *Miller* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for "life" if he will have no opportunity to truly reenter society or have any meaningful life outside of prison." *Casiano v. Commissioner of*



*Corrections*, 317 Conn 52,115 A.3d 1031, 1047 (Conn. 2015). In the pending *Haag*

case, Mr. Haag, who received a 46 year minimum term, argued that:

46 years is a life sentence. The United States Sentencing Commission defined a life sentence as 470 months (39.16 years) or more. US Sentencing Commission, "US Sentencing Commission Quarterly Data Report: Fiscal Year 2017", pg. 28, n. 1, A-7.6 This definitions is based on the median age of sentencing of 25 years<sup>7</sup> and the life expectancy for a person in general prison population, which for a 25 year old, would equate to a life expectancy of 64 years old. See *id.* at A-7. The average life expectancy for men in the United States is 76.1, but prison accelerates the negative consequences of aging. See *Mortality in the United States 2016*, NCHS Data Brief, No. 293, December 2017.<sup>8</sup> There is substantial research on the negative effects of prison on life expectancy. See Pridemore, William Alex, *The Mortality Penalty of Incarceration: Evidence From A Population-Based Case Control Study Of Working-Age Males*, *Journal of Health and Social Behavior*, vol. 55, no. 2, (2014); Patterson, Evelyn PhD, *The Dose-Response of Time Served in Prison On Mortality: New York State, 1989-2003*, *Am J Public Health*, Vol. 103, No 3, Mar 2013; Chammah, Maurice, *Do You Age Faster in Prison?*, The Marshall Project, August 24, 2015.<sup>9</sup> A study in Michigan suggested that adjusting for the length of sentence and race resulted in a significant shortening of life expectancy; life expectancy for ce unconstitutional. Michigan adults incarcerated for natural life sentences was 58.1 years. ACLU of Michigan Life Without Parole Initiative, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*. That number is even lower for those who began their sentences as children. *Id.* Michigan youth serving a natural life sentence were found to have an average life expectancy of 50.6 years. *Id.*

*State v. Haag*, #97766-6, *Petition for Review*, filed 19/19/19.

Brandon expects that in *Haag* this Court will set forth guidelines for determining what constitutes a de facto life sentence. Given that his sentence is of nearly the same length as Mr. Haag's, this Court should stay further consideration of this Petition until the opinion in *Haag* is published. At that

time, this Court should consider whether the outcome in *Haag* renders

Backstrom's sentence unconstitutional.

2. THE COURT OF APPEALS ERRED WHEN IT CONCLUDED THAT THE SENTENCING JUDGE DID NOT ABUSE HER DISCRETION IN SETTING THE MINIMUM TERM AT 42 YEARS.

Even if *Haag* provides no additional guidance on what is a de facto life term, this Court should accept review and reverse because the Court of Appeals published decision conflicts with the decisions in a the *Miller, Bassett, Delbosque* (2018) and the unpublished decision in on this issue in *State v. Collins*, #51511-3-II.

*Collins*, like this case, was remanded after the decision in *Delbosque*. The crucial issue in both cases was the trial court's failure to acknowledge the defendants' capability for rehabilitation. The resentencing judge here did not address the issue except for her statement that "if true" the expert's testimony established that Brandon had actually been rehabilitated. Like the judge in *Collins*, the sentencing judge here did not fully acknowledge the forward looking evidence of Brandon's capacity for change." *State v. Collins*, 51511-3-II, slip opinion at 17.

Similarly, in *Delbosque*, this Court held the sentencing court abused its discretion by entering findings that were unsupported by substantial evidence. Thus, the court's sentence of a presumptively de facto life sentence of 48 years predicated on the finding that Delbosque was permanently incorrigible and irretrievably corrupt, "did not adequately consider mitigation evidence that would support a finding of diminished culpability, rather than irretrievable depravity" and did not reconcile the

finding with the evidence demonstrating Delbosque’s capacity for change. *Delbosque*, 456 P.3d at 814

Further, like many other sentencing judges, the judge here erred by focusing on the severity of the crime. That is contrary to *Miller’s* “central intuition” that even youth who commit heinous crimes are capable of change. *Montgomery*, 136 S. Ct. at 736. The “gruesomeness of a crime is not sufficient” to conclude a defendant is the rare juvenile offender who can constitutionally receive the harshest punishment. *Adams v. Alabama*, - U.S.-, 136 S. Ct. 1796, 1800, 195 L. Ed. 2d 251 (2016).

Here, rather than acknowledging that the case for retribution was a weak or peripheral concern, the sentencing court elevated the “horrific” nature of the crime to a determining factor. This was error.

## VI. CONCLUSION

Because this case presents the same question that will be address in *Haag*, this Court should stay consideration of this Petition until it has published its decision in that case.

RESPECTFULLY SUBMITTED this 17th day of December 2020.

/s/Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634  
Attorney for Brandon Backstrom

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

|                         |   |                     |
|-------------------------|---|---------------------|
| STATE OF WASHINGTON,    | ) | No. 77134-5-I       |
|                         | ) |                     |
| Respondent,             | ) |                     |
|                         | ) |                     |
| v.                      | ) |                     |
|                         | ) |                     |
| BRANDON DALE BACKSTROM, | ) | UNPUBLISHED OPINION |
|                         | ) |                     |
| Appellant.              | ) |                     |
| <hr/>                   |   |                     |

VERELLEN, J. — Trial courts must meaningfully consider, but have considerable discretion to weigh, the mitigating factors of youth when sentencing a defendant convicted of crimes committed as a juvenile. Because the trial court meaningfully considered mitigating evidence of Brandon Backstrom’s youthfulness during resentencing, including evidence of his capacity for rehabilitation, the court did not abuse its discretion.

Therefore, we affirm.

FACTS

In 1997, 17-year-old Brandon Backstrom killed his neighbors, a mother and her 12-year-old daughter, during a planned robbery of their home.<sup>1</sup> He

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<sup>1</sup> The details of Backstrom’s crime are available in this court’s unpublished opinion affirming his conviction. State v. Backstrom, noted at 102 Wn. App. 1042 (2000).

was convicted on two counts of aggravated first degree murder while armed with a deadly weapon and received a mandatory sentence of two consecutive terms of life without the possibility of parole. Each count also carried a 24-month deadly weapon enhancement.

In 2012, the Supreme Court decided Miller v. Alabama<sup>2</sup> and held the Eighth Amendment prohibits mandatory sentences for juveniles of life in prison without the possibility of parole. In response, the legislature enacted the Miller-fix statute,<sup>3</sup> which requires that any juvenile sentenced to life in prison without the possibility of parole be resentenced.<sup>4</sup>

In 2017, a trial court held a Miller hearing for Backstrom and sentenced him to two concurrent terms of a minimum of 42 years up to a maximum term of life. The court declined to impose any confinement for the deadly weapon enhancements.

Backstrom appealed, and we reviewed his appeal as a personal restraint petition and affirmed. He petitioned the Supreme Court for review, and it remanded for reconsideration in light of its decision in State v. Delbosque.<sup>5, 6</sup>

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<sup>2</sup> 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

<sup>3</sup> RCW 10.95.030(3), .035.

<sup>4</sup> State v. Bassett, 192 Wn.2d 67, 74, 428 P.3d 343 (2018) (citing RCW 10.95.035).

<sup>5</sup> 195 Wn.2d 106, 456 P.3d 806 (2020).

<sup>6</sup> State v. Backstrom, 195 Wn.2d 1018, 456 P.3d 209 (2020).

ANALYSIS

An appeal from a Miller-fix resentencing is a direct appeal of the newly-imposed sentence.<sup>7</sup> We review sentencing decisions for abuse of discretion and will reverse where the trial court's decision rests on untenable grounds or was made for untenable reasons.<sup>8</sup>

A trial court lacks the discretion to impose a standard range sentence without first considering the mitigating circumstances of youth where the defendant committed the crime as a juvenile.<sup>9</sup> When the court considers the appropriate mitigating circumstances, it has "absolute discretion" to impose a sentence "proportionate for a particular juvenile" to avoid imposing an unconstitutionally disproportionate sentence.<sup>10</sup> An appellate court "cannot reweigh the evidence on review," even if it "cannot say that every reasonable judge would necessarily make the same decisions as the court did."<sup>11</sup>

During a Miller resentencing hearing, the trial court "must fully explore the impact of the defendant's juvenility on the sentence rendered."<sup>12</sup>

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<sup>7</sup> Delbosque, 195 Wn.2d at 129.

<sup>8</sup> Id. at 116 (quoting State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012)).

<sup>9</sup> In re Pers. Restraint of Ali, No. 95578-6, slip op. at 9-10 (Wash. Sept. 17, 2020), <http://www.courts.wa.gov/opinions/pdf/955786.PDF>.

<sup>10</sup> Id. at 10 (citing State v. Houston-Sconiers, 188 Wn.2d 1, 19 n.4, 34, 391 P.3d 409 (2017)).

<sup>11</sup> State v. Ramos, 187 Wn.2d 420, 453, 387 P.3d 650 (2017).

<sup>12</sup> Id. at 443 (quoting Aiken v. Byars, 410 S.C. 534, 543, 765 S.E.2d 572 (2014)).

Consequently, both the court and counsel have an affirmative duty to ensure that proper consideration is given to the defendant's chronological age at the time of his crime and related features, including immaturity, impetuosity, and a failure to appreciate risks and their consequences.<sup>13</sup> The court must also consider the defendant's childhood and life experiences before the crime, the defendant's capacity for exercising responsibility, and evidence of the defendant's rehabilitation since the crime.<sup>14</sup>

On remand, as in his earlier appeal following resentencing, Backstrom presents a narrow legal challenge, contending the trial court failed to "meaningfully consider" the mitigating circumstances of youth.<sup>15</sup> He does not challenge the sufficiency of the court's findings on resentencing nor does he contend the court failed to consider relevant mitigating evidence. Essentially, he presents two arguments: first, the court engaged in cursory consideration of the Miller factors by giving too much weight to the facts of the offense and insufficient weight to mitigating evidence, and, second, the court disregarded its own findings about his potential for rehabilitation when it resentenced him.

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<sup>13</sup> Id. (citing Miller, 567 U.S. at 477).

<sup>14</sup> See RCW 10.95.030(3)(b) (requiring that courts sentencing juveniles for aggravated first degree murder account for the "age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated"); accord Miller, 567 U.S. at 477-78.

<sup>15</sup> Appellant's Br. at 8; Supp. Appellant's Br. at 10.

Neither argument is compelling because they are not supported by the record or the law. The court reviewed the entire trial transcript, testimony given as part of Backstrom's motion for a new trial, the original sentencing decision, the denial of Backstrom's motion for a new trial, the original appellate opinion, memoranda provided for resentencing, an expert report and a mitigation investigation report prepared for the Miller hearing, letters supporting and opposing Backstrom's petition, victim impact letters, and all statements and testimony from the hearing itself. From this, the court explicitly, thoughtfully, and carefully considered each mitigating factor required by the Miller-fix statute, RCW 10.95.030(3)(b):

. . . [H]e was young. Clearly, he was less than 18. It was a time at which all the science and, of course, our own common sense tells us that his brain and accompanying decision-making abilities were not fully formed.

His lifestyle at the time clearly illustrated that he had very poor decision-making abilities and very poor judgment. So he certainly wasn't a person who was more mature than a typical 17 year old, and I think by his own statements . . . as he put it, [even more] selfish than some and possibly self-centered based on his age and circumstances.

I considered the surrounding environmental and family circumstances. It does appear with the exception of support of grandparents that Mr. Backstrom had little or no family support. . . . He was drinking excessively. He was attending school sporadically, and he did not have much in the way of external controls whatsoever.

. . . .

In terms of his rehabilitation, there's no question in my mind that the person who sits here today is very, very different than the person of 20 years ago . . . And if Dr. Muscatel is



correct that success in prison translates to a good chance of success in society if released, then his prospects for rehabilitation . . . are fairly strong.<sup>[16]</sup>

The court also weighed whether Backstrom's age impacted his legal defense, his potential impetuousness at the time of the crime and whether impetuousness played a role in the crime itself, and whether his compromised decision-making abilities reduced his capacity for exercising responsibility and appreciating risks. The court found Backstrom's chronological age, his family circumstances, and his prospects for rehabilitation were mitigating factors. The record shows the court weighed the mitigating evidence and conducted more than a cursory review.

In Delbosque, by contrast, the trial court "oversimplified and sometimes disregarded Delbosque's mitigation evidence" and entered findings lacking substantial evidence about his potential for rehabilitation.<sup>17</sup> The trial court concluded Delbosque was "irretrievably depraved without reconciling, much less acknowledging, significant evidence to the contrary."<sup>18</sup> Because the trial court's conclusions about Delbosque's ability to be rehabilitated lacked substantial evidence, resentencing was required.<sup>19</sup>

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<sup>16</sup> RP (June 28, 2017) at 181, 184.

<sup>17</sup> 195 Wn.2d at 118-19, 120.

<sup>18</sup> Id. at 120.

<sup>19</sup> Id. at 130-31.

Here, Backstrom does not contend the court's findings lacked substantial evidence, and the court carefully reviewed and weighed the mitigating evidence. He asserts the trial court concluded he was permanently incorrigible by referring to the then-recent Court of Appeals decision of State v. Bassett,<sup>20</sup> but the record shows otherwise. The court here, unlike the trial court in Bassett,<sup>21</sup> did not minimize evidence of rehabilitation and sentence Backstrom to life imprisonment without parole. Indeed, contrary to Backstrom's assertion that the court disregarded its findings about his capacity for rehabilitation, his new sentence is substantially shorter, roughly half of his original sentence,<sup>22</sup> and he now may become eligible for parole. He may disagree with how the court weighted the evidence, but we do not reweigh evidence on review.<sup>23</sup> Because the trial court carefully and meaningfully considered the mitigating evidence presented, including his potential for rehabilitation, and had complete and absolute discretion to weight it when

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<sup>20</sup> 198 Wn. App. 714, 394 P.3d 430 (2017), aff'd in part, 192 Wn.2d 67, 428 P.3d 343 (2018).

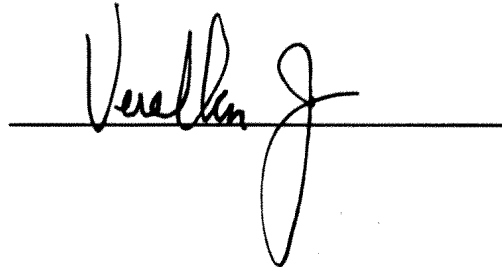
<sup>21</sup> 192 Wn.2d 67, 75, 428 P.3d 343 (2018).

<sup>22</sup> Backstrom will serve his 42-year sentences concurrently rather than consecutively, and he will no longer receive any incarceration for the weapon enhancements to his original sentence, which eliminates four years from his sentence.

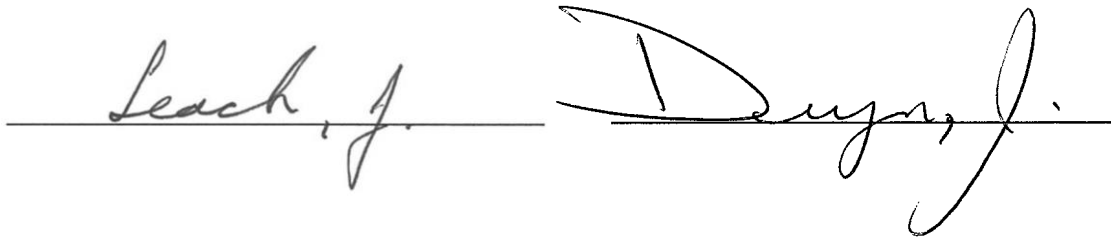
<sup>23</sup> Ramos, 187 Wn.2d at 453.

fashioning a proportionate sentence,<sup>24</sup> Backstrom fails to show the court abused its discretion.

Therefore, we affirm.

A handwritten signature in cursive script, appearing to read "Verellen J.", written over a horizontal line.

WE CONCUR:

Two handwritten signatures in cursive script, one reading "Leach, J." and the other "Dwyer, J.", each written over a horizontal line.

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<sup>24</sup> See Ali, No. 95578-6, slip op. at 10 (trial court has absolute discretion to weigh mitigating evidence in Miller resentencing); Houston-Sconiers, 188 Wn.2d at 21 (holding the trial court has “complete discretion to consider mitigating circumstances” of youth when sentencing for crimes committed by a juvenile).

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 77134-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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petitioner

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MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: December 17, 2020

# WASHINGTON APPELLATE PROJECT

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