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STATE OF WASHINGTON SUPERIOR COURT NO. 95-1-415-9  
COURT OF APPEALS NO. 47251-1-II

BY \_\_\_\_\_  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent.

Vs.

BRIAN M. BASSETT,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY  
The Honorable David Edwards Judge

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BRIEF OF APPELLANT

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## **I. NATURE OF THE CASE**

Appellant Brian Bassett seeks review of the January 30, 2015 decision of the Greys Harbor Superior Court to sentence him to three consecutive minimum terms of life in prison without the possibility of parole for offenses Mr. Bassett was convicted of when he was just 16 years old.

## **II. ASSIGNMENT OF ERROR**

A. RCW 10.95.030 violates the constitutional prohibition against cruel punishment.

B. RCW 10.95.030 violates the constitutional right to a jury.

C. The Superior Court erred by presuming that the appropriate sentence for a juvenile offender convicted of aggravated murder is life without parole.

D. The Superior Court judge erred by sentencing an adolescent offender to life in prison on less than proof beyond a reasonable doubt.

E. The Superior Court erred by failing to apply rules requiring meaningfully consideration of mitigating information and individualized sentencing.

F. The Superior Court erred by basing a juvenile life without parole sentence on information that was not supported by the record.

G. The Superior Court erred by improperly using a mitigating factor, “juvenile homelessness,” to support an aggravated sentence of juvenile life in prison without parole.

H. The Superior Court erred by failing to give any meaningful consideration to an adolescent offender’s “chances at rehabilitation.”

### **III. STATEMENT OF THE ISSUES**

A. Whether RCW 10.95.030 violates the constitutional prohibition against cruel punishment by allowing adolescent offenders to be sentenced to prison until they die.

B. RCW 10.95.030 violates the constitutional right to a jury by allowing a judge to decide if an aggravating factor exists sufficient to support sentencing a juvenile offender to life in prison without parole.

C. Whether a judge should presume the appropriate sentence for juvenile offenders convicted of aggravated murder is life in prison.

D. Whether the law allows a judge to sentence an adolescent offender to life in prison on less than proof beyond a reasonable doubt.

E. Whether a sentence of juvenile life in prison without parole is appropriate when the judge fails to meaningfully consider mitigating information and individualized sentencing.

F. Whether sentencing a juvenile to life in prison without parole is proper when the sentence is based in part on information that was not supported by the record.

G. Whether a sentencing judge should be allowed to consider juvenile homelessness to aggravate a sentence to life in prison when the law requires that factor only be considered in mitigation.

H. Whether sentencing an adolescent offender to life in prison without parole was improper when the judge failed to give any meaningful consideration to the adolescent's "chances at rehabilitation."

#### IV. STATEMENT OF CASE

On August 11, 1995 Brian Bassett's parents, Michael and Wendy, along with Brian's younger brother, Austin, were killed in Grays Harbor County. CP 1-3. The next day, Mr. Bassett, who had recently turned 16-years old, was arrested and charged in their deaths. *Id.* Nicholas McDonald, an older co-defendant, was also charged.<sup>1</sup>

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<sup>1</sup> Details of the crime are contained in *State v. McDonald*, 138 Wn.2d 680, 683-85, 689 (1999). In sum, Bassett, with McDonald's assistance, shot his parents after breaking into their home. McDonald confessed to actually killing Austin Bassett by drowning him in a bathtub at the Bassett home. *Id.* at, 689. McDonald was tried separately on three counts of aggravated murder. At trial he changed his story about having killed Austin Bassett. Although the jury only convicted McDonald of Second Degree Murder in the deaths of Michael and Austin and McDonald was acquitted in the shooting death of Wendy Bassett. See *State v. McDonald*, 138 Wn.2d 680, 683-85, 689 (1999); *State v. McDonald*, 90 Wn App. 604, 614 (1998).

Eight months after his arrest, Mr. Bassett's jury trial had been completed and he had been convicted of three counts of aggravated first-degree murder in the deaths of his parents and his brother. CP 1-3. Shortly after his conviction Mr. Bassett appeared in Grays Harbor County Superior Court for sentencing. RP April 1, 1996, p. 26. At sentencing Mr. Bassett's trial counsel declined the opportunity to speak on Mr. Bassett's behalf and no mitigating information was presented.<sup>2</sup> RP 4-1-96, p. 26.

Mr. Bassett's sentencing judge explained that, if he could have imposed a death sentence, he would have, but Washington law prohibited it. RP April 1, 1996. P. 27-28.<sup>3</sup> In place of a sentence of death, and in accord with the mandatory sentence then required by RCW 10.95.030, Brian, who was still 16-years old, was sentenced to serve three consecutive terms of life in prison without the possibility of parole. (Judgment and Sentence, April 1, 1996, *State v. Bassett*. 95-1-415-9.)

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<sup>2</sup> Defense counsel: "We have no statement or argument at this time, Your Honor." RP April 1, 1996, p. 26. The court then asked: "Mr. Bassett is there anything you wish to say before I pass sentence in this matter?" Bassett: "No, sir." *Id.*

<sup>3</sup> Judge Godfrey: "Tell you what, bottom line, you're a walking advertisement, my friend, for the death penalty for kids your age that do stuff like this. And you want to know what cold really is? If they could have done it, I would have signed it, because if that's how much you value your life, of going in and killing your parents, telling somebody to kill your brother, and sitting right there and watching it happening, that's how much you value your own. You put it at zero. I put yours at zero." RP April 1, 1996, p. 27-28.

In 2012, the U.S. Supreme Court, in *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455 (2012) declared mandatory sentences of life in prison without parole for juveniles convicted of murder to be unconstitutional. In 2014, in response to the *Miller* decision, the Washington legislature amended RCW 10.95., the statutory scheme used to sentence Mr. Bassett to life 20 years earlier.<sup>4</sup> The amended statute required that, prior to sentencing a juvenile for aggravated murder, a judge had to consider mitigating information and information about the juvenile's chances of becoming rehabilitated.<sup>5</sup> The amended statute required a sentencing judge to establish a minimum term of total confinement the juvenile offender must serve before becoming eligible to have a parole board decide if or when the offender could be released. See RCW 10.95.030(3)(a)(f).

On January 30, 2015, pursuant to amended RCW 10.95, Mr. Bassett was returned to Grays Harbor Superior Court to be re-sentenced.

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<sup>4</sup> "Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release." RCW 10.95.030(3)(a)(ii).

<sup>5</sup> "In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated". RCW 10.95.030(3)(b).

RP 1-30-2015, p. 12-14. At re-sentencing, Mr. Bassett presented mitigating information and evidence of rehabilitation contemplated by amended RCW 10.95.030(3)(b). RP 1-30-2015. pp. 16-52, 60-82, CP 158-296. The prosecutor did not present any testimony or evidence in response. RP 1-30-15, p. 51. Instead, the prosecutor argued that Bassett had not proven his constitutional challenge to the amendments to RCW 10.95 and argued that the tragic and awful facts of the twenty year old crimes justified a sentence of life in prison. RP 1-30-15, p. 53, 54-55.

Mr. Bassett's sentencing judge reasoned that the crimes Bassett was convicted of in 1995 were not evidence "of the adolescent brain taking over [Bassett's] decision making and resulting in commission of these crimes," opining instead that "these crimes were the result of a cold and calculated and very well planned goal of eliminating his family from his life." RP 1-30-15, P. 93.

Contrary to the significant evidence Mr. Bassett presented of his "chances of becoming rehabilitated," his judge announced that he didn't "believe that any amount of time in prison was ever going to result in [Bassett] being rehabilitated such that he could safely return to the community." RP 1-30-15, p. 93. The judge then re-sentenced Mr. Bassett to the same three consecutive minimum terms of life in prison without the possibility of parole that Bassett received 20 years earlier, before the U.S.

Supreme Court decision in *Miller* and the amendments to RCW 10.95. *Id.*  
This appeal followed.

## V. ARGUMENT

**A. Amended RCW 10.95.030(3)(a)(ii) authorizing life in prison without parole as a minimum sentence for juvenile offenders like Mr. Bassett violates the constitutional prohibition against cruel punishment.<sup>6</sup>**

Sentencing juvenile offender to life in prison without the possibility of parole, as is allowed by RCW 10.95.030(3)(a)(ii), constitutes “cruel punishment” in violation of Article I, Section 14 of the Washington Constitution and the Eighth Amendment to the U.S. Constitution.

An unconstitutionally cruel sanction is determined by applying the concept of proportionality “for not just the offense, but the offender” and “proportionality is a concept that changes with “evolving standards of decency that mark the progress of a maturing society.” *Miller*, \_\_ U.S. \_\_, 132 S. Ct. at 2463 (citation omitted).

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<sup>6</sup> During Mr. Bassett’s re-sentencing the prosecutor erroneously informed the court that this issue had been decided in *Personal Restraint of McNeil*, 181 Wn.2d 582 (2014), RP 1-30-2015, p. 52. However, the *McNeil* court specifically declined to consider the issue of whether a juvenile life without parole sentence violates Article I, Section 14. Instead, the *McNeil* court relied on procedural grounds - namely that the PRP at issue had been filed beyond the one year time limit required by RCW 10.73.090 and no applicable exception applied under RCW 10.73.100 - to defer the constitutional issue. *McNeil*, 181 Wn.2d at 593-94.

Over the past decade the U.S. Supreme Court has consistently moved towards banning application of the most severe adult punishment to juveniles convicted of serious crimes.<sup>7</sup> In 2005, in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005), the U.S. Supreme Court categorically banned imposition of the death penalty for juvenile offenders. In 2010, in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010), the U.S. Supreme Court categorically banned sentencing juvenile offenders convicted of non-homicide offenses to serve mandatory life in prison without the possibility of parole. In 2012, in *Miller v. Alabama*, cited above, the U.S. Supreme Court categorically banned mandatory life without the possibility of parole for juveniles convicted of murder and instead required that juveniles receive some “meaningful opportunity” for release. *Id.* at 2464, 2468.

Each of those three decisions, while recognizing the commonsense proposition that “adults and children are different,” relied on emergent psychosocial and scientific evidence that established significant differences exist in the brain development of adolescents and adults.

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<sup>7</sup> Consistent with the movement towards categorically banning life without parole sentences for juvenile offenders, in October 2015, the U.S. Supreme Court heard argument in *Montgomery v. Louisiana*, 134 S. Ct. 95 (2013). Although *Montgomery* represents an effort by the Court to resolve conflicts among states about whether *Miller* should apply retroactively, the Court accepted an *amicus* brief asking the Court to resolve the retroactivity issue by categorically banning life without parole sentences for all offenders who were under the age of 18 when they committed their crimes.

*Roper*, 543 U.S. at 569-570. Based on those differences, the Court concluded that juvenile offenders were not as culpable for their criminal acts as were adult defendants and, accordingly, that none of the traditional penological sentencing rationales supported sentencing a juvenile to mandatory life without possibility of parole. *Miller*, 132 S. Ct. at 2464-65.<sup>8</sup>

The *Roper*, *Graham* and *Miller* cases stand for the general proposition that juvenile offenders share some common characteristics that make them less culpable than adults, less deserving of sentences commonly meted out to adults, more deserving of sympathy, understanding, and leniency, and more likely than adults to learn from their mistakes and to become rehabilitated. See, *Graham*, 130 S. Ct. at 2026.

Further, in each of those cases, rather than focus on the nature of the offense, the Court's analysis centered on the shared characteristics of

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<sup>8</sup> Deterrence is a flawed rationale because juveniles are impulsive and unable to consider the consequences of their actions. *Miller*, 132 S. Ct. at 2465. Retribution's focus on an offender's blameworthiness does not justify an LWOP sentence because juveniles have a severely diminished moral culpability. *Id.* Incapacitation fails to justify an LWOP sentence because it presumes that a child is forever incorrigible, and "incorrigibility is inconsistent with youth." *Id.* (quoting *Graham*, 130 S. Ct. at 2029). Lastly, the rehabilitative theory of punishment doesn't justify an LWOP sentence because such a sentence entirely precludes any hope for a child's ultimate rehabilitation. *Id.*

juvenile offenders in order to invalidate a penalty - mandatory life without parole - for an entire class of offenders.

*Roper*, *Graham* and *Miller* were each based on the Eighth Amendment's prohibition against cruel and unusual punishment. The Court's Eighth Amendment analysis considered that, in addition to juveniles being less culpable than adults due to differences in brain development, a life sentence for a juvenile was actually a harsher punishment than when imposed on an adult because the juvenile would spend a much greater proportion of his life incarcerated than an adult would for committing the same crime. *Miller*, 132 S. Ct. at 2466.

Although the Eighth Amendment prohibition against cruel and unusual punishment is applicable to the states through the due process clause,<sup>9</sup> Washington's constitution contains its own prohibition against cruel punishment. Article I, Section 14 of the Washington Constitution provides, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." WASH Const. Art. 1, §14. The framers of our state constitution considered but rejected the language used in the Eighth Amendment, which only prohibited punishment that was both "cruel" and "unusual." US Const, Amend VIII; *State v. Fain*, 94 Wn.2d

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<sup>9</sup> *Tuilaepa v. California*, 512 U.S. 967, 970, 114 S. Ct. 2630 (1994) (Eighth Amendment applies to the states through the due process clause of the Fourteenth Amendment).

387, 393 (1980) (citing Journal of the Washington State Constitutional Convention: 1859, 501-02 (B. Rosenow ed. 1962)).

Based on the differences in text and history, Washington's Supreme Court has repeatedly held that Article I, Section 14 provides an even greater protection against cruel punishment than its federal counterpart. *State v. Thorne*, 129 Wn.2d 736, 772 (1996); *State v. Fain*, 94 Wn.2d at 393; see also, *State v. Roberts*, 142 Wn.2d 471, 506 n. 11 (2000) (This "established principle" requires no analysis under *State v. Gunwall*, 106 Wn.2d 54 (1986)).

In recognition of those differences, the framework Washington's Supreme Court articulated in *State v. Fain* to determine whether a given sentence is "cruel" under Washington's Article 1, Section 14 is different from the framework employed by the U.S. Supreme Court to determine whether a given sentence is "cruel and unusual" under the Eighth Amendment.

The factors set forth in *Fain* are (1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would receive in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction. *Fain*, 94 Wn.2d at 397, 401.

Application of those four factors, establishes that a life without any possibility of parole sentence for juvenile offender constitutes cruel punishment in violation of Article I, Section 14.

*The Nature of the Offense:* Aggravated murder is unquestionably a serious offense. Even so, because of a juvenile offender's lessened culpability and greater capacity for change, the nature of the offense is different when committed by a juvenile than an adult. See, *Miller*, 132 S. Ct. at 2463, 2464-65; *Roper*, at 567, 125 S. Ct at 1194 (quoting *Atkins v. Virginia*, 536 U.S. 104, 116, 102 S. Ct 869, 877 n.11 (1982) (banning the death penalty for murder committed by mentally retarded offenders). A sentence that focuses just on the offense and fails to account for the differences between children and adults and how those differences counsel against irrevocably sentencing a juvenile to a lifetime in prison, is an unconstitutionally cruel sentence. See *Miller*, 132 S. Ct. at 2475, 2465-66. The nature of the offense differs when the offender is a child or an adolescent.

*The Legislative Purpose:* Determining the legislative purpose in this instance requires examining two statutory provisions: First, RCW 13.40.110, a juvenile decline statute authorizing juvenile offenders to be tried as adults under limited circumstances. Second, RCW 10.95, which

sets out the procedures and penalties our courts are required to follow when imposing sentence for first-degree murder with an aggravating circumstance.

In *State v. Furman*, 122 Wn.2d 440 (1993) our Supreme Court addressed the interaction between these two statutory provisions in the context of a juvenile sentenced to death. The court noted that neither statute referred to the other and, as a result, there was no limit on the minimum age for imposition of a death sentence. *Id.* at 458. That absence created an anomaly whereby, contrary to constitutional prohibitions, "a child as young as eight could theoretically be tried as an adult and sentenced to death or mandatory life without parole for aggravated murder." *Id.* at 457. The Court acknowledged that the legislature had simply not considered how RCW 10.95 would apply to juveniles tried as adults, concluding that "[t]he statutes, therefore, cannot be construed to authorize imposition of the death penalty for crimes committed by juveniles." *Furman* at 458. Similarly, when RCW 10.95 was enacted, the statute did contain a clear statement of legislative intent as to how a sentence of life without possibility of parole should apply to a juvenile.

*Punishment in Other Jurisdictions for the same offense:* The "clearest and most reliable objective evidence of contemporary values is

the legislation enacted by the country's legislatures." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citation omitted). "It is not so much the number of these States that is significant, but the consistency of the direction of change." *Id.* at 315.<sup>10</sup>

Following *Miller*, the "direction of change" towards banning life without parole sentences for juveniles has been consistent and swift. In the three years since *Miller* was announced legislatures in eight states have abolished juvenile life without parole.<sup>11</sup>

In addition to the move towards legislatively banning juvenile life sentences, several states have functionally abandoned the sentence. For example, six states, Indiana, Maine, New Jersey, New Mexico, New York, and Rhode Island no longer have any juvenile offenders serving life in

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<sup>10</sup> Even prior to the significant post-*Miller* movement establishing a legislative opposition to JLWOP sentences, the *Miller* court considered and rejected the notion that life in prison without parole for juveniles was widely accepted simply because it was a theoretical possibility in a number of jurisdictions. *Miller*, 132 S. Ct. at 2470-73.

<sup>11</sup> **Connecticut** B. 796, Jan. Sess. (Conn. 2015), amending Conn. Gen. Stat. §§ 54-125a, 46b-127, 46b-133c, 46b-133d, 53a-46a, 53a-54b, 53a-54d, 53a-54a); **Hawaii**: H.B. 2116, 27th Leg. Sess. (Haw. 2014), amending Haw. Rev. Stat. §§706-656(1), 657 (2014) Haw. Rev. Stat. §706-669(2014); **Nevada**: A.B. 267, 78th Reg. Sess. (Nev. 2015), enacting Nev. Rev. Stat. §§176, 176.025, 213, 213.107; **Texas**: B. 2, 83rd Leg. Special Sess. (Texas 2013), enacting Tex. Penal Code Ann. §12.31, Tex. Code Crim. Proc. Ann. art. 37.071; **Vermont**: H. 62, 73rd Sess. (2015), enacting Vt. Stat. Ann. tit. 13, §7045 (2015); **West Virginia**: H.B. 4210, 81 Leg., 2d Sess. (W.V. 2014), enacting W. Va. Code §§61-2-2, -14a, 62-3-15, -22, -23, 62-12-13b; **Wyoming** B. 23, 62nd Leg., Gen. Sess. (Wy. 2013), enacting Wyo. Stat. Ann. §§6-2-101, 6-2-306, 6-10-201, 6-10-301, 7-13-402); **Massachusetts**: *Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270 (2013); Mass. Gen. Laws ch. 265, §2(b); *id.* ch. 279, §24 (2014).

prison.<sup>12</sup>

The consistent post-*Miller* trend in legislatures throughout the country is to recognize that a sentence of life without parole is constitutionally cruel when applied to a juvenile offender.

*The Punishment in Washington for Other Offenses:* For adult defendants a sentence of life in prison without parole is a rare punishment resulting only after conviction for first degree murder with an additional finding of an aggravating circumstance or after a conviction for a serious violent crime after having been previously convicted of a felony classified as “most serious offenses.” See, RCW 9.94A.030(32).

However, Mr. Bassett was not an adult when he was convicted – he was only 16 years old. The U.S. Supreme Court made abundantly clear in *Roper*, *Graham* and *Miller* line that our courts commit error when a juvenile offender, like Mr. Bassett, is treated as though he were simply a “miniature adult.” *Miller*, 132 S. Ct. at 2467.

In light of the mandate in *Roper*, *Graham* and *Miller* that differences between adults and juveniles must be accommodated, the more appropriate comparison requires examining “the punishment in Washington for other offenses” that a juvenile could face if prosecuted in

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<sup>12</sup> See, *Juvenile Life Without Parole After Miller v. Alabama*, A Report of the Phillips Black Project at 31, 63, 70, 71, 82, 89, 97 (July 2015).

the juvenile system for a serious offenses. Under Washington's juvenile sentencing guidelines, even for the most serious crimes, "punishment in Washington for other offenses" is limited to incarcerating for juvenile offenders only until the offender turns 21. RCW 13.40.300.

As described above, the *Fain* factors support the conclusion that a sentence of life in prison for a juvenile under the age of 18 is an unconstitutionally cruel sentence under Article 1, Section 14 of the Washington Constitution.

In addition, through the "*Miller* fix," Washington banned life without parole sentences for aggravated murder for juveniles who were under the age of 16 when their crimes occurred. RCW 10.95.030(3)(a)(i). That ban against was founded in scientific proof that differences between the brains of adolescents and adults render adolescents less culpable for their crimes. Similarly, science has also established that maturation is a lengthy process and brain development is not nearly complete when a youth turns 16.<sup>13</sup> In fact, because the brain does not reach full maturity until a person is well into in their twenties there is little chance that what was true of Mr. Bassett's brain and emotional development at age 15 was

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<sup>13</sup> *MIT Young Adult Development Project: Brain Changes*, MASS. INST. OF TECH., <http://hrweb.mit.edu/worklife/youngadult/brain.html> (2015) ("The brain isn't fully mature at ... 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car").

not also equally true 126 days later when he had turned 16 and the crimes at issue occurred. A statute like RCW 10.95.030(3)(a)(i) that relies on scientific proof to exclude a class of offenders - 15-year-olds - from our harshest punishment is unconstitutionally cruel and in violation of due process and equal protection<sup>14</sup> if that same harsh punishment is allowed to apply to offenders - 6-year-olds - who science has proven also fall within that excluded class.

The State and Federal constitutional prohibition against imposing of cruel punishments holds constant across generations; yet “its applicability must change as the basic mores of society change.” *Kennedy v. Louisiana*, 554 U.S. 417, 419 (2008) (citation omitted); *Obergefell v. Hodges*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2071 (2015) (slip op., at 11) (“The nature of injustice is that we may not always see it in our own times”). Our country is abandoning juvenile life without parole as a punishment for child and adolescent offenders. The direction of change is unmistakable, the pace of change is remarkable, and the extravagance of the punishment in regard to adolescents like Mr. Bassett is sufficient to trigger

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<sup>14</sup> No law shall be passed granting to any citizen [or] class of citizens,...privileges and immunities which upon the same terms shall not equally belong to all citizens..." WASH CONST. Art. I, §2. A denial of equal protection occurs when a law is administered in a manner that unjustly discriminates between similarly situated persons. *State v. Handley*, 115 Wn.2d 275, 290 (1990).

Washington's constitutional protection against cruel punishment.

The science and reasoning behind the *Roper*, *Graham* and *Miller* decisions, as well as the application of *Fain* factors, establish that RCW 10.95.030(3)(a)(ii) violates Article I, Section 14 of Washington's constitution because it allows for juvenile offenders to be sentenced to life in prison without the opportunity for parole.

**B. Chapter RCW 10.95.030 is unconstitutional because it violates the Sixth Amendment Right to a Jury Trial.**

Chapter RCW 10.95.030 violates the state and federal right to due process and to the right to a trial jury under the Sixth Amendment and Article 1, §21 and §22 of Washington's constitution.

RCW 10.95.030(3)(a)(ii) provides:

*Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release (emphasis added).*

Under RCW 10.95.030(3)(a)(ii), a sentence of less than life in prison is presumed as the appropriate punishment. See also, *Miller*, 132 S. Ct. at 2469 (a presumptive imposition of a term of life in prison for a juvenile constitutes excessively cruel and unusual punishment).

Under the Sixth Amendment, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *State v. Williams-Baker* 167 Wn.2d 889, 896 (2010); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). A jury - not a judge - must find beyond a reasonable doubt the “aggravating circumstance necessary for imposition of a death penalty.” *Ring v. Arizona* 536 U.S. 584, 609 (2002). When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. *Allyne v. U.S.*, \_\_U.S.\_\_, 133 S. Ct. 2151, 2162 (2013).

Under *Miller*, a juvenile offender may not be exposed to a sentence of life without parole without a finding beyond a reasonable doubt that the juvenile is “irreparably corrupt.” *Miller*, at 2469. Because *Miller* requires proof a juvenile offender is “irreparably corrupt” before a sentence of life in prison can be imposed, *Miller* requires a factual finding that would increase the offender’s sentence beyond the presumed sentence of less than life in prison without parole. The additional requirement of a finding that a juvenile offender is “irreparably corrupt” acts as an aggravating factor and exposes a juvenile offender, like Mr. Bassett, to greater punishment than would otherwise be allowed under the statute.

Consequently, that additional fact is subject to the Sixth Amendment jury-trial guarantee. See, *Blakely* 542 U.S. 296, 304 (2004).

In *People v. Skinner*, \_\_ NW.2d \_\_, 2015 WL4945986 (2015), the Michigan Court of Appeals examined the issue in the context of *Miller* and declared that “the Sixth Amendment mandates that juveniles convicted of homicide who face the possibility of a sentence of life without the possibility of parole have a right to have their sentence determined by a jury.” *Id.* (at slip op. p. 1).

In order to comply with *Miller*, Mr. Bassett’s judge could not have sentenced Mr. Bassett above the presumed minimum without finding the additional fact of “irreparable corruption.” See, *Miller*, at 2469. Because a jury didn’t make the decision about whether Mr. Bassett was “irreparably corrupt,” Mr. Bassett’s rights under the Sixth Amendment and Article 1, §21 and §22 of Washington’s constitution were violated.

**C. Mr. Bassett’s sentencing judge erred by presuming the appropriate sentence for a juvenile offender convicted of aggravated murder is life without parole.**

Aside from the unconstitutional nature of the statute under which Mr. Bassett was sentenced, Mr. Bassett’s judge committed several sentencing errors that independently require reversal of Bassett’s juvenile life without parole sentence. While Mr. Bassett was not entitled to a

particular result from his sentencing, he was entitled to a sentencing where the court complies with the law and follows proper sentencing procedure. *State v. Grayson*, 154 Wn.2d 333, 335 (2005); *Koons v. United States*, 518 U.S. 81, 100 (1996) (sentence imposed based on court's mistake of law is error).

At the outset, in order to comply with *Roper*, *Graham* and *Miller*, Mr. Bassett's sentencing judge was required to presume that sentencing a juvenile to die in prison via a life without parole sentence is unwarranted. See, *Miller*, 132 S. Ct. at 2469. "[E]ven for a horrible crime, [a sentence of juvenile life without parole] is constitutionally permissible only in the rarest of circumstances where there is proof of 'irreparable corruption'." *Miller*, 132 S. Ct. at 2469. A presumptive imposition of a term of life in prison for a juvenile constitutes excessively cruel and unusual punishment. See, *Miller* 132 S. Ct. at 2469; see also RCW 10.95.030(3)(a)(ii). As illustrated below, the judge in Mr. Bassett's case improperly approached sentencing with the presumption that life without parole was the presumed appropriate sentence.

**D. Mr. Bassett's sentencing judge erred by imposing a life sentence without requiring proof beyond a reasonable doubt.**

Consistent with the presumption against juvenile life in prison, imposition of a life sentence by Mr. Bassett's judge was improper without

proof beyond a reasonable doubt that life in prison was the appropriate sentence. See e.g. *State v. Hart*, 404 S.W. 3d 232, 241 (Mo. 2013) (“[A] juvenile offender cannot be sentenced to life without parole for first degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances”); also, RCW 10.95.060(4) (“...are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?”). Because there is no indication from the record or anywhere else that Mr. Bassett’s judge based his sentence on proof beyond a reasonable doubt, Mr. Bassett is entitled to a new sentencing hearing.

**E. Mr. Bassett’s sentencing judge erred by failing to give meaningfully consider mitigating information and “individualized sentencing”.**

Our courts have previously limited their “individualized sentencing” line of precedent to capital punishment cases because “death is different.”<sup>15</sup> However, after *Roper*, *Graham* and *Miller*, that is no longer the case. In fact, the *Miller* court declared that, “If death is different, children are different too” and extended its individualized sentencing requirement to juvenile offenders being sentenced for our most serious crimes. See, *Miller*, 132 S. Ct. 2470, 2466-67; *Graham v. Florida*,

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<sup>15</sup> E.g. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

130 S. Ct. at 2027 (noting juvenile life without parole sentence is uniquely akin to a death sentence for an adult in that both share certain characteristics that no other sentences share).

Extending individualized sentencing to juveniles facing life in prison represents a significant change. Because aggravated murder sentencings arise infrequently in Washington, judges are more accustomed to relying on the law of felony sentencing under the Sentence Reform Act, (“SRA”) at RCW 9.94A, than under RCW 10.95. There are significant differences between the two statutory schemes. For example, factors permitting a court to deviate from a standard range sentence under the SRA must be “substantial and compelling,” must be “proven by a preponderance of the evidence,” and generally may not be factors personal to the defendant. *State v. Law*, 154 Wn.2d. 85, 98 (2005); RCW 9.94A.535(1).

However, because Mr. Bassett had been convicted of aggravated murder, he was sentenced under the procedure and authority of RCW 10.95.<sup>16</sup> The concept of mitigation under RCW 10.95 contemplates a much broader range of circumstance than the “substantial and

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<sup>16</sup> Chapter RCW 10.95 was enacted May 14 1981, Wash. Laws Ch. 138 to specifically apply to aggravated first degree murder proceedings. Also, *State v. Kron*, 63 Wn. App. 688 (1992) (RCW 10.95 governs sentencings for individuals convicted of aggravated first degree murder).

compelling,” “proof by a preponderance” required under the SRA. Moreover, consistent with the Supreme Court having analogized juvenile life without parole to an adult death sentence, as noted above, when RCW 10.95.030(3)(b) was amended the legislature used some of the same terminology to define mitigation that it used in Washington’s capital sentencing statute, RCW 10.95.070 (“Factors which jury may consider in deciding whether leniency is merited”). That both statutes use the term “factors” instead of “evidence” to identify admissible mitigation represents a legislative acknowledgment that the mitigation principles that have guided our courts in capital sentencing proceedings will likewise apply when a juvenile faces a possible sentence compelling that he die in prison.

In addition to the specific types of mitigation identified in RCW 10.95.030(3)(b), due process and the prohibition against cruel punishment also require that a sentencing court give full consideration to *any* mitigating factor that could affect the decision as to the punishment a juvenile convicted of aggravated first degree murder, like Mr. Bassett, should receive. Under firmly established constitutional principles prohibiting "cruel and unusual punishment," a sentencing court may not be precluded from considering as a mitigating factor any aspect of a defendant’s character or record that the defendant proffers as a basis for a

sentence. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246, (2007); also, RCW 10.95.060(3).

Furthermore, once Mr. Bassett demonstrated the constitutional relevance of a mitigating factor, the sentencing court must consider it. See, *Eddings*, 455 U.S. at 113-114. See also, *Parker v. Dugger*, 498 U.S. 308 (1991); *Hitchcock v. Dugger*, 481 U.S. 393 (1987).<sup>17</sup>

A mitigating circumstance is a fact either about the offense or about the defendant which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability, or which justifies a sentence of less than [life without parole for a juvenile offender], although it does not excuse or justify the offense.

WASHINGTON PATTERN JURY INSTRUCTION; CRIMINAL, WPIC 31.07 at 357 (2d 1994) (emphasis added); see also RCW 10.95.060(4). In contrast with a sentencing governed by the SRA, under RCW 10.95 even a mere feeling of mercy on the part of the sentencer is sufficient mitigation to justify a sentence of less than the ultimate punishment. See e.g. WPIC 31.07; *State v. Davis*, 175 Wn.2d 287, 331 (2012) (approving jury instruction that allowed sentencer to “find mercy for the defendant to be a mitigating circumstance”).

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<sup>17</sup> *Tennard v. Dretke* 542 U.S. 274, 287 (2004) (citation omitted) (to be “constitutionally relevant” for Eighth Amendment purposes the evidence need only be of such a character as that it “might serve as a basis for a sentence less than [the most severe punishment]”).

Mr. Bassett's judge should have also been mindful that sentencing a youthful offender did not involve balancing aggravating factors against mitigating factors. Instead, RCW 10.95.030(3)(b) required that when setting a minimum term, Mr. Bassett's judge had to account for mitigation that illustrated the diminished culpability of youth and Mr. Bassett's chances for rehabilitation.

To comply with due process and avoid the prohibition against cruel punishment when sentencing a youthful offender for murder involves presuming a lesser sentence than life, requiring proof beyond a reasonable doubt before life is imposed, and giving meaningful consideration to any mitigating factor proffered on behalf of the offender. The law requires more than an awareness of those legal principles. See, *Lockett* 438 U.S. at 605. Instead, the law requires a sentencing judge, in this case Mr. Bassett's judge, to actually put those principles into practice. *Id.* Mr. Bassett's judge did not do that.

In pronouncing sentence, Mr. Bassett's judge explained:

While Mr. Bassett was 16-years old at the time that he committed these acts, I don't find that list of these crimes was evidence of the adolescent brain taking over his decision making and resulting in the commission of these crimes. I - I think these crimes were the result of a cold and calculated and very well planned goal of eliminating his family from his life. And I don't believe any amount of time in prison is going to ever result in his being rehabilitated such that he could return safely to any

community. On each of the three counts he will be sentenced to a minimum term of life.  
RP 1-30-15, p. 93.<sup>18</sup>

The failure of Mr. Bassett's sentencing judge to find sufficient evidence of Bassett's "adolescent brain taking over his decision making" before sentencing Mr. Bassett to anything less than life, erroneously presumes life in prison without parole to be the appropriate sentence for a juvenile convicted of aggravated murder. As discussed above, *Miller* does not allow the presumption that life in prison is the appropriate punishment for a juvenile offender. Mr. Bassett is therefore entitled to a new sentencing hearing.

Further, the above statement by Mr. Bassett's judge demonstrates a misunderstanding of the concepts of "individualized sentencing" and "mitigation" required by RCW 10.95, the statute under which Mr. Bassett was sentenced, and relies instead on the legal standard used to request a downward departure under the SRA. See, RCW 9.94A.535(1). Mr. Bassett's judge mistakenly imposed a standard that required proof that the capacity or the "decision making" ability of Mr. Bassett's brain had been "taken over" or diminished by some infirmity - in this case adolescence - before he would conclude that a sentence other than life without parole

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<sup>18</sup> In addition, there is no evidence Mr. Bassett's judge was convinced beyond a reasonable doubt that there was not sufficient mitigating evidence to merit leniency.

was justified. Holding Mr. Bassett to that standard was error. To the contrary, any mitigating factor, including Mr. Bassett's "chances for rehabilitation" was sufficient to merit leniency from the harshest penalty possible. In addition, unless Mr. Bassett's judge was convinced beyond a reasonable doubt that no mitigating information justified a sentence other than life in prison, sentencing Mr. Bassett to life without parole was error.

Finally, although Mr. Bassett's judge acknowledged his obligation to consider diminished culpability due to adolescent brain development, he improperly confined application of that concept to Bassett's participation in the crime itself. As a result, Bassett's judge concluded in essence that what *Roper*, *Graham* and *Miller* said about youth didn't apply to Mr. Bassett because Bassett's crime was not an impulsive act and appeared to have been planned in advance. RP 1-30-15, p. 93, 85.<sup>19</sup>

Unlike a request for an exceptional sentence downward under the SRA, "diminished culpability of youth" defined through *Roper*, *Graham* and *Miller*, is not limited to a juvenile offenders participation in the offense. Instead, it requires a more expansive framework that includes the

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<sup>19</sup> Whether the crimes at issue were planned does not satisfy the inquiry *Miller* requires regarding mitigation. Further, even in cases involving adults, in our legal system evidence of planning alone has never been sufficient to prove a sound mental state. See e.g. *U.S. v. Kaczynski*, 239 F. 3d 1108 (9th Cir. 2001) ("Unabomber" case, where for two decades a "seriously disturbed" schizophrenic carried out a complex plan to deliver bombs through the mail, taking steps to avoid detection from even sophisticated forensic techniques).

offender's social and family history, immaturity, failure to appreciate consequences, and even prospective potential for change. See, *Miller*, \_\_U.S.\_\_, 132. S. Ct. 2468. Because Mr. Bassett's sentencing judge restricted application of mitigation required under *Miller, et. al*, to the offense itself, the judge committed error entitling Mr. Bassett to a new sentencing hearing.

**F. Mr. Bassett's sentencing judge erred by sentencing Mr. Bassett to life in prison without parole based on information that was not supported by the record.**

In sentencing Mr. Bassett to life in prison Mr. Bassett's judge explained:

...so I need to consider that in the case of Mr. Bassett. Were his actions in 1995 reflective of immaturity, was there evidence his actions were impulsive, is there evidence that some emotional stimuli that caused him *to snap* or to act without first thinking about the situation. RP 85 (emphasis added).

The concept of mitigation under RCW 10.95 as a reason for leniency can, but does not require, proof that a juvenile "snapped" or acted on impulse. Mr. Bassett's judge erred by imposing a life sentence based on an absence of evidence that Mr. Bassett "snapped" and erred again by failing to consider evidence before the court that Mr. Bassett did "snap."<sup>20</sup>

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<sup>20</sup> See, Exhibit 19 to Bassett's Presentence Report. CP 293, 294.

Mr. Bassett himself, in a letter he wrote to a girl from jail three weeks after the homicides, explained:

I hope you don't hate me for what I've done. I'm a really nice guy who's usually mellow *I don't know what happened, I just snapped.* CP 294.

Mr. Bassett, writing as a 16-year old boy twenty years prior to his 2015 re-sentencing, could not anticipate the relevance of his statement. He was simply trying to explain what had happened. Although the evidence that Mr. Bassett "snapped" contained in a 20 year old letter standing alone may not be overwhelmingly significant, but Mr. Bassett's sentencing judge should not have based his sentence, even in part, on the absence of any such evidence when it did in fact exist in the record.

Mr. Bassett's judge failed to consider mitigating information of greater significant than evidence Mr. Bassett snapped. For example, in explaining the basis for imposing a sentence of life in prison Mr. Bassett's judge concluded:

...Looking at these factors I find no evidence that this was an impulsive act. In fact, all evidence points to the contrary....RP 86

I don't find any evidence to support [the]argument that Mr. Bassett's criminal conduct was the result of an emotional reaction to some emotional event in his life that caused him to react before he had the ability to - to think through what his emotional reaction was. There's no evidence of either of those of - of acting upon impulse or acting upon emotion. RP 86.

Mr. Bassett's judge erred believing that in order to avoid imposition of a life in prison sentence he needed proof Bassett's crimes were the result of an "emotional reaction to some emotional event" resulting in Bassett being overcome by something akin to an "irresistible impulse."<sup>21</sup>

Mr. Bassett's judge also erred by failing to give meaningful consideration to evidence presented during Mr. Bassett's re-sentencing that an "emotional event" sufficient to cause an "emotional reaction" in Mr. Bassett had taken place.

*Dr. Hansen's testimony about Mr. Bassett was significant:* Dr. Jeffrey Hansen, a pediatric psychologist who treated Mr. Bassett in 1995, testified that, in the months prior to the homicides, he preliminarily diagnosed Mr. Bassett with an Adjustment Disorder. RP 1-30-15. P. 44-47. Dr. Hansen explained that an Adjustment Disorder causes an individual to have an "abnormal emotional behavioral response to specific stressors." RP 1-30-15, p. 45. When Dr. Hansen testified he identified several "specific stressors" Mr. Bassett was experiencing in the months before the homicides, including: having considerable stress with his

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<sup>21</sup> An "irresistible impulse" is one induced by a mental disease affecting the volitive powers so that the person afflicted is unable to resist the impulse to commit the act charged against him. He cannot control his own behavior. *State v. Ellis*, 136 Wn.2d 498 (1981) (an insanity defense not recognized by Washington courts).

parents, RP 46; living a homeless lifestyle, RP 46, and that, as a 16-year old heterosexual, he had a homosexual experience with his older co-defendant. RP 47. See, *State v. McDonald*, 90 Wn App. at 604 (referring to Mr. Bassett as co-defendant McDonald's "boyfriend").

According to Dr. Hansen's uncontradicted testimony, a person suffering an Adjustment Disorder, like 16-year-old Mr. Bassett, would experience "an abnormal emotional reaction" to the type of events Bassett was experiencing prior to the homicide. Because Mr. Bassett's judge required an astoundingly noticeable event to impose less than a life sentence, due to the adjustment disorder Mr. Bassett didn't require anything that conspicuous to cause him to have an abnormal emotional reaction.

Admittedly, Dr. Hansen didn't testify that the homicides were a direct result of the Adjustment Disorder – just as he didn't say they weren't. But, according to *Miller*, the inquiry during the sentencing of a juvenile offender isn't whether there is evidence that would excuse the offense, just whether mitigating information exists that supports leniency from the most severe sentence. Dr. Hansen provided that information. The failure of Mr. Bassett's judge to give the evidence meaningful consideration constitutes an abuse of discretion.

Mr. Bassett's sentencing judge also erred by failing to give meaningful consideration to Mr. Bassett's home and family situation. After recognizing that *Miller* required that Mr. Bassett's home and family situation be considered, Mr. Bassett's judge concluded that Bassett's relationship with his family was apparently fine, advising "I've not heard any evidence to suggest ...that he was neglected in their care of him." CP 87.

One can certainly debate whether Mr. Bassett's parents were neglectful based on the record. Regardless, traditional notions of "neglect" and the court's inability to find one seminal incident of neglect that would excuse the crimes does not complete the inquiry *Miller* requires. Not only did Dr. Hansen testify Mr. Bassett was having "considerable stress" with his family, RP 45-46, but Mr. Bassett's "home situation" was so poor that in the weeks leading up to the homicides he ended up homeless. RP 43.

Even more disconcerting is the court's justifying a life in prison sentence based in part on the mistaken belief that it was Mr. Bassett's parents who tried to reconcile with Mr. Bassett - when in fact that belief was not supported by the record.

Mr. Bassett's judge argued that Mr. Bassett's parents, wanted to help their son and reconcile their relationship

with him.... And it sounded like at least what I heard from Dr. Hansen today that Mr. Bassett simply wasn't willing to take the necessary steps to accomplish that reconciliation other than at one of the five meetings he suggested that he might be willing to do so but by the next meeting had changed his mind. RP 88.

In fact, Dr. Hansen testified that after he'd met with his then 16-year old patient three times, Mr. Bassett had begun to "open up" a bit, RP. 39, and he expressed feeling some empathy for what his parents were going through. RP 40. Mr. Bassett, who Dr. Hansen observed was still finding his identity, indicated Bassett was shifting back a little more towards the person he had been [when he was involved in school and sports, etc.], RP 41, and that "he was getting his feelings back, trying harder in school, getting some of his old friends back, making better decision." RP 41. When Dr. Hansen asked Mr. Bassett where he wanted to see things go from there, it was Mr. Bassett who explained he envisioned "be[ing] more respectful with parents and living with his parents." RP 41-42. To facilitate Mr. Bassett's wish to reconcile with his parents, Dr. Hansen arranged for a joint meeting. During that meeting, Mr. Bassett

[i]indicated he – now he realizes that he wants to come back, [and he] was able to articulate that to his parents. [Mr. Bassett] expressed hope of perhaps going back home in two to four weeks." RP 43.

As Dr. Hansen explained, Mr. Bassett telling his parents he wanted to come home,

... was not particularly well received [by his parents]. I don't recall the specifics of what was said. My recollection is that his mother had a tougher time hearing it than his father did." RP 43.

After his parents responded negatively to Mr. Bassett's interest in returning home, Dr. Hansen had Mr. Bassett leave the room while he attempted to convince Bassett's parents to soften their stance on their son returning home. *Id.* After that, Dr. Hansen met with Mr. Bassett and observed he,

...was upset. He expressed anger and sadness and – primarily towards his mother. He even shed some tears for the first time that I had ever seen any tearful affect or sadness from-to that degree from him." RP 43-44.

Dr. Hansen's testimony was clear: Mr. Bassett wanted to reconcile with his parents. Mr. Bassett's parents responded negatively. Mr. Bassett was hurt by his parent's rejection to the point he cried. As a result, at Mr. Bassett's next counseling session, Dr. Hansen observed Mr. Bassett had regressed and closed himself off again. RP. 48. That type of reaction to emotional pain sums up what adolescence is all about.

The conclusion by the sentencing judge that it was Mr. Bassett's parents, not Mr. Bassett, who wanted to reconcile is contradicted in the record by Dr. Hansen's testimony. Similarly, the judge's conclusion that

Mr. Bassett wasn't willing to take steps to reconcile except at one counseling meeting mischaracterizes Dr. Hansen's significant testimony. Mr. Bassett's parents reacted negatively to Mr. Bassett's entreaty to reconcile and their negative response caused Mr. Bassett to react like a hurt child.

Dr. Hansen's testimony was significant. Bassett's sentencing judge abused his discretion by failing to give it meaningful consideration.

Mr. Bassett presented additional mitigating information of his lack of maturity and his lack of understanding of the consequences of his actions that Mr. Bassett's sentencing judge was required to consider. See, *State v. O'Dell*, \_\_\_ Wn.2d \_\_\_ 2015, WL 4760476 (2015) slip op 21-22 (at sentencing court required to consider "lay evidence" of a youthful defendant's maturity, such as, he had collection of Lego's, played video games, liked to tease his sister, etc.).<sup>22</sup>

For example, prior to the crimes Mr. Bassett was hospitalized and almost died from an alcohol overdose, indicating a possible substance abuse issue and lack of understanding about the consequences of his actions. RP 1-30-15, p. 36-37. Mr. Bassett ran away from home to "get

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<sup>22</sup> During a sentencing, a judge may rely on facts that are admitted, proved, or acknowledged. "Acknowledged facts" include all that factual information presented or considered during sentencing that was not objected to by the parties. *Grayson*, 154 Wn.2d at 338-339. The prosecutor did not object to any of the mitigating information listed herein.

back” at his mother for the emotional pain she’d caused him. RP 42. RP 46-47.<sup>23</sup> Dr. Hansen confirmed Mr. Bassett was still struggling to find his identity. RP 1-30-15, p. 39-42, 46.<sup>24</sup> After his arrest, the first thoughts Mr. Bassett had in jail were over “how much trouble I was going to be in when my parents learned I was in jail. It just didn’t click.” RP 1-30-15, p. 79-80. Shortly after the crimes, Mr. Bassett felt regret for what happened, recalling the good times he’d had with his dad, realizing before all he thought about were negatives.<sup>25</sup> Clearly, Mr. Bassett had an adolescent’s lack of understanding of the realistic consequences of his actions.

**G. Mr. Bassett’s sentencing judge erred by using a mitigating factor for an improper purpose.**

Mr. Bassett’s sentencing judge improperly used mitigating information to support a sentence of life in prison without parole. The sentencing court’s improper use of mitigating information requires that Mr. Bassett receive a new sentencing hearing.

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<sup>23</sup> Consistent with a lack of maturity Bassett explained to a friend that he would have telephoned but, “I don’t want to feel stupid if your mom or dad answers the phone and it says that you have a collect call from the jail in Montesano. CP 295, 296 letter from Bassett, 9-5-1995.

<sup>24</sup> The court in *Roper* specifically observed that because juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. *Roper*, 543 U.S. at 569, 570.

<sup>25</sup> CP 296, letter from Bassett of 9-5-1995.

The *Miller* case requires a judge to consider a juvenile offender's "family and home environment" as part of mitigation. 132 S. Ct. at 2468. Chapter RCW 10.95.030(3)(b) also specifically identifies, "the degree of responsibility the youth was capable of exercising" as a factor that must be considered in mitigation.

During sentencing Mr. Bassett presented mitigating information that his "family and home environment" was poor to the point that, at ages 15 and 16, he was estranged from his parents, frequently lived in a shed with a dirt floor and no water or power, and that he sometimes slept in an empty baseball dugout in a park. RP 1-30-15, p. 80, 66, CP 261. Mr. Bassett explained to the court that, during the months leading up to the homicide, he was largely homeless with no job and no money and he had to resort to petty theft to feed himself. RP 80.<sup>26</sup>

In sentencing Mr. Bassett to consecutive terms of life in prison, Bassett's judge opined that Mr. Bassett's homelessness indicated he

may have had a higher degree of responsibility and – and ability to control his behavior than others teenagers that same age. RP 1-30-15, p. 88.

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<sup>26</sup> Mr. Bassett's homelessness was a relatively new development in this life. (When being treated by Dr. Hansen, Mr. Bassett was living with his sister. Over the next 3-4 months his homelessness occurred.) It is safe to assume that Mr. Bassett did not become homeless and the immediately attain an accelerated level of maturity over other youth his age.

Mr. Bassett's judge reasoned that, although Bassett's homelessness and his living in a shed and sleeping in a baseball dugout was not an

ideal situation, they are situations that cause 15 and 16 year olds to grow up pretty quickly. I deal with – I deal with children between 12 and 17 years of age down in juvenile court three or four days a week. For several years now I see it and there is a difference between a 15 or 16 year olds who has learned to live on the streets and a 15 or 16 year old who is still living at home...I also know that the kids that are forced to live that [homeless] lifestyle gain a level of maturity much quicker than kids who are not in that situation. RP 88-89.

In short, Mr. Bassett's sentencing judge reasoned that, although Mr. Bassett was only a 15 or 16 year old boy, due to his homelessness he was actually more mature and capable of being responsible for his behavior than were his age peers who weren't homeless.<sup>27</sup>

As noted above, "family and home environment" and the "degree of responsibility the youth was capable of exercising" are factors a judge

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<sup>27</sup> Contrary to the beliefs of Mr. Bassett's sentencing judge, countless research has established there is nothing beneficial, including accelerated maturity, to adolescent homelessness. See e.g. Robertson MJ and Toto PA, "Homeless Youth: Research, Intervention, and Policy": <http://aspe.hhs.gov/progsys/homeless/symposium/3-Youth.htm>. (homeless adolescents are at higher risk for anxiety disorders, depression, posttraumatic stress disorder (PTSD), suicide attempts and other health problems that exacerbate and are complicated by emotional problems); National Coalition for the Homeless, Fact Sheet. <http://www.nationalhomeless.org/factsheets/youth.html> (Robertson, 1989) (Homeless adolescents often suffer from severe anxiety, depression, poor health and low self-esteem. Rates of major depression, conduct disorders, and post-traumatic stress syndrome were found to be 3 times as high among runaway youth as among youth who have not.); <http://www.seattlepi.com/local/article/Homelessness-can-cause-mental-problems-in-kids-879396.php> (October 24, 2010).

sentencing a juvenile offender convicted of aggravated murder are required to consider for *mitigation* purposes. Factors a judge is required to consider as a basis for mitigation can be considered only for mitigation purposes, not as a basis to “aggravate” a sentence to the maximum punishment allowed under the law. See, e.g. *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (aggravating circumstances cannot encompass factors that actually should militate in favor of a penalty other than death); *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987) (The Eighth Amendment's command that capital defendants be treated as "uniquely individual human beings" requires that the "diverse frailties of humankind" be considered as "compassionate or mitigating factors," rather than utilitarian arguments for death).

That Mr. Bassett was left to commit petty crimes in order to eat, and that he had to sleep in a baseball dugout “just so [he] could have a roof over his head,” stands in conflict with the sentencing courts conclusion that 16-year-old Mr. Bassett had a high degree of control over any aspect of his life. In fact, one could argue just the opposite is true.

Mr. Bassett’s sentencing judge committed error when he improperly used information he was required to consider in mitigation as a means to justify sentencing Mr. Bassett to life in prison without parole.

**H. Mr. Bassett’s sentencing judge failed to give any meaningful consideration Mr. Bassett’s chances of becoming rehabilitated.**

Both the *Miller* case and the statute under which Mr. Bassett was sentenced, RCW 10.95.030(3)(b), specifically required Mr. Bassett’s sentencing judge to consider Bassett’s “chances of becoming rehabilitated.” See, *Miller*, 132 S. Ct. at 2468. Instead, in the face of substantial evidence of Mr. Bassett’s rehabilitation, his sentencing judge pronounced that he didn’t “believe that any amount of time in prison is ever going to result in his being rehabilitated such that he could safely return to any community.” RP 1-30-2015, p. 93. Mr. Bassett’s judge then imposed a sentence of three consecutive terms of life in prison without parole.

The penalty of juvenile life in prison without parole is reserved for use only in the rarest of circumstances where there is proof of irreparable corruption. *Miller v. Alabama*, 132 S. Ct. 2469. The *Miller* court explained that a juvenile life without parole sentence “presumes a juvenile offender is forever incorrigible” and “incorrigibility is inconsistent with youth,” *Miller* at 2465 (quoting, *Graham*, 560 U.S. at 73). Further, because juveniles are still forming their very identities, even commission of heinous crimes by a juvenile does not establish an “irretrievably

depraved character.” *Roper*, 543 U.S. at 570.

Without proof that Mr. Bassett’s character was “irreparably corrupt” or that he was “forever incorrigible,” sentencing Mr. Bassett to life in prison without parole was a violation of due process and the prohibition against cruel punishment. The sentencing court did not have any. Mr. Bassett could not be redeemed. In fact, Mr. Bassett’s presented considerable and significant information about his “chance at rehabilitation.” Mr. Bassett’s sentencing judge failed to give it meaningful consideration.

1. *Mr. Bassett had no prior criminal history.* The *Miller* court observed that an offender’s past criminal history may shed light on the child’s “irretrievable depravity.” *Miller* 132 S. Ct. at 2468.

2. *Mr. Bassett has not violated a prison rule of any kind in the past 12 years.* Mr. Bassett’s sentencing judge refused to recognize that living in prison for 12 years straight without committing a single infraction was evidence of rehabilitation, commenting instead that Mr. Bassett, like all inmates, was expected to follow the rules. RP 90-91, CP 207.

3. *Mr. Bassett is living a “faith based life.”* Mr. Bassett was baptized in 2009. RP 22-23. He is an active member of a Christian based program called Kairos, and he inspires others to strengthen their faith. CP

264. Mr. Bassett's sentencing judge did not acknowledge this factor as evidence of rehabilitation.

4. *Mr. Bassett has achieved startling academic success while incarcerated.* Mr. Bassett went to prison when he was 16 years old. Subsequently he earned his GED. CP 190-191. After that he earned a full tuition scholarship into college. CP 193. Once he began college, he excelled academically, earning a spot on the Edmonds Community College honor roll. RP 1-30-95, CP 195.

Mr. Bassett's sentencing judge refused to recognize Mr. Bassett's educational accomplishments as evidence of rehabilitation, explaining,

I – I find to be less evidence of rehabilitation and more evidence that – that he is simply doing things to make his time in prison more tolerable. It gives him something to do, something to pass the time, something that he gained some sense of accomplishment from perhaps, but I don't find those factors to be particularly persuasive on the issue of rehabilitation." RP 91.

One could argue that gaining a sense of accomplishment that follows from working for something and succeeding is by itself a sign of rehabilitation - but that argument is unnecessary here. Mr. Bassett's hard work and his well-deserved results speak for themselves.

5. *Mr. Bassett learned a marketable skill that will allow him to support himself if a parole board were to approve his release.* Mr. Bassett earned certificates of completion for Carpentry, Plumbing and

HVAC Maintenance. CP 232. As evidenced by the photographs of Mr. Bassett's works, CP 233-49, he has become a skilled carpenter.

Again, the sentencing judge refused to recognize the rehabilitative value in Mr. Bassett becoming a talented craftsman and learning a marketable skill, rationalizing instead that Mr. Bassett only learned carpentry because it "gave him something to do, something to pass the time." RP 1-31-15, p. 91.

6. *Mr. Bassett has made an effort to understand what led to his crimes.* In his effort to understand what happened 20 years ago, Mr. Bassett completed courses in Stress Anger Management, Understanding Family Violence, Alternatives to Violence, and Advanced Alternatives to Violence. CP 279, 207. Mr. Bassett's judge did not comment on that aspect of Mr. Bassett's rehabilitative efforts.

7. *Mr. Bassett was selected to assist in teaching other inmates.* Mr. Bassett was selected as a teaching assistant for the Edmonds Community College construction maintenance program, RP 21, CP 264.

8. *Mr. Bassett married a wonderful woman, and he and his wife value each other.* Extraordinarily, while he was incarcerated Mr. Bassett met a wonderful woman named Joanne Pfeifer, and the two married in 2010. CP 200. Mr. Bassett's wife has never been convicted of

a crime, owns her own home, and has been employed with the same aerospace company for the past eight years. RP 16. She is stable and intelligent and did not enter into the marriage lightly. See RP 19-21, 23. Mrs. Bassett has spent in excess of 6,300 hours visiting Mr. Bassett. RP 24. A Department of Corrections pastor described Mr. Bassett's love for his wife as, "genuine and everlasting." CP 197. Mrs. Bassett feels their marriage is "wonderful" and "blessed," RP 26, and described her husband as empathetic, understanding, honest, RP 19, and loving. RP 27.

Mr. Bassett's judge refused to consider that a stable marriage, in the most trying of circumstance, was evidence of rehabilitation, commenting instead,

His marriage, that's a non-starter for me. I-I don't know what to make of that. It's – to me it's certainly not evidence of rehabilitation. RP 91.

Instead, the sentencing court denigrated Mrs. Bassett, stating she had "a significant history of extremely dysfunctional relationships." RP 92. The court's conclusion was not supported by the record.<sup>28</sup>

Regardless of the accuracy of the court's interpretation of the Mrs.

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<sup>28</sup> Mrs. Bassett had been married once for 28 years. RP 17. When her husband began to abuse drugs and alcohol she divorced him. *Id.* One of her three children, at age 23, served 36 months for robbery. RP 16, 17. There was no evidence Mrs. Bassett knew in advance of her adult son's troubles, let alone that she was involved in any dysfunctional way with him or anyone else.

Bassett's relationship history, the sentencing judge improperly refused to meaningfully consider the rehabilitative value of a marriage where Mr. Bassett has learned to love someone and, in turn, to be loved.

9. *As a prisoner, Mr. Bassett is industrious, well-behaved, and he is "not your average inmate".* Brian provided his sentencing judge with 30 pages of letters of support. CP 263- 293. Those letters paint the picture of a man who is hardworking, interested in helping other inmates make productive use of their lives, and determined to become a better man.<sup>29</sup> Mr. Bassett's judge appears to have given the letters no consideration.

10. *The Department of Corrections has taken the unusual step of classifying Mr. Bassett, an inmate serving a life sentence, as a "moderate to low" security risk.* RP 1-30-15, p. 29, CP 188. It does not appear Mr. Bassett's sentencing judge acknowledged this fact as evidence

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<sup>29</sup> "Most men who have done a lot of time are calloused, negative, unhappy and standoffish, mindset that they are a lost cause, so why bother with education or self-help or vocational training. Brian is not like that." CP 283. "Brian is not your average inmate," "respectful to everyone." CP 264. "Brian is concerned about the lives of others and wants them to succeed," "he leads through example," "he inspire[s] and motivate[s]." CP 265. "Helps inmates make non-violent choices...guides them through educational opportunities." CP 266. "His dedication to being a better man permeates his daily life." CP 269. "Brian has succeeded despite being surrounded as a youth by the daily possibility of rape murder and deviant behavior one must endure [in prison] on a daily basis." CP 272. "Brian inspires people to keep the right path." CP 275. "Humble, kind and respectful." CP 276. "Patient and calm." CP 278.

of rehabilitation.

11. *Mr. Bassett's allocution was an expression of true remorse and evidence of rehabilitation.* Mr. Bassett entered prison at age 16. He has proportionately spent more of his life in prison than out. The statement he made in court prior to imposition of his sentence was heartfelt and strong evidence of his rehabilitation. RP 78-82. Mr. Bassett's judge appears to have given no consideration to Mr. Bassett's allocution.

The prosecutor did not present any evidence in opposition to Mr. Bassett's rehabilitation or that proved Mr. Bassett was "irreparably corrupt."

When the trial court limited its focus at sentencing to the nature of the twenty-year old crimes and failed to give any meaningful consideration to evidence of rehabilitation, the court erred. In fact, the reason the *Graham* court categorically banned life sentences was to assure that the brutal nature of any particular juvenile offense would not overpower mitigating arguments that a sentencing court was constitutionally required to consider. See, *Graham*, 560 U.S. at 78.

The sentencing court's blanket statement that "no amount of time" would result in Mr. Bassett being rehabilitated" improperly classifies Mr. Bassett as "forever incorrigible" in contradiction to the evidence and the

individualized consideration of his chances of becoming rehabilitated required by both *Graham*, at 2029, 2030, and *Miller* at 2464, 2468. See also RCW 10.95.030(b). The court's failure to properly consider evidence of Mr. Bassett's rehabilitation requires that his sentence of three consecutive terms of life without parole be reversed and he be allowed a new sentencing hearing.

## VI. CONCLUSION

Both Due Process and the Appearance of Fairness Doctrine require that Mr. Bassett's case be re-assigned to a sentencing authority that has not previously pronounced what they think an appropriate sentence for Mr. Bassett should be. WASH CONST. Art. 1, Sec. 3, 22; U.S. Const. Amends. 6, 14; *In re Murchison*, 349 U.S. 133, 136 (1955); *Bracy v. Gramley*, 520 U.S. 899, 905 (1997).

When, as occurred here, a judge makes a sentencing decision without factoring in all required information, that judge's continued involvement in the sentencing process creates an appearance of unfairness and the remedy is remand before a different sentencing body. *City of Seattle v. Clewis*, 159 Wn. App. 842, 851, (2011); *State v. Sledge*, 133 Wn.2d 828, 846 n.9 (1997).

DATED this 29 day of October, 2015.

A handwritten signature in black ink, appearing to read 'Eric W. Lindell', written over a horizontal line.

ERIC W. LINDELL WSBA# 18972  
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I certify that I caused to be delivered a copy of the Brief of Appellant, ~~PERHAPS~~ the above-referenced matter, upon the following persons and/or parties by the means noted below:

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