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Division II
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NO. 49474-4-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CLEON ORVILLE MOEN,

Appellant.

RESPONDENT'S BRIEF

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Representing Respondent**

**HALL OF JUSTICE
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I. STATE’S RESPONSE TO ASSIGNMENT OF ERROR

Moen’s conviction and sentence should be affirmed because:

- (1) The trial court did not abuse its discretion in denying Moen’s challenge for cause to a juror who did not exhibit bias; and
- (2) Moen’s life sentence for aggravated murder in the first degree – domestic violence was not unconstitutional because it was not disproportionate to the crime he committed.

II. ISSUES PERTAINING TO THE STATE’S RESPONSE TO ASSIGNMENT OF ERROR

- A. Did the trial court abuse its discretion by denying Moen’s challenge for cause to a juror when there was no evidence of bias?**
- B. Has Moen met the burden of showing his life sentence for aggravated murder in the first degree – domestic violence was unconstitutional beyond a reasonable doubt because he was 73-years-old and it was claimed he had dementia when he committed the crime?**

III. STATEMENT OF THE CASE

Michelle Moen lived at 295 Robertson Road in Longview with her husband Cleon Moen.¹ RP 334-35, 394-95. Moen and Michelle kept horses on the property. RP 336, 1208-09. On June 16, 2014, Michelle called 911, and the Cowlitz County Sheriff’s Office responded. RP 266-67, 394-95. Moen was arrested for assault in the fourth degree domestic violence and cited into Cowlitz County District Court. RP 269, 396. On November 10, 2014, the case proceeded to jury trial. Michelle testified as

¹ Because they shared a last name, hereinafter Cleon Moen will be referred to as “Moen.” Michelle Moen will be referred to as “Michelle.”

a witness for the State. RP 270, 278-79, 281-82. The jury was unable to reach a verdict and a mistrial was declared that afternoon. RP 279, 283. Moen obtained a shotgun from his truck in the parking lot and attempted to commit suicide by shooting himself in the face. RP 284-86, 1219-20. Moen was unsuccessful. RP 737. Although he suffered a facial injury from the blast, Moen did not suffer any injury to his brain. RP 737, 1200.

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

On September 3, 2015, Michael Gillman served Moen with notice of the hearing at 610 Sightly Road. RP 303-06, 1229. Sometime that night or early the next morning, Moen drove a white Volkswagen Golf out to Whitewater Road which was near, but out of sight of, 295 Robertson Road. RP 310-11, 354, 357, 363, 370. From where he parked the car

Moen walked up a pipeline that led to 295 Robertson Road.² RP 367, 743-44, 1237, 1262.

On Saturday, September 5, 2015, Moen spent the night in a trailer that was behind the main residence at 295 Robertson Road where Michelle lived. RP 649, 932, 1262. Sometime in the morning of September 6, 2015, Michelle left the home. RP 931-32, 1304. After she left, at around 10:00 a.m., Moen snuck into the house, then removed and loaded two handguns out of a safe in the master bedroom. RP 932, 1264-66. Moen brought a backpack with him that contained the contempt paperwork he had been served with. RP 1263. He also brought an axe and stiff red heavy-gauge, electrical wire. RP 880, 1263-64, 1269-70. Moen hid in a spare bedroom. RP at 932-33.

Michelle returned to the house later that day. RP 1304. While Michelle was in the house, Moen continued to hide in the spare bedroom for about an hour. RP 933, 1304. Because Michelle had been going through financial challenges, her 84-year-old neighbor, Jim Guilliams had provided her a pork roast to serve when a relative came to visit her. RP 381, 384-85. Michelle and her relative never ended up eating the pork

² Moen went to the barn at 295 Robertson Road on his first trip with a plan to assault Michelle and show her “what domestic violence really was.” RP 1261, 1303. Bart Chrest observed the car parked on Whitewater Road on the morning of September 4, 2016, did not observe the car parked there on the morning of September 5, 2016, and then observed it parked there again on the morning of September 6, 2016. RP 310-13.

roast, so she had invited Guilliams over that day to have the pork roast for dinner. RP 385. When she returned to the home she put the pork roast in the oven. RP 386, 782. Eventually, around 3:00 p.m., Michelle entered the bathroom. RP 929, 933.

Once Michelle was in the bathroom, Moen entered with the axe. RP 933. Moen struck Michelle in the head with the axe. RP 933, 1267. He then punched her repeatedly in the face. RP 933, 1267. The two of them struggled around on the bathroom floor. RP 942. In addition to her facial injuries, Michelle's arms were covered in bruises and her ribs were broken. RP 1268. At one point during the struggle Michelle told Moen she loved him; Moen responded by punching her in the face.³ RP 943. Michelle told Moen to let her live; Moen responded by telling her he was going to kill her. RP 934. That same afternoon, a neighbor, Summer Casey, heard a woman screaming from the direction of 295 Robertson Road. RP 375-76. After a 30-45 minute struggle, Moen got up on Michelle's shoulders and wrapped the heavy-gauge wire around her neck. RP 944-45. On both ends of the wire, Moen had twisted it to have thumb loops that allowed the ends to be pulled tightly in opposite directions. RP 1269. Moen pulled the wire around Michelle's neck, strangling her until she was dead. RP 945, 1269-70.

³ As a result of punching Michelle, Moen's right fist was red and swollen. RP 558, 950.

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

At around 4:00 p.m., Guilliams came to the property to have dinner with Michelle. RP 385. Guilliams knocked on the door, but there was no answer. RP 387. Figuring Michelle might be in the barn, he went behind the house to find her. RP 387. Guilliams observed the truck backed up to the pumphouse with the dryer hose. RP 387-88. Guilliams went to the door where he contacted Moen. RP 388-89, 1243. Moen told Guilliams he had just killed Michelle. RP 389, 1243. Alarmed, Guilliams went to another neighbor's house where the police were called. RP 389, 1243.

Police arrived, apprehended Moen, and found Michelle's body on the bathroom floor, with the stiff electrical wire still tightly around her neck. 398-410, 473, 481, 883. On the date of her death, Michelle was 57-years-old, and Moen was 73-years-old. RP 776, 1205. Moen was taken to the hospital and treated for carbon monoxide poisoning. RP 551, 573. Moen told police things had not been the same since his domestic violence

arrest, and that he wanted to show Michelle what domestic violence really was. RP 552-53. He said the hung jury had not been good enough because he wanted to show Michelle what domestic violence looked like. RP 561. Moen said he would not let Michelle live because she “f***ing lies.” RP 934. He said every time he closed his eyes he saw Michelle’s bloody body and felt sick but then felt at peace. RP 619. He said he had a plan to tie Michelle up in the barn because that was where she had set him up. RP 582-83. Moen said he brought the wire to choke Michelle. RP 581. And, Moen stated: “It’s all premediated, I planned the whole f***ing thing.” RP 932. Moen was charged with aggravated first degree murder – domestic violence. CP 46. The State also filed notice of decision not to seek the death penalty. CP 144. The case proceeded to trial.

After the trial began, a juror notified the bailiff that she had been contacted by Moen’s family on a prior occasion. RP 300-01. The court questioned the juror regarding this contact. RP 316-320. The juror said she ran an assisted living facility. RP 316. The juror explained that after Moen had suffered his gunshot wound, family had met with her about the possibility of placement in her facility. RP 317. The juror also explained that Moen was not placed in her facility. RP 317. The juror did not have much recollection other than she had met with one or two family members for a half-hour or less. RP 317. The only piece of information regarding

Moen she was told was that the family was looking for placement because of the gunshot wound he had suffered outside the courthouse. RP 317-18.

After the court questioned the juror, the attorneys questioned her.

First, the prosecutor asked:

MR. BENTSON: I guess I'd ask, with that information, is there anything about that that would cause you to be unable to decide this case based on the facts and evidence presented here in court?

JUROR: No.

RP 319.

Next Moen's attorney questioned her:

MR. DEKOATZ: Thank you for bringing this forward, ma'am, we sure appreciate it. You recall that it was Moen family members, his family members, that wanted long-term care?

JUROR: Assisted living, yeah, somebody came in –

MR. DEKOATZ: Assisted living. Assisted living. Okay. Because it was Mr. Moen's family members, I mean, would you feel now that you'd have to convict him because you'd have to bend over backwards to show neutrality?

JUROR: No.

MR. DEKOATZ: You can still keep an open mind on it?

JUROR: Yes.

RP 319.

After the juror had been questioned, Moen's attorney moved to challenge the juror for cause. RP 320. Despite the juror's contrary response to his question about neutrality, Moen's attorney expressed his concern that to avoid being seen as sympathetic to Moen's family the juror would "bend over backwards to convict to show that she's impartial." RP 320. The court noted that the juror had limited contact with one or two family members for at most a total of 30 minutes. RP 320-21. The court also noted that the juror did not remember anything of substance other than Moen's name and that he had suffered a gunshot wound at the Hall of Justice. RP 321. Because the juror had limited contact with Moen's family, had no recollection of any substantive matters, and indicated she would keep an open mind, the court denied Moen's challenge. RP 321.

During trial, Moen called radiologist Dr. Hazan Ozgur to testify about computerized tomography ("CT") scans he reviewed of Moen after his gunshot wound. RP 1186, 1192. Dr. Ozgur testified that although these studies showed extensive injuries to Moen's face as a result of his gunshot wound, they showed no evidence of injury to his brain. RP 1196-97, 1200. Dr. Ozgur testified that while there was slight substance loss to Moen's brain, it was "within normal limits" for a person Moen's age. RP 1200-01. Dr. Ozgur testified he was not qualified to diagnose Moen with dementia. RP at 1201. Dr. Ozgur testified that a neurologist was required

to diagnose a person with dementia based on a CT scan. RP 1197, 1201. Dr. Ozgur further explained that unlike a neurologist, a neuropsychologist is a psychologist and is not required to be a medical-school trained specialist. RP 1201.

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

Moen also called Dr. Michael Grubbs as a witness. RP 1082. Dr. Grubbs was a local physician and a friend of Moen's. RP 1083. Dr. Grubbs visited Moen multiple times after his suicide attempt at the courthouse. RP 1087-89. Dr. Grubbs worked in family medicine. RP 1089. In his practice he had dealt with patients with dementia. RP 1090. Dr. Grubbs did not observe Moen to have any of the symptoms of a patient with dementia. RP 1090, 1092.

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

Dr. Hendrickson did not diagnose Moen with dementia and saw no evidence of Moen suffering from dementia currently or on the date of the murder. RP 1297-98. Dr. Hendrickson explained that dementia means overall memory difficulty. RP 1297. Dr. Hendrickson also explained that the memory loss associated with dementia does not cause a person to lose the ability to form intent. RP at 1319-20. Dr. Hendrickson saw no indication of Moen having any memory problems. RP 1297. Moen's daughter, Shelly, who worked with patients suffering from dementia, spoke with Dr. Hendrickson and told him she did not believe Moen had dementia. RP at 1310. Dr. Hendrickson found Moen did not have diminished capacity, because he was able to intend and to premeditate. RP

at 1315. Dr. Hendrickson testified: “There were no symptoms of depression that significantly impaired his ability or capacity to form the intent, nor did any symptoms that he might have had impair[] his ability to reflect or to premeditate.” RP at 1320-21.

The jury found Moen guilty of aggravated murder in the first degree - domestic violence. RP 1536-37. The jury found the premeditated murder was aggravated because Moen murdered Michelle for having been a witness against him, and because it was committed in the course of a burglary in the first degree. RP at 1536-37.

At sentencing, Moen’s attorney argued that the statute requiring the court sentence Moen to life without parole was unconstitutional because it did not consider mitigation based on advanced age and mental problems. RP 1581. However, Moen’s attorney did not present any evidence at sentencing that Moen suffered from an age-related mental problem. RP 1581-83. Conversely, at sentencing, the State presented Dr. Hendrickson’s report showing that Moen had the ability to appreciate the wrongfulness of his actions. RP 1571, 1604. Prior to sentencing Moen, the court considered that at trial there had been evidence of mental health issues. RP 1602. Having considered the mental health evidence presented, the court specifically found:

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

RP 1602. The court also considered Dr. Hendrickson’s report, observing that Moen had completed a crime of planning to exact revenge, and that he paused, thought calmly, and took action. RP 1602-03. The court found the sentence required by the statute did not conflict with the constitution because there was “such a strong showing of premeditation and absolute lack of any compassion or mercy or kindness.” RP 1603. The court then sentenced Moen to life without the possibility of parole. RP 1603.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MOEN’S CHALLENGE FOR CAUSE TO A JUROR WHO DID NOT EXHIBIT ANY BIAS.

The trial court, which was best-positioned to assess the juror’s statements and demeanor, did not abuse its discretion in denying Moen’s challenge for cause when the juror did not exhibit any bias. “Granting or denying a challenge for cause is within the discretion of the trial court, and will be reversed only for manifest abuse of discretion.” *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987) (citing *State v. Gilchrist*, 91 Wn.2d 603, 611, 590 P.2d 809 (1979)). Moen maintains that the trial court

abused its discretion in denying his challenge for cause to a juror who had a single, brief prior contact with one or two unknown members of Moen's family. Moen claims that this juror should have been excused for exhibiting both implied and actual bias. However, no evidence of such bias exists in the record. His claims speculate far beyond the actual record and fail to show that the trial court manifestly abused its discretion.

To preserve the issue of denial of a challenge for cause for review, "there must be a specification of the ground of the challenge. It is not sufficient to declare in general terms that the party objects to the juror, or that he challenges the juror." *State v. Biles*, 6 Wn. 186, 188, 33 P. 347 (1893). If the specific grounds for the challenge were raised at trial, then the trial court's denial of a challenge for cause will be reversed "only for manifest abuse of discretion." *Rupe*, 108 Wn.2d at 748. "*On appeal, the party challenging the trial court's decision on the objection must show more than a mere possibility that the juror was prejudiced.*" *State v. Noltie*, 116 Wn.2d 831, 840, 809 P.2d 190 (1991) (emphasis added by court) (quoting 14 L. Orland & K. Tegland, Wash.Prac., *Trial Practice* § 202, at 331 (4th ed. 1986)). A trial court does not err in denying a challenge for cause to a "juror with preconceived ideas if the juror can 'put these notions aside and decide the case on the basis of evidence given at the trial and the law as given to him by the court.'" *Rupe*, 108 Wn.2d at

748 (quoting *State v. Mak*, 105 Wn.2d 692, 707, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986)). Unless an error is “very clear, the court’s denial of a challenge for cause must be sustained.” *State v. Stackhouse*, 90 Wn.App. 344, 350, 957 P.2d 218 (1998) (citing *Noltie*, 116 Wn.2d at 839) (additional citation omitted).

A juror may be challenged for cause for having either implied or actual bias. RCW 4.44.170. Implied bias is expressly defined by RCW 4.44.180 and only exists where one of four statutory factors are present.⁴ The “and not otherwise” language of the statute limits implied bias to these enumerated factors. *See State v. Summers*, 73 Wn.2d 244, 245, 437 P.2d 907 (1968). A court does not err in denying a challenge for cause where implied bias is not asserted, “even though, implied bias if asserted, would have required the challenged be granted.” *Ottis v. Stevenson-Carson School Dist. No. 303*, 61 Wn.App. 747, 761, 812 P.2d 133 (1991). “When a challenge is not made at trial, it is waived.” *Id.* at 760.

⁴ RCW 9.44.144 states:

- (1) Consanguinity or affinity within the fourth degree to either party.
- (2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.
- (3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.
- (4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

“Actual bias differs from implied bias in that where implied bias exists, it is conclusively presumed from the facts shown; whereas in cases where actual bias is claimed it must be established by proof.” *Noltie*, 116 Wn.2d at 838. Actual bias is “the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” RCW 4.44.170(2). “The issue of actual bias goes to whether a particular juror’s state of mind is such that he or she can try a case impartially and without prejudice to a party.” *State v. Alires*, 92 Wn.App. 931, 938, 966 P.2d 935 (1998). “‘Prejudice’ is defined as ‘[a] forejudgment; bias; partiality preconceived opinion. A leaning towards one side of a cause for some reason other than a conviction of its justice.’” *Id.* (quoting BLACK’S LAW DICTIONARY 1061 (6th ed.1990)). “An appellate court reviews a trial court’s decision on actual bias in the same way it reviews any other factual determination by a trial court. Rather than making its own *de novo* decision, the appellate court must defer to the trial court’s decision.” *Ottis*, 61 Wn.App. at 755.

The effort to avoid prejudice, must be considered along with the reality that “[p]rospective jurors represent a cross section of the community, and their education and experience vary widely.” *State v.*

Davis, 175 Wn.2d 287, n.9, 290 P.3d 43 (2012). Courts must recognize “that most biases do not render jurors unqualified, and that the solemnity of the proceedings and substance of deliberations will help to ensure just verdicts from our juries.” *State v. Saintcalle*, 178 Wn.2d 34, 105, 309 P.3d 326 (2013) (Gonzalez, J., concurring). When a juror has met the statutory standards to serve on a jury “[t]here is a presumption that he will be faithful to his oath and follow the court’s instructions.” *State v. Moe*, 56 Wn.2d 111, 115, 351 P.2d 120 (1960). Moreover, “[j]urors are assumed to be fair and reasonable[.]” *State v. Eggers*, 55 Wn.2d 711, 713, 349 P.2d 734 (1960). As our Supreme Court once astutely surmised:

In addition, we must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.

State v. Peppoon, 62 Wn. 635, 644, 114 P. 449 (1911).

When a juror is challenged for actual bias based on having formed or expressed an opinion, “such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.” RCW 4.44.190. Thus, “[a] juror holding certain preconceptions is not disqualified, provided he can put these ideas aside

and decide the case on the basis of the evidence and the law as instructed by the court.” *State v. Kerr*, 14 Wn.App. 584, 591, 544 P.2d 38 (1975) (citing *State v. White*, 60 Wn.2d 551, 374 P.2d 942 (1962)). Accordingly, the trial court’s discretion is essential to ensuring that the case is tried impartially and that a juror, who is challenged for cause, is not improperly excluded.

“Case law, the juror bias statute, our Superior Court Criminal Rules and scholarly comment all emphasize that the trial court is in the best position to determine a juror’s ability to be fair and impartial.” *State v. Noltie*, 116 Wn.2d at 839. Because, “[i]t is the trial court that can observe the demeanor of the juror and evaluate and interpret the responses.” *Id.* “[T]he trial court has, and must have, a large measure of discretion. *Id.* at 840 (quoting L. Orland & K. Tegland, § 202, at 331).

Experience developed as a trial judge aids in evaluating a juror:

A judge with some experience in observing witnesses under oath becomes more or less experienced in character analysis, in drawing conclusions from the conduct of witnesses. The way they use their hands, their eyes, their facial expression, their frankness or hesitation in answering, are all matters that do not appear in the transcribed record of the questions and answers. They are available to the trial court in forming its opinion of the impartiality and fitness of the person to be a juror.

Id. at 839 (quoting L. Orland & K. Tegland, § 202, at 332).

Further, the Washington Supreme Court has recognized that, due to its position, the trial court holds an advantage over the reviewing court in evaluating a juror:

The supreme court, which has not had the benefit of this evidence recognizes the advantageous position of the trial court and gives it weight in considering any appeal from its decision. Unless it very clearly appears to be erroneous, or an abuse of discretion, the trial court's decision on the fitness of the juror will be sustained.

Id.

To obtain a new trial for a nondisclosure by a juror during *voir dire*, “a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire* and then further show that a correct response would have provided a valid basis for a challenge for cause.” *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007) (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1985)). “The motives for concealing information may vary, but only those reasons that affect a juror’s impartiality can truly be said to affect the fairness of a trial.” *Id.* (quoting *McDonough* 464 U.S. at 556). “Any misleading or false answers during *voir dire* require reversal only if accurate answers would have provided grounds for a challenge for cause.” *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 313, 868 P.2d 835 (1994). “A strong, affirmative showing of

misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994).

In *State v. Carlson*, 61 Wn.App. 865, 877, 812 P.2d 536 (1991), the Court of Appeals considered the issue of a juror who revealed information after the verdict. *Id.* During *voir dire*, for a trial involving the sexual abuse of a three 3½ year-old child, the juror denied having “any particular background in the subject of child sex abuse or evidence of sexual abuse.” *Id.* After the verdict, the juror revealed that she had read a great deal about dysfunctional families and that during deliberations she had used the term pedophile and commented that pedophiles came from all walks of life.⁵ *Id.*

The Court found that neither of the requirements of the two-part test stated above were met.⁶ *Id.* at 878; see *In re Elmore*, 162 Wn.2d at 267. First, the juror did not fail to disclose material information. When asked during *voir dire* whether she had “any particular background in the subject of child sexual abuse or evidence of sexual abuse,” the juror said

⁵ Perhaps because in 1991 the term “pedophile” was not as widely used as it is today, there was a concern that the juror’s advanced vocabulary indicated she had brought outside expert knowledge into the jury’s deliberations. See *id.* at 878.

⁶ “A party must first demonstrate that a juror failed to answer honestly a material question on *voir dire* and then further show that a correct response would have provided a valid basis for a challenge for cause.” See *supra*, Part IV-A at 18.

she did not. *Id.* at 877. This response was truthful, because “her knowledge about dysfunctional families was not tantamount to particular knowledge about child abuse.” *Id.* at 878. Second, her reading on dysfunctional families, use of the term pedophile—which indicated an advanced vocabulary, and observation that child abusers come from all walks of life, did not qualify as her having introduced specialized knowledge or specific facts to the jury. *Id.* Thus, her “knowledge would not have supported a challenge for cause.” *Id.*

Contrasted with *Carlson*, in *State v. Cho*, 108 Wn.App. 315, 319, 30 P.3d 496 (2001), it appeared that a juror deliberately withheld informing the court he was a retired police officer until after the guilty verdict. *Id.* at 319. After the verdict, the jurors spoke with the attorneys. *Id.* at 320. The juror told Cho’s attorney that “he was the person who really argued the point with the jurors who were hesitant to convict Mr. Cho. In the end he managed to change their minds.” *Id.* The Court of Appeals explained that when a juror’s responses during *voir dire* do not demonstrate actual bias, only in exceptional cases will bias be implied based on a juror’s factual circumstances.⁷ *Id.* at 325 (citing *Smith v. Phillips*, 455 U.S. 209, 222, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (O’Connor, J., concurring)). Such an exceptional circumstance exists

⁷ The court appears to be describing when actual bias may be implied in spite of answers a juror has given, rather than creating a non-statutory means of finding implied bias.

when a juror “deliberately withholds information during voir dire in order to increase the likelihood of being seated on a jury.” *Id.* (citing *McCoy v. Golston*, 652 F.2d 654, 659 (6th Cir.1981)).

In reviewing the record, the Court of Appeals found there was “a troubling inference of deliberate concealment.” *Id.* at 327. From the record it appeared that although he knew disclosure was appropriate, the juror “deliberately construed [the court’s questions] as narrowly and subjectively as possible so as to avoid having to reveal he was a former police officer.” *Id.* From these circumstances the court found that the juror’s bias was conclusively presumed. *Id.*

In *State v. Perez*, 166 Wn.App. 55, 59, 64-66, 269 P.3d 372 (2012), after the jury was selected, it was discovered that one of the jurors had known Perez through church roughly 20 years ago, and was casually acquainted with Perez’s parents from the church he attended. The juror also had seen a police report involving Perez “[a] long time back.” *Id.* at 60, 64-66. Initially the juror had not recognized Perez, but after seeing his mother in the audience went home and realized he was acquainted with him. *Id.* at 64. Because the juror had only infrequent contact with the Perez family, did not recall any specific activity with Perez himself, and had forgotten what he read in the police report, the trial court found there was insufficient support for a challenge for cause. *Id.* at 60. The court

noted that the juror had not failed to answer a material question honestly during *voir dire*, but simply did not know he was acquainted with Perez or his family at that time. *Id.* at 67. The trial court also found the information that the juror did possess did not influence the juror in any way that would justify a new trial. *Id.*

The Court of Appeals analyzed the statutory factors under RCW 4.44.180 and found that Perez did not meet any of the criteria necessary to imply bias. *Id.* at 67-68. The court also found that bias could not be “fairly inferred from the record.” *Id.* at 68. Unlike *Cho*, where the presumption of bias required further inquiry, here the trial court had made the necessary inquiries. *Id.* The fact that the juror had known Perez 20 years ago, was acquainted with his family through church, and had read a police report about him that he could not remember the details of, was insufficient to support a challenge for cause. *Id.* 68-69. Because there was no showing that would have supported a challenge for cause, the trial court did not abuse its discretion. *Id.* at 69.

Here, there was no evidence before the trial court that the challenged juror was biased, therefore the trial court did not abuse its discretion in denying the challenge for cause. At trial, Moen never challenged the juror based on implied bias under RCW 4.44.180. Therefore a statutory challenge was not preserved for review. Yet, in his

appeal, Moen suggests “affinity within the fourth degree to either party” under RCW 4.44.180(1) applies. *Brief of Appellant* at 16-17. It does not. When the statute references a consanguinity or affinity to the fourth degree, it refers to a blood relationship between the juror and a party or a relationship created by marriage between the juror and a party.⁸ There is no evidence the juror was related by blood or marriage to a party or to any witness involved in the trial. Thus, not only was any claim of statutory implied bias not preserved for review, but it has no merit.

Moen’s claim of actual bias for nondisclosure also fails. To show the trial court abused its discretion in denying the challenge for cause, Moen “must first demonstrate that a juror failed to answer honestly a material question on voir dire and then further show that a correct response would have provided a valid basis for a challenge for cause.” *In re Elmore*, 162 Wn.2d at 267. Yet here, there is no evidence the juror failed to answer truthfully during *voir dire*. To the contrary, the only reason the information at issue was discovered was because the juror took the initiative to inform the court of this information. RP 300-01. Moreover, unlike in *Carlson*, *Cho*, and *Perez*, the information was brought

⁸ “Consanguinity” is defined as: “The relationship of persons of the same blood or origin.” BLACK’S LAW DICTIONARY 299 (7th ed.1999). “Affinity” is defined as: “1. A close agreement. 2. The relation one spouse has to the blood relatives of the other spouse; relationship by marriage. 3. Any familial relation resulting from a marriage.” *Id.* at 59.

to the attention of the parties prior to the verdict, allowing a challenge for cause to be raised and considered by the court.

The court was careful to ensure a proper inquiry about the information was made. First, upon learning there was potential new information, the court questioned the juror. From the court's questioning, it was ascertained that the juror ran an assisted living facility, had been contacted by either one or two unknown members of Moen's family for a half-hour or less about the possibility of placement in her facility. RP 316-17. The only information she was told was that he had suffered a gunshot wound outside the courthouse. RP 317-18. Thus, the juror had never met Moen, had minimal contact with unknown family members, and the only substantive information she had was that she suffered a gunshot wound. While Moen shooting of himself was an event that the jury would hear about at trial, there was no debate between the parties that it had occurred or over how it had occurred. The State elicited this information, and the defense used the gunshot evidence to suggest Moen may have suffered an injury to his brain. Because the minimal information known by the juror was not of consequence to either party, it was not material.

The court then gave both attorneys the opportunity to question the juror. The prosecutor asked the juror: "[I]s there anything about that that would cause you to be unable to decide this case based on the facts and

evidence presented here in court?” RP 319. The juror responded by saying no. RP 319. Moen’s attorney then questioned the juror asking if Moen’s family members wanted long-term care, and the juror answered affirmatively. RP 319. Moen’s attorney asked the juror if her dealings with Moen’s family would make her feel that she had to convict him because she’d have to “bend over backwards to show neutrality?” RP 319. The juror told him no. RP 319. Then Moen’s attorney asked her if she could still keep an open mind and she said yes. RP 319. At this point, although the juror had heard information prior to trial, she demonstrated that she could disregard this information and try the case impartially, in accordance with RCW 4.44.190. She assured the prosecutor she would base her decision only on the facts and evidence presented in court. And, she assured Moen’s attorney that her prior contact would not influence her decision and she could keep an open mind.

The trial court then permitted the parties to raise any challenge to the juror for cause. Although the juror had answered that she could keep an open mind and decide the case on the facts and evidence presented, Moen still challenged her for cause. Despite the juror having expressly stated she would not “bend over backwards to convict to show neutrality,” Moen’s attorney still challenged her on this basis. Moen’s attorney claimed he was concerned that in an effort to avoid being seen as

sympathetic to Moen's family the juror would "bend over backwards to convict." RP 320. This suggested that from the juror's observed demeanor in the courtroom, if anything, Moen's attorney viewed the prior contact as making it more difficult for her to convict. Further, this was the sole ground Moen's attorney raised at trial, therefore it was the only ground of bias preserved for review.

The trial court, which was able to observe the juror's demeanor in the courtroom and best assess her credibility, considered that the juror had limited contact with one or two family members for at most 30 minutes on a prior occasion. RP 320-21. The court also considered that the juror did not remember anything of substance other than the fact that Moen had suffered a gunshot wound outside the courthouse. RP 321. The court then ruled that because the juror had limited contact with Moen's family members, had no recollection of any substantive matters, and indicated she could keep an open mind, the challenge for cause was denied. RP 321.

From the record, it cannot be shown that the court manifestly abused its discretion. The juror had no contact with Moen, it was unknown who in Moen's family she had contact with during a brief prior contact, and the only substantive information she recalled from the conversation was a gunshot wound that both parties agreed had occurred. This information alone would not be sufficient to show actual bias.

Further, upon questioning she indicated she would base her decision only on the facts and evidence presented, would not favor either party, and would keep an open mind. Thus, there was no reason to believe that information she had heard—information of minimal consequence that the entire jury also heard during the trial—would have had any impact her during deliberations. Therefore, the court did not abuse its discretion in finding that from all the circumstances, the juror could disregard any prior opinion and try the case impartially in accordance with RCW 4.44.190.

Moen maintains that the situation presented is similar to *Cho*, where the court found juror misconduct based on deliberate concealment by the retired police officer. Moen speculates that the juror minimized her interactions, there was a substantial risk she would recall more information, she would be unable to differentiate between information learned prior to trial and during the trial, and that the previous information was material. Yet, none of these claims were raised at trial. Moen's only grounds for challenging the juror for cause was that she would "bend over backwards to convict" in an effort to show neutrality. Because Moen raises new grounds as to why the challenge for cause should be granted for the first time on appeal, his claims were not preserved for review.

Additionally, Moen's claims all fail on their merits. There was no evidence the juror sought to minimize her contact with Moen's family in

an effort to be seated on the jury. Here, the only reason the court was aware of the information was because the juror brought it to the court's attention on her own initiative. This is much different than *Cho*, where the juror deliberately concealed his status as a retired police officer by intentionally answering questions as narrowly as possible. Thus, the situation is more similar to that which occurred in *Perez*, where the juror had some prior contact with the defendant and his family and brought this to the attention of the court as soon as he realized it.

Moen speculates beyond the actual record to conclude the juror had more contacts than the single contact she described. Moen wrongly concludes that the record necessarily indicates the juror had two or three interactions with the family, rather than the one as the juror testified to. What the juror recalled was a single meeting with the family that she estimated to be “[m]aybe a half-hour, if that.” RP 317. The juror did not recall how the meeting was set up. She guessed that either the family had contacted her facility or medical information had come from the hospital. This appears to be the juror relying on how referrals to her business normally come in, but not recalling exactly how Moen's was received. It does not show there were two or three contacts.

Further, the juror's statements about the number of family members she met with and length of the contact, indicate an effort to avoid

underestimating rather than an attempt to minimize. When the juror was asked how many of Moen's family members she met with she said: "I want to say it was one, or maybe two." RP 317. This indicates that the juror's memory was that she had met with one, but wanted to leave open the possibility that an additional person may have been present. It is often the case that when business is conducted on behalf of a family member a single family member will speak when another is present. When the juror was asked how long they met she said, "Maybe a half-hour, if that." RP 317. The juror indicated contact was brief, but gave the longest amount of time it could have taken. This also did not indicate an effort to minimize, but rather an effort to be completely candid by not underestimating.

The timing of the juror's recollection did not create a substantial risk that she would recall information during the trial. Moen assumes the juror did not notify the court until after four witnesses had testified. In doing so, he fails to consider the practical realities of a jury trial. The only person the juror would have been permitted to communicate with was the bailiff. After opening statement was given, each of these witnesses were called in rapid succession, prior to the lunch hour. There was one brief break after the first witness testified to set up the video that would be played through the second witness. RP 273. It is likely the bailiff would have been needed to assist with setting up the video during this break.

Thus, there may not have been an opportunity for the juror to communicate with the bailiff during this initial break. At the next break the court informed the parties that the juror had contacted the bailiff with the information that morning. RP 300. From the record, there is no way of knowing exactly when the juror contacted the bailiff, but it appears to have been at her earliest opportunity.

Because none of the witnesses who had been called testified regarding the gunshot, it appears that the juror became aware of this information during opening statement, and then related it to the bailiff as soon as she was able. Consequently, there is no indication from the record that the juror was recalling additional details based on each witnesses' testimony. Should she have recalled additional details later in the trial, there is no reason to believe she would not have also contacted the bailiff later with such information. Because she did not, there is no evidence she recalled additional details later during the trial.

Because there was no evidence of the juror recalling additional details outside of the trial, Moen's claim that she would have lacked the ability to differentiate between what she learned prior to and during the trial also fails. The juror's lack of precise recollection of a brief prior contact with his family was understandable given that the shooting occurred on November 10, 2014, and the court's inquiry occurred on

August 24, 2016.⁹ While it is unknown when the meeting took place it would likely have been shortly after Moen shot himself and needed rehabilitation. Further, as in *Perez* where the juror had read a prior police report regarding the defendant but did not remember the details, here the juror's vague recollection of the details of their contact lessen any concern of outside influence. All of Moen's speculative claims should be weighed against the juror's statements that she would base her decision on the facts and evidence, would keep an open mind, and would not let the prior meeting with the family cause her to be more likely to convict. Because there is no evidence to the contrary, there are no grounds to find the court abused its discretion.

Moen's claim that the information was material also speculates wildly beyond the record. The only substantive information the juror knew was that Moen suffered a gunshot wound at the courthouse. There was no evidence that she had ever met Moen or his daughter Shelly. Other than Dr. Stanulis' testimony, there was no diagnosis of dementia. Thus, because Dr. Stanulis did not diagnose Moen until after he was charged, dementia would not have been a topic of conversation at the time the juror met with one or two members of Moen's family.

⁹ Considering he was arrested on September 6, 2015, and held without bail from that date forward and had lived alone in Toutle after rehabilitation, the contact would have likely been over a year-and-a-half old at the time of the court's inquiry. RP 340, 355, 1089.

Further, Moen's reliance on *Cho* is misplaced. While *Cho* involved deliberate concealment by a juror, here the juror volunteered information that the parties would not have learned otherwise. And, the juror provided this information as soon as she realized it, giving the parties and the court an opportunity to inquire before the verdict that did not exist in *Cho*. Additionally, the record does not give any indication that the juror exhibited hostility toward Moen. This became apparent when Moen's attorney suggested through his question that the juror's sympathies would potentially be for Moen, so that she would have to "bend over backwards to convict" to appear neutral.

Rather, this case is much more similar to *Perez*. As in *Perez*, here on her own initiative, the juror alerted the court to the potential issue before the verdict. As in *Perez*, the juror had prior contact with Moen's family. In *Perez* the juror knew the defendant, having taught him in Sunday School and remained acquainted with his family since that time, attending the same church. Further, the *Perez* juror knew of the defendant being the subject of another police report. Despite these facts, the *Perez* Court did not find sufficient evidence to support a challenge for cause.

Here, the situation is even more benign than in *Perez*. Rather than 20 years of contact with Moen's family, the juror had a single, brief contact with Moen's family. Further, unlike in *Perez*, she had no

knowledge of any prior police report involving Moen. The only information she had was that Moen had suffered a gunshot wound, which was not disputed at trial. There is no evidence in the record that the juror ever held any information beyond this. Further, unlike in *Carlson, Cho*, and *Perez*, the parties were aware of the information before the verdict and Moen's attorney was able to bring a challenge for cause. The court conducted a careful inquiry to ensure the juror was not biased and able to decide the case based on the evidence presented. Thus, the court considered the information the juror provided, her responses to questions, the grounds raised by Moen's attorney, and decided that there was insufficient support to sustain a challenge for cause. Under these circumstances, the reviewing court should defer to the trial court in making this determination. Because there was no showing of bias, the trial court did not abuse its discretion.

B. THE STATUTE REQUIRING A LIFE SENTENCE FOR MOEN'S DOMESTIC VIOLENCE CONVICTION OF AGGRAVATED MURDER IN THE FIRST DEGREE WAS NOT UNCONSTITUTIONAL BECAUSE MOEN WAS 73-YEARS-OLD AND IT WAS CLAIMED THAT HE HAD DEMENTIA WHEN HE MURDERED HIS WIFE.

Moen's life sentence for his domestic violence crime of aggravated murder in the first degree was not unconstitutional because he was 73-years-old and claimed to have dementia when he murdered of his wife. With regard to a conviction for aggravated first degree murder, "[w]here

aggravating circumstances are found by the jury it does not violate the Eighth Amendment and Const. art. 1, § 14, to sentence to life imprisonment without the possibility of release or parole without further consideration of mitigating circumstances.” *State v. Grisby*, 97 Wn.2d 493, 498, 647 P.2d 6 (1982). Moen maintains that his sentence of life without the possibility parole constitutes cruel and unusual punishment, claiming he belongs to a class which he labels “elderly persons with age-related mental infirmities.” Moen also alleges that if a member of this new class of adults commits an aggravated murder in the first degree, then he or she should be treated as a juvenile and categorically barred from receiving a sentence of life without the possibility of parole.

The dramatic change to the law Moen argues for is unwarranted. First, there are numerous distinctions between juveniles and adults that make the categorical bar analysis inappropriate for an adult who commits an aggravated first degree murder. The correct legal standard for determining the constitutionality of the statute remains proportionality. Because his sentence of life is not disproportionate to his aggravated and premeditated murder of his wife, his sentence is not cruel or unusual punishment. Second, Moen’s claim of membership to this new class is especially weak. His claimed dementia was unsupported by the evidence, as was reflected when the jury rejected his claim of diminished capacity

and appeals for lesser included crimes. RP 1513-15. His actual mental issue—depression—is not “age-related” and can apply to people in any age group. For these reasons, Moen’s sentence was appropriate for the heinous crime he committed and does not conflict with the United States or Washington State Constitutions.

The United States Supreme Court has articulated the distinction between intentional first-degree murder and nonhomicide crimes: “The latter crimes may be devastating in their harm, as here, but ‘in terms of moral depravity and injury to the person and to the public’ they cannot compare to murder in their ‘severity and irrevocability.’” *Kennedy v. Louisiana*, 554 U.S. 407, 438, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (quoting *Coker v. Georgia*, 433 U.S. 584, 598, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977)). “Life is over for the victim of the murderer.” *Coker*, 433 U.S. at 598. Due to the severity and irrevocability of murder, it is “beyond question” that even one murder deserves severe punishment. *See Miller v. Alabama*, 567 U.S. 460, 479, 132 S.Ct. 2455, 183 L.Ed. 407 (2012). While all murder is deserving of severe punishment, the most severe punishment for murder is reserved for aggravated first degree murder. *See State v. Kron*, 63 Wn.App. 688, 694-95, 821 P.2d 1248 (1992). “[U]nless there is a premeditated intent to cause the death of a person coupled with one of the aggravating circumstances listed under RCW 10.95.020, the

commission of aggravated first degree murder has not occurred.” *State v. Irizarry*, 111 Wn.2d 591, 599, 763 P.2d 432 (1988).

Aggravated first degree murder is so egregious, that it is the only crime in Washington where the death penalty may be sought. *See State v. Cross*, 156 Wn.2d 580, 623, 132 P.3d 80 (2006). “A brutal murder involving substantial conscious suffering of the victim makes the murderer more deserving of the death penalty.” *Davis*, 175 Wn.2d at 349. When an adult, without intellectual disability, is convicted of aggravated first degree murder, and the death penalty is sought, among other protections, “Washington juries are informed that if they do not recommend a death sentence, the defendant will automatically be sentenced to life in prison without the possibility of parole.” *Cross*, 156 Wn.2d at 623 (citing RCW 10.95.030(1), .080(2)). “This assures the jurors that if they exercise mercy, a brutal killer will not someday be set free.” *Id.* at 623-24. Combined with other protections, this helps to avoid a “freakish and wanton application” of the death penalty. *Id.* at 622-23 (citing *Gregg v. Georgia*, 428 U.S. 153, 169, 173, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). As a result of these statutory protections, “Washington’s death penalty does not violate the Eighth Amendment.” *Davis*, 175 Wn.2d at 343; *See* RCW 10.95. Nor does this statutory scheme violate art. I, § 14 of the Washington State Constitution for an adult sentenced to death for

aggravated first degree murder. See *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 731, 327 P.3d 660 (2014) (explaining that in this context, art. I, § 14 is not interpreted more broadly than the Eighth Amendment; See *State v. Dodd*, 120 Wn.2d 1, 21-22, 838 P.2d 86 (1992)).

Washington's statutory scheme also permits the prosecutor to exercise discretion over whether or not to seek the death penalty for aggravated murder when there are mitigating circumstances that would merit leniency, by filing a notice within 30 days of arraignment. See RCW 10.95.040. If the prosecutor files notice that the death penalty will not be sought, then the penalty for aggravated first degree murder is life without the possibility of parole. See RCW 10.95.030(1). Thus, an aggravated murderer for whom the death penalty is not sought has already received the benefit of mitigation. With regard to an adult, "the mandatory sentence of life imprisonment without parole for aggravated first degree murder does not constitute cruel and unusual punishment." *State v. Dictado*, 102 Wn.2d 277, 296, 687 P.2d 172 (1984) *abrogated on other grounds by State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986).

Several United States Supreme Court decisions have impacted juvenile sentencing. A juvenile may not receive the death penalty. *Roper v. Simmons*, 543 U.S. 551, 578-79, 125 S.Ct. 1183, 161 L.Ed.2d. 1 (2005). A juvenile who is not convicted of homicide may not receive a sentence of

life without parole. *Graham v. Florida*, 560 U.S. 48, 82, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). A juvenile convicted of homicide may not receive a sentence of life without parole unless an individualized sentencing decision is made that considers any mitigation. *Miller v. Alabama*, 567 U.S. 460, 489, 132 S.Ct. 2455, 183 L.Ed. 407 (2012). RCW 10.95.030 was altered in an attempt to comport with the decision in *Miller*. RCW 10.95.030(3)(b). Recently, the Court of Appeals held that this “*Miller*-fix” violated art. I, § 14 of the Washington State Constitution, therefore a juvenile convicted of aggravated murder may not receive a sentence of life without parole under any circumstances. *State v. Bassett*, 198 Wn.App. 714, 744, 394 P.3d 430, *review granted*, 189 Wn.2d 1008, 402 P.3d 827 (2017).

The *Bassett* decision was solely concerned the constitutionality of life without parole sentences for juveniles. *See id.* 714-744. The court noted the high burden that exists for finding a statute unconstitutional, stating: “We presume statutes are constitutional and the party challenging a statute’s constitutionality has the burden of proving otherwise beyond a reasonable doubt.” *Id.* at 723. Although *Miller* held that a sentence of life without parole could be imposed if sentencing was individualized and mitigation considered, the Court of Appeals held such a sentence was unconstitutional in Washington because art. I, § 14 offers greater

protection than the Eighth Amendment.¹⁰ *Id.* The Court carefully considered the decisions in *Roper*, *Graham*, and *Miller*, which distinguished juveniles from adults. *Id.* at 723-35. The court considered that few juvenile crimes reflect “irreparable corruption,” and that courts cannot on a case-by-case basis distinguish “the few incorrigible juvenile offenders from the many that have the capacity for change.” *Id.* at 723.

The *Bassett* Court explained that in *Miller*, “the Court stated that it has been established that children are ‘constitutionally different from adults for purposes of sentencing.’” *Id.* at 724 (quoting *Miller*, 132 S.Ct. at 2464). The court also relied on *Miller* to distinguish children from adults, explaining the reality that children lack maturity and have an underdeveloped sense of responsibility that leads to recklessness, impulsivity and heedless risk taking. *Id.* “Children are also more vulnerable to negative influence and outside pressure from family and peers, have limited control over their environments, and lack the ability to extricate themselves from horrific, crime-producing settings.” *Id.* Finally, the court noted that because a child’s character is not as well-formed as an

¹⁰ The court cited *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996), a case involving life without parole under the “three strikes law,” for the proposition that art. I, § 14’s protection against “cruel punishment” affords greater protection than the Eighth Amendment, which protects against “cruel and unusual punishment.” In the context of an adult sentenced to death for aggravated murder, the Supreme Court has held this was not a distinction the framers of the Washington Constitution intended. *Dodd*, 120 Wn.2d at 21. The Supreme Court reaffirmed *Dodd*’s reasoning in 2014. *In re Pers. Restraint of Cross*, 180 Wn.2d at 731. Still other cases have found art. I, § 14 provides greater protection. *See, e.g., State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014).

adult's, the child's traits are less fixed, and the child's actions are "less likely to be evidence of irretrievable depravity." *Id.* Having explained the fundamental differences between children and adults, the Court noted that "life without parole is an especially harsh punishment because the juvenile will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender." *Id.*

"Life without parole is only for the 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 725 (quoting *Montgomery v. Louisiana*, -- U.S. --, 136 S.Ct. 718, 734, 193 L.Ed.2d 599 (2016)). While prisoners who have shown an inability to reform should continue to serve life sentences, "[t]he opportunity for release will be afforded to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change." *Id.* at 725-26 (quoting *Montgomery*, 136 S.Ct. at 736).

The court explained that the existing test in Washington for determining whether a sentence constituted cruel punishment was the proportionality analysis from *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980). "The four *Fain* factors to consider in analyzing whether a punishment is cruel under article I, section 14 are: '(1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the

punishment meted out for other offenses in the same jurisdiction.” *Id.* at 732 (quoting *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014)). However, rather than apply the proportionality test from *Fain*, the court applied a two-part categorical bar analysis where the court first considers whether there is a national consensus against the sentence at issue and then makes an independent judgment as to whether the punishment violates the State’s cruel punishment prescription. *Id.* at 739, 741. The court used the categorical bar approach because:

- (1) Bassett’s claim implicated a sentencing practice that applied to the entire class of juvenile offenders;
- (2) Washington has adopted *Miller’s* reasoning that “children are different” and recognized three significant gaps between children and adults; and
- (3) The *Fain* analysis does not adequately address the special concerns inherent to juvenile sentencing by failing to consider the offender’s youth and comparing punishment with adult offenders who commit the same crime.

Id. at 734-38.

The court found a “building national consensus against juvenile sentences of life without parole” that favored holding the statute unconstitutional, noting that in the five years since *Miller*, 13 states had banned such sentences and four had done so in the last two years, the majority of these by legislative enactment. *Id.* at 740-41. The court then

applied its independent judgment, finding the “fundamental problem” with the *Miller*-fix statute was that it placed the court in the position of trying to separate juveniles who were irretrievably corrupt from juveniles whose crimes reflected transient immaturity. *Id.* at 742. Because of the risk of misidentifying juveniles with hope of rehabilitation from those who are irretrievably corrupt, the court found the juvenile sentencing provision of the statute unconstitutional. *Id.* at 743; *See* RCW 10.95.030(a)(ii).

In *State v. Witherspoon*, the Washington Supreme Court addressed the question of whether *Miller*'s prohibition of mandatory life sentences for juveniles applied to an adult who received a mandatory sentence of life without parole under the Persistent Offender Accountability Act. 180 Wn.2d at 887-91; *see* RCW 9.94A.570. The Court applied the *Fain* proportionality test, and determined the sentence did not violate art. I, § 14. *Id.* In doing so, the Court distinguished *Witherspoon*'s case from *Miller* and *Graham*. *Id.* at 889-90. The Court noted that *Miller* and *Graham* “establish that children are constitutionally different from adults for sentencing purposes.” *Id.* at 890. Children are different from adults because (1) they lack maturity and have an underdeveloped sense of responsibility; (2) they are more vulnerable to negative influences and have little control over their environments; and (3) their characters are not well formed, meaning their actions are less likely to evidence depravity.

Id. The Court dismissed the notion that *Graham* and *Miller* would apply to adults, stating: “*Graham* and *Miller* unmistakably rest on the differences between children and adults and the attendant propriety of sentencing children to life in prison without the possibility of release.” *Id.* Because Witherspoon was an adult when he committed the crimes, his sentence did not violate art I, § 14 or the Eighth Amendment.

Here, the court did not violate the constitution when it sentenced Moen to life without parole for the aggravated, premeditated murder of his wife. Because statutes are presumed constitutional, it is Moen’s burden to show that his sentence is unconstitutional beyond a reasonable doubt. *See Bassett*, 198 Wn.App at 723. He fails to do so.

The proper standard of review for the constitutionality of Moen’s sentence under art. I, § 14 and the Eighth Amendment is the *Fain* test. First, unlike in *Bassett* and *Miller*, which involved a broad class that included all juveniles convicted of homicide, here Moen creates a nuanced class of “elderly persons with age-related mental infirmities” (“EPWARMI”). While EPWARMI exist, Moen provides no evidence showing there is a large group of these individuals who have been convicted of aggravated first degree murder. Second, *Miller*’s juvenile-specific rationale that “children are different” has not been applied to adults in Washington and none of the three significant gaps between

children and adults apply to Moen. Even with an age-related infirmity few would argue the elderly lack maturity or have an underdeveloped sense of responsibility. EPWARMI are less vulnerable to peer pressure or negative influences, and unlike children, EPWARMI who live independently have the ability to control their environments most of the time. And, as adults EPWARMI have character that is well-formed and their harmful acts toward others generally do evidence depravity. Third, the inadequacies identified by *Bassett* in applying the *Fain* analysis to children, which failed to consider youth and compared juveniles to adults does not apply to an adult aggravated murderer who is also an EPWARMI.

Under *Fain*, Moen's sentence is not disproportionate. The nature of the offense favors the constitutionality of the punishment. Moen was convicted of aggravated murder in the first degree - domestic violence. This involved the premeditated murder of his wife, where he also committed a burglary by unlawfully entering her home and lying in wait for her, fashioned thumb loops in a stiff electric wire to strangle her with, waited for her to enter the bathroom so she could not escape, struck her in the head with an axe, punched her repeatedly for 30-45 minutes, and then strangled her to death. All of this occurred in Michelle Moen's home, the place where she is supposed to be safe. The jury unanimously found Moen murdered her because she had testified against Moen in their earlier

domestic violence trial. As Moen himself stated, “he wanted to show Michelle what domestic violence really was.” RP at 553. A more heinous act of domestic violence would be difficult to imagine, the murder was brutal, and the evidence of premeditation was overwhelming.

The legislative purpose behind the statutory penalty for aggravated first degree murder - domestic violence is self-evident: it is the most severe crime possible and its consequences are irrevocable. The legislature has an interest in deterring adults from committing premeditated murders involving aggravating circumstances against family or household members. Because it is the worst possible crime, the most severe penalty is necessary to maximize the deterrent effect of the punishment. Retribution is served by causing the murderer to forfeit any hope for further liberty, just as he or she has taken all future life and liberty from the victim. In Moen’s case, because Michelle was 57, a much greater portion of her life expectancy was lost than Moen’s, who despite losing his liberty, still lives. Further, unlike a juvenile for whom a sentence of life without parole may be considered especially harsh, the older an adult is, the less harsh such a sentence would be. This fact would also make the punishment much harsher for younger people who suffer mental infirmity than for EPWARMI. Incapacitation is a necessary end when a person has demonstrated the capacity to commit an aggravated,

premeditated murder.¹¹ The risk of the murderer being released and killing again is real. This is especially true, when the convicted murderer is an adult who does not lack the maturity, sense of responsibility, or control over environment that a juvenile lacks.

The punishment for aggravated, premeditated murder by adults in other state jurisdictions is nearly uniformly death or life without parole.¹² Moen cites no authority for the proposition that there is a growing national consensus that EPWARMIs who commit aggravated murder should receive a lesser punishment.

The punishment meted out for other offenses in Washington is the same. All adults who are convicted of aggravated first degree murder, are either sentenced to death or life without the possibility of parole. In fact, when an adult with an intellectual disability is convicted of aggravated first degree murder, the mandatory penalty is life without parole. *See* RCW 10.95.030. Thus, even the class of adults Moen compares to his new class of EPWARMIs receives a sentence of life without parole when convicted of aggravated murder. Accordingly, under the *Fain* test, Moen's sentence is not disproportionate.

¹¹ While rehabilitation is not achieved for the person permanently incarcerated, rehabilitation's partial goal of specific deterrence is achieved by permanent incarceration.

¹² The only state that does not have life as a possible punishment for aggravated, premeditated murder is Alaska, which imposes a mandatory *de facto* life sentence of 99 years. *See* AS 12.55.125.

Further, even if the categorical bar applied in *Bassett* were applied, Moen's claim would still fail. The class of aggravated murderers who are EPWARMI is distinct from juveniles. Moen fails to cite a single example from another jurisdiction where an EPWARMI has been convicted of aggravated, premeditated murder and received a lesser sentence than he did. Having presented no evidence of a national consensus regarding whether EPWARMI who avoid the death penalty for aggravated, premeditated murder merit further leniency, Moen's claim fails the first prong of the categorical bar analysis.

Moen also fails to make a compelling case for the court to exercise its independent judgment and ban all sentences of life without parole for EPWARMI who commit aggravated first degree murder. EPWARMI are different from children. As adults, they bear greater responsibility for their actions and are less likely to be rehabilitated. If the imposition of a sentence of life without parole is more severe for a juvenile because the child will spend a greater portion of his or her life incarcerated, then it is necessarily less severe the older a person is. Further, should the court find the statute unconstitutional for EPWARMI, it would be doing so despite the fact that the punishment for the aggravated murderer with intellectual disability or any person with a mental infirmity that is not age-related,

remains life without the possibility of parole. For these reasons, Moen's claim also fails the categorical bar analysis.

Additionally, Moen does not actually belong to the EPWARMI class as he claims. Dr. Hendrickson testified that while Moen suffered from depression—a mental issue that is not age-related—he did not have dementia, which involves memory loss. While Dr. Stantulis claimed Moen had dementia, he provided no evidence of memory loss to substantiate this. Dr. Hendrickson conducted an examination of Moen, and found his memory was good. Dr. Ozgur testified Moen's brain was within normal limits for his age. Dr. Grubbs, who sees dementia patients, never observed Moen to have symptoms of dementia. The jury found Dr. Stanulis unconvincing and rejected Moen's claim of diminished capacity, finding him capable of the premeditated, intentional murder of his wife. Simply claiming oneself to be an EPWARMI does not make it so. Moreover, at 73, Moen was not especially old when he committed the murder. Considering both presidential candidates in the 2016 election would have been over this age at the end of the first four-year term, it should not be assumed that Moen is incapable of being held responsible for his actions because he was 73 when he committed the crime.

Moen's attempt to conflate his mental state with that of a juvenile or a person with intellectual disability was considered and rejected by the

trial court at sentencing. The court found Moen's issues neither came near where a juvenile would be in brain development nor reached the level of intellectual disability. For this reason, the court found the sentence to be imposed did not "even come close" to being unconstitutional. RP 1602. Accordingly, Moen's claim that as applied the statute was unconstitutional also fails, because the court considered his mitigation and found it insufficient to make his punishment disproportionate.

Consideration of the crime Moen committed supports the trial court's reasoning. Domestic violence is concerning in part because it can escalate. One factor that makes domestic violence so horrific is the inability for a victim to find safety in her home. Michelle called the police and testified against her husband in a domestic violence trial. Subsequently, she and Moen underwent divorce proceedings and lived in separate homes. At this point, Michelle should have been safe. She was not. The jury found Moen's unlawful entry into the home with intent to commit a crime against a person therein constituted burglary. The crime he intended was, of course, premediated murder.

By his own admission, Moen committed the premediated, brutal murder of his wife. It began when he struck her in the head with an axe. He then subjected her to a prolonged 30-45 minute assault, punching her in the face repeatedly, breaking her ribs, and covering her arms with

bruises. When Michelle told him she loved him, he punched her in the face. When she told him to let her live, he told her that he would kill her. This was akin to torture. Finally, he strangled her to death with a wire he had prepared to kill her with.¹³ After hearing Moen committed this crime to show Michelle “what domestic violence really was[,]” the jury found that Moen murdered Michelle because of her former testimony against him. If “[a] brutal murder involving substantial conscious suffering of the victim makes the murderer more deserving of the death penalty,”¹⁴ then surely Moen’s aggravated and premeditated murder of his wife is deserving of a sentence life without parole.

V. CONCLUSION

For the above stated reasons, Moen’s conviction and sentence should be affirmed.

Respectfully submitted this 17th day of November, 2017.



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¹³ The thumb loops fashioned on the stiff electric wire that would not come undone once pulled tight was especially strong evidence of premeditation, as was Moen’s statement: “It’s all premeditated, I planned the whole f***ing thing.” RP 932.

¹⁴ *Davis*, 175 Wn.2d at 349.

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on November 17th, 2017.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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