

THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON
Division II

CASE # 50126-1-II

SEAN ALLEN STEVENSON,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

APPELLANT'S OPENING BRIEF

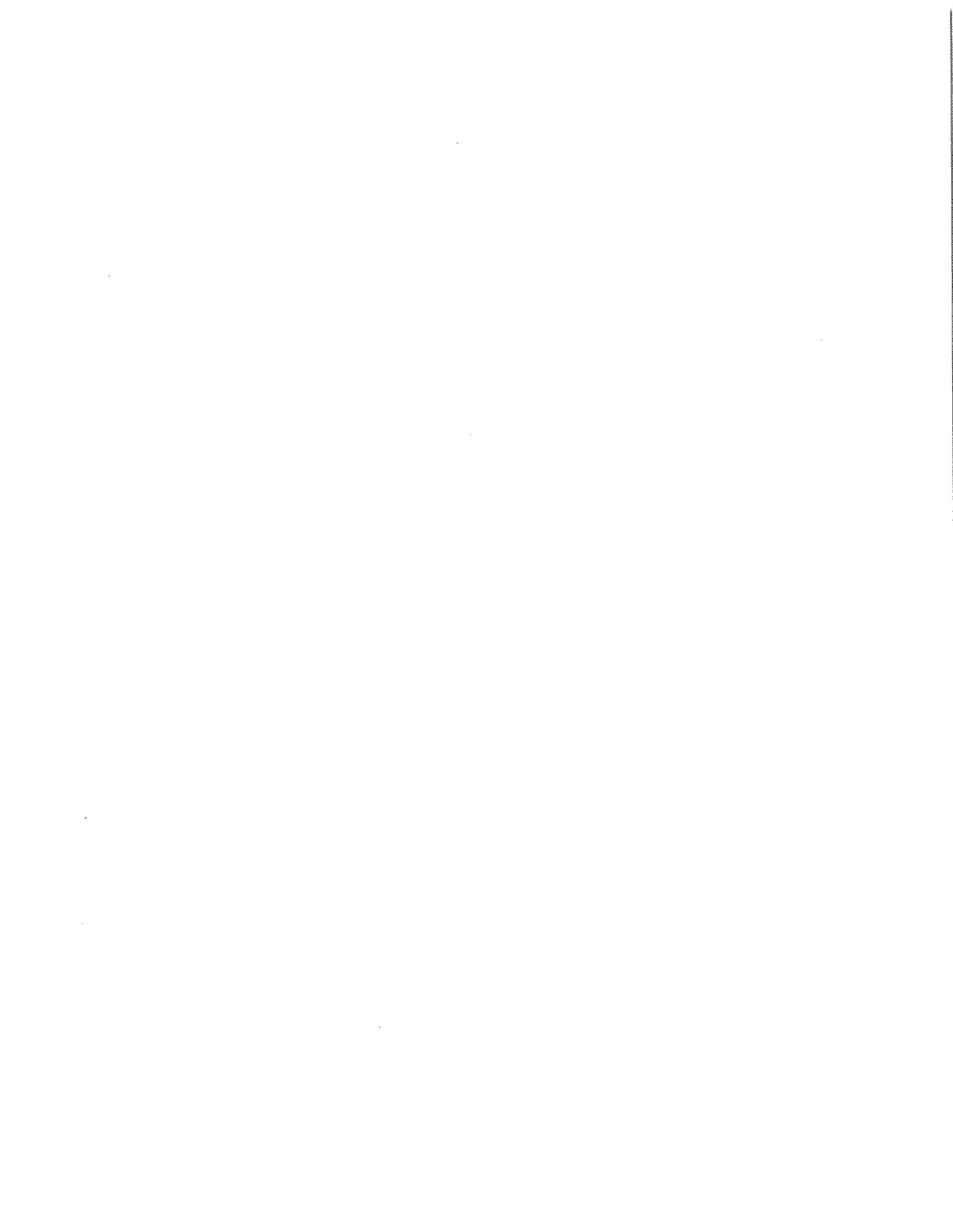
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I. INTRODUCTION

This action arises out of the conviction of Sean Stevenson for two counts of first degree murder and one count of aggravated first degree murder. Following the Trial Court's March 17, 2017 resentencing of Mr. Stevenson pursuant to RCW 10.95.030(3) ("*Miller* fix statute"), this Court found that the statute was unconstitutional and violates Washington Constitution's prohibition against cruel punishment. State v. Bassett, 198 Wash. App. 714, 726, 394 P.3d 430 (Div. II, 2017). This Court held a life sentence without the possibility of parole or early release is unconstitutional under Article I, Section 14 of the Washington State Constitution. As a result, Mr. Stevenson's sentence must be reversed and remanded for a resentencing in accordance with the Bassett holding.

II. ASSIGNMENT OF ERROR

1. Whether the sentence of the trial court pursuant to RCW 10.95.030(3) should be reversed and remanded for resentencing as a result of this Court finding this statute unconstitutional. State v. Bassett, 198 Wash. App. 714, 726, 394 P.3d 430 (Div. II, 2017).

2. Whether Mr. Stevenson's sentences should run concurrent as a result of being treated as one crime by the trial court, and resentencing

occur in accordance with this Court's decision in State v. Bassett, 198 Wash. App. 714, 726, 394 P.3d 430 (Div. II, 2017).

3. Whether as a matter of fairness and to ensure impartiality, this matter should be reassigned to a different trial court for resentencing.

III. STATEMENT OF THE CASE

A. Background/Procedural History.

On May 8, 1987, then 16-year old Sean Stevenson was found guilty of two counts of murder in the first degree for killing his mother and step-father, and one count of aggravated murder for the rape and murder of his sister. CP 190. On June 12, 1987, Mr. Stevenson was given two 320-month sentences to run concurrently to each other for the first-degree murders of his mother and step-father, and to run consecutively to the life in prison without the possibility for parole sentence he was given for the aggravated murder of his sister. CP 190; RP 1-2. During the sentencing of Mr. Stevenson, the Trial Court determined that all of the offenses constituted the same criminal act and counted as one crime. CP 190.

On January 23, 2017, counsel for Mr. Stevenson filed a motion for reconsideration of sentencing pursuant to the *Miller*-fix statute. CP 245. On March 3, 2017, counsel for Mr. Stevenson filed its memorandum of risk assessment providing argument in support of resentencing. CP 247 - 248.

On March 15, 2017, the State filed a memorandum supporting its position as to the resentencing on Mr. Stevenson. CP 251. Included within the State's filing as "Exhibit B," was the "Sentencing Memorandum" filed by Mr. Stevenson's previous counsel on June 11, 1987. CP 187. The 1987 sentencing memorandum set forth authority showing Mr. Stevenson's sentences must run concurrent and pointing out there can be no sentence longer than life without parole. CP 187.

On March 16, 2017, at the resentencing hearing, the Trial Court order Mr. Stevenson be sentenced to life in prison. RP 35. The Trial Court also determined it did not have the authority to alter the two 320-month sentences set to run consecutive to the life in prison sentence and once again entered the two 320-month sentences to run consecutive to the life in prison sentence. RP 35-36. On March 17, 2017, the Trial Court entered its findings of fact and conclusions of law. CP 255.

On April 25, 2017, this Appellate Court held in State v. Bassett, a sentence of life in prison without parole or early release pursuant to the *Miller-fix* statute, under which Mr. Stevenson was resentenced, was unconstitutional as it violated Article I, Section 14, of the Washington State Constitution prohibiting cruel punishment.

Mr. Stevenson seeks a reversal of his sentence, to have his sentences run concurrent, to have this matter remanded to the trial court for

resentencing in accordance with this Court's decision in Bassett, and to have this matter reassigned to a new trial judge upon remand.

IV. ARGUMENT

A. Standard of Review

A statute's constitutionality is a question of law, which is reviewed by the Appellate Court de novo. State v. Hunley, 175 Wash.2d 901, 908, 287 P.3d 584 (2012). The court presumes the statute to be constitutional, and the party challenging the statute has the burden to prove unconstitutionality beyond a reasonable doubt. Id. "The Washington Constitution, Article I, Section 14, prohibits infliction of cruel punishment." State v. Bassett, 198 Wash. App. at 723. (internal quotations omitted). Washington's proscription against cruel punishment is more protective than the federal counterpart. Id.

Mr. Stevenson was issued a sentence longer than life without parole by the Trial Court. That has been declared unconstitutional by this Court as cruel punishment. Thus, Mr. Stevenson's sentence must be reversed, this matter must be remanded for resentencing, and a new judge must be reassigned for resentencing.

B. The Trial Court Sentenced Mr. Stevenson to Life in Prison Pursuant to RCW 10.95.030(3)(a)(ii), Which Has Been

Determined Unconstitutional. Therefore, Mr. Stevenson’s Life Sentence Must be Reversed and Remanded for Resentencing.

On March 16, 2017, Sean Stevenson was resentenced under the *Miller*-fix statute, codified as RCW 10.95.030, to life in prison. RP 35. Because Mr. Stevenson was resentenced to life in prison under RCW 10.95.030(3)(a)(ii) for aggravated first degree murder he is ineligible for parole or early release. CP 255.

In State v. Bassett, this Court found RCW 10.95.030(3)(a)(ii) violates Article I, Section 14 of the Washington State Constitution. This Court adopted categorical analysis and noted that Washington historically has recognized two classifications of cruel and unusual sentences that violate the Eighth Amendment: “those that are disproportionate and those that are categorically barred.” Bassett, 198 Wash. App. at 732-734. Categorical analysis requires a review of both objective standards expressed through legislative enactments, as well as state practice to determine whether there is a national consensus and exercise of independent judgment. Id. at 732. This court further recognized, “Article I, Section 14 of the state constitution like the *Eighth Amendment*, proscribes disproportionate sentencing *in addition to certain modes of punishment.*” Id. at 733, quoting, State v. Manussier, 129 Wash.2d 652, 676, 921 P.2d 473 (1996).

This Court determined the categorical approach in Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L.Ed.2nd 825 (2010), was appropriate because the challenge to life sentences “implicates a sentencing practice as it applies to an entire class of juvenile offenders.” Bassett, 198 Wash. App. at 734. Using this standard, this Court held that to the extent the *Miller*-fix statute imposed a sentence of life without parole or early release against juvenile offenders “it fails the constitutional categorical bar analysis.” Id. at 744. “Therefore, a life without parole or early release sentence is unconstitutional under Article I, Section 14 of our state constitution.” Id.

On March 16, 2017, a little more than one month prior to the ruling of this Court’s in Bassett, Mr. Stevenson was resentenced under RCW 10.95.030(3)(a)(ii) to life in prison with no opportunity for parole or early release. RP 35; CP 255. Mr. Stevenson’s life sentence imposed by the trial court is unconstitutional and must be reversed. See, Id. at 744. This matter must be remanded to the trial court level for resentencing in accordance with the ruling set forth in Bassett. Id.

B. Mr. Stevenson’s Offenses Were Found To Be The Same Criminal Conduct and Were Treated as One Crime. Therefore, Resentencing Should Apply to All Offenses.

On June 12, 1987, the Trial Court entered “Judgment and Sentence” for Mr. Stevenson. CP 190. At the time of Mr. Stevenson’s initial sentence, the mandatory sentence for aggravated murder was life in prison without parole, regardless of the offender’s age. State v. Bassett, 198 Wash. App. 714, 726, 394 P.3d 430 (Div. II, 2017). The trial court determined that all offenses (two counts of murder in the first degree and one count of aggravated murder in the first degree) encompassed the same criminal conduct and counted as one crime. CP 190. Despite this finding by the Trial Court, it sentenced Mr. Stevenson to two 320-month sentences for the two counts of murder in the first degree to run concurrent with each other, and consecutive to sentence of life in prison without parole for the aggravated murder in the first degree. CP 190. The Trial Court imposed a sentence on Mr. Stevenson that is longer than life without parole.

The language of the law in effect at the time of the initial sentence in 1987, RCW 9.94A.400, provided that offenses that encompass the same criminal conduct must run concurrently. RCW 9.94A.400(1)(a). The State, in its “Memorandum Regarding Setting of Minimum Term Under RCW 10.95.030” recognized the Trial Court’s decision to have the two 320-month sentences run consecutive to the life sentence violated the terms of RCW 9.94A.400(1) requiring these offenses to run concurrent.

CP 251. However, the State argued the Trial Court did not have the authority to revisit the two 320-month concurrent sentences because resentencing pursuant to RCW 10.95.035(4) did not reopen Mr. Stevenson's convictions to challenges barred by RCW 10.73.090; RCW 10.73.10; and RCW 10.73.140. CP 251.

RCW 10.95.35(4) states, "resentencing under this section shall not reopen the defendant's conviction to challenges that would otherwise be barred by RCW 10.73.090; 10.73.100, 10,73.140, or other procedural barriers." RCW 10.73.090 defines "collateral attack" and states that it includes but is not limited to, "a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw a guilty plea, a motion for a new trial, and a motion to arrest judgment." RCW 10.73.090(2). More importantly, RCW 10.73.100(6) specifically provides relief where:

There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in law lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100(6)(emphasis added).

There has been a substantial change in the law related to Mr. Stevenson's sentence. In response to the decision of the United States Supreme Court in Miller v. Alabama, 567 U.S. 406, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012), finding mandatory life sentences for individuals under 18 violates the Eighth Amendment's prohibition on cruel and unusual punishment, our legislature amended RCW 10.95.030 (*Miller*-fix statute) and also enacted RCW 10.95.035(1) to require persons under the age of 18 sentenced before June 1, 2014 to be resentenced consistent with RCW 10.95.030. Bassett, 198 Wash. App. at 726-727. Our legislature expressly stated the retroactive application of resentencing. RCW 10.95.035(1).

On June 12, 1987, at age 16, Mr. Stevenson was sentenced to two 320-month sentences to run consecutively to the life sentence without parole; Mr. Stevenson was given a sentence longer than life without release. CP 190. On March 16, 2017, Mr. Stevenson was resentenced in accordance with RCW 10.95.030(3)(a)(ii), and was once again given a sentence longer than life without parole by the trial court. RP 35; CP 255. The trial court determined it did not have the authority to consider and/or modify the two 320-month sentences set to run consecutive to Mr. Stevenson's life without parole sentence because it was barred by RCW 10.95.035(4). RP 35-36. However, RCW 10.73.100 clearly allows the

trial court to consider the consecutive sentences as a result of the substantial change in the law, direction of the legislature and retroactive application of resentencing to all juvenile offenders sentenced prior to June 1, 2014. RCW 10.73.100(6).

The United States Supreme Court determined imposing a mandatory sentence of life without parole on a person under the age of 18 is unconstitutional. Miller, 567 U.S. at 465; Bassett, 198 Wash. App. at 744. This Court went even further than the United States Supreme Court and did not limit its unconstitutional finding to mandatory sentences when it held:

that to the extent that a life without parole or early release sentence any be imposed against a juvenile offender under the Miller-fix statute, RCW 10.95.030(3)(a)(ii), it fails the constitutional categorical bar analysis. Therefore, a life without parole or early release sentence is unconstitutional under article I, section 14 of our state constitution.

Bassett, 198 Wash. App. 744. On March 16, 2017, the trial court did not have the benefit of the Bassett decision at the time of Mr. Stevenson's resentencing; however, it is clear the trial court's resentencing of Mr. Stevenson is unconstitutional. Id. at 744.

Because the initial sentence treated all offenses as one crime, it is necessary to treat Mr. Stevenson's sentence as one concurrent sentence. RCW 9.94A.400(1)(a). It would defeat the purpose of resentencing Mr.

Stevenson as directed by the legislature and in accordance with this Court's decision in Bassett to allow Mr. Stevenson to be sentenced longer than life in prison. Bassett, 198 Wash. App. at 744. Reading Bassett in conjunction with RCW 10.73.100, Mr. Stevenson's sentence should be reversed. Id. at 744; RCW 10.73.100(6). This matter should be remanded to the trial court with the direction to treat Mr. Stevenson's two 320-month sentences to run concurrent with a sentence less than life without parole or early release in accordance with Bassett. Id. at 744.

C. A New Judge Should be Assigned for Resentencing of Mr. Stevenson.

In order for Mr. Stevenson to receive a fair and impartial resentencing, a new judge must be assigned to conduct the resentencing. The appearance of fairness doctrine requires that a party receive a fair, impartial and neutral hearing. State v. Gamble, 168 Wash.2d 161, 187, 225 P.3d 973 (2010). "The law requires more than an impartial judge, it requires that the judge also appear to be impartial." State v. Solis-Diaz, 187 Wash.2d 535, 540, 387 P.3d 703 (2017). A party seeking a new judge has the burden to show a judge's actual or potential bias. Id.

A party may seek reassignment of a judge for the first time on appeal, however, this remedy is only available in limited circumstances. Solis-Diaz, 187 Wash.2d at 540. Reassignment is available where the trial

judge “will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue.” *Id.*, quoting, State v. McEnroe, 181 Wash.2d 375, 387, 333 P.3d 402 (2014). Reassignment is generally not a remedy on appeal if the appellate decision offers specific guidance and limits the trial judge’s ability to use its discretion. Solis-Diaz, 187 Wash.2d at 540. Mr. Stevenson is appealing the resentencing of the trial judge, which will require the trial judge to use discretion issue a sentence.

Mr. Stevenson committed these crimes in a small community, and it was clear in the trial court’s ruling that these acts had an effect on the judge’s decision. RP 34. The trial court stated:

Mr. Stevenson your actions back on New Year’s Eve – New Year’s Day – 1987 rocked the community. The brutal and heinous, cold-blooded and calculated execution of your three family members shattered the innocence of a whole community.

When you made the conscious decision to shoot and kill your mother and stepfather and when you made the conscious decision to shoot and kill and then rape your sister, you showed this community what the face of pure evil looks like.

The savage murder and rape of your sister are not the acts of an unfortunate offender exhibiting transient immaturity. Those are the acts of an irreparably corrupt young man.

RP 34-35. These statements made by the trial judge show the inability to be impartial, that the judge expressed an opinion on the merits, and

prejudged the issue such that an impartial hearing cannot be had by Mr. Stevenson. Therefore, a new judge should be reassigned to Mr. Stevenson's resentencing upon reversal and remand by this Court.

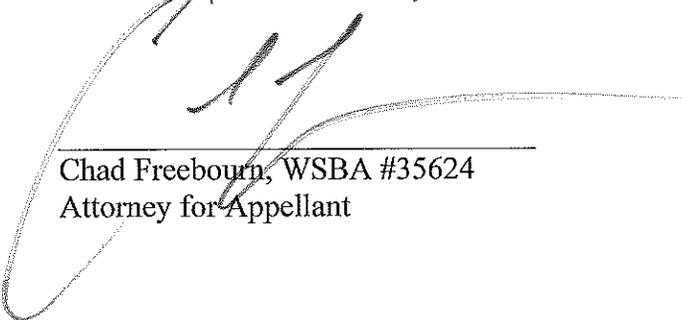
V. **CONCLUSION**

Mr. Stevenson's sentence of more than life in prison without the possibility of parole or early release is unconstitutional, and as a matter of law must be reversed. Mr. Stevenson's offenses were treated as one crime by the trial court, and as such all sentences must run concurrent. This matter should be remanded for resentencing of Mr. Stevenson as on concurrent sentence in accordance with the ruling set forth in State v. Bassett, 198 Wash. App. 714, 726, 394 P.3d 430 (Div. II, 2017).

Finally, this matter should be reassigned to a new trial judge for the resentence upon remand to ensure a fair and impartial judicial proceeding.

RESPECTFULLY SUBMITTED this 8th day of September, 2017.

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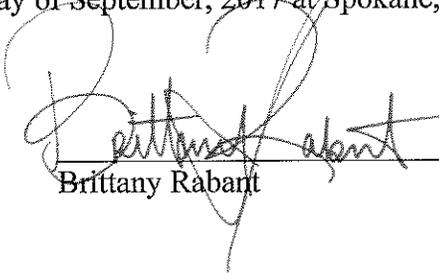
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