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Division II
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NO. 50126-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SEAN ALLEN STEVENSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA COUNTY

HONORABLE JUDGE RANDALL C. KROG

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES PRESENTED.....2

III. STATEMENT OF THE CASE.....3

IV. ARGUMENT.....4

A. Because this Court and the State Supreme Court have now held that sentences of life without parole violate the State Constitution for offenders who were under the age of 18 at the time of the crime, Stevenson's sentence of life without parole on his conviction for aggravated murder in the first degree should be reversed and the case remanded back to the Skamania County Superior Court for re-sentencing on that one count.....4

B. Stevenson's sentences of 320 months on each of two additional counts of murder in the first degree, and their imposition concurrent to each other but consecutive to his sentence on aggravated murder in the first degree, should not be disturbed.....5

1. Stevenson's attempt to re-open his sentences of 320 months on each of two counts of murder in the first degree, and their imposition concurrent to each other but consecutive to his sentence for aggravated murder in the first degree, is procedurally barred.....6

2. Assuming *arguendo* that Stevenson *does* properly raise his sentences for his two additional crimes of murder in the first degree and their imposition consecutive to his sentence for aggravated murder in the first degree, this Court should nevertheless uphold the original trial judge's imposition of a consecutive sentence on substantive grounds.....9

C. This Court should deny Stevenson's request to disqualify the current Skamania County Superior Court judge upon remand for re-sentencing.....14

1. Nothing in the record supports a finding that the Skamania County Superior Court judge cannot be impartial.....14

2. Disqualification by this court of the Skamania County Superior Court judge is in any case improper because the judge will not be able to exercise discretion on remand concerning the issues raised in this appeal.....15

V. CONCLUSION.....19

TABLE OF AUTHORITIES

Table of Cases

WASHINGTON CASES

Page

In re Breedlove,
138 Wn.2d 298, 311, 979 P.2d 417 (1999).....13

Matter of St. Pierre,
118 Wn.2d 321, 326, 823 P.2d 492 (1992).....12

State v. Bassett,
198 Wn. App. 714, 394 P.3d 430 (2017),
affirmed,
428 P.3d 343 (Wash. 2018).....1, 5, 17

State v. Bassett,
394 P.3d 430 (2017)(unpublished section),
affirmed on other grounds,
428 P.3d 343 (Wash. 2018).....18-19

State v. Bassett,
428 P.3d 343 (Wash. 2018).....5-6

State v. Dunaway,
109 Wn.2d 207, 215-216, 743 P.2d 1237 (1987),
modified on other grounds,
109 Wn.2d 207, 749 P.2d 160 (1988).....11-12

State v. Edwards,
45 Wn. App. 378, 380-382, 725 P.2d 442 (1986)).....11

State v. Evans,
154 Wn.2d 438, 443-449, 114 P.3d 627 (2005).....13

State v. French,
157 Wn.2d 593, 611-612, 141 P.3d 54 (2006).....7-8

State v. McEnroe,
181 Wn.2d 375, 387, 333 P.3d 402 (2014).....16, 18

State v. Solis-Diaz,
187 Wn.2d 535, 539, 387 P.3d 703 (2017).....14-18

FEDERAL CASES

Blakely v. Washington,
542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004).....13

Graham v. Florida,
560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).....15

Griffith v. Kentucky,
479 U.S. 314, 328, 107 S. Ct. 708, 716, 93 L.Ed.2d 649 (1987)...12

Miller v. Alabama,
567 U.S. 460, 465, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).....
.....3-4, 15, 17

Roper v. Simmons,
543 U.S. 551, 573, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).....15

Rules, Statutes, and Regulations

Washington State

Laws of 1987, ch. 456, § 5, p. 1980.....11

RCW 9.94A.030(21)(1986 Supp.).....10

RCW 9.94A.120(1986 Supp.).....10

RCW 9.94A.120(3)(1986 Supp.).....13

RCW 9.94A.330(1985 Ed.).....10

RCW 9.94A.400(1)(a)(1986 Supp.).....10-11, 13

RCW 9.94A.400(1)(b)(1986 Supp.).....10, 13

RCW 10.73.100(6).....8-9

RCW 10.95.030 (1985 Ed.).....3

RCW 10.95.030(3)(a)(ii).....1, 4

RCW 10.95.030(3)(b).....4, 15, 17

RCW 10.95.035(1).....3, 5-6

RCW 10.95.035(4).....4, 6, 18

Treatises

D. Boerner, Sentencing in Washington § 5.8(a) (1985).....11-12

I. INTRODUCTION

The appellant, Sean Allen Stevenson, appeals re-imposition under RCW 10.95.030(3)(a)(ii) of his sentence to life without the possibility of parole for aggravated murder in the first degree, committed when he was 16 years old. Because this court and the State Supreme Court have now held that such sentences are unconstitutional for juvenile offenders, *State v. Bassett,* 198 Wn. App. 714, 394 P.3d 430 (2017), *affirmed*, 428 P.3d 343 (Wash. 2018), the State concedes that the case should be remanded back to the trial court for re-sentencing on that crime.

However, this Court should reject Stevenson's invitation to reconsider the original trial judge's consecutive imposition of 320 months for two additional counts of murder in the first degree because that issue is not properly before this court and because the original trial judge did not substantively err in imposing a consecutive sentence. This Court should also deny Stevenson's request that the matter be assigned to a different trial court because there is no evidence that the Skamania County Superior Court judge cannot be impartial concerning Stevenson's case and because the judge will not be in a position where he will be asked to exercise discretion concerning the issues raised in this appeal.

II. ISSUES PRESENTED

A. Should Stevenson's sentence of life without parole for count III (aggravated murder in the first degree) be reversed and the case remanded to Skamania County Superior Court for re-sentencing on that count because he was under 18 years of age at the time of the crime?

B. At the same time as his conviction for aggravated murder in the first degree, Stevenson was also convicted of two additional counts of murder in the first degree and sentenced to 320 months on each, concurrent to each other but consecutive to his sentence on aggravated murder in the first degree:

1. Does Stevenson properly seek to re-open his sentences of 320 months for each of two counts of murder in the first degree?

2. Assuming *arguendo* that these sentences may properly be raised at this time, did the original trial judge substantively err when imposing them consecutive to Stevenson's sentence on aggravated murder in the first degree?

C. Stevenson is asking this Court to disqualify the current Skamania County Superior Court judge upon remand for another re-sentencing, arguing that he cannot be impartial.

1. Is there anything in the record that would support a finding that the Skamania County Superior Court judge cannot be impartial in Stevenson's case?

2. Do any substantive issues raised in this appeal justify disqualification of the Skamania County Superior Court judge by this court?

III. STATEMENT OF THE CASE

On May 3, 1987, the appellant, Sean Allen Stevenson, was found guilty by jury of two counts of murder in the first degree and one count of aggravated murder in the first degree for the murders of his mother and his step-father and the murder and rape of his sister. CP 155-157, RP 1. Stevenson was 16 years old at the time but was tried as an adult upon the recommendation of the Juvenile Department. RP 1.

On June 12, 1987, the Skamania County Superior Court sentenced Stevenson to 320 months for each count of murder in the first degree, concurrent to each other but consecutive to a sentence of life without parole for the count of aggravated murder in the first degree. CP 190, RP 1-2. At the time, barring the death penalty, life without parole was the only available sentence for aggravated murder in the first degree. RCW 10.95.030 (1985 Ed.).

On January 23, 2017, Stevenson filed a motion for re-sentencing under RCW 10.95.035(1), which requires re-sentencing of anyone sentenced prior to June 1, 2014 to life without parole for a crime committed prior to the age of 18.CP 245. The Washington State Legislature passed this law in response to the United States Supreme Court's holding that "*mandatory* life without parole for

those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments,'" *Miller v. Alabama*, 567 U.S. 460, 465, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (emphasis added).

On March 16, 2017, the Skamania County Superior Court, after considering all mitigating factors, including those specifically listed in RCW 10.95.030(3)(b), re-sentenced Stevenson to life without parole on his conviction for aggravated murder in the first degree, RP 29-35, CP 255, as permitted at the time for anyone who was 16 or 17 years of age at the time of the crime, RCW 10.95.030(3)(a)(ii). The Court further ruled that it was barred under RCW 10.95.035(4) from reviewing the imposition of 320 month sentences for two additional counts of murder in the first degree consecutive to Stevenson's sentence for aggravated murder in the first degree. RP 35-36, CP 255. This appeal follows. CP 257.

IV. ARGUMENT

A. Because this Court and the State Supreme Court have now held that sentences of life without parole violate the State Constitution for offenders who were under the age of 18 at the time of the crime, Stevenson's sentence of life without parole on his conviction for aggravated murder in the first degree should be reversed and the case remanded back to the Skamania County Superior Court for re-sentencing on that one count.

Just over a month after Stevenson was re-sentenced to life without parole on his conviction for aggravated murder in the first degree, this Court held that this sentence is unconstitutional under the State Constitution. *State v. Bassett,* 198 Wn. App. 714, 744, 394 P.3d 430 (2017), *affirmed*, 428 P.3d 343 (Wash. 2018). In October 2018, the State Supreme Court affirmed. *State v. Bassett*, 428 P.3d 343 (Wash. 2018). For this reason, the State concedes that Stevenson's sentence of life without parole on his conviction for aggravated murder in the first degree should be reversed and the case remanded to the Skamania County Superior Court for re-sentencing on the one count of aggravated murder in the first degree.

B. Stevenson's sentences of 320 months on each of two additional counts of murder in the first degree, and their imposition concurrent to each other but consecutive to his sentence on aggravated murder in the first degree, should not be disturbed.

Stevenson argues that in addition to reversing his sentence of life without parole for aggravated murder in the first degree, as required under RCW 10.95.035(1) and *State v. Bassett*, 428 P.3d 343 (Wash. 2018), this Court should also direct the Skamania County Superior Court to reverse the original trial judge's decision to run his two 320-month sentences on each of two additional

counts of murder in the first degree concurrent to each other but consecutive to his sentence on aggravated murder in the first degree. Brief of Appellant at 6-11.

Because this issue is not properly raised at this time, this Court should decline Stevenson's invitation to re-address his sentences beyond the requirement of RCW 10.95.035(1). Furthermore, assuming *arguendo* that this additional sentencing issue *is* properly raised at this time, this Court should uphold the original trial judge's imposition of a consecutive sentence on substantive grounds.

1. Stevenson's attempt to re-open his sentences of 320 months on each of two counts of murder in the first degree, and their imposition concurrent to each other but consecutive to his sentence for aggravated murder in the first degree, is procedurally barred.

As conceded above, Stevenson is entitled under RCW 10.95.035(1) and *State v. Bassett*, 428 P.3d 343 (Wash. 2018) to be re-sentenced on his conviction for aggravated murder in the first degree. However, as held by the trial court, RP 35-36, CP 255, such a re-sentencing does "not reopen the . . . challenges that would otherwise be barred by RCW 10.73.090, 10.73.100, 10.73.140, or other procedural barriers." RCW 10.95.035(4). He is therefore barred from raising other sentencing issues, including the imposition of two 320-month sentences on

each of two additional counts of murder in the first degree concurrent to each other but consecutive to his sentence on aggravated murder in the first degree.

Stevenson first attempts to get around this procedural bar by arguing that because his "[o]ffenses [w]ere [f]ound [t]o [b]e [t]he [s]ame [c]riminal [c]onduct and [w]ere [t]reated as [o]ne [c]rime, . . . [r]esentencing [s]hould [a]pply to [a]ll [o]ffenses." Brief of Appellant at 6. However, while it is true that the original trial court found all three of Stevenson's offenses to "encompass[] the same criminal conduct," it only found that they would "count[] as one crime *in determining the offender score*" under RCW 9.94A (Sentencing Reform Act (SRA)). CP 190 (emphasis added). This finding does *not* mean that all counts are considered to be as one crime *in general.*

For instance, the State Supreme Court has held that

> [a] double jeopardy violation claim is distinct from a "same criminal conduct" claim and requires a separate analysis. The double jeopardy violation focuses on the allowable unit of prosecution and involves the charging and trial stages. The "same criminal conduct" claim involves the sentencing phase and focuses instead on the defendant's criminal intent, whether the crimes were committed at the same time and at the same place, and whether they involved the same victim. [citation omitted]

State v. French, 157 Wn.2d 593, 611-612, 141 P.3d 54 (2006). Similarly, the fact that the original trial court here made a finding of "same criminal conduct" such that Stevenson's three crimes would count as one crime in the context of RCW 9.94A (Sentencing Reform Act (SRA)) does *not* allow him to import that finding onto the completely distinct issue of re-sentencing under the procedural rules of RCW Chapter 10.

Stevenson goes on to argue that he is entitled to raise this distinct sentencing issue because "[t]here has been a significant change in the law," RCW 10.73.100(6). Brief of Appellant at 8. But the alleged change is the prohibition on sentences of life without parole for offenders who were under the age of 18 at the time of the offense. *Id.* at 9-11.

However, the State has already conceded that Stevenson must be re-sentenced on the count of aggravated murder in the first degree because he was sentenced to life without parole for a crime committed when he was under the age of 18. The issue of his sentences for the two additional counts of murder in the first degree and their imposition consecutive to his sentence for aggravated murder in the first degree is a wholly separate issue about which

there has *not* been "a significant change in the law," RCW 10.73.100(6).

Finally, Stevenson argues that he is entitled to raise the issue of imposition of his sentences for the two additional counts of murder in the first degree consecutive to his sentence for aggravated murder in the first degree because the result is "a sentence longer than life without parole." Brief of Appellant at 9. However, since the State has conceded that he may not be sentenced to life without parole for his crime of aggravated murder in the first degree, a consecutive sentence will *not* result in a sentence longer than life without parole.

For these reasons, Stevenson is procedurally barred from re-opening his sentences for his two additional crimes of murder in the first degree and their imposition consecutive to his sentence for aggravated murder in the first degree.

2. Assuming *arguendo* that Stevenson *does* properly raise his sentences for his two additional crimes of murder in the first degree and their imposition consecutive to his sentence for aggravated murder in the first degree, this Court should nevertheless uphold the original trial judge's imposition of a consecutive sentence on substantive grounds.

Assuming *arguendo* that Stevenson *does* properly raise his sentences for his two additional crimes of murder in the first degree

and their imposition consecutive to his sentence for aggravated murder in the first degree, the Court must then look at the sentencing statute in effect at the time of the crime.

Murder in the First Degree is a "[s]erious [v]iolent" offense. RCW 9.94A.330 (1985 Ed.), RCW 9.94A.030(21) (1986 Supp.). "Whenever a person is convicted of three or more serious violent offenses, . . . arising from separate and distinct criminal conduct, . . . sentences imposed . . . shall be served consecutively to each other . . . ." RCW 9.94A.400(1)(b)(1986 Supp.).

However, "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct . . . [s]entences imposed . . . shall be served concurrently." RCW 9.94A.400(1)(a)(1986 Supp.). As previously noted, the original trial court judge made such a finding in this case but nevertheless ran the two sentences for murder in the first degree consecutive to the sentence for aggravated murder in the first degree, CP 190, presumably under the provisions for exceptional sentences of RCW 9.94A.120 (1986 Supp.), RP 24.

At the time of Stevenson's initial sentencing, the term "same criminal conduct" was not defined by statute. Effective July 26, 1987 (i.e., about six weeks after Stevenson was initially sentenced),

RCW 9.94A.400(1)(a) was amended to define "same criminal conduct" to "'mean[] two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.'" *State v. Dunaway*, 109 Wn.2d 207, 215-216, 743 P.2d 1237 (1987), *modified on other grounds*, 109 Wn.2d 207, 749 P.2d 160 (1988) (quoting Laws of 1987, ch. 456, § 5, p. 1980).

While the State Supreme Court declined to apply the 1987 amendment definitional amendment retroactively, *Id.* at 216, it nevertheless independently held as a matter of law that "[c]onvictions of crimes involving multiple victims must be treated separately." *Id.* at 215 (overruling *State v. Edwards*, 45 Wn. App. 378, 380-382, 725 P.2d 442 (1986)). "To hold otherwise," the Supreme Court continued,

> would ignore two of the purposes expressed in the SRA: ensuring that punishment is proportionate to the seriousness of the offense, and protecting the public. [citation omitted] As one commentator has noted, "to victimize more than one person clearly constitutes more serious conduct" and, therefore, such crimes should be treated separately. [citation omitted] Additionally, treating such crimes separately, thereby lengthening the term of incarceration, will better protect the public by increasing the deterrence of the commission of these crimes. For these reasons, we conclude that crimes involving multiple victims must be treated separately.

Dunaway, 109 Wn.2d at 215 (quoting D. Boerner, Sentencing in Washington § 5.8(a) at 5-18 (1985)). It should be emphasized that all crimes at issue in *Dunaway* occurred *prior* to July 26, 1987, the effective date of the statutory definitional amendment. *Id.* at 210-211.

Also, *Dunaway* was decided on October 8, 1987, at a time when Stevenson's case had not yet been finalized, as shown by the subsequent filing of the Verbatim Report of Proceedings on December 23, 1987, CP 221. Thus, *Dunaway* would have applied to Stevenson's case upon direct appeal. *See Matter of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992)(quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 716, 93 L.Ed.2d 649 (1987))("'A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from the past.'")

Thus, although the initial sentencing judge's finding of "same criminal conduct" for all three of Stevenson's murders does call for concurrent sentences, *that finding was erroneous as a matter of law* since they involved three separate victims, RP 1, requiring *all*

three sentences to be run consecutively under RCW 9.94A.400(1)(b)(1986 Supp.).

It should also be noted that at the time of original sentencing, the trial court judge had discretion to impose a consecutive sentence as an exceptional sentence under RCW 9.94A.400(1)(a) (1986 Supp.) ("Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.120 and 9.94A.390(2)(e) or any other provision of RCW 9.94A.390.") Although many years later, the United States Supreme Court would rule that such sentences require a jury finding or an admission, *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), the State Supreme Court has ruled that *Blakely* is not retroactive on collateral attack, *State v. Evans*, 154 Wn.2d 438, 443-449, 114 P.3d 627 (2005).[1]

Thus, in addition to being barred procedurally from addressing the imposition of his sentences for murder in the first degree

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[1] At the March 16, 2017 re-sentencing hearing, Stevenson also argued that an exceptional sentence was barred because no written Findings of Fact and Conclusions of Law had been entered at the original June 12, 1987 sentencing, RP 24, as required under RCW 9.94A.120(3)(1986 Supp.). However, the remedy for failure to enter such written findings and conclusions is typically remand for entry, not vacation of the sentence. *In re Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999)("The failure to enter findings does not justify vacation of the sentence in a personal restraint proceeding unless it is a fundamental defect which results in a complete miscarriage of justice.")

consecutive to his sentence for aggravated murder in the first degree, Stevenson is also wrong substantively. To be sure, the State is not seeking after thirty years to have all three of his sentences run consecutively, but the substantive law does not support Stevenson's argument that they should all be run concurrently.

C. This Court should deny Stevenson's request to disqualify the current Skamania County Superior Court judge upon remand for re-sentencing.

"[A] criminal defendant has the right to be tried and sentenced by an impartial court." *State v. Solis-Diaz*, 187 Wn.2d 535, 539, 387 P.3d 703 (2017). "The law requires more than an impartial judge; it requires that the judge also appear to be impartial. [citation omitted] The party asserting a violation of the appearance of fairness must show a judge's actual or potential bias." *Id.* at 540.

Stevenson argues that "[i]n order for [him] to receive a fair and impartial resentencing, a new judge must be assigned to conduct the resentencing." Brief of Appellant at 11. Stevenson's request should be denied.

1. Nothing in the record supports a finding that the Skamania County Superior Court judge cannot be impartial.

Stevenson alleges that the judge's closing remarks upon pronouncing sentence "show the inability to be impartial." Brief of Appellant at 12. But the judge's closing remarks do not evidence any bias or impartiality; they merely summarize the heinous nature of Stevenson's crimes in support of the judge's sentencing decision.

In fact, the judge's comment that Stevenson's "savage murder and rape of [his] sister are not the acts of an unfortunate offender exhibiting transient immaturity" but "the acts of an irreparably corrupt young man," RP 35, is a direct reference to language contained in *Miller*, 567 U.S. at 479-480 (quoting *Roper v. Simmons*, 543 U.S. 551, 573, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)), as required under RCW 10.95.030(3)(b).

2. Disqualification by this court of the Skamania County Superior Court judge is in any case improper because the judge will not be able to exercise discretion on remand concerning the issues raised in this appeal.

"Generally, a party seeking a new judge files a motion for recusal in the trial court, which allows the challenged judge to evaluate the grounds for recusal and permits the parties to develop a record adequate to determine whether the judge's impartiality

might reasonably be questioned." *Solis-Diaz*, 187 Wn.2d at 540. On the other hand, "reassignment for the first time on appeal . . . is usually done 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 Wn.2d 375, 387, 333 P.3d 402 (2014)(footnotes omitted)).

For instance, in *Solis-Diaz*, the State Supreme Court reviewed a Court of Appeals decision holding that the trial court judge had "erred in not considering an exceptional sentence below the standard range on the basis of Solis-Diaz's youth and to mitigate the consecutive sentences required under the multiple offense policy." *Id.* at 539. Thus, The Court of Appeals had "directed the trial court on resentencing to conduct a meaningful, individualized inquiry into whether either factor should mitigate Solis-Diaz's sentence in light of recent case law." *Id.* However, the Court of Appeals had "declined Solis-Diaz's request to disqualify [the][j]udge . . . from presiding over resentencing, noting that he could move to disqualify the judge on remand." *Id.*

Upon review, the State Supreme Court ruled that the Court of Appeals should also have disqualified the trial court judge because he had already expressed "frustration and unhappiness at the Court of Appeals requiring him to address anew [at a previous re-sentencing pursuant to a personal restrain petition] whether Solis-Diaz should be considered for an exceptional downward sentence on the basis of his age or the multiple offense policy." *Id.* at 541. The record thus "suggest[ed] he ha[d] already reached a firm conclusion about the propriety of a mitigated sentence . . . and may not be amenable to considering mitigating evidence with an open mind." *Id.* "These are precisely circumstances that justify remand of the matter to another judge," the Supreme Court concluded. *Id.*

Here, Stevenson asserts "that the judge expressed an opinion as to the merits, and prejudged the issue." Brief of Appellant at 12-13. In the context of this appeal, that allegation is unfounded. With respect to imposing life without parole for aggravated murder in the first degree, because re-sentencing was conducted before *Bassett* had been decided, the judge acted within his proper discretion, using the appropriate legal analysis under RCW 10.95.030(3)(b) and *Miller.* RP 29-35, CP 255. On the consecutive versus concurrent sentence issue, the judge simply ruled that he was

barred under RCW 10.95.035(4) from reviewing that issue. RP 35-36, CP 255. Even if this Court should hold that the judge erred, "[e]rroneous rulings generally are properly grounds for appeal, not for recusal." *Solis-Diaz*, 187 Wn.2d at 540.

But what is most critical is that, unlike in *Solis-Diaz*, the judge is *not* in a position where he "'will exercise discretion on remand regarding the very issue that triggered the appeal,'" *Id.* at 540 (quoting *McEnroe*, 181 Wn.2d at 387 (footnotes omitted)).

The State has conceded that Stevenson's sentence of life without parole for aggravated murder in the first degree must be reversed, and this Court is poised to rule one way or the other whether Stevenson's sentences on the two additional counts of murder in the first degree must remain consecutive to his sentence for aggravated murder in the first degree or must be run concurrent to his sentence for aggravated murder in the first degree. So this Court's opinion will "offer[] sufficient guidance to effectively limit trial court discretion on remand," *Id.* In this situation, "reassignment is generally not available as an appellate remedy," *Id.*

In fact, this case is analogous to this Court's decision in *Bassett* itself, in an unpublished portion of which this Court denied the appellant's request for disqualification of the trial court judge, noting

> that when the court resentenced Bassett, it expressly acknowledged its duty to balance the *Miller* factors and that it could not make a decision based solely upon the circumstances of the crime. The resentencing court's decision to impose life without parole or early release was a reasoned application of the *Miller* -fix statute and was supported by the record as discussed. Further, on remand, our opinion prevents the resentencing court from again imposing life without parole or early release.

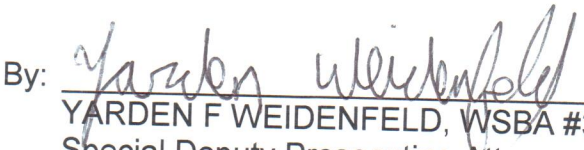
State v. Bassett, 394 P.3d 430 (Wash. App. 2017)(unpublished section), *affirmed on other grounds*, 428 P.3d 343 (Wash. 2018).

V. CONCLUSION

For the above reasons, this Court should reverse the imposition of life without parole and remand for re-sentencing on the one count of aggravated murder in the first degree, deny Stevenson's request to order that his sentences for two additional counts of murder in the first degree be run concurrently to his sentence for aggravated murder in the first degree, and deny Stevenson's request to assign a new trial court judge for re-sentencing.

DATED this 2nd day of April, 2019

RESPECTFULLY submitted,

By: 

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