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In the
Court of Appeals for the State of Washington
Division Two

In Re the Personal Restraint of:

LA'JUANTA L. CONNER,

Petitioner.

**REPLY BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

Kitsap County Superior Court No. 11-1-00435-8

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I. ARGUMENTS AND AUTHORITY

A. Mr. Conner's Petition is Timely.

The State incorrectly argues that Petitioner La'Juanta Conner's ("Mr. Conner[']s") petition is untimely, as the final mandate did not issue until July 17, 2017, and the petition was filed on July 17, 2018, within the one-year time limit. See Attach. E¹ (superior court docket showing the mandate being issued on July 17, 2017). In arguing to the contrary, the State mistakenly relies on the July 12, 2017 date appearing in the text of the mandate, rather than the controlling July 17, 2017 date on which the mandate was *issued*. Because the date of issue controls, Mr. Conner's petition is timely.

RCW 10.73.090 provides that a judgment becomes final on the last of the following dates:

- (a) The date it is filed with the clerk of the trial court;
- (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction;
or
- (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal...

¹ All references to attachments refer to the Appendix attached to Mr. Conner's Petition.

RCW 10.73.090. The relevant subsection with respect to this case is “[t]he date that an appellate court *issues* its mandate ...” In this case, the last date on which a mandate was issued was July 17, 2017, when the mandate was filed in the superior court. See Rizzuti v. Basin Travel Serv., 125 Wash. App. 602, 612, 105 P.3d 1012, 1017 (2005) (defining “issue” as “to appear or become available through being officially put forth or distributed,” or or “to cause to appear or become available by officially putting forth or distributing or granting or proclaiming or promulgating.”)

In this case, the mandate was “officially put forth or distributed,” went forth by authority, and became available by officially putting forth or distributing, on July 17, 2017, when the appellate mandate was e-filed in the Kitsap County Superior Court and copied to Mr. Conner’s attorney and the attorney for the State in this matter. Attach. E.

Even if the mandate is also deemed “issued” on July 12, the judgment does not become final on the second to last of the events listed in RCW 10.73.090, but rather “on the last of the [specified] dates.” RCW 10.73.090(3). The clear intent of this provision is to eliminate confusion and remove traps for the unwary. Thus, the last possible applicable date controls. In this case, that date is July 17, 2017, the “last” date upon which a mandate was “issue[d]” in Mr. Conner’s case. Therefore, Mr. Conner’s PRP was timely filed and this Court should consider it on the merits.

B. Mr. Conner’s Ineffective Assistance of Counsel Claim Relies on Newly Discovered Evidence and is therefore Timely.

Mr. Conner’s present claim of ineffective assistance of counsel relies on newly discovered evidence, specifically a new investigation that culminated in Mr. Longacre’s declaration. It is therefore timely under RCW 10.73.100(1), which provides that the one-year time bar does not apply in the case of “[n]ewly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion.” Nonetheless, the State contends this exception does not apply because the evidence does not meet the criteria set forth in In re Fero, 190 Wn.2d 1, 15, 409 P.3d 214, 222 (2018). The State’s argument is refuted by the record.

At the outset, the State relies on the assertion that Mr. Longacre’s declaration does not support Mr. Conner’s claims. In support of this argument, the State selects a few self-serving portions of the declaration, dismissing the remainder as “utterly unsubstantiated accusations regarding the integrity of the judge, the police, and the prosecutor’s office.” State’s Resp. at 8-9, n. 3.

The State misapprehends the evidentiary value of Mr. Longacre’s “utterly unsubstantiated accusations”, mistakenly believing they are offered for the truth of the matters asserted therein. They are not. Rather, as set forth in Mr. Conner’s opening brief, the “utterly unsubstantiated

accusations” support Mr. Conner’s petition because they demonstrate Mr. Longacre’s unreasonable state of mind, illustrating Mr. Longacre’s belief that he lost at trial due to improprieties by the prosecution, judge, and jurors, rather than due to the complete lack of a credible defense. These conspiracy theories lend considerable support to Mr. Conner’s assertion that Mr. Longacre failed to properly advise Mr. Conner that he lacked a credible defense and should accept the State’s offer, resulting in Mr. Conner receiving a more than 80 year “trial penalty” at sentencing.

The State’s reliance on Mr. Longacre’s other statements, tending to support the reasonableness of his performance as defense counsel, is misplaced because they are entirely self-serving and inconsistent with the conspiracy theories he advances in the very same declaration – it cannot both be true that Mr. Longacre believed Mr. Conner had little chance of prevailing at trial and that he lost at trial due to a combination of prosecutorial, judicial, and juror misconduct. Mr. Longacre’s misguided understanding of why Mr. Conner was convicted strongly corroborates Mr. Conner’s assertion that he was not properly advised regarding likely outcomes at trial and the concomitant necessity of accepting a plea deal.

Given that Mr. Longacre’s declaration constitutes new evidence material to Mr. Conner’s ineffective assistance claim, it necessarily follows that, had the newly discovered evidence of Mr. Longacre’s

ineffectiveness been available at trial, the outcome of the trial proceedings would have been entirely different – he would have accepted the State’s plea offer instead of proceeding to trial. See Attach. V, Affidavit of La’Juanta Conner.

The evidence was also discovered since trial. In support of its contrary argument, the State asserts “the alleged facts regarding the plea offer were known to Conner before trial”. State’s Resp. at 10. This argument misapprehends Mr. Conner’s current claim of ineffective assistance – Mr. Conner argues in his present petition that counsel gave improper advice regarding the risks of trial and comparative benefits of accepting a plea offer. He was unaware of the deficiency of the advice provided by trial counsel until well after trial. The current claim differs substantially and relies on different facts from Mr. Conner’s misguided *pro se* claim that the plea offer was not forwarded to him. Nothing in the *pro se* CrR 7.8 motion suggested that Mr. Longacre, basically as a matter of policy before he was disbarred, refused to advise clients to accept plea offers, even when the chances of prevailing at trial are nonexistent and the consequences of rejecting an offer are catastrophic, and that he followed this policy in advising, or failing to advise, Mr. Conner.

Element three of the Fero test is also met because Mr. Conner could not have discovered this new evidence earlier. Ineffective assistance

of counsel of this nature is self-concealing, as Mr. Conner was dependent upon the advice of his counsel without independent means of assessing its deficiency. In arguing to the contrary, the State again presumes, wrongly, that the basis for Mr. Conner's current claim of ineffective assistance is the same as that set forth in Mr. Conner's previous *pro se* CrR 7.8 motion.

This evidence is further material for the reasons set forth with respect to the first element – had this evidence been available prior to trial, Mr. Conner would have accepted the State's plea offer. As to the final factor, the evidence is not merely cumulative or impeaching. It is material evidence that would have had a dramatic impact on the trial outcome.

The current petition relies on entirely new evidence that was not available at the time of Mr. Conner's CrR 7.8 motion. Consequently, the RCW 10.73.100(1) exception to the one-year time bar applies and Mr. Conner's ineffective assistance claim should be considered on the merits.²

² Mr. Conner asserted in his Petition in the alternative that, if the claim is deemed untimely, trial and appellate counsel following remand were ineffective for failing to uncover this evidence of Mr. Longacre's deficient performance sooner. The State points out in response that this claim fails pursuant to the Court's holding that there is no right to counsel on collateral attacks. State's Resp. at 20-21. The State is correct on this point. Mr. Conner therefore withdraws this alternative argument, which, in any event, was not included in the "grounds for relief" portion of Mr. Conner's petition.

C. Mr. Conner was Prejudiced by Trial Counsel's Deficient Representation.

The State's argument that Mr. Conner was not prejudiced by trial counsel's deficient performance is again premised on a misapprehension of the nature of this Petition. The State argues "Conner [sic] first substantive claim is that trial counsel failed to adequately advise him about whether he should accept the State's plea offer. Conner previously raised this claim in his second PRP." State's Resp. at 17. As set forth above, this is untrue.

Mr. Conner's current claim for ineffective assistance of counsel is based on the affidavit of Mr. Longacre, which shows that Mr. Longacre did not try to persuade Mr. Conner to accept a plea offer, that he believed Mr. Conner had a credible defense, and that he believed Mr. Conner was only convicted because of improprieties by the prosecutor and judge and racial biases by the jury, despite no evidence supporting these accusations. It is also based on the record showing that Mr. Longacre did not attempt to negotiate a plea deal beyond the State's initial offer. It is not based on Mr. Conner's inaccurate prior *pro se* claim that Mr. Longacre never conveyed the State's offer.

The arguments raised in this Petition have not been previously raised, much less previously rejected by this Court as frivolous. See In re Taylor, 105 Wash. 2d 683, 687, 717 P.2d 755 (1986) (holding an issue

raised in a petition is only deemed repetitive when it constitutes “[t]he same ground” as an issue raised on appeal). To the extent there is doubt as to whether Mr. Conner’s present claim constitutes the “same ground” as that previously raised, that doubt is to be resolved in Mr. Conner’s favor. Id. at 688 (“Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant.”)

For the reasons set forth in Mr. Conner’s opening petition, he was greatly prejudiced by Mr. Longacre’s deficient performance. Had Mr. Longacre persuaded Mr. Conner to accept a plea, or attempted to negotiate a plea deal that Mr. Conner would accept, as any reasonable attorney would have done in this case, Mr. Conner would be serving no more than a decade in prison, rather than the *de facto* life sentence he is currently serving.

D. Mr. Conner’s Sentencing Arguments do not Require an RCW 10.73.100 Exception because they were Brought within One-Year of the Mandate.

The State asserts in its brief that Mr. Conner fails to explicitly assert why his sentencing arguments are timely, presuming Mr. Conner is seeking to avail himself of the RCW 10.73.100(6) exception to the time-bar based on changes in the law. State’s Resp. at 11-12. However, the reason Mr. Conner did not address an RCW 10.73.100 exception with

respect to his sentencing arguments is that no such argument was needed – as set forth above, his petition was timely filed within a year of the appellate mandate being issued following resentencing on remand.

Whereas the ineffective assistance claim requires an exception to the time-bar because it arose in the initial proceedings, Mr. Conner’s sentence was imposed on remand. Because this petition was filed within one year of the final issuance of the mandate following resentencing, no RCW 10.73.100 exception is needed.

E. The Resentencing Court Did Not “Meaningfully” Consider Mr. Conner’s Youth as a Mitigating Factor.

The State asserts “the trial court did consider whether a mitigated sentence was warranted under *O’Dell*”. State’s Resp. at 22 (citing State v. O’Dell, 183 Wn.2d 680, 693, 358 P.3d 359 (2015)). However, although the trial court mentioned O’Dell in resentencing Mr. Conner to a *de facto* life sentence for a series of crimes in which no one was seriously injured, the record shows it fundamentally misunderstood that decision and therefore failed to “meaningfully” apply its holding to Mr. Conner’s resentencing.

In arguing otherwise, the State quotes the court’s statements to the effect that Mr. Conner, six years after the crimes at issue, exhibited characteristics of maturity. State’s Resp. at 22-24. The State ignores the fact that, at the outset of its analysis, the resentencing court stated its

incorrect belief that the O'Dell decision dealt with, and applies only to, juvenile offenders, stating “[i]n O'Dell, it *was a juvenile*, an unsophisticated individual” being sentenced. RP 31 (emphasis added). This misstatement of the law stemmed from the State’s own misrepresentation of the facts of O'Dell, arguing incorrectly to the resentencing court that O'Dell did not apply because Mr. Conner was “of age” at the time of the offenses. RP 21.

By failing to recognize that it was permitted, and in fact required, to meaningfully consider youth as a mitigating factor even for young offenders over the age of 18, the trial court committed precisely the same error for which the trial court in O'Dell was reversed. O'Dell, 183 Wn.2d at 693 (reversing the trial court due to its incorrect belief that it was “absolutely prohibited [...] from considering whether youth diminished O'Dell's capacity to appreciate the wrongfulness of his conduct or conform that conduct to the requirements of the law”). Pursuant to O'Dell, the trial court’s incorrect belief that it could only consider youth as a mitigating factor when the defendant is a juvenile, alone, mandates reversal.

In arguing that the court nonetheless reached the proper result, despite its manifest misunderstanding of the applicable law, the State argues that (1) evidence of Mr. Conner’s positive actions and sense of responsibility towards the community and his children evidence

sophistication and maturity, and (2) “the circumstances of Conner’s crimes do not reflect youthful impulsivity.” State’s Resp. at 24. The State’s argument, like the resentencing court’s reasoning, reflects a misunderstanding of O’Dell and its scientific underpinnings.

First, Mr. Conner’s positive engagement with the community and his family supports, rather than undermines, a finding that youth played a role in Mr. Conner’s commission of the offenses. One of the three primary reasons the courts have begun to treat young offenders with greater leniency is the recognition that, due to the transitory nature of the characteristics of youth, young offenders have a greater potential for successful rehabilitation. Roper v. Simmons, 543 U.S. 551, 570, 125 S. Ct. 1183, 1195-96 (2005) (“From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.”); see also O’Dell, 183 Wn. 2d at 692-93 (extending Roper’s reasoning to young adults). Mr. Conner’s positive character traits show an underlying positive personality with significant potential for rehabilitation once the transitory effects of youth are outgrown. He exhibits precisely the redeemable characteristics upon which the Roper Court relied in striking down the death penalty for juveniles.

The State’s position misapprehends the qualities of youth that warrant leniency, namely, an underlying personality that can conform to the rules of society temporarily overshadowed by poor judgment while the processes of reductions in gray matter, shifts in the proliferation and redistribution of dopamine receptors, increases of white matter in the prefrontal regions, and increases in connections between the cortical and subcortical regions remain ongoing. Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?* 64 *Am. Psychologist* (Nov. 2009), at 742-43.³

Similarly, the State’s argument that youth was properly disregarded as a mitigating factor because the crimes “do not reflect youthful impulsivity” is a misapplication of O’Dell. As a preliminary matter, the existence of pre-planning does not preclude, or even militate against, a finding that youth played a role in the offense. In O’Dell, an 18-year-old defendant lured a 12-year-old girl into the woods with cigars and

³ See also MIT Young Adult Development Project: Brain Changes, Mass. Inst. of Tech., <http://hrweb.mit.edu/worklife/youngadult/brain.html> (last visited Aug. 4, 2015) (“The brain isn't fully mature at ... 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.”); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 *Ann. N.Y. Acad. Sci.* 77 (2004) (“[t]he dorsal lateral prefrontal cortex, important for controlling impulses, is among the latest brain regions to mature without reaching adult dimensions until the early 20s” (formatting omitted)).

alcohol and forcibly raped her. O'Dell, 183 Wn.2d at 683-84. Clearly, pre-planning was involved in the offense in the form of acquiring cigars and alcohol, establishing a relationship with the victim, and persuading her to go into the woods with him. This pre-planning, however, is not cited anywhere in the O'Dell opinion as a fact weighing against imposition of an exceptional sentence downward. Rather, the evidence referenced in O'Dell suggesting to the Court that youth played a role in the crime consisted simply of evidence that the defendant exhibited youthful characteristics around the time he committed the crime.

In Mr. Conner's case, his request for a downward sentence based on youth was supported by abundant evidence indicating that Mr. Conner had considerable potential for rehabilitation, including specific examples of positive community service activities in which he engaged, in addition to caring for his family members. See Attach. I, 07.27.2012 Sentencing VRP. On the other hand, Mr. Conner's poor judgment drew him into the local criminal subculture and led him to become involved in a series of property crimes against other members of that same subculture.

Involvement in this sort of criminal activity despite an underlying tendency towards positive social engagement establishes potential for rehabilitation and suggests that transitory characteristics of youth, rather than abiding character flaws, led to the crimes at issue. The resentencing

court failed to meaningfully consider this dynamic, wrongly interpreting O'Dell as applying only to juveniles, and wrongly believing that positive character traits undermine a request for a downward exceptional sentence despite the scientific underpinnings of Roper and its progeny establishing otherwise. These errors constitute a miscarriage of justice.

F. Mandatory Imposition of the Firearm Enhancements Violated Mr. Conner's Eighth Amendment Rights Pursuant to Houston-Sconiers.

The State argues Houston-Sconiers does not apply in Mr. Conner's case because its application is limited to juvenile offenders. State's Resp. at 25-28 (citing State v. Houston-Sconiers, 188 Wn.2d 1, 18, 391 P.3d 409 (2017)). In support of this argument, the State cites unpublished appellate decisions refusing to expand Houston-Sconiers' application to young adult offenders. *Id.* However, the combined impact of Washington's recent jurisprudence on youth sentencing cannot be reconciled with the State's argument for imposition of a bright line demarcation between those under and over the age of 18.

In Graham, the Court methodically set out the characteristics of youth and explained how, in light of these characteristics, the sentencing goals of retribution, deterrence, incapacitation, and rehabilitation are violated in the context of mandatory life without parole sentences for non-homicide crimes. Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L.

Ed. 2d 825 (2010). Miller then extended this reasoning to homicide offenses as well. Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455 (2012). In both Miller and Roper, the Supreme Court cited a study entitled “Less Guilty by Reason of Adolescence” in defense of the bright-line rule. Miller, 132 S. Ct. at 2464; Roper, 543 U.S. at 569, 570, 573. However, the study in fact lends no such support, providing instead that research findings are "unlikely to ever be sufficiently precise to draw a chronological age boundary" for acquiring fully developed reasoning and decision-making capabilities. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychol. 1009 (2003).

The developments in knowledge of the human brain underpinning the foregoing decisions do not support the notion that individuals are more culpable for their misconduct the day after their eighteenth birthdays versus the day before.⁴ Every reason provided in Roper, Graham, Miller,

⁴ See Brief for American Psychological Ass'n et al. as Amici Curiae Supporting Petitioners at 6 n.3, Graham, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621) ("Science cannot, of course, draw bright lines precisely demarcating the boundaries between childhood, adolescence, and adulthood."); see also Sara B. Johnson et al., Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy, 45 J. Adolescent Health 216, 218 (2009) ("Neuroimaging studies do not allow a chronologic cut-point for behavioral or cognitive maturity at either the individual or population level."); Greg Ridgeway &

and their progeny for striking down the sentencing schemes at issue applies with precisely equal weight to young offenders aged 18 years and older. This conclusion became the law in Washington in O'Dell.

The defendant in O'Dell, like Mr. Conner, was over 18 at the time of the offenses, and thus considered an “adult.” Id. at 683. Nonetheless, the Court held that because “we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18,” youth must be considered as a mitigating factor even in the case of defendants who are “adults.” Id. at 695. Thus, pursuant to science and Washington law, it has been established that the diminished culpability associated with youth persists after one’s 18th birthday.

The next issue concerns the implications of this recognition with respect to the rejection of mandatory firearm enhancement in Houston-Sconiers. In sum, the Washington Supreme Court has now held that:

- “sentencing juvenile offenders to life without parole or early release constitutes cruel punishment and, therefore, RCW 10.95.030(3)(a)(ii) is unconstitutional”, State v. Bassett, 192 Wash. 2d 67, 78, 428 P.3d 343, 348 (2018);

Robert L. Listenbee, Young Offenders: What Happens and What Should Happen, U.S. DEP'T OF JUST. (Feb. 2014), <https://www.ncjrs.gov/pdffiles1/nij/242653.pdf> (last visited Oct. 14, 2017) (“During adolescence and into the early 20s, increased maturation of the prefrontal cortex improves cognitive functioning and reasoning ability. The evidence from developmental neuroscience suggests that young adult offenders ages 18-24 are, in some ways, more similar to juveniles than to adults.”)

- the “mandatory nature” of the weapon enhancement statute is unconstitutional when applied to juveniles, Houston-Sconiers, 188 Wn.2d at 18;
- “courts must be allowed to consider youth as a mitigating factor when imposing a sentence on a[young] offender”, O'Dell, 183 Wn.2d at 696; *and*
- “we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18,” Id.

Given these principles, the unavoidable conclusion is that imposition of mandatory firearm enhancements on a young defendant, particularly where, as here, it results in a *de facto* life sentence, constitutes cruel punishment “even if that defendant is over the age of 18”. In light of O'Dell, and the science upon which Roper and its progeny are based, Houston-Sconiers' rejection of mandatory firearm enhancements on Eighth Amendment grounds cannot be limited to juveniles on any rational ground. Therefore, the resentencing court's mechanical imposition of 13 “mandatory” firearm enhancements without meaningful consideration of the mitigating factor of youth is every bit as unconstitutional in Mr. Conner's case as it was in Houston-Sconiers.

G. Mandatory Imposition of the Firearm Enhancements Violated Mr. Conner's Rights Under Washington's Constitution.

1. No Gunwall analysis is required with respect to Mr. Conner's State constitutional claim.

The State first argues Mr. Conner's claim under Washington's Constitution should not be considered because it did not include a

Gunwall analysis. State’s Resp. at 28 (citing State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)). However, “where this court has already determined in a particular context the appropriate state constitutional analysis under a provision of the Washington State Constitution, no *Gunwall* analysis is necessary.” State v. Reichenbach, 153 Wash. 2d 126, 131 n.1, 101 P.3d 80, 84 (2004). As stated in Mr. Conner’s opening brief, Washington’s Supreme Court has “repeated[ly], recogni[zed] that the Washington State Constitution’s cruel punishment clause often provides greater protection than the Eighth Amendment.” Bassett, 192 Wash. 2d at 78 (quoting State v. Roberts, 142 Wn.2d 471, 506, 14 P.3d 713 (2000)).

Moreover, in a decision entered following Mr. Conner’s opening Brief (which the State relies upon in ostensible support of its position), the Supreme Court recently upheld this principle in the specific context presented in Mr. Conner’s petition. See Bassett, 192 Wash. 2d at 78. In Bassett, the Court applied the Gunwall factors and concluded that each factor weighs in favor of concluding that Washington’s Constitution provides greater protections than its federal counterpart with respect to sentencing juvenile offenders. Bassett, 192 Wash. 2d at 80. In reaching this conclusion, the Court rejected the State’s argument that Washington’s “shameful” history of executing children demonstrated that Washington’s

Constitution was no more protective on this issue than its federal counterpart. Instead, the Court recognized “both statutory and case-based, recognize that children warrant special protections in sentencing.” Bassett, 192 Wash. 2d at 81. In reaching this conclusion, the Court cited O’Dell, thereby indicating use of the word “children” in this context includes young adult offenders. Id.

The State argues the decision in Bassett, and specifically the Gunwall analysis conducted therein, applies only with respect to juvenile offenders, necessitating a separate Gunwall analysis in the case of young adult offenders like Mr. Conner. However, as set forth hereinabove, pursuant to the scientific understanding of adolescent brain development and the decision in O’Dell, the State seeks to draw a distinction without a difference. Mr. Conner is entitled to greater protection under Washington’s Constitution for all of the reasons set forth in Bassett. Therefore, to the extent any further Gunwall analysis was required in Mr. Conner’s opening brief, Bassett obviates that requirement by addressing the precise circumstances presented here.

2. Mr. Conner is entitled to relief from his unconstitutionally cruel sentence under a categorical bar analysis.

The State is further incorrect in arguing for rejection of Mr. Conner’s claims under Washington’s Constitution on the merits, because under either a categorical bar analysis or a Fain analysis, imposition of 13

mandatory firearm enhancements without meaningful consideration of Mr. Conner's youth violated Article I, § 14. See State v. Fain, 94 Wn.2d 387, 397, 617 P.2d 720 (1980).

In Bassett, the defendant was sentenced to life in prison without parole for murdering his family at the age of 16. Bassett, 192 Wash. 2d 67. After conducting the Gunwall analysis, the Court applied a categorical bar analysis and determined that sentences of life imprisonment without parole are unconstitutional when applied to juvenile offenders, even when such sentence is not mandated. Id. In reaching this holding, the Court reasoned that (1) "the direction of change in this country is unmistakably and steadily moving toward abandoning the practice of putting child offenders in prison for their entire lives" and (2) the analysis in Graham (discussed above) illustrates that the penological goals of sentencing cannot justify imprisoning a juvenile for life without parole. Id.

Because we now know "that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18," this holding, along with Houston-Sconiers, necessarily applies to young offenders over the age of 18, particularly when mandatory sentencing regimes result in a *de facto* life sentence. Pursuant to Bassett, O'Dell and Houston-Sconiers, Mr. Conner's sentence violates the Eighth Amendment to the United

States Constitution and Article I, § 14 of Washington’s Constitution for failure to allow consideration of youth as a mitigating factor.

3. Mr. Conner’s Sentence also violates the Washington Constitution due to a lack of proportionality.

The holding in Bassett further supports Mr. Conner’s State constitutional claim under the Fain analysis. In Bassett, the Court proceeded to conduct a Fain proportionality analysis even though it already struck the relevant portion of the statute down under the categorical bar analysis. In evaluating proportionality, the Court noted with respect to the first two factors that “while aggravated murder warrants a serious punishment,” the legislative purpose behind the Miller-fix statute was to require sentencing courts to consider children's diminished culpability. Bassett, 192 Wash. 2d 67. Because this diminished culpability applies to offenders over 18 under O’Dell, the legislative purpose is furthered by extending protection to all young offenders with diminished culpability.

With respect to the third factor, the Court recognized that imposition of life sentences on juveniles was going out of favor in many jurisdictions across the country. Bassett, 192 Wash. 2d 67. Finally, with respect to the fourth factor, the Court found a great discrepancy between punishments meted out for offenses other than aggravated first degree murder because “If a juvenile is convicted of any other crime or

combination of crimes, he or she would be eligible for release after 20 years, unless he or she has committed a disqualifying infraction in the prior year.” Id.

The reasoning in Bassett applies to Mr. Conner’s case because, as explained above, the factors warranting leniency for juveniles persists into one’s twenties. Also, in light of Houston-Sconiers and Bassett, Mr. Conner’s sentence is now rendered dramatically disproportionate to sentences that may be imposed on offenders only three or four years younger for the same offense. Thus, Bassett provides further support for Mr. Conner’s argument that the proportionality analysis under Fain, 94 Wn.2d at 397, reveals a violation of Article I, § 14 in his case.

H. Mr. Conner has Shown Prejudice Resulting from his Counsel’s Deficient Performance at Sentencing on Remand.

The State argues Mr. Conner cannot establish prejudice from his counsel’s failure to present evidence in support of his request for an exceptional sentence on remand because the record is devoid of evidence suggesting Mr. Conner’s youth should have been taken into consideration as a mitigating factor. State’s Resp. at 32-34. This argument ignores the record on this petition, which, through the evidence presented at the initial sentencing hearing and Mr. Conner’s affidavit submitted in connection with this petition, provides abundant evidence suggesting youth played a role in his criminal activity. See Attach. I; V. At the initial sentencing,

multiple witnesses testified regarding Mr. Conner's positive character traits, which, as set forth above, constitutes evidence that transitory effects of youth, rather than abiding character flaws, motivated his criminal activity. Attach. I.

Additionally, Mr. Conner asserted in his affidavit that he was immature at the time of the crimes, that he has matured considerably in the interim, and that multiple witnesses, such as Joshua Pulley, Brittney Taylor, and Faith Henderson, could corroborate these assertions at a hearing. Attach. V. Given these circumstances, in the event the Court concludes the trial court did not err in failing to meaningfully consider Mr. Conner's youth as a mitigating factor, it follows that he was deprived effective assistance of counsel at resentencing due to counsel's failure to present an effective case for a downward exceptional sentence.

I. The Resentencing Court Abused its Discretion in Failing to Conduct a Same Criminal Conduct Analysis, and Mr. Conner was Prejudiced by this Abuse of Discretion.

It is clear that the Court abused its discretion in failing to recognize the existence of its discretion to conduct a same criminal conduct analysis, believing wrongly that this Court foreclosed the issue in its ruling. RP 15-16. The State effectively concedes this point, arguing instead that Mr. Conner was not prejudiced by the error. State's Resp. at 34-38

The State also concedes that the Court had discretion to merge burglary offenses with underlying thefts under the anti-merger statute. State's Resp. at 35-36. The State instead argues it would not have applied this discretion in Mr. Conner's favor. This is pure speculation. Upon properly recognizing the extent of its discretion, a reasonable sentencing court would likely have merged one or more offenses, particularly the burglary and theft offenses, given the similarity of the charged offenses and the over-charging by the State and draconian SRA standard range effectuated thereby. Accordingly, Mr. Conner is entitled to relief as a result of the resentencing court's abuse of discretion in failing to consider his same criminal conduct argument on the merits.

J. A Trial Court is Confined by the Appellate Order on Remand.

The State argues, without supporting authority, that the trial court on remand rightly disregarded this Court's instruction to resentence "on the remaining convictions and *twelve firearm enhancements*," instead imposing 13 firearm enhancements. Attach. D at 2, 30; Attach. J. Contrary to the State's argument, a trial court's discretion is constrained by the plain language of the appellate court's instructions on remand. See, e.g., State v. Wheeler, 183 Wash. 2d 71, 78, 349 P.3d 820, 823 (2015).

Therefore, pursuant to the plain language of the appellate decision, the

trial court in this case had no discretion to impose more than 12 firearm enhancement penalties on remand.

K. Appellate Counsel Following Remand was Ineffective Because Mr. Conner's Claims Have Merit.

Because the foregoing sentencing issues have merit and were not raised on appeal following resentencing, Mr. Conner was denied effective assistance of appellate counsel. See In re Brown, 143 Wn.2d 431, 452, 21 P.3d 687 (2001).

II. CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant the relief requested in Mr. Conner's Petition.

Respectfully submitted this 4th day of March, 2019.

LAW OFFICE OF COREY EVAN PARKER


Corey Evan Parker, WSBA #40006
Attorney for Petitioner, La'Juanta L. Conner

CERTIFICATE OF SERVICE

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on March 4, 2019, I caused to be served the document to which this is attached to the parties listed below in the manner shown below:

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- By First Class Mail
- By Fed Express
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- By Email

Corey Evan Parker
Corey Evan Parker

LAW OFFICE OF COREY EVAN PARKER

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