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NO. 52400-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

STACEY BRIANNA ALLEN,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kitty-Ann Van Doorninck

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. The trial court abused its discretion in denying a motion for mistrial based on untenable grounds and unreasonable reasons.

2. The trial court's denial of Ms. Allen's motion for mistrial denied her a fair trial.

3. The sentencing court violated the appellant's Eighth Amendment right to a full *Miller* hearing to consider the mitigating qualities of youth.

4. The sentencing court violated the appellant's Washington Constitution, article I, section 14 right to be protected against cruel punishment when it failed to conduct a full *Miller* hearing to consider the mitigating factors of youth before imposing a sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A trial court abuses its discretion when its evidentiary ruling is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Here, the trial court denied Ms. Allen's motion for mistrial for testimony concerning Ms. Allen's homosexuality, concluding there is no scientific evidence showing homosexuals are more likely to molest children and no one believes that homosexuals are more likely to molest children than

heterosexuals. Where some studies show homosexuals are more likely to molest and polling demonstrates that one in four Americans still believe homosexuals are more likely to molest children, was the court's ruling manifestly unreasonable, exercised on untenable grounds or for untenable reasons? (Assignment of Error 1).

2. A mistrial should be granted if there is a question as to whether a defendant can receive a fair trial. In the instant case, the court did not believe there was any prejudice when the complaining witness divulged that Ms. Allen was a lesbian. Was Ms. Allen denied a fair trial, when a juror on the panel had a 25% likelihood of believing homosexuals are far more likely to molest children than heterosexuals? (Assignment of Error 2).

3. When a juvenile is sentenced in adult court, under the Eighth Amendment and *Miller v. Alabama*, counsel must argue the mitigating qualities of youth and the sentencing court must consider the mitigating qualities of youth and then have the discretion to impose any sentence below the otherwise applicable SRA range. Here, the parties failed to argue the mitigating qualities of youth concerning Stacey Allen and without considering the mitigating qualities of youth, the court imposed a standard range sentence. Was Ms. Allen denied her constitutional right to have counsel argue

and the sentencing court consider the mitigating qualities of youth as applied to her? (Assignment of Error 3).

4. Article I, section 14 of the Washington Constitution protects a juvenile against cruel punishment and provides greater protection than the federal Eighth Amendment. Here, the court failed to conduct a full *Miller* hearing to consider Ms. Allen's mitigating qualities of youth before determining her sentence. Was Ms. Allen denied her State article I, section 14 constitutional right to a full *Miller* hearing before the adult sentencing court imposed her sentence? (Assignment of Error 4).

C. STATEMENT OF THE CASE.

1. Trial testimony. T.W. was borne on May 15, 2004. 2RP 145. She is the daughter of Candice Ervin and Tofik Abdullahi. 2RP 146. Her biological father is Terrance Williams. 2RP 147. Her aunt is Stacey Allen, Candice Ervin's sister. 2RP 155. Candice and Stacey's mother and father were June and Bill Allen. 2RP 156.

T.W. testified about four incidents that occurred long ago when she was five years old. 2RP 160. The first alleged incident (Count 3) occurred at her grandparents' house on her mother's father's side of the family, Martha and Fred Ervin. 2RP 161. When the rest of the family was in the kitchen, Stacey allegedly took T.W.

behind a sofa, pulled down both their pants, and forced her to use a green vibrator on Stacey's private parts. 2RP 161-62. Then Stacey took the vibrator and started doing the same to T.W., holding the vibrator near the clitoris. 2RP 163-64. The two were then called into dinner. 2RP 164.

The second alleged incident (Count 1) allegedly occurred when T.W. was five or six years old. 2RP 170. This incident supposedly took place at grandmother June Allen's house, downstairs in the basement room. *Id.* Grandmother had left for the store and Stacey came down to the basement and put a pornography DVD disk into the television. 2RP 170-71. Stacey took off their clothes and started to touch T.W. 2RP 171-72. Stacey directed her to do what she saw on the screen to her, fingering her vagina. 2RP 172. Then Stacey placed two of her fingers inside T.W.'s vagina, kissed her on the neck and between the thighs until the grandmother returned. 2RP 173-74. T.W. also alleged that she and Stacey were scissoring. 2RP 180.

For the third incident (Count 2), the grandparents were away again. 2RP 180. T.W. first alleged that Ms. Allen dragged her up the stairs and into the spare bedroom where T.W. was staying. 2RP 181. T.W. then testified that Ms. Allen "put" her on top of the

bed, but then changed her story to “threw” her on the bed. 2RP 181, 182.

T.W.’s testimony about where Ms. Allen obtained the toothbrush changed during the course of her testimony. First, T.W. testified Ms. Allen then obtained a Sonicare toothbrush from the bathroom, returned to the bedroom and took off T.W.’s clothes. 2RP 181. But then T.W. testified that the toothbrush was already on the bed and then took off their clothes. 2RP 182. After their clothes were off, Ms. Allen told T.W. to turn on the toothbrush and then guided T.W.’s hand to where she wanted to place T.W.’s fingers. 2RP 183. When the grandmother came home, everything stopped. 2RP 184. T.W. was 7 years old during the third incident.

The last incident (Count 4) occurred when T.W. was eight years old. The incident allegedly happened in Ms. Allen’s room, where Ms. Allen and T.W. were watching a movie, “Blade,” on her bed. 2RP 186. Neither Bill nor June Allen were in the house. *Id.* at 187. According to T.W., “all of a sudden she starts pulling off her clothes and pulling off mine.” *Id.* Ms. Allen then left to obtain the toothbrush and started to finger T.W. and place the toothbrush near the top of her vagina. *Id.*

According to the T.W., the four incidents all occurred between the ages of five and eight, and then stopped “because SBA got a

girlfriend.” 2RP 190. An objection was made to T.W.’s testimony of Ms. Allen’s sexual orientation. *Id.*

During the two to three years when the contact allegedly occurred, T.W. did not tell anybody about it. 2RP 190-91. When she turned 13 years of age, however, her mother Candice Erwin confronted T.W. about her Sonicare toothbrush smelling like a vagina. 2RP 191-92. T.W. admitted she lied to her mother because she didn’t want to tell her mother what she was doing. 2RP 201. Two hours later, T.W. made a different explanation to her mother, but that was a lie as well. 2RP 202. Finally, on the third conversation, T.W. testified that she finally told her mother the alleged truth about what she had done with the toothbrush. 2RP 204. This explanation included the story about what T.W. claimed Stacey did to her from ages five to eight. *Id.*

Other witnesses also testified about the allegations. For the first incident (Count 3), Ms. Allen’s aunt, Carol Wright opined that there would never be an incident in that special room that would last 25 minutes and not be noticed. 3RP 413-14. Ms. Wright testified that Ms. Allen could not have taken T.W. behind the sofa in the living room, because that room is a trophy room, where no children were ever allowed. 3RP 382-84. Ms. Wright testified that,

from the kitchen and family room, a person could tell if someone was in the hallway, you would hear them. 3RP 385.

For Counts 2 and 4, William Allen, Stacey's father, testified that there was never a DVD player at any time in his house and, therefore, neither allegation of watching a porn DVD or "Blade" could have happened. 3RP 431. Mr. Allen also testified that Stacey was never responsible for looking after T.W.. 3RP 428. Mr. Allen testified that Stacey was employed and during her time away from her school studies and work, she spent her time with classmates and friends her own age. *Id.* He also testified that there was no other television in the house except for the one in the lower level (Incident 2), there was no television in the guest room, and there was no DVD player anywhere in the house. 3RP 431, 432, 443, 444.

Stacey Allen testified that she was much older than T.W. and was employed and attended school and church. 3RP 458-62. When T.W. visited the house, T.W. stayed with her grandmother June Allen. 3RP 463. Stacey never babysat T.W., even if June ran errands. 3RP 463-65. Ms. Allen corroborated Mr. Allen's testimony that there was never a VCR or DVD player anywhere in the house. 3RP 470.

2. The trial court denied defense counsel's mistrial motion for violating an *in limine* motion to exclude testimony concerning Ms. Allen's sexual orientation. On May 30, 2018, defense counsel filed a trial brief and motions *in limine*, including a motion to exclude her sexual orientation under ER 401, 402, 403, and 404(b). CP 82, 84-86. Detective Moss included discovery material that implicated Ms. Allen in allegedly mutually consented peer age kissing, CPS investigations, and testimony from Candice Ervin (Ms. Allen's sister), regarding her strong negative opinions and feelings toward same-sex relations. CP 86. Defense argued such issues should not be heard by the jury and mention of her sexual orientation should be excluded. CP 87. "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." CP 87, quoting *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968); *State v. Green*, 71 Wn.2d 372, 737, 428 P.2d 540 (1967).

*In limine* motions were heard on May 30, 2018. The State agreed with defense counsel that Ms. Allen's sexual orientation would not be talked about. 1RP 26, 33. The court granted defense counsel's motion. 1RP 26.

Nevertheless, during the direct examination, T.W. said the abuse stopped when she was eight years old "because [Ms. Allen]

got a girlfriend. 2RP 190. Defense counsel objected, and the court told the jury to disregard the last answer. *Id.* When the jury later went out on recess, defense counsel moved for a mistrial, arguing the bell could not be unrung and the jury could speculate that Ms. Allen was more likely to molest T.W. due to her sexual orientation. 2RP 98. The trial court denied the motion for a mistrial, ruling that she did not feel it was prejudicial enough, the argument that she was more likely molest a child because she is a lesbian is not scientifically true, and concluded "I don't know if anybody actually believes that." 2RP 198-99.

Following the trial, the jury found Ms. Allen not guilty of the two first-degree rape of a child counts, Counts 1 and 2. 4RP 556-57. But the jury found Ms. Allen guilty of two counts of child molestation in the first degree, Counts 3 and 4, each of which had a separate finding of abuse of trust. 4RP 557.

3. The trial court failed to consider the mitigating factors of youth at sentencing. At sentencing, the State recommended 89 months in custody, the high end of the standard range. 5RP 566. The State informed the court that it was not an exceptional sentence, even though, based on the Special Verdict Forms for a finding of abuse of position of trust, the State could ask for an exceptional sentence. *Id.*

The State also alerted the court to the fact that Ms. Allen would have only been 17 at the time of the offenses, while T.W. was 8 years old. 5RP 568. Under *Houston-Sconiers*, the State informed the court that the ruling did not apply because Ms. Allen's lack of impulse control inherent in youth was not a one-time event. *Id.* Instead, the State argued that Ms. Allen was not a person who lacked impulse control – "it was a planned, deliberative action that was repeated multiple times over multiple years." 5RP 571.

Defense counsel argued that the offenses occurred when Ms. Allen was a juvenile. *-Id.* The standard range was 67 to 89 months, and under *Houston-Sconiers* and *Miller*, the court had discretion to impose a sentence below the standard range. 5RP 572. Defense counsel argued that with this type of offense, there is an inherent abuse of trust that typically occurs. 5RP 572. But this even has more meaning, defense counsel argued, when you deal with two minors, rather than an adult abusing a position of trust over a minor. *Id.*

Defense counsel argued that Ms. Allen was a different person than she was when she was a juvenile. 5RP 573. If it was a juvenile case, Ms. Allen would be given a sentence of 30 to 40 weeks. *Id.* at 573. Defense counsel recommended a two-year

sentence, an exceptional down sentence in light of Ms. Allen's age and maturity at the time of the offense. *Id.* at 574.

The court stated that an exceptional sentence downward was not appropriate, since even though she was young, the jury found an aggravating factor that she abused her position of trust. 5RP 578. The court did not consider any mitigating factors of youth.

The court imposed the low end of the standard range. *Id.* The court also made an exception in the judgment and sentence so that Ms. Allen could have contact with her own children. *Id.*

Ms. Allen timely appealed. CP 271-93.

#### D. ARGUMENT

##### 1. THE STATE VIOLATED AN *IN LIMINE* MOTION CONCERNING EVIDENCE ASSOCIATED WITH MS. ALLEN'S SEXUAL ORIENTATION

a. Ms. Allen objected when the State elicited and the alleged victim responded that the sexual abuse ended "Because she got a girlfriend." During the direct examination of T.W., the State questioned her on the last time that she was inappropriately touched by Ms. Allen. 2RP 189. The state then asked, "After you were eight years old, did any of these things happen? Do you recall?" 2RP 190. T.W. responded "No." *Id.* The State at this point had an answer to when the abuse ended. But rather than

merely accepting the answer, the state insisted, “They just stopped?” *Id.* T.W. responded that the incidents stopped, “[b]ecause [Ms. Allen] got a girlfriend.” *Id.*

Defense counsel asked the court to instruct the jury to disregard the response, which was granted. *Id.* The court delayed defense counsel's request to be heard outside the presence of the jury. *Id.*

The next time the jury was excused, the State informed the court,

I will also reinstruct her that we're not to talk about Ms. Allen's sexual orientation. I went through every Order of Limine with the witnesses, but sometimes, I suppose, a 14-year-old might forget them. So I'm going to remind her of that.

2RP 197. Defense counsel argued that despite the fact that the court instructed the jury to disregard the comment, the bell could not be unring and asked for a mistrial. *Id.* at 197. Ms. Allen further argued,

The basic idea being something that's I've already addressed, that this is something that can't be taken back. Your Honor's best efforts – otherwise, what you can do is to instruct them to disregard it. I don't see how they can disregard it. And I think it was an important enough issue that I brought it to the Court's attention *in limine*. I'm afraid that the jurors are going to make speculation that, for instance, Ms. Allen would be more likely to have done this to a female victim is she has – if she is known otherwise to have interest in females.

2RP 198. The court denied the motion for a mistrial, stating that she had told the jury to disregard and “I guess I don’t feel like it’s prejudicial enough.” *Id.* at 198-99. The court also stated that the potential for speculation that the jury would think if she was a lesbian she would be more likely to do this is not scientifically true. The court concluded, “I don’t know if anybody actually believes that.” *Id.* at 199.

b. The trial court’s ruling on the mistrial was manifestly unreasonable and was exercised for untenable grounds and for untenable reasons. A mistrial must be granted when the defendant has been prejudiced and only a new trial could insure that the defendant will be tried fairly. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). A trial court’s evidentiary rulings are reviewed for abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 875 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). The trial court’s summation that there is no scientific evidence or that anyone even believed that gay people are deviants who molest children was an idealistic and myopic understanding of what the American public actually believes about homosexual behavior.

i. The history of gays in the United States has shown a public hatred and revile of homosexuals. In the early 1600's in the United States, under the enacted of sodomy laws, a person could be punished by death or whipping for sexual acts with a person of the same sex and sodomy laws were in place that criminalized sexual acts between same-sex individuals. *Out of the Past: 400 Years of Lesbian and Gay History in America*, Public Broadcasting Service, [www.pbs.org/outofthepast](http://www.pbs.org/outofthepast) (last visited March 12, 2019). In 1917, United States immigration law was modified to ban all individuals "with abnormal sexual instincts" from entering the United States." *Id.* In 1947, the State Department began to fire any suspected homosexuals under President Truman's National Security Loyalty Program, and by 1955, more than 1,200 men and women lost their jobs with the federal government. *Id.* That was followed by President Dwight D. Eisenhower issuing Executive Order #10450, which banned employment of homosexuals by the federal government. Many state and local governments then adopted similar laws.

In 1977, Anita Bryant founds "Save Our Children" and campaigns to enact laws that barred county and municipal laws from protecting gays and lesbians. *Id.* In 1986, the United States Supreme Court ruled that the federal constitution allows states to

pass and enforce sodomy laws targeting homosexuals. *Id.* In 1998, Matthew Shepard was tied to a fence, beaten, and left to die 5 days later by two men in Laramie, Wyoming. *Id.*

Not until 2003 did the United States Supreme Court reverse *Bowers v. Hardwick*, finally ruling that sodomy laws in the United States are unconstitutional. *Id.* But hatred of gay people still exists. On June 12, 2016, a security guard killed 49 people and wounded 53 others inside Pulse, a gay nightclub in Orlando, Florida. Karen Franklin,<sup>1</sup> [Inside the Mind of People Who Hate Gays](http://www.pbs.org/wgbh/pages/frontline/shows/assault/roots/franklin.html), Frontline, [www.pbs.org/wgbh/pages/frontline/shows/assault/roots/franklin.html](http://www.pbs.org/wgbh/pages/frontline/shows/assault/roots/franklin.html).

The hatred of homosexuals in America is alive and well. “Bias-related violence against homosexuals is believed to be widespread in the United States.” *Id.* Hate crimes occur to homosexuals in part due to an attempt to enforce gender norms – “an extreme expression of American cultural stereotypes and expectations regarding male and female behavior.” *Id.* Assaults against gay people stem from a perspective that homosexuals deviate from sex role norms and are viewed as a learned form of social control of deviance. *Id.*

Although a majority of society is becoming more tolerant of L.G.B.T. people to a point where same-sex marriage is recognized,

“[t]he flip side of marriage equality is that people who strongly oppose it find the shifting culture extremely disturbing.” Haeyoun Park and Iaryna Mykhyalyshyn, L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group, N.Y. Times, June 16, 2016, [www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html](http://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html) (quoting Gregory M. Herek, psychology professor at University of California, Davis, an expert on anti-gay violence).

ii. The view by some in the public that homosexuals are immoral and should still be criminalized has led to a perception that homosexuals are more likely to molest children than heterosexuals. Even in progressive states, such as California, homosexuals must still battle the perception that homosexuals are more likely to molest children than heterosexuals. After same-sex marriage in California became legal, a voter’s initiative, Proposition 8, was placed on the ballot, which would allow the public to vote on whether California should pass a constitutional amendment prohibiting same-sex couples from marrying. *Perry v. Schwarzenegger*, 704 F. Supp.2d 921, 928 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) . The

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<sup>1</sup> Karen Franklin is a forensic psychologist.

citizens voted to pass the constitutional amendment during the November 2008 election. *Id.* at 928.

Opponents of Proposition 8 challenged the constitutionality of Proposition 8 under the Fourteenth Amendment. *Id.* On August 4, 2010, the United States District Court, N.D. California, found the constitutional amendment violated the Due Process Clause of the Fourteenth Amendment and also the Equal Protection Clause of the Fourteenth Amendment. 704 F.Supp.2d 1003-4.

Importantly, the court found that testimony of several witnesses showed that a primary purpose of Proposition 8 was to ensure that California confer a policy preference for opposite-sex couples over same-sex couples based on a belief that same-sex pairings are immoral and should not be encouraged in California. (Emphasis added.) *Perry v. Schwarzenegger*, 704 F. Supp.2d at 936. The district court heard testimony from an historian speaking about society's cultural understanding that gays and lesbians are dangerous to children, despite a lack of evidence to prove the matter:

Historian George Chauncey testified about a direct relationship between the Proposition 8 campaign and initiative campaigns from the 1970s targeting gays and lesbians; like earlier campaigns, the Proposition 8 campaign emphasized the importance of protecting children and relied on stereotypical images of gays and lesbians, despite the lack of any evidence showing that gays and lesbians pose a danger to

children. Chauncey concluded that the Proposition 8 campaign did not need to explain what children were to be protected from; the advertisements relied on a cultural understanding that gays and lesbians are dangerous to children.

(Emphasis added). *Id.* at 937. Chauncey attributed the societal understanding as “an artifact of the discrimination gays and lesbians faced in the United States in the twentieth century,” when gays and lesbians were seen as criminals which made the stereotype of gay people as criminals pervasive. *Id.* “Chauncey noted that stereotypes of gays and lesbians as predators or child molesters were reinforced in the mid-twentieth century and remain part of current public discourse.” (Emphasis added). *Id.* at 937.

One proponent and campaigner for Proposition 8, Hak-Shing William Tan, testified in the federal district court case that he was the secretary of the America Return to God Prayer Movement, which operated the website “1man1woman.net.” 1man1woman.net actually encouraged voters to support the proposition “on the grounds that homosexuals are twelve times more likely to molest children.” *Perry*, 704 F.Supp.2d at 937. Mr. Tam identified the National Association for Research and Therapy of Homosexuality (NARTH) as of source of information. *Id.*

In its findings of fact, the district court found that the fear of homosexuals as child molesters or as recruiters continues to play a

role in debates, with attention paid to gay teachers, parents, and married couples – people who have close contact with children. *Id.* at 979. The court found that these stereotypes about gay men and lesbians – that they are child molesters who recruit young children into homosexuality is not supported by any evidence. *Id.* at 983.

Religious conservatism continues to promote the stereotype that homosexuals pose a greater risk of molestation towards children than heterosexuals. In a story in Baptist Press, entitled “Homosexuals more likely to molest kids, study reports,” Ken Walker reported that a social researcher (Judith Reisman, president of the Institute for Media Education) who had studied sexual behavior for 24 years has written that gay scoutmasters should be prohibited because “as a group the incidence of homosexuals molesting children is up to 40 times greater than heterosexuals.” Walker, Ken, *Homosexuals more likely to molest kids, study reports*, Baptist Press, May 30, 2001, <http://www.bpnews.net/11002/homosexuals-more-likely-to-molest-kids-study-reports>. Reisman also stated that the Department of Justice had released data that the rate of abuse by homosexuals of children are “off the charts.” *Id.*

UC Davis Psychology Professor Gregory Herek points out that antigay activists still do routinely assert that homosexuals are

child molesters. Gregory Herek, *Facts About Homosexuality and Child Molestation* (last updated August 31, 2018, 2:28 PM), [http://psychology.ucdavis.edu/rainbow/html/facts\\_molestation.html](http://psychology.ucdavis.edu/rainbow/html/facts_molestation.html). The good news is that the number of Americans who believe the myth that gay people are child molesters has declined from 1970, when 70% of respondents believed that homosexuals were a threat to molest children. *Id.* A Gallup Poll conducted showed that as of 2018, 23% of the American population still believe that gay or lesbian relations between consenting adults should not be legal (should be criminalized). *Gay and Lesbian Rights*, Gallup, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited March 12, 2019). That translates into one in four United States citizens who believe sex between same-sex individuals is a criminal act.

c. Caselaw has recognized that references to homosexuality is prejudicial to a criminal defendant. *Jones v. United States*, 625 A.2d 281, 282 (1993) is instructive. In *Jones*, a volunteer kindergarten teacher neared an intersection leading a group of kindergartners to a playground, when she was stabbed in the chest with a serrated-edged steak knife. *Id.* at 283. The defendant and a co-defendant were each charged with assault with intent to kill while armed with a weapon. *Id.* A jury convicted the

co-defendant of the indicted offense, but Jones was only convicted of the lesser-included offense of assault with a dangerous weapon. *Id.* at 282. On appeal, Mr. Jones argues that the trial court abused its discretion by admitting evidence and argument concerning the co-defendant's homosexual relationship. *Id.* at 283. The Court of Appeals held that the trial court abused its discretion by allowing evidence of the appellant's homosexual relationship as well as Butler's effeminate characteristics. *Id.*

The court held that even if evidence is relevant, it may be excluded if its potential for prejudicial misuse by the jury substantially outweighs its probative value. 625 A.2d at 284. The Court found that evidence of homosexuality poses a "high risk of prejudicial impact on a jury." *Id.*, citing *Tinker v. United States*, 135 U.S.App.D.C. 125, 127, 417 F.2d 542, *cert. denied*, 396 U.S. 864, 90 S.Ct. 141, 24 L.Ed.2d 118 (1969). The court ruled that this is even more prejudicial when applicable to a criminal defendant:

This is especially true where evidence of homosexuality is introduced against a criminal defendant who has a constitutional right to a fair trial. See *United States v. Provo*, 215 F.2d 531, 537 (2d Cir.1954) (evidence of defendant's homosexuality elicited by government during cross-examination was inadmissible, because "[t]he sole purpose and effect of this examination was to humiliate and degrade the defendant, and increase the probability that he would be convicted not for the crime charged, but for his ... unsavory character").

*Jones*, 625 A.2d at 284.

d. Testimony of Ms. Allen's sexual orientation denied her a fair trial. In the present case, the testimony that Ms. Allen stopped the alleged abusive behavior when she got a girlfriend increased the probability that she would be convicted not based on the credibility of the witnesses, but instead on the mere fact that Ms. Allen was homosexual. With one in four Americans still holding onto the idea that homosexuals are immoral, deviant, and a greater danger to molest children than heterosexuals, the unfair prejudice was real.

With the prohibited testimony of Ms. Allen's sexual orientation introduced at trial, Ms. Allen was also denied a fair trial in another way. Under the federal Sixth Amendment and article 1, section 21 of the Washington State Constitution, a criminal defendant has a right to be tried by an impartial jury, which "requires a trial by an unbiased and unprejudiced jury." *State v. Boiko*, 138 Wn.App. 256, 260, 156 P.3d 934 (2007); *In re Munchinson*, 349 U.S. 133, 136 (1955). "The primary purpose of voir dire is to give a litigant an opportunity to explore the potential jurors' attitudes in order to determine whether the jury should be challenged." *Lopez-Stayer v. Pitts*, 122 Wn.App. 45, 51, 93 P.3d 904 (2004). The test is whether the court permitted a party to ferret

out bias and partiality. *Id.* “[T]he Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict.” *Peters v. Kiff*, 407 U.S. 493, 501 (1972).

During voir dire, where the issue of sexual orientation will arise during a trial, defense counsel could reveal to the venire members that the defendant is homosexual and ask one or more questions in an attempt to determine if any member would be unable to decide the case based solely on the evidence presented and without being influenced by personal beliefs and feelings about homosexuality. Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 Yale J. of L. & Feminism, 1, 13 (2001).

Here, the State and defense counsel agreed that Ms. Allen’s sexual orientation would not be introduced at trial and the trial court ruled before trial that the evidence would be excluded. 1RP 26. Voir dire began five days later on June 4, 2017 and concluded on June 6, 2017. Had defense counsel known that there would be testimony about Ms. Allen’s sexual orientation, he could have asked the jury pool whether any juror believed homosexuals were more likely to commit child molestation than heterosexuals. Instead, Ms. Allen was confronted with a jury of her peers, wherein 23% of the jury (3 jurors) believed that homosexual relationships

between consenting adults should be criminalized. The denial of Ms. Allen's motion for mistrial substantially prejudiced her chances of receiving a fair trial.

e. The trial court's error of denying a mistrial was prejudicial. The State's evidence was weak and the jury did not believe T.W. concerning much of her testimony. This case was a "she said versus she said," and the jury disbelieved T.W.'s allegations about any penetration of fingers, vibrators, or toothbrushes. The jury did not find Ms. Allen guilty of the rape counts. 4RP 556-67, CP 213, 215. Specifically, the State elected Incident 2 (the first incident downstairs with a DVD player playing, where Ms. Allen allegedly penetrated T.W.'s vagina) should be Count 1. 4RP 512. The other rape charge was incident 3 (the incident when Ms. Allen allegedly pulled T.W. up the stairs and used a Sonicare toothbrush and her fingers to digitally penetrate T.W.'s vagina). 4RP 512.

The jury did find Ms. Allen guilty of Counts 3 and 4. 4RP 557; CP 217, 219. Count 3 was Incident 1, when Ms. Allen used a vibrator to stimulate T.W.'s vagina. 4RP 512. Count 4 was the last incident, Incident 4, where Ms. Allen and T.W. were allegedly watching the DVD "Blade" in the guestroom and Ms. Allen used a Sonicare on T.W. *Id.*

But for those two incidents, the evidence was weak. For Count 3, Ms. Allen's aunt, Carol Wright testified that this incident allegedly took place downstairs living room, considered a trophy, where no children were ever allowed and always kept nice and clean. 3RP 382-84. The room was always left empty unless a very special occasion. 3RP 391. The doors were never closed in the house except the bathrooms doors when someone would use the bathroom. 3RP 383, 384. Moreover, from the kitchen and family room, a person could tell if someone was in the hallway; Ms. Wright testified you would hear them. 3RP 385. From the family room, you would be able to hear from a window that is always open any noise in the living room, which is only about six feet away. 3RP 385, 405. Lastly, Ms. Wright opined that there would never be an incident in that special room that would last 25 minutes and not be noticed. 3RP 413-14.

For Count 4, Stacey's father, Bill Allen, testified that there was never a DVD at any time in his house and therefore, this could not have taken place. 3RP 431. If there was no DVD player in the house at any time, it is likely that T.W. is making up the entire story. Ms. Allen also worked, went to school, church, and was never responsible for her care. Mr. Allen also testified that Stacey was never responsible for looking after T.W. 3RP 428. Mr. Allen

testified that Stacey was employed and during her time away from her school studies and work, she spent her time with classmates and friends her own age. *Id.* He also testified that there was no other television in the house except for the one in the lower level (Incident 2), there was no television in the guest room and there was no DVD player anywhere in the house. 3RP 431, 432, 443, 444.

Stacey Allen testified that she was 10 years older than T.W. and was employed, went to school, and attended church. 3RP 458-62. When T.W. visited the house, T.W. only came to see her grandmother June Allen. 3RP 463. Stacey was never in charge of taking care of T.W. and never babysat T.W. 3RP 463-64. She also testified that she never was asked to watch T.W. while June ran errands. 3RP 464-65. Ms. Allen also testified that there was never a VCR or DVD player anywhere in the house. 3RP 470. She denied having any sexual contact with T.W.. 3RP 471-43.

f. Reversal is required. The trial court's erred in denying Ms. Allen's motion for mistrial. The error in admitting this prejudicial evidence cannot be considered harmless. "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230

P.3d 583 (2010). In “sex cases, ... the prejudicial potential of prior acts is at its highest.” *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). This Court should reverse Mr. Allen’s convictions and remand for a new trial.

2. DEFENSE COUNSEL AND THE TRIAL COURT FAILED TO UNDERGO A PROPER *MILLER* ANALYSIS IN DETERMINING WHETHER MS. ALLEN SHOULD BE GIVEN AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE

a. The Washington Supreme Court has repeatedly ruled that when a juvenile is sentenced in adult court, a full *Miller* analysis must be afforded to the juvenile. The Supreme Court of Washington has ruled that whenever a person who committed a crime while he or she was a juvenile is before an adult court for sentencing, the judge, even *sua sponte*, must properly consider the mitigating factors of youth under *Miller*. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017).<sup>2</sup> Under RCW 9.94A.535, a trial court may impose a sentence outside the standard sentence range if it finds that there are “substantial and compelling reasons justifying an exceptional sentence.”

In *Houston-Sconiers*, the Supreme Court held that the trial court is required to consider a juvenile defendant’s youth in

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<sup>2</sup> In a de facto life sentence case, the Washington Supreme Court held that “while not every juvenile homicide offender is automatically entitled to an exceptional sentence below the standard range, every juvenile offender facing a literal or de

sentencing, even for mandatory sentences such as firearm enhancements. 188 Wn.2d at 8-9. The Court ruled, “[t]rial courts must consider mitigating qualities of youth a sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.” *Id.* at 21.

The Supreme Court reaffirmed this ruling in *Ramos*, holding

At the *Miller* hearing, the court must meaningfully consider how juveniles are different from adults, how those differences apply to the facts of the case, and whether those facts present the uncommon situation where a life-without-parole sentence for a juvenile homicide offender is constitutionally permissible. If the juvenile proves by a preponderance of the evidence that his or her crimes reflect transient immaturity, substantial and compelling reasons would necessarily justify an exceptional sentence below the standard range because a standard range sentence would be unconstitutional.

187 Wn.2d at 434-35. This “required *Miller* hearing is not an ordinary sentencing proceeding. *Miller* ‘establishes an affirmative requirement that courts fully explore the impact of the defendant’s juvenility on the sentence rendered.’” 187 Wn.2d at 443, quoting *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572 (2014).

Accordingly, the *Ramos* Court ruled “a court conducting a *Miller* hearing must do far more than simply recite the differences between juveniles and adults and make conclusory statements that

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facto life-without-parole sentence is automatically entitled to a *Miller* hearing. *State v. Ramos*, 187 Wn.2d 420, 434, 387 P.3d 650 (2017).

the offender has not shown an exceptional downward sentence is justified.” *Id.*

This reasoning applies for life sentences or even sentences that are less than a life sentence. The *Houston-Sconiers* Court relied on *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), which provided guidance to trial courts on how to exercise their discretion in juvenile sentencing. 188 Wn.2d at 23. The *Houston-Sconiers* Court ruled,

[Miller] holds that in exercising full discretion in juvenile sentencing, the court must consider mitigating circumstances related to the defendant's youth—including age and its “hallmark features,” such as the juvenile's “immaturity, impetuosity, and failure to appreciate risks and consequences.” *Miller*, 132 S.Ct. at 2468. It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and “the way familial and peer pressures may have affected him [or her].” *Id.* And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated. *Id.*

*Houston-Sconiers*, 188 Wn.2d at 23. The *Houston-Sconiers* Court concluded “[t]his is what the sentencing court should have done in this case and this is what we remand for it to do.” *Id.*

The *Ramos* Court also made clear that following its analysis, “the sentencing court must thoroughly explain its reasoning, specifically considering the differences between juveniles and adults identified by the *Miller* Court and how those differences

apply to the case presented.” 187 Wn.2d at 444. The *Ramos* Court makes it clear that Ms. Allen cannot waive her right to a proper *Miller* analysis. In *Ramos*, the Court ruled that a “juvenile cannot forfeit his or her right to a *Miller* hearing merely by failing to affirmatively request it, and all doubts should always be resolved in favor of holding a *Miller* hearing.” 187 W.2d at 443. Therefore, the fact that defense counsel failed to present mitigating evidence of youth does not excuse the court’s failure to conduct a meaningful *Miller* hearing.

b. The sentencing court failed to properly conduct the required *Miller* hearing. The *Ramos* Court held that at a *Miller* hearing,

The court and counsel have an affirmative duty to ensure that proper consideration is given to the juvenile's “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” *Miller*, 132 S.Ct. at 2468.

*Ramos*, 187 Wn.2d at 443. The Washington Supreme Court recognized that a *Miller* analysis requires a court to do more than simply recite differences between juveniles and adults and then make conclusory remarks that the offender failed to show he should receive an exceptional downward sentence. *Ramos*, 187 Wn.2d at 443, citing *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d

572 (2014). Here, the trial court failed to conduct any *Miller* analysis, but instead made a conclusory statement that because the jury found a mitigating factor of abuse of trust, an exceptional sentence was not warranted. 5RP 578.

But under *Ramos* and *Aiken*, the court had a duty to actually meaningfully consider Ms. Allen's youth at the time of the offenses as a possible mitigating circumstance, despite a jury finding of an aggravating factor. The trial court must 1) properly consider Ms. Allen's maturity and lifestyle compared to other juveniles rather than compared to adult offenders, 2) consider her likelihood for rehabilitation from maturation, and 3) consider how immature judgment and impetuosity may have contributed to Ms. Allen's conduct. The second and third arguments trace two of the facts that the *Houston-Sconiers* Court stated that a sentencing court "must consider." 188 Wn.2d at 23.

Counsel also has an affirmative duty to ensure proper consideration is given to the juvenile's age and the hallmark features of immaturity, impetuosity, and failure to appreciate the risks and consequences. *Ramos*, 187 Wn.2d at 44, citing *Miller*, 132 S.Ct. at 2468. Here, defense counsel failed to provide the court with information that the court could have used to undergo a proper *Miller* analysis. Before sentencing, defense counsel filed

Defendant's Sentencing Memorandum. CP 220. The sentencing memorandum speaks to the fact that the charges covered times when Ms. Allen was between 15 and 19 years of age, and the testimony at trial showed that the crimes likely occurred between the ages of 15 and 18. *Id.* But otherwise, defense counsel failed to provide useful information how Ms. Allen satisfied the mitigating factors of youth under *Miller*. Instead, defense counsel cited *Houston-Sconiers*, stating "children are different," and then spent the remainder of the brief citing what the court must do and consider at a *Miller* hearing. Defense counsel never once attempted to explain to the court any information about how Ms. Allen was impetuous, immature, lacked impulse control, or how any *Miller* differences applied to the case presented. 187 Wn.2d at 444.

Instead, defense counsel merely recommended an exceptional sentence below the standard range due to Ms. Allen's "youthfulness." Defense counsel pointed out that the writer of the Pre-Sentence Investigation Report by the Department of Corrections failed to address the issue of youthfulness.

The State did not file a sentencing memorandum. The State could only concentrate on the offenses itself rather than any hallmark feature of youth. The State recommended 89 months in

custody, the high end of the standard range. 5RP 566. The State claimed that Ms. Allen would have only been 17 at the time of the offenses, while T.W. was 8 years old. 5RP 568. Finally turning to *Houston-Sconiers*, the State informed the court that the ruling did not apply because Ms. Allen's lack of impulse control inherent in youth was not a one-time event. *Id.* The State argued the abuse was planned and a deliberative action "repeated multiple times over multiple years." Beyond the one mention of impulse control, no other mention of the mitigating factors of youth were argued.

Defense counsel agreed that the offenses occurred when Ms. Allen was a juvenile. 5RP 571. The standard range was 67 to 89 months, and under *Houston-Sconiers* and *Miller*, the court had discretion to impose a sentence below the standard range. 5RP 572. Concerning the aggravating factor of abuse of a position of trust, defense counsel argued that, with this type of offense, there is an inherent abuse of trust that typically occurs. 5RP 572. But this even has more meaning, defense counsel argued, when you deal with two minors, rather than an adult abusing a position of trust over a minor. *Id.*

Defense counsel made no argument concerning the mitigating factors of Ms. Allen that would apply to her. But defense counsel finally argued that Ms. Allen was a different person than

she was when she was a juvenile. 5RP 573. If it was a juvenile case, Ms. Allen would be given a sentence of 30 to 40 weeks. *Id.* at 573. Defense counsel recommended a two-year sentence, an exceptional down sentence in light of Ms. Allen's age and maturity at the time of the offense. *Id.* at 574.

The sentencing court failed to undergo a proper *Miller* analysis. The court stated that an exceptional sentence downward was not appropriate, since even though she was young, the jury found an aggravating factor that she abused her position of trust. 5RP 578. Instead, the court imposed the low end of the standard range. *Id.* The court also made an exception in the judgment and sentence so that Ms. Allen could have contact with her own children. *Id.*

But, as *Ramos* made clear, this is not a typical sentencing when a juvenile is involved. A simple holding that the judge would not consider an exceptional downward sentence because of the aggravating factor is contrary to the holdings of *Houston-Sconiers*, *Ramos*, and *Miller*. In order to fulfill its constitutional duty to undergo a *Miller* analysis, the Court must consider the circumstances of youth such as age and "hallmark features," including the family and home environment that surrounds the offender, the circumstances of the offenses, incompetencies

associated with youth, and the possibility of rehabilitation.

*Houston-Sconiers*, 188 Wn.2d at 23, citing *Miller*, 567 U.S. at 477-78.

3. UNDER ARTICLE 1, SECTION 14 OF THE WASHINGTON CONSTITUTION, THE SENTENCING COURT WAS ALSO REQUIRED TO CONSIDER THE MITIGATING FACTORS OF YOUTH AT MS. ALLEN'S SENTENCING<sup>3</sup>

- a. Article I, section 14 of the Washington Constitution is more protective than the Eighth Amendment to the United States Constitution. In *State v. Bassett*, this Court noted that that the Supreme Court “has ‘repeated[ly] recogni[zed] that the Washington State Constitution’s cruel punishment clause often provides greater protection than the Eighth Amendment.’” 192 Wn.2d 67, 78, 428 P.3d 343 (2018), quoting *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000). However, the *Bassett* Court recognized that it had four times ruled that the State constitutional provision was not more protective than its federal counterpart. 192 Wn.2d at 78-79, citing *State v. Dodd*, 120 Wn.2d 1, 838 P.2d 89 (1992) (later limited to facts of that case); *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 731, 327 P.3d 660 (2014) (death penalty); *State v. Yates*, 161 Wn.2d 714, 792, 158 P.3d 359 (2007) (death penalty); *State v.*

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<sup>3</sup> Currently, *State v. Houston-Sconiers* is good law, although the State hopes to someday petition an identical ruling to the United States Supreme Court. This section is provided to ensure that Ms. Allen receives resentencing under either the Eighth Amendment or article 1, section 14 of the Washington Constitution.

*Gentry*, 125 Wn.2d 570, 631-32, 888 P.2d 1105 (1995) (death penalty).

In explaining its inconsistent ruling, the Court conducted a *Gunwall* analysis to determine whether a Washington statute authorizing the imposition of a sentence of life imprisonment without parole for defendants aged 16 and 17 violated the State Constitution. *Id.* at 79. The Court quoted *Ramos* in noting, “[e]ven where it is already established that the Washington Constitution may provide enhanced protections on a general topic, parties are still required to explain why enhanced protections are appropriate in specific applications.” *Bassett*, 192 Wn.2d at 79, quoting *State v. Ramos*, 187 Wn.2d 420, 454, 387 P.3d 650, *cert. denied*, \_\_\_ U.S. \_\_\_, 138 S.Ct. 467, 199 L.Ed.2d 355 (2017).

The six *Gunwall* nonexclusive criteria are the following:

- (1) the textual language of the state constitution,
- (2) differences in the texts of parallel provisions of the federal and state constitutions,
- (3) state constitutional and common law history,
- (4) preexisting state law,
- (5) structural differences between the federal and state constitutions, and
- (6) matters of particular state interest or local concern.

*Bassett*, 192 Wn.2d at 80, citing *Gunwall*, 106 Wn.2d at 61-62.

i. The first three factors demonstrate that article 1, section 14, is more protective than the Eighth Amendment. The

*Bassett* Court decided that the first three factors do show a more protective right under article 1, section 14 than the Eighth Amendment:

The first three factors provide cogent grounds for finding article I, section 14 more protective than the Eighth Amendment. The Washington Constitution provides that “[e]xcessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.” WASH. CONST. art. I, § 14. This provision is similar to the Eighth Amendment but omits the words “and unusual.” U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). This difference indicates that “Article 1, section 14, on its face, may offer greater protection than the Eighth Amendment, because it prohibits conduct that is merely cruel; it does not require that the conduct be both cruel and unusual.” *Dodd*, 120 Wash.2d at 21, 838 P.2d 86. “The historical evidence reveals that the framers of [Wash.] Const. art. 1, § 14 were of the view that the word ‘cruel’ sufficiently expressed their intent, and refused to adopt an amendment inserting the word ‘unusual.’” *Fain*, 94 Wash.2d at 393, 617 P.2d 720 (citing *The Journal of the Washington State Constitutional Convention: 1889*, at 501-02 (Beverly Paulik Rosenow ed. 1962) ). Thus, these factors weigh in favor of interpreting article I, section 14 as affording broader rights than the Eighth Amendment.

*Bassett*, 192 Wn.2d at 80.

ii. The fourth factor shows greater protections for the state provision than its federal counterpart. In *Bassett*, the Supreme Court ruled against the State’s argument that the fourth factor did not favor independent state constitutional analysis, since

children were treated this way over 100 years ago, including at statehood, when there were no juvenile courts and no mention of juveniles in the State Constitution. 192 Wn.2d at 80. The Court found that Washington's "execution of a child, Walter Dubuc, in 1932, is not a guiding light for interpreting our constitution's ban on cruel punishment today in 2018." *Id.* at 80-81. Instead, the Court decided that it should view "how our jurisprudence on juvenile sentencing has evolved to ensure greater protections for children." *Id.* at 81.

The Court recognized that since *Miller* was decided by the United States Supreme Court, the Washington Supreme Court had consistently applied the principle that "children are different" and even extended that idea to those young adults that are over the age of 18. *Id.* at 81, citing *Miller*, 567 U.S. at 481, *State v. O'Dell*, 183 Wash.2d 680, 691-96, 358 P.3d 359 (2015). The Court also cited *Ramos* and *Houston-Sconiers*, demonstrating that the furtherance of the *Miller* analysis to juveniles that had de facto juvenile life without parole sentences as well as allowing sentencing courts to have complete discretion to consider mitigating circumstances associated with youth to give an exceptional sentence downward whenever any juvenile is haled into adult court. *Ramos*, 187 Wn.2d at 438; *Houston-Sconiers*, 188

Wash.2d at 21. The Court also cited legislative efforts to change the way juveniles are treated in the court system. Citing *Ramos*, 187 Wash.2d at 446 (citing RCW 9.94A.540(3) (eliminating mandatory minimum sentences for juvenile offenders tried as adults), RCW 9.94A.730 (expanding parole eligibility for juvenile offenders tried as adults); RCW 10.95.030(3)(a)(i) (striking life without parole sentences for children age 15 and under).

The Court concluded the fourth factor was satisfied by “established bodies of state law, both statutory and case-based, recognize that children warrant special protections in sentencing.” *Bassett*, 192 Wn.2d at 81.

iii. The fifth factor is satisfied. As the *Bassett* Court noted “[t]he fifth *Gunwall* factor ‘will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State’s power.’” *Bassett*, 192 Wn.2d at 82, quoting *State v. Young*, 123 Wash.2d 173, 180, 867 P.2d 593 (1994).

iv. The *Bassett* Court ruled that the sixth factor is satisfied because state policy considerations, as indicated in the fourth factor, grants juveniles special sentencing protections were appropriate. The *Bassett* Court found that the sixth factor would

typically be satisfied due to state policy considerations as indicated in the fourth factor that grants juveniles special sentencing protections:

The sixth factor also weighs in favor of interpreting article I, section 14 more broadly than the Eighth Amendment. While there may be some benefit to national uniformity for sentencing children, it is outweighed by the state policy considerations discussed under the fourth factor, to grant juveniles special sentencing protections where appropriate. See *Gunwall*, 106 Wash.2d at 67, 720 P.2d 808 (explaining that the discussion of the fourth factor may pertain to the sixth factor).

Because the same state policy considerations grant juveniles special sentencing protections, this factor is also satisfied when an adult court sentencing hearing considers the sentence for a person who committed an offense as a juvenile.

The *Bassett* Court concluded “[t]he six *Gunwall* factors all direct us toward interpreting article I, section 14 more broadly than the Eighth Amendment,” and holding “in the context of juvenile sentencing, article I, section 14 provides greater protection than the Eighth Amendment.” 192 Wn.2d at 82.

b. The Washington Supreme Court has already recognized that juveniles have a federal constitutional right to consideration of the *Miller* factors, and under article I, section 14, Ms. Allen has a state constitutional right to have a judge consider

the *Miller* factors in any adult sentencing court. In *Houston-Sconiers*, the Washington Supreme Court has made clear that under the Eighth Amendment, whenever a juvenile is brought into adult court for sentencing, the judge shall undergo a full *Miller* analysis, *sua sponte*, even when defense counsel has not asked the court to do so. 188 Wn.2d at 21. The State's position in many of these cases is that United States Supreme Court is the final arbitrator of the full protections offered under the Eighth Amendment for juveniles and has not ruled in a case concerning a juvenile who receives a standard range sentence for less than life. See e.g., Amended Supplemental Brief of Respondent, *In re Personal Restraint of Time Rikat Meippen*, No. 95394-5 (State arguing Eighth Amendment is not implicated for every juvenile charged in adult court and juvenile with sentence less than life is not entitled to resentencing).<sup>4</sup>

The State may also argue that *Houston-Sconiers* was limited by *State v. Scott*, 190 Wn.2d 586, 592, 391 P.3d 990 (2018). Without qualification, *Houston-Sconiers* concluded that the SRA must be permitted to allow sentencing courts complete discretion whenever a child is sentenced. 188 Wn.2d at 24. *State v. Scott* does not change *Houston-Sconiers*. In *Scott*, the Supreme Court

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<sup>4</sup> The Supreme Court heard oral argument in Mr. Meippen's case on November 15, 2018, a decision was still pending at the time of the filing of the instant appeal.

found a petitioner's eligibility for parole after 20 years had afforded him a remedy such that he was not entitled to relief under RAP 16.4. This case is not controlled by RAP 16.4 but is instead a direct appeal of her sentence under RAP 2.1. Moreover, Ms. Allen has no such remedy as no statute is available that affords her eligibility for parole.

But to ensure that Ms. Allen gets an opportunity to be resentenced, Ms. Allen argues that the Washington Supreme Court provides greater protections than the Eighth Amendment and would require an adult sentencing court to undergo a *Miller* analysis for any juvenile haled into adult court for sentencing to determine whether an exceptional sentence below the standard range is appropriate. *Bassett*, 192 Wn.2d at 82.

c. This Court should reverse Ms. Allen's sentence and remand to the trial court for resentencing with a full *Miller* analysis. Because the sentencing court failed to undergo a *Miller* analysis under the Eighth Amendment and article I, section 14 of the Washington State Constitution, this Court should reverse Ms. Allen's sentence for resentencing.

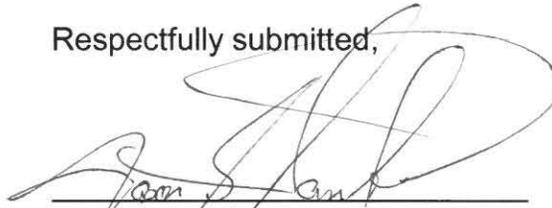
E. CONCLUSION.

For the foregoing reasons, Mr. Allen requests this Court reverse her conviction. In the alternative, should this court affirm

her conviction, Ms. Allen requests this Court remand her case for resentencing so that the court can conduct a proper *Miller* analysis.

DATED this 12<sup>th</sup> day of March, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jason B. Saunders", written over a horizontal line.

JASON B. SAUNDERS, WSBA #24963  
Gordon & Saunders, PLLC  
Attorney for Appellant Stacey Allen

**CERTIFICATE OF SERVICE**

I, Ian D. Saling, state that on the 12<sup>th</sup> Day of March, 2019, I caused the original **Appellant's Opening Brief** to be filed in the **Court of Appeals – Division Two** and a true copy of the same to be served on the following in the manner indicated below:

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I certify under penalty of perjury of the laws of the State of Washington the foregoing is true and correct.

Name:  \_\_\_\_\_ Date: 03/12/2019  
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The Law Offices of Gordon & Saunders

# GORDON & SAUNDERS PLLC

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