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Division II COURT OF APPEALS NO. 53721-4-II
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,

Respondent.

vs.

BRIAN M. BASSETT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY
The Honorable David Edwards

BRIEF OF APPELLANT

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I. INTRODUCTION

“Based on my years of working within the DOC, I occasionally run across people in the prison system where there is no longer any point in keeping them there. Mr. Bassett is one.”

Joshua Goodloe, Unit Supervisor, Department of Corrections. CP 259.

II. NATURE OF THE CASE

Appellant, Brian Bassett, seeks review of the 60-year *de facto* juvenile life prison sentence, imposed following his 2019 *Miller* re-sentencing hearing.

III. ASSIGNMENT OF ERROR

A. The Superior Court erred by sentencing an adolescent offender to a mandatory minimum 60-year *de facto* life prison term.

B. The Superior Court erred by failing to comply with RCW 10.95.030(3)(b) when sentencing the Appellant.

C. The Superior Court erred by denying the Appellant's Motion for Immediate Referral to the Parole Board for a release hearing.

D. The Superior Court erred by denying the Appellant's Motion for Recusal.

IV. STATEMENT OF THE ISSUES

A. Whether a judge may constitutionally sentence an adolescent offender to a mandatory minimum 60-year *de facto* juvenile life prison term.

B. Whether a judge can constitutionally sentence a juvenile offender in disregard of RCW 10.95.030(3)(b), Washington's *Miller*-fix statute.

C. Whether a juvenile offender should be required to remain in prison for at least 25 years, even though the juvenile has exceeded the recognized age of “brain maturity,” and has established that he is, or can be, rehabilitated.

D. Whether a judge should be recused from sentencing a juvenile offender after having previously opined that the juvenile should never be released from prison, and after having previously sentenced the juvenile to life in prison without parole.

V. STATEMENT OF THE CASE

In 1996, while a 16-year old boy, Brian Bassett was sentenced to serve three consecutive terms of mandatory life in prison without possible of parole for the deaths of his parents and younger brother.¹ (*State v. Bassett*, 95-1-415-9, Judgement and Sentence, 4-1-1996.)²

In 2012, the U.S. Supreme Court announced, in *Miller v. Alabama*, 560 U.S. 460 (2012), that, for all but the rarest offender, mandatory life without parole sentences for juveniles convicted of murder violate the constitutional prohibition against cruel and unusual punishment. In an attempt to comply with *Miller's* constitutional mandate, the Washington legislature adopted RCW 10.95.035 and modified RCW 10.95.030, the statutory scheme used in 1996 to sentence Mr. Bassett. As a result, Mr. Bassett was granted a new sentencing hearing.

1. Nicholaus McDonald, an older co-defendant, confessed to police that he actually killed Mr. Bassett's younger brother. Later, when facing trial himself, Mr. McDonald changed his story and attempted to blame Mr. Bassett. See, *State v. McDonald*, 138 Wn.2d 680, 684 (1998); also see, RP 4-1-1996, p. 28 (Mr. Bassett's original sentencing judge, acknowledging that in 1996 Mr. McDonald killed Mr. Bassett's brother).

2. For additional details of the crimes see *State v. Bassett*, 198 Wn. App. 714, 717-720 (2017) (*affirmed*, 192 Wn.2d 67 (2018)).

In January 2015, Mr. Bassett appeared in Grays Harbor Superior Court for re-sentencing. Mr. Bassett presented significant evidence both mitigating his crimes and demonstrating his potential for rehabilitation. See, e.g. *State v. Bassett*, 192 Wn.2d 67, 75 (2018). Nonetheless, Mr. Bassett was again sentenced to life in prison without parole. *Id.* During sentencing, Mr. Bassett's judge expressed his opinion that Mr. Bassett should never be released. RP 1-30-2015, p. 93.

The Court of Appeals reversed Mr. Bassett's life without parole sentence as violating the prohibition against cruel punishment contained in Article I, Section 14 of Washington's constitution. *State v. Bassett*, 198 Wn. App. 714 (2017).

Mr. Bassett requested to the Court of Appeals that, on remand, his case be assigned to a judge who had not previously opined that he should never be released from prison.³ In the unpublished portion of its opinion, the appellate court, relying in part on the fact that Mr. Bassett's judge would be prohibited from reimposing a life without parole sentence, denied Mr. Bassett's request for judicial reassignment. *Id.*

3. See, *State v. Bassett*, No. 47251-1-II, Brief of Appellant, p. 48 (10-29-2015).

In 2018, the Supreme Court affirmed the Court of Appeals and categorically banned life without parole sentences for juvenile offenders because they are unconstitutionally cruel. *State v. Bassett*, 192 Wn.2d 67 (2018).

Mr. Bassett was remanded back to Grays Harbor Superior Court for a second re-sentencing hearing before the same judge who previously sentenced him to life without possible parole. *Id.*

In February 2019, defense counsel filed a motion to recuse Mr. Bassett's sentencing judge. CP 1-13.⁴ In June 2019, just prior to the start of Mr. Bassett's re-sentencing hearing, the court denied the motion for recusal. CP 249-250.

During Mr. Bassett's re-sentencing hearing, Dr. Mark Cunningham, one of the foremost experts in America on sentencing issues and future dangerousness, presented expert testimony. RP 6-6-2019, Vol. I, pp.12-106. Dr. Cunningham explained that various neurodevelopmental factors mitigated Mr. Bassett's crimes. Those factors included the effects of Mr. Bassett having been born two months prematurely (RP 6-6-2019, Vol. I, p.

4. CP 1-13, CP 249-250. (Motion for Sentencing Before Hon. Stephen Brown pursuant to RCW 10.95.035, or, Alternatively, for Recusal of the Hon. David Edwards.)

54-56); the effects of Mr. Bassett's childhood alcohol abuse (*id.* at 56-70); and, an alcohol poisoning event that necessitated Mr. Bassett's resuscitation and hospitalization. RP 6-6-2019, Vol. I, p. 63-64; CP 80.

Dr. Cunningham also testified that various psychosocial factors negatively affected Mr. Bassett's emotional development and further mitigated his crimes. Those factors included Mr. Bassett's estrangement from his parents (RP 6-6-2019, Vol. I, p. 66), his homelessness (RP 6-6-2019, Vol. I, p. 72; CP 71), as well as how the participation of an older co-defendant influenced the commission of his crimes. RP 6-6-2019, Vol. I, p. 35-37.

Considering both the neurodevelopmental and psychosocial factors effecting Mr. Bassett, Dr. Cunningham concluded that Mr. Bassett was “less functionally mature at the time of the offense than a normally situated 16-year old.” RP 6-6-2019, Vol. I, p. 22, 74.

Dr. Jeffrey Hansen, the pediatric psychologist who had been treating Mr. Bassett in 1995 shortly before his crimes, reached conclusions similar to those of Dr. Cunningham.⁵ Prior to Mr. Bassett's crimes, Dr.

5. CP 254-256, (Dr. Hansen's 2019 declaration affirming and expanding on his prior testimony); CP 76-95 (transcript of Dr. Hansen's prior 2015 testimony).

Hansen had diagnosed him as suffering from an Adjustment Disorder (CP 88-91), and noted that he was still struggling to find his identity. CP 85-86. Dr. Hansen felt that, had he been able to continue counseling Mr. Bassett in 1995, his tragic crimes may not have occurred. See, CP 256.

The sentencing court also received substantial evidence establishing Mr. Bassett's maturation and rehabilitation since his incarceration in 1996.⁶

Mr. Bassett also presented the court with evidence of his successful 9-year marriage, and of his wife's determination to assist him with his adjustment to release into the community.

6. E.g. 2018 DOC file entry that Mr. Bassett “continues to be a positive influence on the prison visiting program.”(CP 65); DOC file entry that Mr. Bassett meets minimum security classification criteria. (CP 125); Mr. Bassett earned his GED (CP 100); Mr. Bassett earned a full tuition college scholarship through the University Behind Bars (CP 103); Mr. Bassett earned a position on the honor roll at Edmonds Community College (CP 105); Mr. Bassett earned an AA Degree from Seattle Central C.C. in 2017 (CP 110); Mr. Bassett's married JoAnne Pfiefer in 2010 (CP 113-119); Mr. Bassett mentored other inmates while working as a tutor and teachers aide (CP 125); Mr. Bassett successfully completed Redemption counseling classes in 2018 (CP 127); Mr. Bassett successfully completed the Bridges to Life victim empathy program (CP 129); Mr. Bassett earned certifications in carpentry, facility maintenance, plumbing, and HVAC Maintenance from Edmonds C.C. (CP 131); Mr. Bassett successfully completed three days of facilitator training, qualifying him as an Alternatives to Violence program counselor (CP 133); Mr. Bassett received a Certificate of Appreciation from the Wheels for the World program for his work refurbishing wheelchairs (CP 144-45); Mr. Bassett received a Certificate of Appreciation from the Bicycles from Heaven program for Mr. Bassett's role refurbishing bikes which the were then provided to underprivileged children (CP 147).

Two corrections officers from the Monroe prison submitted under oath declarations on Mr. Bassett's behalf. Officer Brenda Fredricks, a 27 year DOC employee, had served as Mr. Bassett's job supervisor for two years and has continued to interact with him on a daily basis. CP 261-63. She spoke highly of Mr. Bassett's character and reliability, and she confirmed that at times Mr. Bassett worked alone on the prison grounds where he was not in any plain view, explaining that "Mr Bassett... is not someone you need to watch closely to see if they are doing what they've been told or to see if they are doing what they ought to be doing." CP 263.

Officer Joshua Goodloe is Mr. Bassett's prison job supervisor interacts with Mr. Bassett seven hours a day, five days a week. CP 257-260. Officer Goodloe described Mr. Bassett as "calm," "responsible," and "a pleasure to work with." CP 258-59. In addition, DOC Officer Goodloe previously worked in the prison visiting area for three years and observed that Mr. Bassett and his wife were respectful, followed rules, and seemed to enjoy each other. CP 258. Officer Goodloe declared that he had never seen or heard of Mr. Bassett ever being involved in any of the type of problematic behavior that commonly occurs in the prison. CP 259.

Officer Goodloe concluded,

Based on my years of working within the DOC, I occasionally run across people in the prison system where there is no longer any point in keeping them there. Mr. Bassett is one.

CP 259.

Mr. Bassett provided the court with more than 70 pages of letters speaking to his high character, maturity, and his consistent efforts to improve himself and his community. CP 151-223.⁷ One such letter came from Ann Frost, J.D., Ph. D., a University of Washington instructor teaching a juvenile justice class in the prison composed of UW students

7. E.g. Mr. Bassett is generally described by others as a person of high character, a leader, and a mentor to younger inmates (CP 151-223); Mr. Bassett's "Roots of Success" environmental literacy job class voted him their graduation speaker (CP 152); Mr. Bassett is "humble, kind, respectful" (CP 155); Inmate explaining how Mr. Bassett convinced him to abandon his plan to join a prison gang and instead led him to focus on his education, crediting Bassett for his subsequent success (CP 157-158); Mr. Bassett is a "natural leader" and 'role model.'" (CP 160); Mr. Bassett "helped me grow and make changes to my character' that have been life altering." (CP 165); Younger prisoners are able to look up to Mr. Bassett as "an upstanding person who encourages and helps others."(CP 167); Mr. Bassett "pushed and inspired me." (CP 169); "Watching [Bassett] mentor younger men towards a better life inspires me to do the same." (CP 171); Despite adversity, Mr. Bassett is able to maintain a positive attitude and keep moving forward. (CP 173); Mr. Bassett builds the community in a wonderful way (CP 175); Mr. Bassett stands out as someone who would be able to "step into a productive life seamlessly [outside prison] and never look back."(CP 180); Mr. Bassett is "a source of counsel and advice." (CP 181); "I know [Mr. Bassett] will never steer me in the wrong direction." (CP 183); Mr. Bassett is always willing to help and encourage people around him because he has the desire to make a difference (CP 186).

and prison inmates, including Mr. Bassett. CP 149. Dr. Frost described Mr. Bassett as “warm and friendly,” “very intelligent,” and commented that his writing and analytical abilities were on par with the top UW students in the class. *Id.*

Mr. Bassett's remorseful allocution statement was also presented to the court. CP 225-229. In that statement Mr. Bassett took responsibility for his actions, expressed his shame and sorrow for his offenses, and pointed out his growth, maturation, and determination to become a better man. *Id.*

After considering Mr. Bassett's offense, the fact that Mr. Bassett had not violated a prison rule in 16 years, along with his long list of accomplishments while incarcerated, Dr. Cunningham testified that Mr. Bassett's profile placed him among inmates with the lowest risk to re-offend and among paroled inmates with the highest chance of success upon release. RP 6-6-2019, Vol. I, p. 22, 23, 75-98.

Finally, Dr. Cunningham provided expert testimony that, even considering his crimes, Mr. Bassett was, and is not, “permanently incorrigible or irreparably corrupt.” *Id.* at 22-23.

The expert testimony and conclusions of Dr. Cunningham and Dr. Hansen, the declarations from the DOC employees, Mr. Bassett's record of successful rehabilitative accomplishments, and the 70 pages of letters referencing his maturity and high character, were un rebutted by any evidence presented to the court.

The prosecutor presented testimony from Mr. Bassett's sister who discussed the devastating effect the crimes Mr. Bassett and Mr. McDonald committed 23 years earlier had on their family. RP 6-6-2019, p. 29-36.

When imposing sentence, Mr. Bassett's judge did not comply with the clear terms required by RCW 10.95.030(3)(b). Instead, after twice acknowledging that the Supreme Court's *Bassett* decision prohibited re-sentencing Mr. Bassett to life without parole (RP6-6-2019, Vol II, p. 46, 55), he sentenced Mr. Bassett to serve two concurrent mandatory 25 year prison terms, consecutive to a mandatory 35 year prison term, thereby requiring Mr. Bassett serve a mandatory minimum term of 60 years in prison before his release could be considered. CP 251-52.

VI. ARGUMENT

Each of the cases noted below represents a material step in the evolution of the constitutional principles Mr. Bassett's judge was required to apply during Mr. Bassett's re-sentencing:

1. **The *Roper* case:** In *Roper v. Simmons*, 543 U.S. 551, (2005), the U. S. Supreme Court categorically banned the death penalty for juvenile offenders. *Roper* relied on emergent psychosocial and scientific evidence establishing that significant differences existed between the brains of adolescents and adults. *Roper*, 543 U.S. at 569-570. Those significant differences meant that a juvenile's character was not as fully formed as that of an adult, leaving the juvenile much more likely to rehabilitate during the maturation process. See, *id.* at 570. The *Roper* court concluded that, because juveniles are still forming their very identities and their deficiencies of character likely transient, even commission of the most heinous crimes by a juvenile does not establish the existence of an “irretrievably depraved character,” a prerequisite to imposing society's ultimate penalty. *Id.* at 570, 573.

2. **The *Graham* case:** Following *Roper*, in *Graham v. Florida*, 560 U.S. 48 (2010), the U. S. Supreme Court categorically banned mandatory life in prison for juveniles convicted of non-homicide crimes. The *Graham* Court reasoned that a categorical ban was necessary in order to assure that the brutality or cold-blooded nature of any particular offense would not overpower mitigating arguments based on youth that a sentencing court was constitutionally required to consider. *Id.* at 78. The *Graham* court declared that a juvenile offender must be provided with a sentence that allows for a “meaningful” or “realistic” opportunity to obtain release based on “demonstrated maturity and rehabilitation.” *Id.* at 75. Further, *Graham* announced that these constitutional protections applied whether a sentence was actual “life without parole” or the “term of years” equivalent of a life sentence. *Id.*

3. **The *Miller* case:** In *Miller v. Alabama*, 567 U.S. 460 (2012), continuing the lessons of *Roper* and *Graham*, the U.S. Supreme Court ruled that, in all but the rarest of circumstance where a juvenile offender is proven to be “permanently incorrigible,” sentencing a juvenile convicted of homicide to mandatory life in prison without parole violates

the federal constitutional prohibition against cruel and unusual punishment.

Miller reaffirmed that, because areas of the brain responsible for regulating behavior do not fully develop until a person reached their mid-twenties, the traditional penological rationales used in adult sentencing did readily not apply to juveniles. See, *id.* at 472.-73.⁸ The Court also observed that “youth” is more than a chronological fact, but is also “condition” characterized by lack of emotional maturity, underdeveloped sense of responsibility, vulnerability to outside pressures, and inability to escape dysfunctional environments. *Miller*, 567 U.S. at 471, 475, 477-78. Those “mitigating qualities of youth,” the foremost of which is their transience, required that our legal system treat juvenile offenders not as “miniature adults,” but as constitutionally different and less culpable than adult defendants. See, *id.* at 481. As a result, when juvenile offenders are

⁸ . Deterrence is a flawed rationale because juveniles are impulsive and unable to consider the consequences of their actions. *Miller*: at 472. Retribution’s focus on an offender’s blameworthiness does not justify an LWOP sentence because juveniles have a severely diminished moral culpability. *Id.* Incapacitation fails to justify an LWOP sentence because it presumes that a child is forever incorrigible and “incorrigibility is inconsistent with youth.” *Id.* at 472-73. Lastly, the rehabilitative theory of punishment doesn’t justify an LWOP sentence because such a sentence entirely precludes any hope for a child’s ultimate rehabilitation. *Id.* at 473; *accord, Bassett*, 192 Wn.2d at 88-89.

sentenced, the focus must be on the offender, rather than just the offense. See *id.* at 472-73.

4. The *Montgomery* Case: In *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016) the U.S. Supreme Court observed that societal “standards of decency” have evolved to the point that sentencing children and adolescents to spend their entire lives in prison is no longer accepted. See, *Id.* at 733-36.

The *Montgomery* Court clarified that, unless a juvenile is proven to be one of the exceptionally rare offenders who is “permanently incorrigible” to such a degree that rehabilitation at some point in the future is impossible, a sentence of life in prison without parole is constitutionally prohibited. *Id.* After reaffirming that one of the hallmark features of youth is the capacity for future change, the Court declared that juvenile offenders, “...must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for some years of life outside prison walls must be restored.” *Id.* at 736-37.

5. The Washington Supreme Court's Decision in *State v. Bassett*: Following those four constitutionally significant opinions, each

decided under the federal constitution, Mr. Bassett's appeal of his 2015 life sentence reached the Washington's Supreme Court. Our Supreme Court placed juvenile sentencing jurisprudence firmly under the umbrella of Washington's State constitution, announcing that, “in the context of juvenile sentencing, Article I, Section 14 provides greater protection than the Eighth Amendment.” *State v. Bassett*, 192 Wn.2d 67, 82 (2018).⁹

The Supreme Court also confirmed that Article I, Section 14 protections applied with equal force in cases involving multiple offenses. The *Bassett* court then identified Mr. Bassett's 2015 sentencing hearing as “an illustration of the imprecise and subjective judgments a sentencing court could make regarding transient immaturity and irreparable corruption.” See, *Id.* at 89-90. Recognizing that, under Washington's broader constitutional protection against cruel punishment, “imprecise and subjective judgments,” from a sentencer produced an unacceptable risk

9. Article I, Section 14 of the Washington Constitution provides “Excessive bail shall not be required, excessive fines imposed, nor cruel or unusual punishment inflicted.” The state framers considered and rejected the language of the Eighth Amendment to the United States Constitution, which only prohibited punishment that is both “cruel” and “unusual.” Based on the differences in text and history it is an “established principle” of Washington law that Article I, Section 14 provides an even broader protection against cruel punishment than does its federal counterpart. *State v. Bassett*, 192 Wn. at 82 (2018); *State v. Roberts*, 142 Wn.2d 471,506 n.11 (2000); *State v. Thorne*, 129 Wn.2d 736, 772 (1996).

that an undeserving child might receive a sentence of life in prison, the Court categorically banned juvenile life without parole as a potential punishment for juvenile offenders. *Id.* at 90.

Those constitutional principles governed Mr. Bassett's 2019 re-sentencing hearing

A. Mr. Bassett's 2019 mandatory 60-year prison term is an unconstitutional *de facto* juvenile life sentence.

“[E]very judge conducting a *Miller* sentencing in Washington must set a minimum term that is less than life.” *State v. Delbosque*, __ Wn.2d __, No. 96709-1, slip op. at 16 (2020); and see, *Bassett* 192 Wn.2d at 81 (the protections provided by Article I, Section 14 of Washington's constitution apply to *de facto* juvenile life sentences).

1. Under applicable case law, Mr. Bassett's minimum 60-year prison term is an unconstitutional *de facto* juvenile life sentence:

Neither Washington's legislature nor its courts have, as of yet, assigned a specific number that identifies what constitutes a *de facto* life sentence. Nonetheless, Washington case law makes clear that Mr. Bassett's 60-year mandatory minimum prison term - which would result in his

eligibility for release from prison at age 76 - is an unconstitutional *de facto* life sentence. E.g. *State v. Saloy*, 2017 WL 758539, 197 Wa. App. 1080 (2017) (“Here, Saloy was sentenced to nearly 60 years for a crime he committed as a 16 -year old.... Saloy's sentence is a *de facto* life sentence.” Slip op. at 13); *State v. Ronquillo*, 190 Wn. App. 765, 774-775 (2015) (juvenile sentenced to a 51.75 year minimum term with release at age 68, violates the prohibition against *de facto* juvenile life sentences); *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017) (to avoid the “functional equivalent” of life sentences for two juveniles sentenced to terms of 41-45 years and 36-40 years, *Miller* allows a sentencer to disregard mandatory minimum and consecutive sentence requirements).

Numerous cases from other jurisdictions have reached similar

conclusions.¹⁰

Mr. Bassett's 60 year mandatory minimum sentence is an unconstitutional *de facto* life sentence.

2. Mr. Bassett's 60-year mandatory minimum prison term is a *de facto* life sentence even under “average life expectancy” projections:

Mr. Bassett was 16.4 years old when he was incarcerated for his crimes. RP 6-6-2019, Vol. I, p. 21. Under the terms of his 60-year sentence, he will not be eligible for release until age 76.4. Our courts have, for limited purposes, previously identified 76.2 years as the average life

10. E.g. *People v. Contreras*, 411 P. 3d. 445 (Cal. Sup. Ct. 2018) (juvenile offender sentenced to 50 years to life, violates prohibition against *de facto* life sentences); *Carter v. State*, 192 A.3d 695 (Md. Ct. App. 2018) (50-year minimum prison sentence is *de facto* life); *State v. Zuber*, 152 A. 3d 197, 203 (New Jersey 2017) (sentence requiring a juvenile serve 55 years, with possible release at age 72, violates *Miller*); *People v. Buffer*, 75 NE 3d 470 (Ill. App. 2017) (50-year minimum sentence is *de facto* life); *Sam v. State*, 401 P.3d 834, 860 (Wyo. S. Ct. 2017) (reversing sentence of 52 years, with possible release at age 70, as a *de facto* life sentence); *Casiano v. Commissioner of Correction*, 115 A. 2d 1031 (Conn. S. Ct. 2015) (50-year prison sentence for 16 year-old offender triggers *Miller* protections); *Bear Cloud v. Wyoming*, 2014 WY. 113, 334 P.3d 132 (2014) (Court reversed 45-year sentence as a *de facto* juvenile life sentence); *State v. Null*, 836 N.W.2d 41, 71-75 (Iowa 2013) (Parole eligibility after 52.5 years for juvenile offender does not comply with *Graham*); *People v. Caballero*, 55 Cal.4th 262, 282 P.3d 291 (2012) (a term of years sentence that meets or exceeds the life expectancy of a juvenile offender who is still capable of reform is inherently disproportionate and therefore violates both *Miller* and *Graham*); accord, *U.S. v. Grant*, 887 F.3d. 131 (3rd Cir. 2018); *Moore v. Biter*, 725 F.3d 1184, 1194 (9th Cir. 2013) (“[*De facto* life is irreconcilable with *Graham*’s mandate that juvenile must be provided ‘some meaningful opportunity’ to reenter society”).

expectancy for a *non-incarcerated* male in Washington State.¹¹ Life expectancy tables are of questionable application for their failure to account for variables, such as the effect of incarceration on lifespan. Numerous studies confirm that incarceration significantly reduces life expectancy.¹² The United States Sentencing Commission has acknowledged that fact by defining a life sentence as 470 months (39.17 years).¹³

11. WPIC 6A, App. B, Life Expectancy Table, (2019) [https://govt.westlaw.com/wciji/Document/I2cd51f17e10d11dab058a118868d70a9viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/wciji/Document/I2cd51f17e10d11dab058a118868d70a9viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)).

12. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003* (2013), 103 Am. J. Pub. Health 523, 526 (finding each year of incarceration correlated with a 15.6 percent increase in odds of death for parolees and a two-year decline in life expectancy); Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning* (2011) 173 Am. J. Epidemiology 479, 484; U.S. Dept. of Justice, Nat. Inst. of Corrections, *Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates* (2004) pp. 9-10 (Correctional Health Care) (incarceration intensifies the health problems of elderly inmates and accelerates the aging processes); Nick Straley, *Miller's Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 986 n.142 (2014); also, Michael Massoglia & William Alex Pridemore, *Incarceration and Health*, 41 ANN. REV. SOC. 291 (2015); Michigan Life Expectancy Data for Youth Serving Life <http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf>. (The life expectancy of youth in prison is significantly reduced in comparison to the life expectancy of the general, non-incarcerated, public.)

13. U.S. Sentencing Commission Preliminary Quarterly Data Report (through March 31, 2014), at 8. <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014-Quarter-Report-2nd.pdf>.

For Mr. Bassett to ever see a single day outside prison walls, he would have to overcome his reduced life expectancy due to incarceration, and then would still have to exceed the average life expectancy for a non-incarcerated male.

In addition, as *Graham*, *Miller* and *Montgomery* explain, the inquiry into what constitutes juvenile “life in prison,” depends on more than mere biological survival. See, e.g. *Graham*, 560 U.S. at 79-80; *Miller*, at 479. Implicit in the requirement of a “meaningful release” is the promise of providing an adolescent offender with something more than a *de minimus* period outside of prison before death. A “meaningful release” requires the opportunity for a rehabilitatable adolescent to achieve a degree of “fulfillment outside prison walls” with the “chance for reconciliation with society.” See, *Graham*, 560 U.S. at 79; *accord*, *Montgomery*, 136 S. Ct. at 736-37.

If Mr. Bassett did somehow exceed his natural life expectancy and live to release, his geriatric release does not allow for the societal reintegration that *Graham* contemplates.

Further, compelling Mr. Bassett to remain in prison for a period exceeding his estimated life expectancy impliedly finds, without substantial evidence, that he is “permanently incorrigible.” The evidence presented during Mr. Bassett's re-sentencing hearing, and Dr. Cunningham's unrebutted expert opinion, established just the opposite to be true. RP 6-6-2019, Vol. I, p. 22-23. See, *State v. Delbosque*, No. 96709-1, slip op. at 11-12 (*Bassett* “sets a high standard for concluding that a juvenile is 'permanently incorrigible'”).

In light of the evidence before the court when Mr. Bassett was sentenced, imposing a virtual life 60-year prison sentence is “cruel punishment” in violation of Washington's Article I, Section 14. See, *Bassett*, 192 Wn.2d at 89-90; and see, *State v. Delbosque*, __ Wn. 2d. __, No. 96709-1.

B. The Superior Court erred by failing to comply with RCW 10.95.030(3)(b) when sentencing Mr. Bassett.

In 2014, to ensure compliance with *Miller's* constitutional imperative, our legislature enacted RCW 10.95.30(3)(b). That statute

requires that, when re-sentencing an adolescent offender convicted of aggravated murder,

[T]he court *must* take into account *mitigating factors* that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), *including*, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

RCW 10.95.030(3)(b) (emphasis added); *accord*, *State v. Bassett*, 192 Wn.2d at 74.

Instead of following the statutory mandate during sentencing, Mr. Bassett's judge used a different process. Mr. Bassett's judge selected three terms - "transient rashness," "proclivity for risk," and "inability to assess consequences"- out of their context in the *Miller* opinion and attempted to apply them, not to Mr. Bassett, but to the circumstances surrounding his crimes. RP 6-6-2019, Vol. II, p.46-47. In their proper context, those terms were used by the *Miller* court not as a sentencing standard, but to describe some of the broad conclusions scientists reached that were subsequently acknowledged by the *Graham* and *Roper* courts as being generally

common to juveniles as a class, thereby supporting the proposition that class members were generally less morally culpable and more likely to rehabilitate than adult defendants.¹⁴

In addition to taking those terms out of their context, Mr. Bassett's sentencer misinterpreted the terms. For example, after acknowledging he'd never heard the phrase “transient rashness” before, Mr. Bassett's judge simply looked up a dictionary definition of “rash,” stating, “[r]ash means to act hastily or without due consideration.” RP 6-6-2019, Vol. II, p. 47.¹⁵ Ignoring the term “transient,” the court then concluded that, “[t]here is nothing *about the crimes* that Mr. Bassett's committed that could be

14. *Miller*, 567 U.S. at 471-472. (“In *Roper* we cited studies showing that 'only a small portion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior'[citing to a study by Steinburg & Scott]. “[I]n *Graham* we noted that 'developments in psychology and brain science showed fundamental difference ...in parts of the brain involved in behavior control' (citation omitted). We reasoned that those findings - of transient rashness, proclivity for risk and inability to assess consequences – both lessened a child's “moral culpability” and enhanced the prospect that as years go by and neurological development occurs, his 'deficiencies will be reformed.' ”); See also, *Bassett*, 192 Wn. at 87 “...[W]e now have the benefit of the studies underlying *Miller*, *Roper*, and *Graham*...that establish a clear connection between youth and decreased moral culpability for criminal conduct.” (citation omitted).)

15. It appears the court utilized a definition of “rash” found at <https://www.dictionary.com/browse/rash>. Significantly, the trial court did not define or consider the impact of the term “transient,” in conjunction with “rashness.” (using the same dictionary, 'transient,' generally means “existing briefly, temporary.” <https://www.dictionary.com/browse/transient>).

characterized as a rash act.” *Id.* (emphasis added). But see, *Commonwealth v. Batts*, 163 A. 3d. 410, 437 (Pa. 2017) (a finding that a murder was both planned and deliberately carried out by a juvenile means little when determining whether the crime resulted from the “transient immaturity” central to *Miller*).

The court followed that same procedure with “proclivity for risk,” first using the dictionary to define one word - 'risk'- and then reasoning that, because Mr. Bassett took some steps to reduce the risk of being apprehended, “there is *nothing about the facts of this case* that exhibit a proclivity by Mr. Bassett to want to engage in risky behavior.” RP 6-6-2019, Vol. II, p. 48-49 (emphasis added).¹⁶

Likewise, the sentencing court misconstrued the term “inability to assess consequences.” Dr. Cunningham had explained while testifying that, even when a juvenile acts with some forethought, the act can be indicative of the “judgment impulsivity,” and the inability to assess long term consequences that are consistent with brain immaturity. RP 6-6-2019,

16. Had the court's focus properly extended beyond the circumstances of the crimes, it would have found acts by Mr. Bassett evidencing a “proclivity for risk consistent with youth.” For example, at age 15, in response to a dare, Mr. Bassett consumed a fifth of alcohol, resulting in his loss of consciousness and hospitalization. CP 80-81.

Vol. I, p. 43-45, 50-51. Rejecting Dr. Cunningham's testimony without any rebuttal evidence or testimony, the sentencing court concluded that, because Mr. Bassett had taken steps to conceal his crimes “Mr. Bassett clearly assessed the consequences of his actions.” RP 6-6-2019, Vol. I, p. 49.¹⁷ The court, disregarding the constitutionally required distinction between juveniles and adults, then reasoned that, because the failure of adult defendants to take appropriate steps to avoid detection was unrelated to their brain immaturity, Mr. Bassett's failure to avoid detection probably wasn't the result of his brain immaturity either. RP 6-6-19, Vol. II, p. 52.¹⁸

In the end, without specifically addressing any of the constitutional mitigating factors mandated by RCW 10.95.030(3)(b), Mr.

17. Although the sentencing court dismissed Dr. Cunningham's expert testimony on “judgment impulsivity,” as it pertained to the juvenile inability to assess consequences, (RP 6-6-19, vol. II, p. 50-51), it is relevant to note that four years *prior* to hearing Dr. Cunningham testify, Mr. Bassett described having experienced “judgment impulsivity,” when he stated in open court, “I was unable to see the longterm consequences of my actions, caring little for the hurt I inflicted upon others. My first thoughts in jail I recall being over how much trouble I was going to be in when my parents learned I was in jail. It just didn’t click.” CP 226-227 (Bassett's statement of remorse to the court.).

18. “The-the overwhelming majority of adult criminal offenders that I have seen have similarly failed to take steps to avoid detection and arrest. That is not something that is unique to a juvenile. To state that - that Mr. Bassett should somehow be found less culpable of his conduct because he didn't take appropriate steps to avoid detection, arrest and prosecution is simply not related to his age or his lack of maturity. The - the overwhelming majority of criminal offenders that appear in this [Superior] court have engaged in - in similar behavior of failing to avoid detection and arrest, it is not related to brain immaturity.” RP 6-6-19, Vol. II, p. 52.

Bassett's judge announced, "Ultimately, the decision today comes down to moral culpability." RP 6-6-2019, Vol. II p.52, 54. But see, *Montgomery*, 136 S. Ct. at 734-36 (*Miller's* critical question is whether the defendant is capable of future change); *accord*, *Bassett*, 192 Wn.2d. at 89-90; *accord*, *U.S. v. Briones*, 929 F. 3d 1057, 1066, 1067 (9th Cir. 2019).

Mr. Bassett's sentencing court then noted with significance that, had Mr. Bassett been an adult, he "could certainly be sentenced to life without parole, and in some states put to death" inferring that, because Mr. Bassett avoided either of those adult sentences he'd already received a "break" in his punishment. RP 6-6-2019 Vol. II, p. 54-55. But see, *State v. Bassett*, 198 Wn. App. 714, 738, *aff'd*, 192 Wn.2d 67 (2018) ("[C]hildren cannot simply be treated as miniature adults for punishment purposes." (citing to *Miller*)).

The sentencing court abused its discretion by failing to apply either RCW 10.95.030(3)(b) or the constitutional principles upon which that statute is based. As a result, Mr. Bassett was unconstitutionally sentenced.

1. The sentencing court erred by disregarding significant evidence the court was required by RCW 10.95.030(3)(b) to meaningfully consider: Although Mr. Bassett's judge failed to properly consider the sentencing criteria mandated by Washington's *Miller*-fix statute, Mr. Bassett presented substantial evidence and testimony directly responsive to that statutory criteria.

a. Mr. Bassett's chronological age: The first mitigating factor Mr. Bassett's sentencing judge was statutorily required, but failed, to address, was Mr. Bassett's chronological age. Mr. Bassett was young, 16 years and 4 months old, when his crimes occurred. RP 6-6-2019, Vol I. p. 21.

Even though Mr. Bassett was a young offender, the *Miller* line of cases makes clear that there is more to consider about an offender's “age” than a simple, chronological number. E.g. *Miller*, 567 U.S. at 476.

i. Mr. Bassett's premature birth: For example, one significant mitigating factor Mr. Bassett's sentencing court failed to address was the effect Mr. Bassett's having been born two months prematurely had on his neurodevelopment. RP 6-6-2019, Vol. I, p. 54. Dr.

Cunningham testified in some detail about the effects of premature birth, noting that children born prematurely suffer from an increased incidence of problems interacting with their mothers (RP 6-6-2019, Vol. I, p. 55), an issue Mr. Bassett had with his own mother.¹⁹ Dr. Cunningham testified that premature birth also results in inhibition spectrum issues, meaning a child born prematurely has greater difficulty in exercising good judgement. *Id.* Dr. Cunningham explained that studies conclude that children born prematurely are three times more likely to have impulse control issues and executive functioning deficits. RP 6-6-2019, Vol. I, p.109-110.

Consistent with his premature birth, when his crimes occurred Mr. Bassett was significantly less physically developed than most children his age, being smaller than 90% of other 16-year olds. 6-6-2019, Vol. I, p. 54. Further, as Dr. Cunningham explained, Mr. Bassett's premature birth resulted in an immature nervous system, causing him to suffer extended bedwetting up to age ten. *Id.* at p.55. It would be unreasonable to assume that Mr. Bassett's premature birth, which physically stunted his growth and

¹⁹ . See e.g. CP 86-88, 255-56 (testimony and declaration from Dr. Hansen, the psychologist who Mr. Bassett prior to his crimes, discussing some of the difficulties occurring between Mr. Bassett and his mother.)

caused the delayed development of his nervous system, somehow failed to have any effect on the development of his brain.

These cause and effect issues, which Dr. Cunningham clearly explained, are the very foundation upon which the reasoning behind the *Miller* line of cases rests. Nonetheless, those mitigating factors went unaddressed when Mr. Bassett's judge imposed sentence.

ii. *Mr. Bassett's childhood alcohol abuse*: Mr. Bassett abused alcohol as an adolescent. RP 6-6-2019, Vol. I. p. 61-63. Dr. Cunningham explained that childhood alcohol abuse damages the developing adolescent brain even more so than the fully developed adult brain. RP 6-6-2019, Vol. I, p.56-59. In addition, alcohol abuse at a young age damages psychosocial development, and impedes maturity, coping, and adaptive socialization skills. RP 6-6-2019, Vol. I., p. 68-69.

Dr. Cunningham's testimony and conclusions regarding Mr. Bassett's premature birth and child alcohol abuse were unrebutted. For Mr. Bassett's judge to impose sentence without having addressed the mitigating effects of those significant factors on Mr. Bassett's neurodevelopment was manifestly unreasonable.

b. Mr. Bassett's childhood and life experience:

Although a statutory requirement specified by RCW 10.95.030(3)(b), Mr. Bassett's judge failed to address this mitigating circumstance. Specifically, the court failed to address:

i. *Mr. Bassett's teen homelessness:* During the period leading up to Mr. Bassett's crimes, he was living as a homeless teen with no means of supporting himself. CP 80, CP 255. Mr. Bassett's homelessness was psychologically damaging and stunted his emotional maturation. RP 6-6-2019, Vol. I, p. 70-74.

ii. *Mr. Bassett's parents rejected his plea to return home:* Mr. Bassett had, with Dr. Hansen's assistance, attempted to reconcile with his parents, hoping he would be allowed to return to his home. Mr. Bassett's entreaty was rejected by his mother. CP 42-44, CP 255-56. Mr. Bassett was visibly upset by her rejection. *Id.*

iii. *Mr. Bassett "life experiences" were consistent with immaturity:* Mr. Bassett was born and raised in McCleary,

a town of approximately 1,500 people.²⁰ At the time of his crimes Mr. Bassett had just turned 16. He had been on one “date” in his life - a freshman dance at school, he'd never had a checking account, had never paid a bill, never had a driver's license, and had never been on a plane or in a taxi. RP 6-6-2019, Vol. I, p. 40, 41.

iv. Prior to the crimes, Mr. Bassett was diagnosed as suffering from an Adjustment Disorder: Shortly before his crimes, Dr. Hansen, Mr. Bassett's treating psychologist, diagnosed him as suffering from an Adjustment Disorder, which resulted in Mr. Bassett having an abnormal reaction to stressors. CP 89-90. At the time of his crimes, Mr. Bassett was experiencing a variety of stressors, including adolescent homelessness, having no money, no job, and, that he was still struggling to find his identity. CP 90-91.

Mr. Bassett's sentencing judge never addressed any of these mitigating issues and made no findings about Mr. Bassett's childhood or life experiences.

20. https://www.google.com/search?ei=mYAGXvXNCfC_0PEP19mE4Ag&q=mcclary+wa+population+1996&oq=mcclary+wa+population+1996&gs_l=psy-ab.3...118153.120441..121413...0.2..0.322.583.4j3-1.....0....1..gws-wiz.....0i71j0i22i30j33i22i29i30j33i160.H6c_S5ercK4&ved=0ahUKEwi1_oO-69bmAhXwHzQIHdesAYwQ4dUDCAs&uact=5

c. The degree of responsibility the youth was capable of exercising:

This statutory mitigating factor was not addressed by Mr. Bassett's sentencing judge.

i. Mr. Bassett lifestyle demonstrates that, as a 15 and 16 year old, he was able to exercise only minimal responsibility: At the time of his crimes Mr. Bassett had stopped attending school, he had no occupational skills or vocational training, he'd never had a full-time job, and his “employment history” consisted of sweeping out a parking lot once a week for \$10.00. RP 6-6-2019, Vol. I, p. 39. He had never made an appointment to see the doctor or dentist. *Id.* p. 41.

ii. Contrary to the court's previously stated belief, adolescent homelessness did not make Mr. Bassett a more responsible person: Mr. Bassett, prior to his crimes, was living as a homeless child. CP 227. The sentencing court had previously expressed its belief that living as a homeless child had the effect of making Mr. Bassett more responsible

than children who weren't homeless.²¹ During the 2019 sentencing, both Dr. Hansen, and Dr. Cunningham made clear that homelessness does not make teens more responsible. Instead, it impedes their maturity and is destructive to their development. RP 6-6-2019, Vol. I, p. 70-74.²² For Mr. Bassett, homelessness was “extraordinarily psychologically injurious.” *Id.* at 72.

When sentencing Mr. Bassett, his judge did not address the limited degree of responsibility Mr. Bassett was capable of exercising and did not address the damaging effects teen homelessness had on his emotional development.

21 During Mr. Bassett's 2015 sentencing his judge stated....”living in a shed and sleeping in a baseball dugout was not an ideal situation, they are situations that cause 15 and 16 year olds to grow up pretty quickly...I also know that the kids that are forced to live that [homeless] lifestyle gain a level of maturity much quicker than kids who are not in that situation.” ...[because of Mr. Bassett’s homelessness he] may have had a higher degree of responsibility and – and ability to control his behavior than others teenagers that same age.” RP 1-30-2015, p. 88-89. During Mr. Bassett's 2019 sentencing, the court gave no indication it had changed that belief.

22 . CP 255. Declaration of Jeffrey Hansen, Ph. D., May 31, 2019. “During the time period when I met with Brian I recall he was experiencing a number of stressors, one of which was periodic homelessness. Based on my experience as a pediatric psychologist and my review of relevant literature, there is nothing beneficial about child homelessness. Homelessness does not result in a child have a greater ability to make a wise decision. In fact, when a child suffers a loss of connection, such as when a connection is severed with the family home, the result is generally destructive the child's development.”

d. The youth's chances of becoming rehabilitated.

After *Miller*, juvenile defendants who are not “permanently incorrigible” or “irreparably corrupt” are constitutionally ineligible for our most severe punishments. *Montgomery*, 136 S. Ct. at 735 (citation omitted). Accordingly, when sentencing a juvenile facing a lengthy punishment, the central inquiry is whether that particular juvenile is capable of rehabilitation in the future. See, *State v. Delbosque*, ___ Wn.2d. ___, No. 96709-1, slip op. at 16 (2020) (“the key question is whether the defendant is capable of change”); *State v. Bassett*, 192 Wn.2d. at 89-90; *U.S. v. Briones*, 929 F. 3d at 1067.

That “central inquiry” constitutionally requires an “individualized” sentencing hearing where “meaningfully consideration” is given to the juvenile's possible future rehabilitation. See, *Delbosque*, No. 96709-1, slip op. p. 13; *Miller*, 567 U.S. at 477-78; *Graham*, 560 U.S. at 76. It was the complexity involved in requiring a sentencing court to look forward in time in order to differentiate those juvenile offenders who could rehabilitate at some point in the future, from the extraordinarily

rare offender who could not, that provided the rationale for Washington's categorical ban on juvenile life without parole. See, *Bassett*, 192 Wn 2d at 89-90.

In Mr. Bassett's case, there is no need to speculate about his “potential for rehabilitation.” Mr. Bassett has been answering that question for two decades.

“[R]esentencing courts must consider the measure of rehabilitation that has occurred since a youth was originally sentenced to life without parole.” *Delbosque*, slip op. p.15; accord, *Briones*, 929 F. 3d. at 1067 ([W]hen a substantial delay occurs between a defendant's initial crime and later sentence, the defendant's post-incarceration conduct is especially pertinent to a *Miller* analysis) (citations omitted).

Delbosque involved a 17-year old convicted of aggravated murder and felony murder, sentenced to life without parole in 1994. In 2016 he was granted a *Miller* re-sentencing hearing. While incarcerated, he'd been a prison gang leader and had been infractioned 10 times for offenses such as fighting, weapons possession, and extortion. His most recent infraction occurred just six years prior to his *Miller* hearing, when

he'd arranged for the assault of another inmate. *Delbosque*, slip op. at 4. At re-sentencing, based on what it described as “ongoing predatory behavior,” Delbosques's judge imposed a minimum term of 48 years. The Supreme Court, noting that Delbosques' judge had “oversimplified and sometimes disregarded” mitigation evidence, reversed the sentence. Further, because during the six years since Delbosque's last infraction there was evidence consistent with rehabilitation, the Supreme Court found a “lack of substantial evidence” to support the finding of “permanent incorrigibility” necessary to justify a 48-year term.

The court in *Briones*, spoke even more expansively on the constitutional requirement that during a *Miller* re-sentencing a judge give meaningful consideration to post-incarceration evidence of rehabilitation, stating:

Most significant, Briones offered abundant evidence on the critical issue: that he was not irreparably corrupt or irredeemable because he had done what he could to improve himself within the confines of incarceration. The eighteen years that passed between the original sentencing hearing and the resentencing hearing provide a compelling reason to credit the sincerity of Briones’s efforts to rehabilitate himself. Briones was sentenced in 1997; *Miller* was not issued until 2012. Thus, for the first fifteen years of Briones’s incarceration, his LWOP sentence left no hope

that he would ever be released, so the only plausible motivation for his spotless prison record was improvement for improvement's sake. This is precisely the sort of evidence of capacity for change that is key to determining whether a defendant is permanently incorrigible, yet the record does not show that the district court considered it. *This alone requires remand.*

U.S. v. Briones, 929 F. 3d at 1067 (emphasis added) (citation omitted); See also, *Bassett*, 192 Wn.2d at 88 (good behavior and character improvement are material).

The volume evidence of “capacity for change,” that Mr. Bassett presented to his sentencing court is too large and varied to discuss in detail here. See e.g. fn. 6 and fn. 7, *supra.*; CP 55-229, 254-263. Some of the evidence of Mr. Bassett's rehabilitation presented to his sentencing court included:

- i. Mr. Bassett had not been infraacted for violating a prison rule of any kind in 16 years. RP 6-6-2019, Vol. I, p.83-84.
- ii. Mr. Bassett earned his GED (CP 100), then earned a scholarship to college (CP 103), then earned a position on the college honor roll (CP 105), then earned his AA degree (CP 110), and is working towards his BA degree.

iii. Mr. Bassett had earned praise from prison staff for his reliability, maturity, hard work, willingness to volunteer his assistance, ability to get along well with others, and, his efforts to give back to the community. E.g. CP 65, 144, 145, 147, 257-263. Clearly, prison staff have concluded that Mr. Bassett is not “incorrigible;” he is given access to tools that could be weaponized and is allowed to work alone in areas of the prison not in plain view. CP 262; RP 6-6-2019, Vol. I, p. 84-85.

iv. Mr. Bassett qualified for a minimum security designation, (though his “lifer,” status prevents the DOC from formally designating him below medium.). CP 125.

v. Mr. Bassett, while in prison, met, fell in love with, and married his wife. They have sustained their strong, intimate relationship for 9 years. CP 108; RP 6-6-2019 Vol. I, p. 86-87.

vi. Mr. Bassett enrolled in, and successfully completed, numerous self-betterment programs on topics such as, understanding the dynamics of crime, family violence, and victim empathy. e.g. CP 127, 129, 132, 133.

vii. Mr. Bassett has actually and positively influenced the lives of others through his mentoring, and by counseling others to improve themselves through education and avoidance of a criminal lifestyle. See, fn. 7, *supra.*; CP 151-223.

Consistent with Mr. Bassett's years of post conviction rehabilitation, Dr. Cunningham also testified that, Mr. Bassett was not 'permanently incorrigible' or 'irreparably corrupt.' RP 6-6-1209, Vol. I, p. 22-23.

In addition, DOC Supervisor Goodloe declared that, based on his 15 years of experience in the DOC and his extensive contacts with Mr. Bassett, there was “no longer any point” in keeping Mr. Bassett in prison. CP 259.

That evidence and those opinions, each consistent with Mr. Bassett's years of successful rehabilitation, were unrefuted by any evidence or testimony presented to the court during sentencing.

After that testimony and evidence was presented, the extent of the sentencing court's analysis of Mr. Bassett's “potential for rehabilitation” was as follows:

I haven't discussed the potential for rehabilitation, [Mr. Bassett's counsel] has mentioned that. And he's correct, this is one of the *Miller* factors. And - and I have considered that today in reaching my decision and – and there is evidence that – that Mr. Bassett possesses some potential for rehabilitation.

RP 6-6-2019, Vol II, p. 52-53.

Further, in response to Dr. Cunningham's testimony that various studies, when applied to Mr. Bassett, placed him among paroled inmates least likely to reoffend and most likely to succeed outside of prison walls.

(RP 6-6-2019, Vol. I, p.88- 98) the court commented,

[b]ut you can't take that data and – and then assert we should just open the doors of our prisons and release people convicted of homicide because they're low risk offenders. So while its a factor to consider, it is not a factor that relieves someone of their moral culpability.

RP 6-6-2019, Vol. II, p. 53.

Based on the record, the sentencing court lacked the “substantial evidence” necessary to support imposition of a lengthy sentence, let alone a sentence of virtual life in prison.

Furthermore, the oral findings made by Mr. Bassett's sentencing judge failed to establish that he gave any, let alone the individualized “meaningful consideration” that the constitution requires, to Mr. Bassett's

evidence of rehabilitation. As a result, Mr. Bassett's *de facto* life sentence is manifestly unreasonable, was based on untenable grounds, and must be reversed.

C. The Superior Court erred by denying Mr. Bassett's motion for immediate referral to the Parole Board so his release could be considered.²³

Denying Mr. Bassett's motion for immediate referral to the parole board violated his substantive right that his “individual circumstances” be given “meaningful consideration” during sentencing and also violated the broad constitutional protections Article I, Section of 14 provides adolescent offenders against cruel punishment.²⁴

Washington courts recognize that the brain science and psychology upon which the *Miller* line of cases is founded, established

23. Prior to his sentencing, Mr. Bassett moved that the court immediately refer Mr. Bassett to the ISRB to determine his suitability for release. CP 45-47. The court denied Mr. Bassett's motion. CP 250.

24. See, RCW 10.95.030(3)(a)(ii), requiring, regardless of his or her individual circumstance, that every adolescent offender convicted of aggravated murder remain in prison for not less than 25 years. But see, *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014) (a statute mandating incarceration for juvenile offenders with no opportunity for parole until a minimum period of time has been served, is unconstitutional).

that areas of the brain responsible for regulating behavior, impulsivity, and the ability to fully consider consequences, generally mature by the time a person reaches their mid-twenties. See, *State v. O'Dell*, 183 Wn.2d 680, 692 n.5 (2015) (citations omitted).²⁵

Our courts have also recognized that, as a result of adolescent brain immaturity, the traditional purposes justifying adult punishment, including incapacity, do not readily apply to adolescent offenders. See, *Bassett*, 192 Wn.2d at 88-89 (citations omitted).²⁶

Consistent with that recognition, Washington courts have previously determined that, when sentencing adolescent offenders, even mandatory minimum sentences and mandatory consecutive terms must give way to ensure *Miller's* central edicts regarding youth and future

25 . e.g. *MIT Young Adult Development Project: Brain Changes*, MASS. INST. OF TECH, <http://hrweb.mit.edu/worklife/youngadult/brain.html> (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) ("The 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); see also, RP 6/6/19, vol.I p. 23-34 (testimony of Dr. Cunningham.)

26. See, *fn. 8, supra*.

rehabilitation are complied with. See, *State v. Bassett*, 192 Wn.2d at 81; *State v. Houston-Sconiers*, 188 Wn.2d 1, 21 (2017).

It follows that, for a juvenile offender, like Mr. Bassett, who has long since exceeded the age generally recognized as signifying physiological brain maturity, and, who has established his rehabilitation year after year through his consistent, mature, rule oriented, responsible behavior, that denying him even the opportunity of having a parole board determine his suitability for release until he has been imprisoned for at least 25 years, constitutes an abuse of discretion and is unconstitutionally cruel punishment in violation of Article I, Section 14 of Washington's constitution.

The sentencing court erred in denying Mr. Bassett's motion for an immediate referral to the parole board.

D. Mr. Bassett's constitutional right to be sentenced by a fair and impartial judge was violated.

In 2015, when sentencing Mr. Bassett to life without possible parole, Mr. Bassett's sentencing judge declared, he did not “believe that

any amount of time in prison was ever going to result in [Bassett] being rehabilitated such that he could safely return to the community.” RP 1-30-15, p. 93. Subsequently, the Supreme Court, relying in part on the “imprecise and subjective” interpretation Mr. Bassett's judge had given to Mr. Bassett's mitigation evidence, reversed Mr. Bassett's sentence.

Having been remanded to appear before the same judge who sentenced him in 2015, prior to his 2019 resentencing, Mr. Bassett moved for the recusal of that judge. During the recusal hearing, Mr. Bassett's counsel voiced concern that the court still held the opinion that Mr. Bassett should never be released. RP 6-6-2019, Vol. I, p.5. Mr. Bassett's counsel also expressed some additional concern of bias based upon the court's seeming willingness to schedule Mr. Bassett's sentencing hearing without regard as to whether or not Mr. Bassett's witnesses were available to appear and testify on that date. RP 6-6-2019, Vol. I p. 6-7.²⁷ The court

27. RP 6-6-2019, Vol. I, p.6. On April 1, 2019, the sentencing court had inquired of the parties via email as to whether May 15, 2019 was an acceptable date for the re-sentencing hearing. The prosecution agreed to the May 15, 2019 date. *Id.* Defense counsel advised the Court that prior to accepting that date the defense had to confer with defense witnesses to ensure they were available to appear and testify on that date. *Id.* On April 3, 2019, without waiting to see if defense witnesses were available to appear, on May 15, 2019, the Court set Mr. Bassett's re-sentencing hearing for May 15, 2019. *Id.*

failed to specifically respond to either concern. RP 6-6-2019, Vol. I, p.5; CP 249-250.

Due process requires, at the very least, that a defendant have a fair and impartial judge without an actual bias against the defendant or an interest in the outcome of the defendant's particular case. WASH CONST. Art. 1, Sec. 22; U.S. Const. Amend 14.; *In re Murchison*, 349 U.S. 133, 136, (1955); *Bracy v. Gramley*, 520 U.S. 899, 905 (1997).

In addition, the Appearance of Fairness Doctrine requires disqualification of a judge who is biased against a party or whose impartiality may reasonably be questioned. *State v. Ryna Ra*, 142 Wn. App. 868, 884-885 (2008). When the "appearance of fairness" is violated, the decisions of a tribunal must be reversed even if the tribunal was in fact, impartial. See, *Milwaukee Railroad v. Human Rights Commission*, 87 Wn.2d 802, 808 (1976) (multiple citations omitted); *Accord, State v. Madry*, 8 Wn. App. 61, 70 (1972) (a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned). Appellate decisions in Washington have required a strict application of this rule. See, *Brister v. Tacoma City Council*, 27 Wn. App. 474, 486,

(1980) (citations omitted); *Sherman v. State*, 128 Wn.2d 164, 205 (1995). *State v. Talley*, 83 Wn. App. 750, 763 (1996) (remanded for re-sentencing before a different judge because sentencing judge's prior comments may have indicated sentence was predetermined); *State v. Sledge*, 133 Wn.2d 828, 846, n.9 (1997).

Denial of Mr. Bassett's motion for recusal was manifestly unreasonable. Consistent with the sentencing court's previously stated opinion that Mr. Bassett was never going to be rehabilitated, the court failed to give meaningful consideration to unrefuted evidence of Mr. Bassett's rehabilitation, presented during his 2019 *Miller* hearing.²⁸ Further, when sentencing Mr. Bassett, the court disregarded RCW 10.95.030(3)(b), the statute specifically enacted to govern juvenile re-sentencing hearings like Mr. Bassett's. Then, after twice noting that the law prohibited the court from again sentencing Mr. Bassett to mandatory life in prison, the court sentenced Mr. Bassett to serve the term of years equivalent of a life in prison sentence. See, RP 6-6-2919, Vol. II, p. 55.

28. See, text accompanying p.38-41, *supra*.

Mr. Bassett's right to have his sentence determined by a fair and impartial judge was violated. As a result, his sentence must be reversed.

V. CONCLUSION

Sentencing a juvenile offender to either mandatory life in prison, or to *de facto* life in prison is unconstitutional.

Sentencing a juvenile convicted of aggravated murder in disregard of a statute specifically enacted to apply to sentencings involving juvenile offenders convicted of aggravated murder, is an abuse of discretion.

Sentencing a juvenile offender without giving “meaningful consideration” to substantial, uncontroverted evidence from both lay and expert witnesses, that that juvenile offender has rehabilitated, is an abuse of discretion.

For the reasons and law noted herein, the Appellant's *de facto* life in prison sentence should be reversed. Further, the trial court should be ordered on remand, to immediately refer the Appellant to the State ISRB

for a hearing to determine his eligibility for, and the conditions of, his release.

DATED this 12th day of February 2020.

Eric W. Lindell

ERIC W. LINDELL WSBA# 18972
Attorney for Appellant, Brian Bassett

LINDELL LAW OFFICES, PLLC

February 16, 2020 - 6:12 PM

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Superior Court Case Number: 95-1-00415-9

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IN THE COURT OF APPEALS, DIVISION II,
STATE OF WASHINGTON

STATE OF WASHINGTON,)
) Court of Appeals No.:53721-4-II
 Plaintiff,) Superior Court No: 95-1-415-9
)
 vs.)
)
 BRIAN M. BASSETT,) PROOF OF SERVICE
)
 Defendant.)
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I certify that on the dates noted below, I caused to be delivered to the following persons and/or parties in the means specified herein, the Brief of Appellant, in the above referenced cause:

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Brian Bassett DOC#749363 Monroe Correctional Complex - WSR P.O. Box777 Monroe, WA. 98272	

DATED this 15th day of February 2020.

Eric W. Lindell
Eric W. Lindell, WSBA # 18972
Attorney for Defendant/Appellant

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