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Court of Appeals
Division II
State of Washington
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No. 53721-4-II

THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent,

v.

BRIAN M. BASSETT, Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON'S
RESPONSE BRIEF

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INTRODUCTION

We have continually recognized that children are different from adults for the purpose of sentencing. We also recognize that trial judges face an extraordinarily difficult task when determining whether a child's crime is a reflection of transient immaturity or permanent incorrigibility.

State v. Delbosque, 195 Wn.2d 106, 110, 456 P.3d 806 (2020).

Grays Harbor County Superior Court has sentenced defendant Brian Bassett three times. In each instance, the sentencing judge correctly applied the relevant statutes and imposed a sentence within the standard range. The United States Supreme Court's decision in Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) invalidated defendant's first sentence -- mandatory life without possibility of parole -- requiring Washington courts to resentence all similarly sentenced juvenile offenders.

The Superior Court resentenced defendant Bassett under RCW 10.95.030-.035, the Miller-fix statutes. The trial court again imposed life without parole, a standard range sentence for aggravated first-degree murder, after carefully considering defendant's mitigation evidence. This Court and the Washington Supreme Court reversed, concluding that RCW 10.95.030 violated

the Washington Constitution by authorizing sentences of life without parole for juveniles. State v. Bassett, 192 Wn.2d 67, 91, 428 P.3d 343, 355 (2018) (“sentencing juvenile offenders to life without parole or early release constitutes cruel punishment”). The Supreme Court remanded for resentencing.

On June 6, 2019, Grays Harbor County Superior Court Judge David Edwards sentenced defendant Bassett for the third time. The court imposed the following standard range sentence for Bassett’s three convictions, again after carefully considering his evidence in mitigation:

- 25 years for murdering his father;
- 25 years for murdering his mother; and
- 35 years for murdering his five-year old brother.

(Order Setting Minimum Term; CP 251-252). The court ordered the 25-year terms to run concurrently, imposing a minimum term of 60 years.

Defendant Bassett now appeals, arguing that this standard range sentence is cruel punishment under Article I Section 14 of the Washington Constitution. Because the trial court complied fully and meaningfully with Washington’s evolving law before imposing sentence, the State of Washington respectfully requests this Court

to affirm the trial court. Sentencing defendant has been more than an extraordinarily difficult task in this case – it has been impossible. It would be unconscionable to require the family to endure a fourth sentencing.

I. RESTATEMENT OF ISSUES ON REVIEW

Defendant Bassett's appeal raises three issues:

A. The Washington Supreme Court has yet to define a defacto life sentence. State v. Delbosque, 195 Wn.2d 106, 122, 456 P.3d 806 (2020). Here, the trial court sentenced defendant Bassett to a minimum 60 years confinement. Is this a defacto life sentence?

B. “[E]very judge conducting a Miller sentencing in Washington *must* set a minimum term that is less than life.” Delbosque, 195 Wn.2d at 122. Defendant Bassett will be eligible for early release at age 76. Did the trial court enter a sentence with a minimum term less than life?

C. “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.” State v. Ramos, 187 Wn.2d 420, 444, 387 P.3d 650 (2017). The trial court carefully weighed defendant Bassett's mitigation evidence and prison record

but was not *persuaded* by it. Does “meaningful consideration” require sentencing courts to believe defendants’ assertions of rehabilitation?

II. STATEMENT OF FACTS

A. Bassett’s Crimes.

This Court and the Washington Supreme Court have described defendant Bassett’s crimes in five published and unpublished opinions. State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018); State v. McDonald, 138 Wn.2d 680, 683, 981 P.2d 443 (1999); State v. Bassett, 198 Wn. App. 714, 394 P.3d 430, (2017); State v. McDonald, 90 Wn. App. 604, 953 P.2d 470 (1998); State v. Bassett, noted at 94 Wn. App. 1017, 1999 WL 100872, at *3.

This Court succinctly detailed the murders in McDonald:

On August 11, 1995, McDonald and his boyfriend, Brian Bassett, executed their week-old plan to steal money and an automobile from Bassett’s parents, to kill Bassett’s parents if they were home, and to drive to California. They went to Bassett’s parents’ home in McCleary. Bassett entered first and fatally shot his father and mother, Michael and Wendy Bassett. McDonald entered next, noticed that Michael was still breathing, and shot him in the head. Bassett’s five-year-old brother Austin was kneeling next to his parents’ bodies; Bassett told him to take a bath to wash off the blood. Austin was drowned in the bathtub.

Michael died of multiple gunshot wounds to the head and trunk. Either of two head wounds alone would have been fatal.

McDonald, 90 Wn. App. at 606–07. Defendant Bassett now accepts responsibility for the murders. (2015 Allocution at 79; CP 226) (“it was my – my decisions and it was my actions that were to blame”).

B. Bassett's First And Second Sentences.

On March 22, 1996, a Grays Harbor County jury found defendant Bassett guilty of three counts of aggravated first-degree murder. (Verdicts, State v. Bassett, No 95-1-00415-9). The jury also returned three special verdict forms finding “there was more than one victim and the murders were part of a common scheme or plan.” RCW 10.95.020. (Special Verdicts, Bassett, No. 95-1-00415-9). On April 1, 1996, Judge Gordon Godfrey sentenced defendant Bassett to three terms of life without early release, to run consecutively. (Judgment and Sentence, Bassett, No. 95-1-00415-9). This was a standard range sentence for three counts of aggravated first-degree murder.

In 2015, defendant Bassett returned to Superior Court for resentencing under the Miller-fix statutes, RCW 10.95.030-.035. As this Court described in its published decision, Superior Court Judge

David Edwards properly weighed and evaluated mitigating evidence before resentencing defendant Bassett.

The resentencing court acknowledged that it had a duty to consider the Miller factors and not to make a decision based upon the horrific circumstances of the crime alone. Further, the resentencing court noted that it had to assess Bassett's degree of responsibility and whether Bassett's crimes were the result of immaturity, impulsiveness, and emotion stimuli that caused Bassett to snap.

State v. Bassett, 198 Wn. App. 714, 720, 394 P.3d 430 (2017).

This Court also acknowledged that defendant's evidence of rehabilitation did not persuade Judge Edwards.

When the resentencing court considered the Miller factors, it concluded that Bassett's infraction-free record did not carry "much weight in terms of assessing the likelihood that he can be rehabilitated or has been." RP (Jan. 30, 2015) at 90. Bassett's educational endeavors and trade certificates were "less evidence of rehabilitation and more evidence that [Bassett was] simply doing things to make his time in prison more tolerable" and to pass the time, and Bassett's marriage was "certainly not evidence of rehabilitation." RP (Jan. 30, 2015) at 91.

The resentencing court found that the evidence about the crimes' commission outweighed the mitigating nature of Bassett's adolescence. In doing so, the resentencing court concluded that Bassett's crimes "were the result of a cold and calculated and very well planned goal of eliminating his family from his life. And I don't believe that any amount of time in prison is going to ever result in his being rehabilitated such that he could safely return to any community." RP (Jan. 30,

2015) at 93. The resentencing court imposed three consecutive life without parole sentences.

Bassett, 198 Wn. App. at 720–21.

Both this Court and the Supreme Court vacated defendant Bassett's second sentence on grounds unrelated to the Superior Court's findings: life without possibility of parole for a juvenile violates the cruel punishment clause of the Washington Constitution, Article I Section 14. State v. Bassett, 192 Wn.2d 67, 91, 428 P.3d 343 (2018) ("sentencing juvenile offenders to life without parole or early release constitutes cruel punishment"). The Supreme Court remanded for resentencing, stating "on remand, the trial court may not impose a minimum term of life as it would result in a life without parole sentence." Bassett, 192 Wn.2d at 91.

C. Bassett's Third Sentence

On June 6, 2019, defendant Bassett returned to Grays Harbor County Superior Court for resentencing. Defendant made four pre-hearing motions to: (1) recuse Judge Edwards; (2) demand a jury trial; (3) refer Mr. Bassett immediately to the Parole Board; and (4) prohibit victim impact evidence. (Pre-Hearing Motions; CP 14). The court denied all four. (Order on Pre-Hearing Motions; CP 249-250).

Judge Edwards began the hearing by noting the sentencing judge's duty to follow the law in all cases, even as that law changes.

At the time of the resentencing hearing before me, my decision at that time was consistent with the then existing law in this state regarding sentencing in such cases. And it was only after our state Supreme Court issued its ruling in the appeal that the law in this state became such that sentencing offenders who were juveniles at the time of the commission of their crimes to life without parole constituted cruel and unusual punishment and was deemed unconstitutional as a matter of law.

That is now the law in this state. And I intend to follow the law. That is all judges do. And I will take into account all of the factors that the Supreme Court has identified as appropriate and necessary for the court's consideration in making a judgment in a case such as this and I will do so based upon the evidence presented.

(I VRP 7). The trial court then listened as defense counsel presented testimony and argument for a downward departure from a standard range sentence. Defendant's Opening Brief describes that evidence in detail.

Judge Edwards also heard testimony and a victim impact statement from Stephanie Bassett, defendant's sister. She described the life-long damage that resulted from her brother's crimes.

My safety - my personal safety from that time, I feel the least safe in my own house, because at night that's

where bad things happen. And when we go on like vacation, the safest I feel is when I'm in a hotel, because nobody knows I'm here, so why would I be hurt? And still to this day, if I think I hear something -- and we have a cat, it's usually the cat -- but I have to get up, I have to go make sure that the door is locked. I have to. I have to know that my cell phone is right there and if they need help I can call 911. And it's the reality that I live in because of this.

(II VRP 34). Ms. Bassett also shared her fear that her brother would be free someday.

At the initial sentence - sentencing I was much younger. And from that time I've gone on to be married and have children and have - create a really good life, because I knew he was gone forever. And to - if I would have thought he would come out, I would have to rethink those choices. And that's the worse feeling as a mother, because I feel like I can't protect them. It's like everything beautiful has this taint of sadness on it because of him.

(II VRP 34).

After hearing argument from counsel, Judge Edwards gave an extensive ruling from the bench. (II VRP 46-56) (attached as Appendix A). The court began by outlining its duty to weigh and evaluate evidence relevant to the Miller factors.

The Supreme Court decision in this case and decisions of the United States Supreme Court have set forth factors and identified factors that must be considered by a sentencing court when sentencing a juvenile for a crime such as aggravated murder. And the first factor cited in all of these decisions is the culpability of the

defendant considered in light of his crimes and his characteristics and youthfulness.

* * * *

[I]n the Miller case the United States Supreme Court found - found that a - there were reasons for making a distinction between juveniles and adult offenders. And the Supreme Court found that a juvenile's transient rashness, proclivity for risk, and inability to assess consequences, lessens the juvenile's culpability and that Courts must consider those factors when deciding the culpability of any particular juvenile defendant.

(II VRP 47). Judge Edwards spent considerable time before and during the sentencing hearing assessing “Mr. Bassett’s culpability in considering these characteristics that the Supreme Court has determined to be important.” (II VRP 47). The court then addressed the three Miller factors.

1. Transient Rashness.

Judge Edwards interpreted transient rashness to mean “to act hastily or without due consideration.” (II VRP 47). Examining defendant Bassett’s behavior before the murders, the court concluded that defendant acted deliberately with extensive planning.

There is nothing about the crimes that Mr. Bassett committed that could be characterized as a rash act. To the contrary, a great deal of time was spent by Mr. Bassett in making his decision to commit these crimes and - and to plan the commission of the crimes. He made the decision to commit these crimes at least several days in advance of committing the crimes. And,

in fact, went to the house to commit the crime on several occasions, only to abort his mission on those occasions until all of the circumstances were such that he felt he could carry out his plan. So I do not believe that there has been any evidence to support a finding that he acted with transient rashness.

(II VRP 48). Defendant's behavior was neither transient nor rash.

2. Proclivity for Risk.

The second Miller factor is a juvenile's proclivity for risk. Addressing testimony from defendant's expert, Dr. Mark Cunningham, Judge Edwards found more than just risky behavior underlying defendant's crimes.

Dr. Cunningham talked at length about risk and the proclivity of juveniles to engage in risky behavior. You know, risk is defined as a hazard or - or a dangerous chance. And Dr. Cunningham used the example of a group of young men on motorcycles racing down a freeway in Texas at extremely dangerous speeds. I would certainly agree that that's risky behavior, but it - it's - it's quite a leap to go from racing your motorcycle down the highway to killing your family.

(II VRP 48).

Reviewing defendant Bassett's preparation for the murders, Judge Edwards saw a level of planning and execution that belied any proclivity for risk.

Dr. Cunningham minimized the steps taken by Mr. Bassett to reduce his risk. And I don't agree with Dr. Cunningham's assessment that those steps were not meaningful; cutting phone lines, devising a silencer,

doing other things to minimize his - his risk. So I don't find that the Miller factor of - of proclivity for risk lessens Mr. Bassett's culpability in this case.

(II VRP 49). The court concluded that defendant Bassett did not show a proclivity for risky behavior, but rather caution and premeditation. Defendant was fully aware of what he was planning.

3. Inability to Assess Consequences.

The last Miller factor is a juvenile's inability to assess consequences. After discussing and disagreeing with Dr. Cunningham's analysis, Judge Edwards examined what the Supreme Court meant in Miller,

Dr. Cunningham's testimony where he takes the Miller factor of impulsiveness and divides it into two different times of impulsivity is simply not supported by the case law. The Miller Court doesn't talk about judgment impulsivity. It talks about a juvenile's impulsiveness in that oftentimes it would not be appropriate to sentence a juvenile as harshly as a judge might sentence an adult where the evidence clearly shows that the juvenile was acting impulsively. That's what the Miller Court talked about. And had they meant impulsivity meant a failure to consider the long-term consequences of one's behavior they could have said so and the Court did not say that.

(II VRP 51).

The court found ample evidence that defendant Bassett understood the consequences of his actions.

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 court have engaged in - in similar behavior of failing to avoid detection and arrest, it is not related to brain immaturity.

Ultimately the decision today comes down to moral culpability.

(II VRP 52).

Finally, Judge Edwards looked again at defendant Bassett's prison record and efforts at rehabilitation. "[T]hat 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." (II VRP 53). The court reviewed and weighed all the testimony and submissions before arriving at a sentence.

I have listened carefully to the testimony, I have considered the circumstances of the crime, and all of the other evidence presented to me both in the form of testimony and declarations and statements and documents.

(II VRP 53-54).

Based on all the evidence, Judge Edwards announced his sentence.

Mr. Bassett has been found guilty of the aggravated murder of his mother, father, and brother. And the sentence of the Court today is a term of 25 years to life for the murder of his mother, 25 years to life for the murder of his father, those two sentences shall be served concurrently, and a term of 35 years to life for the murder of his brother.

I believe there is a - a - solid factual basis for making the distinction between these three murders in terms of the moral culpability. I - I believe that the evidence is clear that - that Mr. Bassett entered his parents' home with the intention of killing his mother and father. And after committing those crimes and having additional time to reflect upon what he had just done he killed his brother and I believe that warrants a more severe sentence for the third murder. The result of the sentence that I have imposed is that Mr. Bassett will serve a term of 60 years to life in prison. That's my decision.

(II VRP 56).

Defendant Bassett now appeals, claiming the court's sentence is unconstitutional and unlawful.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews the trial court's sentence for an abuse of discretion.

We will reverse a sentencing court's decision only if we find a clear abuse of discretion or misapplication of the law. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. Further, the untenable grounds basis applies if the factual findings are unsupported by the record.

State v. Delbosque, 195 Wn.2d 106, 116, 456 P.3d 806 (2020) (citations and quotations omitted).

The Court reviews denial of a motion to recuse for an abuse of discretion. “Recusal lies within the discretion of the trial judge, and his or her decision will not be disturbed without a clear showing of an abuse of that discretion.” State v. Hecht, 2 Wn. App. 2d 359, 369, 409 P.3d 1146, review denied, 190 Wn.2d 1024, 418 P.3d 800 (2018).

IV. THE TRIAL COURT’S STANDARD RANGE SENTENCE WAS LAWFUL AND CONSTITUTIONAL.

A. Sixty Years Is Not A De Facto Life Sentence.

Defendant makes a two-step argument that his sentence is cruel punishment under Article I Section 14 of the Washington Constitution. First he asserts that a 60-year minimum term is a de facto life sentence. (Opening Brief at 17). Second, he argues that the Supreme Court’s categorical bar to life without possibility of parole also invalidates his 60-year term. (Opening Brief at 22). Neither assertion is correct.

In its most recent opinion on the topic, the Supreme Court acknowledged that it has never decided when a lengthy prison term becomes a de facto life sentence.

In Ramos, we stated that a “standard range consecutive sentencing may, and in this case did, result in a total prison term exceeding the average human life-span—that is, a de facto life sentence.” Ramos, 187 Wn.2d at 434, 387 P.3d 650. However, we did not define “de facto life sentence” as a “total prison term exceeding the average human life-span.” Id. Rather, we explicitly stated, “It is undisputed that Ramos’ 85-year aggregate sentence is a de facto life sentence, so the question of precisely how long a potential sentence must be in order to trigger Miller’s requirements is not before us. We reserve ruling on that question until we have a case in which it is squarely presented.” Id. at 439 n.6, 387 P.3d 650 (emphasis added). Although the trial court clearly intended to impose a life sentence when setting Delbosque’s 48-year minimum term, the question of whether this amounts to a de facto life sentence is not squarely presented here, either. We therefore decline to address the issue.

State v. Delbosque, 195 Wn.2d 106, 122, 456 P.3d 806 (2020).

Labeling a prison term “a defacto life sentence” does not render it unconstitutional, as the State describes below. Instead, it entitles a juvenile to a Miller hearing.

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 facto life-without-parole sentence is automatically entitled to a Miller hearing.

State v. Ramos, 187 Wn.2d 420, 434–35, 387 P.3d 650 (2017). The Supreme Court in Ramos upheld the constitutionality of an 85-year defacto life sentence. “On the record presented, Ramos received

an adequate Miller hearing at his second resentencing and he has not shown that his sentence violates the Eighth Amendment.” Ramos, 187 Wn.2d at 435. And the Supreme Court in Delbosque did not reverse that conclusion. Delbosque, 195 Wn.2d at 122.

A 60-year term is not the same as life without possibility of parole. Although defendant will be old when released, he will still have the opportunity to earn his freedom.

Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.

Graham v. Florida, 560 U.S. 48, 79, 130 S. Ct. 2011, 2032–33, 176 L. Ed. 2d 825 (2010), as modified (July 6, 2010). Unlike a sentence of life without parole, Defendant Bassett’s sentence has the possibility of early release after 60 years. He is not condemned to die in prison.

Defendant asserts a “de facto life sentence” is equivalent in all respects to life without parole. That is both legally and factually incorrect. But if the Court accepts defendant’s argument, the State

respectfully requests the Court to specify the minimum term of a de facto life sentence to guide trial courts in future sentencings.

B. A Sixty-Year Term Is Not Categorically Unconstitutional.

Next, defendant argues that his 60-year term is cruel punishment under Article I section 14, citing State v. Delbosque, and State v. Bassett. (Opening Brief at 22). Neither case supports such a sweeping, unprecedented conclusion.

In Delbosque, the Supreme Court vacated a 48-year sentence and remanded for resentencing “to give the trial court the benefit of our subsequent decisions.” Delbosque, 195 Wn.2d at 120. The Court did not rule the sentence unconstitutional but rather required the trial court on resentencing to meaningfully consider evidence of Delbosque’s immaturity.

In sum, Bassett has narrowed the available sentences under the Miller-fix statute, while Ramos and other courts have clarified what a meaningful consideration of youth requires in terms of procedure. The superior court would benefit from such precedent in making its resentencing decision.

Delbosque, 195 Wn.2d at 122–23. As described in the section below, Judge Edwards fully and meaningfully considered defendant’s evidence.

Next, in Bassett, the Supreme Court held under Article 1 Section 14 that life without possibility of parole for juveniles violates the Washington Constitution. Bassett, 192 Wn.2d at 77 (“a life sentence without parole or early release”). The Court announced three new legal principles to reach this conclusion. First, Article I Section 14 provides juveniles greater protection than the Eighth Amendment to the United States Constitution.

The six Gunwall factors all direct us toward interpreting article I, section 14 more broadly than the Eighth Amendment. Thus, we hold that in the context of juvenile sentencing, article I, section 14 provides greater protection than the Eighth Amendment.

Bassett, 192 Wn.2d at 82.

Second, a new categorical bar analysis rather than the traditional proportionality test determines the constitutionality of RCW 10.95.030.

Though we have adopted [State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980)] to assess other cruel punishment claims under our state constitution, it is inappropriate to assess Bassett’s categorical challenge, which is based on the characteristics of children. We are free to evolve our state constitutional framework as novel issues arise to ensure the most appropriate factors are considered. Because the categorical bar analysis allows us to consider the characteristics of youth, the crux of this categorical challenge, we adopt it in this instance.

Bassett, 192 Wn.2d at 85.

Third, under the categorical bar analysis, sentencing a juvenile to life without possibility of parole was cruel punishment.

Under the two-pronged categorical bar analysis, we find that states are rapidly abandoning juvenile life without parole sentences, children are less criminally culpable than adults, and the characteristics of youth do not support the penological goals of a life without parole sentence. Thus, we hold that sentencing juvenile offenders to life without parole or early release is cruel punishment and therefore RCW 10.95.030(3)(a)(ii) is unconstitutional under article I, section 14.

Bassett, 192 Wn.2d at 90.

Unlike life without parole, a 60-year term is not categorically cruel punishment. The Supreme Court in Bassett separated Washington law from its Eighth Amendment federal counterpart to bar juvenile sentences with no possibility of early release. But the categorical bar analysis only examined one sentence – life without parole. The Court did not analyze or discuss sentences with some possibility of release. And in his Opening Brief, defendant provides no argument that a 60-year term conflicts with (1) objective indicia of society's standards and (2) legitimate penological goals, the two prongs of the categorical bar analysis. Bassett, 192 Wn.2d at 83.

Defendant urges this Court to move far beyond the Supreme Court's earlier decision into uncharted constitutional waters. But the

possibility of early release distinguishes defendant's sentence from life without parole. The State respectfully requests the Court to recognize the material differences between a 60-year term and life with no possibility of release. Defendant's sentence is not categorically impermissible.

V. THE TRIAL COURT GAVE MEANINGFUL CONSIDERATION.

Defendant's final challenge to his sentence is that Judge Edwards failed to address the resentencing factors in RCW 10.95.030(3)(b).

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.

(Opening Brief at 23). Yet as detailed above in the Statement of Facts, Judge Edwards addressed the core principals of Miller that determine whether defendant Bassett's youth diminished his culpability for the three murders. The court necessarily addressed defendant's age, his childhood and life experience, degree of responsibility, and chances of rehabilitation. The court complied fully with RCW 10.95.030.

The trial court did not believe defendant's youth reduced his moral culpability for killing his father, mother, and five-year old

brother, or prove his suitability to be released from prison. Unlike the trial court in Delbosque, Judge Edward gave meaningful consideration to all defendant's evidence to reach this essential conclusion.

The trial judge did not adequately consider mitigation evidence that would support a finding of diminished culpability rather than irretrievable depravity. Miller hearings require sentencing courts to meaningfully consider "mitigating factors that account for the diminished culpability of youth," including "the youth's chances of becoming rehabilitated." RCW 10.95.030(3)(b). Moreover, the trial court concluded that Delbosque is irretrievably depraved without reconciling, much less acknowledging, significant evidence to the contrary.

Delbosque, 195 Wn.2d at 120. Here Judge Edwards acknowledged and addressed all of defendant's submissions, disagreeing with defendant's experts. Simply put, Judge Edwards was not persuaded by defendant Bassett's evidence.

The Supreme Court in Delbosque reaffirmed that sentencing courts face a difficult responsibility, one given to the sentencing judge's discretion. Here, Judge Edwards exercised that discretion carefully, in full compliance with the law. To hold defendant accountable for three aggravated premeditated murders, the trial court sentenced Defendant Bassett to a minimum term of 60 years. Defendant fails to prove this was an abuse of discretion.

VI. THE TRIAL COURT APPROPRIATELY DENIED DEFENDANT'S PREHEARING MOTIONS.

Finally, defendant argues that the trial court erroneously rejected his motion to recuse and motion for immediate referral to the Parole Board. (Opening Brief at 42). The court did not abuse its discretion in denying both motions.

To support a motion for recusal, defendant Bassett must prove actual prejudice.

The trial court is presumed to perform its functions without bias or prejudice. The party moving for recusal must demonstrate prejudice. Casual and unspecific allegations of judicial bias provide no basis for appellate review.

State v. Hecht, 2 Wn. App. 2d 359, 369, 409 P.3d 1146 (2018) (citations and quotations omitted). Defendant has failed to meet this demanding standard and nothing in the record suggests that Judge Edwards acted with bias or prejudice.

The same is true for defendant's request for immediate referral to the Parole Board. Defendant provides no legal support for his motion, arguing instead 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.” (Opening Brief at 44). Under RCW 10.95.030, defendant has no claim to eligibility for early release. Judge Edwards appropriately denied his motion.

CONCLUSION

Resentencing under Miller entitled defendant Brian Bassett to a full and fair hearing on whether his youth affected his moral culpability for murdering his father, mother, and five-year old brother. In two sentencing hearings, defendant Bassett has received ample opportunity to make his case for rehabilitation and release.

The fact that his sentencing judge remains unconvinced violates neither the Washington Constitution nor the sentencing statutes. The State of Washington respectfully requests this Court to affirm defendant’s sentence and dismiss his appeal.

DATED this 11th day of September, 2020.

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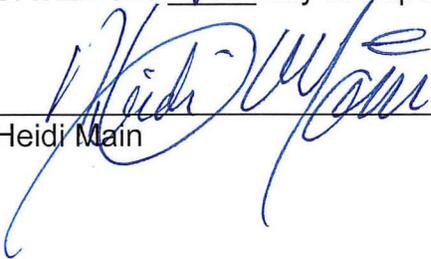
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of State of Washington's Response Brief to:

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Via Appellate Court Filing Portal

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Heidi Main

APPENDIX A

COURT'S RULING

1 THE COURT: Since the last sentencing hearing
2 in this case the Washington State Supreme Court has
3 decided that a sentence for a juvenile of life
4 without parole constitutes cruel and unusual
5 punishment, which by definition makes it
6 unconstitutional, and the Supreme Court sent this
7 case back to this Court for re-sentencing today. And
8 the directions in the Supreme Court decision stated
9 that the decision made by this Court today cannot
10 include life without patrol.

11 The Supreme Court decision in this case and
12 decisions of the United States Supreme Court have set
13 forth factors and identified factors that must be
14 considered by a sentencing court when sentencing a
15 juvenile for a crime such as aggravated murder. And
16 the first factor cited in all of these decisions is
17 the culpability of the defendant considered in light
18 of his crimes and his characteristics and
19 youthfulness.

20 The U.S. Supreme Court decision that set all
21 of this process into motion that - that resulted in
22 statutory changes in this State and ultimately the
23 decision in - in State versus Brian Bassett that
24 determined that a life sentence - or life without
25 sentence was unconstitutional was a case called

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1 Miller versus U.S. And in the Miller case the United
2 States Supreme Court found - found that a - there
3 were reasons for making a distinction between
4 juveniles and adult offenders. And the Supreme Court
5 found that a juvenile's transient rashness,
6 proclivity for risk, and inability to assess
7 consequences, lessens the juvenile's culpability and
8 that Courts must consider those factors when deciding
9 the culpability of any particular juvenile defendant.

10 So I've spent a great deal of time in this
11 case, both before we met today and during the course
12 of this hearing today in trying to assess
13 Mr. Bassett's culpability in considering these
14 characteristics that the Supreme Court has determined
15 to be important. I'm going to discuss them. The
16 first is transient rashness, a term I had not heard
17 before. Rash means to act hastily or without due
18 consideration. There is nothing about the crimes
19 that Mr. Bassett committed that could be
20 characterized as a rash act. To the contrary, a
21 great deal of time was spent by Mr. Bassett in making
22 his decision to commit these crimes and - and to plan
23 the commission of the crimes. He made the decision
24 to commit these crimes at least several days in
25 advance of committing the crimes. And, in fact, went

1 to the house to commit the crime on several
2 occasions, only to abort his mission on those
3 occasions until all of the circumstances were such
4 that he felt he could carry out his plan. So I do
5 not believe that there has been any evidence to
6 support a finding that he acted with transient
7 rashness.

8 The second factor is defined by - or
9 characterized by the Miller Court as a proclivity for
10 risk. Dr. Cunningham talked at length about risk
11 and the proclivity of juveniles to engage in risky
12 behavior. You know, risk is defined as a hazard or -
13 or a dangerous chance. And Dr. Cunningham used the
14 example of a group of young men on motorcycles racing
15 down a freeway in Texas at extremely dangerous
16 speeds. I would certainly agree that that's risky
17 behavior, but it - it's - it's quite a leap to go
18 from racing your motorcycle down the highway to
19 killing your family.

20 There is - there is nothing about the facts
21 of this case that exhibit a proclivity by Mr. Bassett
22 to want to engage in risky behavior. That is simply
23 not what happened. He wasn't thrill seeking. He
24 wasn't doing something akin to racing his motorcycle
25 down the highway. In fact, he took steps to reduce

1 his risk. There's been testimony about it.

2 Dr. Cunningham minimized the steps taken by
3 Mr. Bassett to reduce his risk. And I don't agree
4 with Dr. Cunningham's assessment that those steps
5 were not meaningful; cutting phone lines, devising a
6 silencer, doing other things to minimize his - his
7 risk. So I don't find that the Miller factor of - of
8 proclivity for risk lessens Mr. Bassett's culpability
9 in this case.

10 The last factor is the inability to assess
11 consequences. Dr. Cunningham defined this factor as
12 an understanding of long-term life altering
13 consequences. And that definition that
14 Dr. Cunningham attached to that term is not discussed
15 in the Miller case or in the case law of the State of
16 Washington. It - it - consequences are not defined
17 in those cases as only those consequences that are
18 out months and years beyond the commission of the
19 fact. The evidence establishes in this case that
20 Mr. Bassett clearly assessed the consequences of his
21 actions, several of his decisions and actions
22 demonstrated an understanding of consequences and
23 none more so than the decision to murder his brother.

24 When Dr. Cunningham was discussing
25 immaturity, he had a slide that gave examples of

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1 juveniles engaging in behavior that demonstrated that
2 they were less capable of making mature judgments.
3 And some of the examples he gave were a propensity to
4 engage in risky and even illegal behavior, telling us
5 that risky and illegal behavior is virtually normal
6 behavior for adolescents. I disagree. I disagree
7 strongly with that position. And even if true, to
8 compare risky and illegal behavior to killing your
9 family is - simply lacks all credibility and I do
10 not - do not and cannot accept Dr. Cunningham's
11 testimony on - on those issues.

12 The Miller Court says that a sentencing
13 Court must consider the impulsiveness of a juvenile -
14 of a juvenile's conduct. Dr. Cunningham stated
15 opinions that he holds that there are two types of
16 impulsivity or impulsive behavior. He called them
17 reactive impulsivity and judgment impulsivity. The
18 common definition of impulsiveness is the sudden or
19 involuntary inclination that prompts one into action.
20 And that definition is consistent with what
21 Dr. Cunningham characterizes as reactive impulsivity.
22 But Dr. Cunningham minimizes the importance of
23 reactive impulsivity and says that instead we should
24 look at what he calls judgment impulsivity. And his
25 examples of judgment impulsivity are engaging in

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1 criminal behavior that - that is planned but
2 ill-conceived -- his words -- engaging in criminal
3 behavior without an adequate weighing of
4 consequences. Again, meaning consequences that are
5 weeks or months down the road. And in my opinion,
6 this is not impulsivity. The examples given by
7 Dr. Cunningham are not examples of impulsive
8 behavior, it's just examples of poor planning and
9 there - there is a difference. Dr. Cunningham -
10 Dr. Cunningham's testimony where he takes the Miller
11 factor of impulsiveness and divides it into two
12 different times of impulsivity is simply not
13 supported by the case law. The Miller Court doesn't
14 talk about judgment impulsivity. It talks about a
15 juvenile's impulsiveness in that oftentimes it would
16 not be appropriate to sentence a juvenile as harshly
17 as a judge might sentence an adult where the evidence
18 clearly shows that the juvenile was acting
19 impulsively. That's what the Miller Court talked
20 about. And had they meant impulsivity meant a
21 failure to consider the long-term consequences of
22 one's behavior they could have said so and the Court
23 did not say that. And - and I'm not accepting Dr.
24 Cunningham's own definition of what constitutes
25 impulsive behavior.

1 Dr. Cunningham's testimony that Mr. Bassett
2 act impulsively relies almost entirely upon the
3 failure of Mr. Bassett and Mr. McDonald to take steps
4 to avoid detection and arrest and prosecution. And
5 that conclusion is simply severely flawed. The - the
6 overwhelming majority of adult criminal offenders
7 that I have seen have similarly failed to take steps
8 to avoid detection and arrest. That is not something
9 that is unique to a juvenile. To state that - that
10 Mr. Bassett should somehow be found less culpable of
11 his conduct because he didn't take appropriate steps
12 to avoid detection, arrest, and prosecution is simply
13 not related to his age or his lack of maturity. The
14 - the overwhelming majority of criminal offenders
15 that appear in this court have engaged in - in
16 similar behavior of failing to avoid detection and
17 arrest, it is not related to brain immaturity.

18 Ultimately the decision today comes down to
19 moral culpability. There are many Miller factors
20 that have to be considered. I've just discussed
21 several of them. I haven't discussed the potential
22 for rehabilitation, Mr. Lindell mentioned that. And
23 he's correct, that is one of the Miller factors.
24 And - and I have considered that today in reaching my
25 decision and - and there is evidence that - that

1 Mr. Bassett possesses some potential for
2 rehabilitation. But the data presented by
3 Dr. Cunningham is that a very, very low percentage of
4 individuals committed - convicted of homicide
5 re-offend, that they're all good risk for parole.
6 They're all on the low risk scale, some very small
7 percentage of persons convicted of homicide if they
8 are paroled re-offend by committing another violent
9 offense. But you can't take that data and - and then
10 assert that we should just open the doors of our
11 prisons it and release people convicted of homicide
12 because they're low risk offenders. So while it's a
13 factor to consider, it is not a factor that relieves
14 someone of their moral culpability.

15 The Washington State Supreme Court has
16 directed that the sentencing courts of this State
17 consider the culpability of the defendant in light of
18 the crimes and characteristics of the - of the
19 defendant and his youthfulness. The Supreme Court
20 directed that the sentencing court should, quote,
21 include youth specific reasoning into the analysis.
22 I have done so. I have listened carefully to the
23 testimony, I have considered the circumstances of the
24 crime, and all of the other evidence presented to me
25 both in the form of testimony and declarations and

1 statements and documents.

2 At the very beginning of his testimony today
3 Dr. Cunningham testified that there was a direct
4 relationship - an inverse relationship between moral
5 culpability and immaturity. In other words, as
6 immaturity increases, culpability decreases. The -
7 the more immature a juvenile offender is shown to be,
8 the less culpable he or she is. The assessment of
9 immaturity on this continuum that Dr. Cunningham set
10 forth requires an assessment of the factors that I
11 discussed at the beginning of my remarks and that is
12 transient rashness, proclivity for risk, and an
13 inability to assess consequences. And I'm not
14 persuaded by the evidence in this case that
15 Mr. Bassett lacks moral culpability.

16 After considering all of the factors which
17 distinguish juveniles from adults, and there are many
18 factors, there are many factors which clearly - which
19 are clearly established by the science now that show
20 that juveniles are different than adults and that
21 juveniles are less culpable than adults. And the
22 state of our law right now, both in Washington and in
23 almost every jurisdiction in this country takes that
24 into account, an adult having committed three
25 aggravated murders such as Mr. Bassett could

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1 certainly be sentenced to life without parole and in
2 some states be put to death. So while juveniles may
3 be less culpable than adults, that does not mean that
4 juveniles are not morally culpable.

5 While life without parole is no longer an
6 available sentence in this State for a juvenile
7 convicted of aggravated murder, the Court still has
8 discretion in determining what sentence is
9 appropriate in a case such as this and that's my job
10 today. I must decide upon a sentence that falls
11 short of life in imprisonment. I'm not required to
12 find that Mr. Bassett lacks any moral culpability and
13 I'm not required to find that he should not be held
14 accountable for his crimes in this case. That's not
15 what the Supreme Court has directed and I do not
16 believe that will ever be the law in this State and
17 the evidence does not support a finding that
18 Mr. Bassett lacks moral culpability.

19 Mr. Bassett has been found guilty of the
20 aggravated murder of his mother, father, and brother.
21 And the sentence of the Court today is a term of 25
22 years to life for the murder of his mother, 25 years
23 to life for the murder of his father, those two
24 sentences shall be served concurrently, and a term of
25 35 years to life for the murder of his brother. I -

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1 I - I believe there is a - a - solid factual basis
2 for making the distinction between these three
3 murders in terms of the moral culpability. I - I
4 believe that the evidence is clear that - that
5 Mr. Bassett entered his parents' home with the
6 intention of killing his mother and father. And
7 after committing those crimes and having additional
8 time to reflect upon what he had just done he killed
9 his brother and I believe that warrants a more severe
10 sentence for the third murder. The result of the
11 sentence that I have imposed is that Mr. Bassett will
12 serve a term of 60 years to life in prison. That's
13 my decision.

14 Ms. Svoboda, do you need time to prepare
15 documents reflecting the Court's ruling today? Do
16 you have a judgment and sentence you want to present?
17 How do you want to proceed?

18 MS. SVOBODA: I have an order, Your Honor.
19 I just need to make a small change, so I can present
20 that to counsel. If he - if he wants it signed on
21 the record, we can do it after in-custodies. Or if
22 he wants --

23 THE COURT: In-custodies are being handled --

24 MS. SVOBODA: Okay.

25 THE COURT: -- by a different Judge.

BURI FUNSTON MUMFORD, PLLC

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