

NO. 78255-0-I

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TONELLI ANDERSON,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Tonelli is serving nearly a 61-year sentence for a crime he committed as a 17-year-old boy. Tonelli will remain in prison for the rest of his life. There is no minimum term set and he is not eligible for parole. This sentence violates the prohibition against cruel punishment contained in Article I, Section 14 of Washington's constitution.

The trial court erred when it found at the *Miller* hearing it conducted that Tonelli's case presented "the uncommon situation" where a life without parole for a juvenile homicide offender was constitutional.¹ Not excusing the crime he committed, Tonelli also presented the court with evidence of nearly twenty years of good conduct, where he became a mentor, dependable, and a "level headed individual" trying to "better his current situation." The court's finding that Tonelli's conduct as a child did not represent the transient qualities of youth and that he should not have the

¹ *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

opportunity to reenter society was not supported by substantial evidence. Remand for a new hearing is required.

B. ASSIGNMENTS OF ERROR

1. In violation of Article I, section 14 of Washington's constitution, the trial court erred when it determined Tonelli circumstances presented the uncommon situation where a child should be sentenced to a life sentence with no opportunity for release to reenter society.

2. Substantial evidence does not support the trial courts determination that Tonelli was not entitled to resentencing, erroneously ruling that no evidence of transient immaturity had been presented to the court.

3. Because any sentence imposed on a juvenile that does not provide an opportunity for release to reenter society violates article I, section 14 of the Washington Constitution, the court entered Finding of Fact 6 in error.

4. Because the evidence did not establish that Tonelli was irreparably corrupt, the court entered Finding of Fact 7 in error.

5. Because Tonelli's circumstances are similar to those found in *Miller* and can be distinguished from *State v. Ramos*, especially in that Ramos has an opportunity for release in his lifetime, the court entered Finding of Fact 8 in error.²

6. Because Tonelli's crimes were committed when he was young and because his conduct while in custody reflects his rehabilitation, the court entered Finding of Fact 11 in error.

7. Because the evidence at Tonelli's hearing demonstrated his crimes were characterized by the hallmarks of youth, the court entered Findings of Fact 12 through 14 in error.

8. Because the evidence suggested Tonelli's lack of maturity when these crimes were committed, the court entered Finding of Fact 15 in error.

² *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017), *cert. denied*, 138 S. Ct. 467, 199 L. Ed. 2d 355 (2017).

9. Because the evidence demonstrated the impulsive nature of Tonelli's crimes, the court entered Finding of Fact 21 in error.

10. Because Tonelli did not understand the consequences of his actions, the court entered Finding of Fact 22 in error.

11. Because Tonelli was not required to establish that he was entitled to have his youthfulness considered at sentencing and this is a legal conclusion, Finding of Fact 23 was entered in error.

12. Because Finding of Fact 26 is a legal conclusion, it was entered in error.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article I, section 14 of the Washington Constitution prohibits juvenile sentences that do not provide a meaningful opportunity for release and reentry into society. Tonelli received a de facto life sentence on his juvenile sentence, and because Tonelli was convicted of an adult felony when he was a young man, he will never have an opportunity for release

for this crime or reenter society. Like all other children sentenced in adult court, does the prohibition against cruel punishment require resentencing in order to provide Tonelli with an opportunity for release during his lifetime that allows him a meaningful opportunity to reenter society?

2. Trial courts must consider the mitigating qualities of youth at sentencing and have the complete discretion to impose any sentence, including one below the standard range and without regard to sentence enhancements. A determination that a child is permanently incorrigible and irretrievably depraved requires substantial evidence not found in this case. Is remand required because the trial court's order is not supported by substantial evidence that Tonelli is the rare child in Washington who should not be provided with an opportunity for release to meaningfully reenter society during his lifetime on the sentence imposed for his juvenile crime?

D. STATEMENT OF THE CASE

When Tonelli was a 17-year-old child, he was involved in the murder of two people. CP 300. For his crimes, the court sentenced him to 736 months, or approximately 61 years. CP 164. This sentence provides for no opportunity for release. CP 300. At the time of his sentencing, our justice system failed to account for the inherent differences between children and adults. CP 300.

Since the court sentenced Tonelli, the legislature created an opportunity for those who committed crimes as a youth to be released on parole, except in limited circumstances. *See* RCW 9.94A.730. Because Tonelli committed a new offense as a young and emerging adult, he is not eligible for parole or release under this statute. *Id.*³

Tonelli experienced a rough upbringing and a hard childhood. RP 21, 25. He had virtually no parental support. His mother was drug-addicted and his father was

³ “Emerging adult” is the phase of the life span between adolescence and full-fledged adulthood that encompasses late adolescence and early adulthood. Jeffrey Arnett, *Emerging adulthood: A theory of development from the late teens through the twenties*, *American Psychologist*, vol. 55 (no. 5), 470-71 (2000).

unavailable. RP 21-22, 25. His aunt, who tried to care for him, had troubles of her own, having fallen victim to prostitution. RP 22. For most of his childhood, Tonelli was on his own. “He was a dumb kid. He was young. And he was a follower. He was never a leader.” RP 24.

Like many poor youths, Tonelli turned to the only support network he could find. Tonelli told that court that “Seeing the drug traffic in and out of the house, the prostitution in and out of the house, and to get away from that, I stayed in the streets.” RP 25. He became involved with street gangs. RP 24-25. He was the youngest in his crowd. RP 25. Tonelli looked up to his older peers and when asked to take part in a dangerous activity, he did. *Id.* This decision to engage in risky and dangerous behavior resulted in the deaths of two persons when Tonelli and another robbed a drug dealer of his drugs and money. RP 25-26. After this shooting, two other persons were shot, one of whom died. *Id.*

Tonelli was not originally a suspect in the murders. Remaining in the community, Tonelli committed a robbery

that resulted in convictions for assault and robbery shortly after he became an adult. CP 163. It was only after serving time for the adult offenses that he was charged with the murders he committed as a child. CP 100. Tonelli was convicted of two counts of murder in the first degree for the crimes he committed as a child, after waiving his right to a jury trial. CP 162.

At the time of Tonelli's original sentencing hearing, courts did not appreciate the transitory nature of youthfulness. CP 300. The court sentenced him to the high end of the range for the two convictions for a total of 763 months, which was approximately 61 years. CP 164.

After the Supreme Court's landmark decisions in *Miller*, Tonelli asked to be resentenced. CP 30. At that hearing, Tonelli took immediate responsibility for his actions, expressing regret to the family of his victims. RP 24. He explained to the court how his lack of family forced him into the streets. RP 25. He recognized that his decisions as a child

resulted in tragedy: “people lost lives and people’s lives were changed, including my own.” RP 26.

Tonelli also demonstrated how he had matured as he grew up. Since he started his incarceration, Tonelli involved himself in programs designed to make him a better person. CP 61-97. He was thankful for older prisoners, who taught him how to become a good person. RP 27. Tonelli demonstrated his reform. Department of Corrections staff described him as “level headed and mature.” CP 96. They also recognized, as Tonelli also told the court, that he was helpful to others. CP 96.

In addition to Tonelli, the court heard from his family and from the family of his victims. Nonetheless, the court found Tonelli failed to demonstrate he was entitled to a new sentencing hearing and denied his motion for a new sentence. CP 306.

E. ARGUMENT

1. **With no opportunity for early release, Tonelli's sentence violates article I, section 14 of Washington's constitution.**

In 2012, the United States Supreme Court held it was unconstitutional to impose mandatory life without parole sentences for juvenile homicide offenders. *Miller v. Alabama*, 567 U.S. 460, 489, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). The Supreme Court recognized juvenile offenders have diminished culpability and are less deserving of the most severe punishments because they have a lack of maturity and an underdeveloped sense of responsibility, are more vulnerable to outside pressures and negative influences, and their traits are less likely to be evidence of irretrievable depravity. *Id.* at 471.

The *Miller* decision is one from a line of cases where the Court curtailed states from imposing the harshest punishments against juveniles. *See Montgomery v. Louisiana*, — U.S. —, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016) (holding that *Miller* announced a new substantive

constitutional rule that was retroactive); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (barring life without parole sentences for juveniles convicted of non-homicide offenses); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (barring capital punishment for juvenile offenders).

The *Miller* Court required sentencing courts to consider the “mitigating qualities of youth,” including an offender’s youth and attendant characteristics, before imposing a particular penalty. 567 U.S. at 476. These circumstances include chronological age, immaturity, failure to appreciate risks and consequences, the circumstances of the homicide offense, and the possibility of rehabilitation. *State v. Bassett*, 192 Wn.2d 67, 88, 428 P.3d 343 (2018). “[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” *Miller*, 567 U.S. at 472. Only “permanent incorrigibility” justifies lifetime incarceration for a child. *Montgomery*, 136 S. Ct. at 743.

Before *Miller*, Washington allowed mandatory sentence of life without the possibility of release or parole for children convicted of aggravated first-degree murder. *Bassett*, 192 Wn.2d at 74. Almost all other children sentenced in adult court were subject to fixed-term sentences. *See, e.g., State v. Ramos*, 187 Wn.2d 420, 440, 387 P.3d 650 (2017), *cert. denied*, 138 S. Ct. 467, 199 L. Ed. 2d 355 (2017). For both life without parole and fixed-term sentences that exceeded the child’s life expectancy, these children were not provided with an opportunity for release. *Id.*

In response to *Miller*, the legislature passed “fixes” intended to make Washington’s sentencing structure for youth constitutional. For juveniles convicted of aggravated first-degree murder, RCW 10.95.030 provided for a new sentencing hearing.⁴ Almost all other juveniles serving

⁴ RCW 10.95.030 provides in relevant part that:
(3)(a)(i) Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person’s sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.

sentences beyond 20 years can also petition the indeterminate sentence review board for early release. RCW 9.94A.730.⁵

Only those who have committed a new offense as an adult or who have been convicted as a persistent offender are not entitled to relief. *Id.*

(ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.

(b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in [Miller] 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.

⁵ RCW 9.94A.730 provides in relevant part that:

1) Notwithstanding any other provision of this chapter, any person convicted of one or more crimes committed prior to the person's eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than twenty years of total confinement, provided the person has not been convicted for any crime committed subsequent to the person's eighteenth birthday, the person has not committed a disqualifying serious infraction as defined by the department in the twelve months prior to filing the petition for early release, and the current sentence was not imposed under RCW 10.95.030 or 9.94A.507.

These fixes are inadequate for children who remain in custody without the possibility of release like Tonelli because they violate Washington’s constitutional prohibition against cruel punishment. *Bassett*, 192 Wn.2d at 73; Const. art. I, § 14. *Bassett* holds that article I, section 14 categorically bars courts from imposing a life sentence with no opportunity for release for any youth who commits an offense, including those convicted of aggravated first-degree murder. *Id.*

In *Bassett*, the Supreme Court recognized the national trend prohibiting life sentences for juvenile offenders.

Bassett, 192 Wn.2d at 352. States that have eliminated life sentences for juveniles include Alaska, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Iowa, Kansas, Kentucky, Massachusetts, Nevada, New Jersey, North Dakota, South Dakota, Texas, Utah, Vermont, West Virginia, and Wyoming. *Id.*⁶ This change has

⁶ Alaska Stat. § 12.55.015(g); Ark. Code Ann. § 5-4-108; Cal. Penal Code §§ 3051, 4801; Colo.rev. Stat. §§ 17-22.5-104(2)(d)(IV), 18-1.3-401(4)(b)(I); Conn. Gen. Stat. § 54-125a(f); Del. Code Ann. tit. 11, §§ 4209A, 4204A(d); D.C. Code § 22-2104(a); Haw. Rev. Stat. § 706-656; *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016); Kan. Stat. Ann. § 21-6618;

been rapid, as only four states prohibited life sentences before *Miller*. *Id.* In addition to these states, four states have no juveniles serving life without parole sentences. *Id.* And even before *Miller*, several states created parole eligibility for juvenile offenders. *Id.*⁷

Washington’s Supreme Court also recognizes that its exercise of independent judgment weighs in favor of finding juvenile life sentences unconstitutional. *Bassett*, 428 P.3d at 352. There is a clear connection between youthfulness and decreased moral culpability for criminal conduct. *State v. O’Dell*, 183 Wn.2d 695, 684, 358 P.3d 359 (2015). And because children have “lessened culpability they are less deserving of the most severe punishments.” *Bassett*, 192 Wn.2d at 87 (quoting *Graham*, 560 U.S. at 68). But sentencing a youth to a life of incarceration “alters the offender’s life by a forfeiture

Ky. Rev. Stat. Ann. § 640.040(1); *Diatchenko v. Dist. Att’y*, 466 Mass. 655, 1 N.E.3d 270 (2013); Nev. Rev. Stat. § 176.025; N.J. Stat. Ann. § 2C:11-3; N.D. Cent. Code Ann. §§ 12.1-20-03(4), 12.1-32-13.1; S.D. Codified Laws § 22-6-1; Tex. Penal Code Ann. § 12.31; Utah Code Ann. § 76-3-209; Vt. Stat. Ann. tit. 13, § 7045; W. Va. Code Ann. § 61-11-23(a)(2); Wyo. Stat. Ann. § 6-2-101(b).

⁷ Mo. Rev. Stat. § 558.047(1); Colo. Rev. Stat. § 18-1.3-401(4)(b); *Jackson v. State*, 883 N.W.2d 272 (Minn. 2016).

that is irrevocable” and “deprives [individuals] of the most basic liberties without giving hope of restoration.” *Id.* 87–88 (quoting *Graham*, 560 U.S. at 69-70).

Finally, the Court determined the penological goals of retribution, deterrence, incapacitation, and rehabilitation are not served by imposing life sentences on juveniles. *Bassett*, 192 Wn.2d at 88. This was an affirmation of the court’s determination in *Ramos* that “the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” *Ramos*, 187 Wn.2d at 438 (quoting *Miller*, 567 U.S. at 472). Instead, the Court recognized that youth have “diminished culpability and a heightened capacity for change.” *Id.* at 444. In fact, it is “the rare juvenile offender whose crime reflects irreparable corruption.” *Bassett*, 192 Wn.2d at 353 (quoting *Roper*, 543 U.S. at 573).

The remedy in *Bassett* was to remand the matter to trial court for a new sentencing hearing. *Bassett*, 192 Wn.2d at 355. The life without parole sentence Bassett received

violated the prohibition against cruel punishment, requiring a new sentence with a minimum term that would not result in a life without parole. *Id.* The Court of Appeals issued its decision in Bassett on April 25, 2017. *State v. Bassett*, 198 Wn. App. 714, 394 P.3d 430 (2017), *review granted*, 189 Wn.2d 1008, 402 P.3d 827 (2017), *aff'd*, 192 Wn.2d 67, 428 P.3d 343 (2018). This was five days before the trial court issued its decision here. CP 304. Presumably, the trial court was aware that its decision was in conflict with *Bassett*, but did not address the unconstitutionality of its sentence.

This analysis must apply equally to de facto life sentences. Juveniles serving “de facto life without parole sentences” are entitled to the same relief as those facing “literal life without parole sentences.” *Ramos*, 87 Wn.2d at 429. Tonelli was convicted of an adult crime before he was sentenced in this case, which means he has no opportunity for release in his lifetime. RCW 9.94A.730. And while *Ramos* upheld the sentence imposed by the trial court after a *Miller* hearing, it did so under the Eighth Amendment and not the

state constitution. *Ramos*, 187 Wn.2d at 458. He was also eligible for release under RCW 9.94A.730, while Tonelli is not.

Under the state constitution, all children serving adult sentences must have an opportunity for release in order to re-enter society within their lifetime. *Bassett*, 192 Wn.2d at 91 (citing Const. art. I, § 14). Tonelli is serving a de facto life without parole sentence, which provides for no opportunity for release. This sentence is unconstitutional. *Bassett*, 192 Wn.2d at 91. Because this sentence violates Washington's prohibition against cruel punishment, remand for a new sentencing hearing is required. *Id.*; Const. art. I, § 14.

2. Substantial evidence does not support the trial court's finding that Tonelli is not entitled to an opportunity for release during his lifetime.

When Tonelli asked the court for resentencing, the court assumed that the facts of a case may "present the uncommon situation where life without parole for a juvenile homicide offender is constitutionally permitted." RP 55. Based on this mistake in law, the trial court determined Tonelli failed to demonstrate he was entitled to a new sentencing

hearing. CP 303, RP 55. This decision was not supported by substantial evidence.

This Court reviews challenged findings of fact for substantial evidence. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Substantial evidence is “evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.” *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

The court’s finding ignores the holding in *State v. Houston-Sconiers* that requires trial courts to “consider mitigating qualities of youth at sentencing” and to “have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.” *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). The court presumed Tonelli was the “rare” child who should be incarcerated for the rest of his life and required that he prove otherwise. CP 304. The trial court then found Tonelli failed to prove that the evidence of transient immaturity at

the time of his offenses did not justify a new sentencing hearing. CP 304. In addition, the court found there were not substantial and compelling reasons to justify a sentence below the standard range. CP 304.

Tonelli offered no excuse for the crimes he committed as a child. At his first chance to speak, Tonelli offered his apology and expressed his remorse to the family, friends, and victims of his crime. RP 24. He completed his statement to the court with the same apology, hoping it would at least give his victims some closure. RP 28.

He told the court that as a young person, the opinion of his peers and his reputation on the streets were his only motivation. RP 24. He was angry at his lack of family support and his mother's addiction to cocaine. RP 25. He admitted that he hung out with an older crowd and tried to mimic the behavior of the older gang members he admired. RP 25.

When he asked to be the backup on a drug deal, he decided to go along, hoping his assistance would help him make his reputation on the street. RP 25. He could not

explain why he ended up participating in the murders he committed, only that “street sense kicked in and it was like an automatic response.” RP 26. In the process, “people lost lives and people’s lives were changed, including my own.” RP 26.

He tried to explain his lack of emotion as a young person, telling the court it was necessary to “maintain and survive in the streets.” RP 26. Showing fear and emotion, he stated, “makes you a victim.” RP 27.

When he went to prison, older prisoners who were also serving life sentences who wanted to “redeem themselves by helping younger people become good men” provided Tonelli with mentorship. RP 27. With their help, he invested his time and energy in a new direction. RP 27. He took up his education and got two vocational degrees, one in bookkeeping and the other in graphic design. RP 27. He helped start a non-violence program to help young people coming into prison have something to do with their time. RP 27. He also trained dogs, discovering “I have extreme love for giving back to

something that is helpless.” RP 27. He learned that even those who “created disharmony in the communities” they came from by “committing atrocious acts” such as his could be redeemed. RP 28.

The court discounted Tonelli’s statement. It found Tonelli’s circumstances were not like those in *Miller*, as Tonelli was 17 and a half when he committed his crime, that his actions were planned, and that Tonelli had not suffered a difficult childhood, despite evidence from both Tonelli’s supporters and detractors who agreed his childhood had been “horrible.” CP 301 (Finding of Fact 8), RP 36. In contrast, the court found Tonelli’s circumstances were like those found in *Ramos*, ignoring that Ramos is eligible for early release while Tonelli is not. CP 301 (Finding of Fact 9).

These findings overlook not only Tonelli’s statement but also other statements made in court. One of the victim’s family acknowledged Tonelli started from “horrible beginnings.” RP 36. His parents were drug addicted and he had to “survive in the streets.” RP 36. His older peers were

his “family,” who he looked up to and tried to please. RP 37. While the court made a finding that there was no evidence other than that presented by Tonelli about his remorse or youthfulness, this contradicts the evidence presented to the court. CP 303 (Finding of Fact 21).

A friend of Tonelli’s acknowledged what other witnesses said, telling the court “He was a dumb kid. He was young. And he was a follower. He was never a leader.” RP 24. And over time, he transitioned into adulthood and became a person who deserved an opportunity for release. RP 24.

In its findings of fact, the court stated it was familiar with adolescent brain development, but did not apply this science to Tonelli’s case. CP 301 (Finding of Fact 12). The court acknowledged Tonelli committed additional crimes after he committed this one, but did not recognize that all of Tonelli’s criminal activity took place when he was still a young person or an emerging adult. CP 301 (Finding of Fact 13). Our courts recognize a contrary opinion, holding that

even for young adult offenders, youthfulness can support a sentence below the standard range. *O'Dell*, 183 Wn.2d at 699.

The court found Tonelli's actions were not impetuous, or evidence of immaturity, but these findings are inconsistent with findings made in other cases reviewed by the appellate courts. CP 301 (Finding of Fact 14, 15). In *Bassett*, for example, the defendant returned to his home to kill his parents. *Bassett*, 192 Wn.2d at 346. After completing this crime, he and his co-conspirator turned to his younger brother, drowning him in the bathtub. *Id.* Like *Bassett*, this Court cannot be confident Tonelli's actions were thought out in the deliberate and pre-meditated way the trial court found. CP 303 (Finding of Fact 22).

Finally, the court focused on the statutory factors to determine whether Tonelli's sentence was fair. CP 303 (Finding of Fact 23-25). Again, this is not the standard for when to impose an exceptional sentence for a youth. Instead, our Supreme Court recognizes that because children are different, an offender's age is relevant at sentencing. *Houston-*

Sconiers, 188 Wn.2d at 8 (citing *Miller*, 567 U.S. at 480-81, *Graham*, 560 U.S. at 76). Procedures that fail to take into account youthfulness are flawed. *Id.*

In *State v. Delbosque*, this Court held that substantial evidence did not support the trial court's decision to impose a minimum term of 48 years with a maximum of life. *State v. Delbosque*, ___ Wn. App. 2d ___, 430 P.3d 1153, 1156 (2018). *Delbosque* involves a 17-year-old boy convicted of aggravated first-degree murder. *Id.* The court found insufficient evidence that the defendant demonstrated an attitude reflective of the underlying crime and that the murder reflected permanent incorrigibility and irretrievable depravity. *Id.* at 1159.

Like here, the trial court in *Delbosque* focused on the distant past, finding in *Delbosque* a 2010 infraction for attempting to arrange an assault demonstrated his ongoing attitude towards crime. *Delbosque*, 430 P.3d at 1160. Tonelli's convictions were even older, having occurred in 1997 when Tonelli was still a young and emerging adult. CP 163.

There was no evidence Tonelli's current state of mind reflected irreparable corruption that should deprive him of an opportunity for release. CP 301 (Finding of Fact 7). Instead, Tonelli demonstrated his consistent attempts at rehabilitation. He submitted to the court letters of recommendation from his workforce development specialist, the director of a community services program Tonelli worked with, and Walla Walla Community College, where he made the President's List in 2015. CP 61-63. The court saw his Walla Walla Community College Certificate of Completion. CP 61. It also saw his completion of the C.I. Food Program, Substance Abuse Training, Thinking for a Change, Breaking Barriers, Ridge Dogs, Projects for a Civil Society, Smart Recovery, Re-Entry Life Skills, WSP/EC Offender Based Dog Program, Parallel Community Orientation, Basic Bookkeeping, Cultural Diversity, Anger Management, Traumatized Minds, Alternatives to Violence, and the Custodian Course. CP 61-88. Tonelli showed the court he worked over 1,600 hours as a bookkeeper and in food

preparation. CP 80, 82. Tonelli had been working on improving himself from 2000, when he entered prison. CP 61-88. There is no evidence he has ever stopped. *Id.*

His Department of Corrections reports state Tonelli is a “level headed individual who is trying to better his current situation.” CP 95. The Department described Tonelli as having become a “leader” who shows a willingness to help others, unlike when he was a child. *Id.* RP 24. According to another Department employee, Tonelli is “a reliable and dependable worker” with “good communication skills” who does “whatever job was asked of him to the best of his ability without complaint.” CP 61. Not only has Tonelli been “instrumental and consistent” with preparing for his own release, but also assists in the “preparation for reentry for fellow prisoners by providing tutoring.” CP 62.

Based on this record, the court’s conclusion that Tonelli should not be resentenced was not supported by substantial evidence. As such, remand is required. *Delbosque*, 430 P.3d at 1160.

Likewise, the *Delbosque* court examined the diminished capacity of youth. *Delbosque*, 430 P.3d at 1160. Like here, the trial court in *Delbosque* “failed to meaningfully consider evidence with the proper context of the diminished culpability of youth.” *Id.* While the court here examined the factors listed in *Miller*, it did not consider how the diminished culpability and greater prospects for reform have shaped Tonelli’s life. *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68).

Miller requires a court to look at three features of youth, which are that children display a lack of maturity and an underdeveloped sense of responsibility, they are more vulnerable to outside pressures and negative influences, and their traits are less likely to be evidence of irretrievable depravity. *Delbosque*, 430 P.3d at 1160 (citing *Miller*, 567 U.S. at 471). This analysis foreswears the penological justifications for incarcerating an adult to a life sentence, as none of them justifies life without parole sentences for youths. *Miller*, 567 U.S. at 472.

Like *Miller*, Tonelli's testimony, along with studies provided to the court, demonstrated that the diminished culpability of youth results in increased risk-taking, the failure to appreciate consequences and responsibility, and susceptibility to outside influences. *Miller*, 567 U.S. at 472 (citing *Roper*, 543 U.S. at 569). The trial court lacked the substantial evidence required to establish that these factors did not apply to Tonelli, especially with the evidence presented to the contrary.

Bassett establishes that even for the most serious crime a juvenile can commit, there must be an opportunity for release to meaningfully reenter society. *Bassett*, 192 Wn.2d at 73. Only "permanent incorrigibility" justifies lifetime incarceration for a child. *Montgomery*, 136 S. Ct. at 743. The trial court's determination that Tonelli was not entitled to the same relief was not supported by substantial evidence. This error requires remand, with instructions to the trial court to hold a sentencing hearing that provides Tonelli the

opportunity for release to meaningfully reenter society upon a showing of maturation and rehabilitation. *Id.* at 355.

F. CONCLUSION

Unlike almost every other youth serving a life sentence in Washington, Tonelli will never have the opportunity for release for the crimes he committed as a juvenile. At a minimum, Tonelli is entitled to the same relief afforded to those convicted of aggravated first-degree murder. His aberrational sentence requires correction and entitles Tonelli to a new sentencing hearing.

DATED this 28th day of February 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 78255-0-I
v.)	
)	
TONELLI ANDERSON,)	
)	
Appellant.)	

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