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

REPLY BRIEF OF APPELLANT

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington Supreme Court

Statutes

Constitutional Provisions

A. ARGUMENT IN REPLY

Tonelli Anderson is entitled to resentencing.[1] Tonelli may be the only youth serving a de-facto life sentence in Washington for crimes he committed as a child who has no opportunity for release within his lifetime. *State v. Bassett* holds that life sentences with no possibility for release are unconstitutional for juveniles. *State v. Bassett*, 192 Wn.2d 67, 85, 428 P.3d 343 (2018). In *Bassett*, the Court was explicit that its holding applied to "life without parole or early release" cases. *Id.* at 89. Because Tonelli has no opportunity for release within his lifetime for crimes he committed as a juvenile, this Court should order a new sentencing hearing, with instructions that Tonelli be provided with a sentence that provides him with an opportunity for release.

[1] Because Tonelli was a youth when he committed this crime, he is referred to by his first name. All other youth in this case are referred to by their initials.

1. **The question of whether juveniles serving de-facto life sentences are entitled to the same protections as those serving life without parole has been settled by *State v. Ramos* and is affirmed in *State v. Bassett*.**

In *Alabama v. Miller*, the United States Supreme Court held that even for homicide offenders, "mandatory life-without-parole sentences violate the Eighth Amendment." 567 U.S. 460, 470, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). The prosecutor argues that there is a distinction between life-without-parole and de-facto life sentences for juvenile offenders. Brief of Respondent at 8.

The prosecutor's assertion is contrary to the now well-established rule Washington's Supreme Court issued in *State v. Ramos*, where it held that "*Miller* does apply to juvenile homicide offenders facing de-facto life-without-parole sentences." 187 Wn.2d 420, 437, 387 P.3d 650 (2017) . In fact, *Ramos* makes unequivocally clear that "*Miller* applies equally to literal and de facto life-without-parole sentences." *Id.* For our courts, there is no distinction.

Since *Miller*, the United States and Washington's Supreme Court have examined how children should be

treated when they commit crimes further. In *Montgomery v. Louisiana*, the United Supreme Court held that only "permanent incorrigibility" justifies the lifetime incarceration of a child. —— U.S. ——, 136 S. Ct. 718, 743, 193 L. Ed. 2d 599 (2016). Sentencing a child to life without parole is excessive for all but "the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 734 (quoting *Miller*, 567 U.S., at 479-80).

In *State v. Bassett*, the Supreme Court affirmed this Court's holding that the Washington Constitution categorically bars life sentences for juveniles. 192 Wn.2d at 85; *see also Ramos*, 187 Wn.2d at 437 ("We now join the majority of jurisdictions that have considered the question and hold that Miller does apply to juvenile homicide offenders facing de facto life-without-parole sentences.")

Bassett recognizes that "the direction of change in this country is unmistakably and steadily moving toward abandoning the practice of putting child offenders in prison for their entire lives." *Bassett*, 192 Wn.2d at 86. The court

also recognized that the penological goals for incapacitation were especially concerning when a court makes an "irrevocable judgment" that is at odds with a child's capacity for change. *Id.* (citing *Graham v. Florida*, 560 U.S. 48, 74, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)).

Most importantly, the *Bassett* Court addresses the problem of imprecise and subjective judgments. *Bassett*, 192 Wn.2d at 89. The prosecutor argues that when Bassett killed his family he had been kicked out of his house and was living in a shack, with no significant criminal history is too dissimilar to Tonelli's past to require resentencing for Tonelli. Brief of Respondent at 12.

Like Bassett, Tonelli suffered greatly as a child. RP 21, 25. His mother was drug-addicted and his father was 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. With no guidance, Tonelli turned

to his older peers, who were involved in dangerous and risky behavior. RP 25-26.

And like Bassett, Tonelli has lived a largely infraction-free life after his conviction in this case. 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.

This case demonstrates why the Supreme Court correctly affirmed this Court's reasoning when it created a categorical bar for life sentences for youth. *Bassett*, 192 Wn.2d at 89. The disagreement over how to interpret both Bassett's and Tonelli's childhood and maturation results in imprecise and subjective judgments about what constitutes transient immaturity and irreparable corruption. *Id.* Thus, the court held 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." *Id.*

2. The Supreme Court does not limit the rights of juveniles in *State v. Gilbert*, instead holding that RCW 10.95.035 cannot limit judicial discretion at juvenile sentencing hearings.

In *State v. Gilbert*, Washington's Supreme Court held RCW 10.95.035 cannot limit the discretion of the trial judge to impose a sentence below the standard range. 193 Wn.2d 169, 176, 438 P.3d 133 (2019). The prosecutor invites this Court to read *Gilbert* as a limitation on *Bassett*. Brief of Respondent at 11. This invitation should be rejected. *Gilbert* answers the question of whether a judge's authority is limited by RCW 10.95.035. *Gilbert*, 193 Wn.2d at 171. The Supreme Court held that there was no such limitation. *Id.* at 176.

The *Gilbert* Court affirmed the Court's prior holding that courts must consider the mitigating factors of youth, including immaturity, impetuosity, and the failure of youth to appreciate risks and consequences of their actions. *Gilbert*, 193 Wn.2d at 176 (citing *State v. Houston-Sconiers*, 188

Wn.2d 1, 23, 391 P.3d 409 (2017)). The trial court must also consider the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, the way familial and peer pressures may have affected him or her, how youth impacted any legal defense, and any factors suggesting that the juvenile might be successfully rehabilitated. *Id.* Nothing about this holding suggests a limitation on *Bassett*, despite the prosecutor's request for the Court to find one.

3. The prosecution does not offer substantially different arguments for why the holding in *State v. Bassett* should be overruled than it did when *Bassett* was originally argued.

In *Bassett*, the prosecution argued Washington's constitution offers no greater protection than the federal constitution. Supplemental Brief of the Respondent, No. 94556-0 at 10.[2] Like here, the prosecution argued in *Bassett* that *State v. Gunwall*[3] did not compel more protection under the Washington Constitution. *Id.* at 8. This argument was

[2]https://www.courts.wa.gov/content/Briefs/A08/945560%20Supp%20Brief%20-%20Revised%20Pet'r.pdf

[3] 106 Wn.2d 54, 720 P.2d 808 (1986).

rejected in that case, as it should be here. *Bassett*, 192 Wn.2d at 82.

Bassett's holding is clear: the six *Gunwall* factors all direct the Court toward interpreting article I, section 14 more broadly than the Eighth Amendment. *Bassett*, 192 Wn.2d at 67. "Thus, we hold that in the context of juvenile sentencing, article I, section 14 provides greater protection than the Eighth Amendment." *Id.* Because the prosecution offers no compelling reasons for departing from this precedent, this Court must decline to do so.

4. A new sentencing hearing is required because Tonelli's sentence provides no opportunity for release for a crime he committed as a juvenile and because the trial court's finding that he is the "rare" individual who should remain in prison for the rest of his life is not supported by substantial evidence.

The prosecutor agrees Tonelli is serving a de-facto life sentence. Brief of Respondent at 10. The prosecution asserts that because Tonelli had the opportunity to ask a trial court for a new sentencing hearing, nothing else is required and his sentence is lawful. *Id.* at 11. This is contrary to *Bassett's* holding that the Washington Constitution categorically bars

courts from imposing life sentences for juveniles. *Bassett*, 192 Wn.2d at 85.

Tonelli is not eligible for release at any point in his life. RCW 9.94A.730. This was not for a crime he committed as an adult, but for crimes he committed as a youth. Because Tonelli committed a new offense as a young and emerging adult, he is not eligible for parole or release under this statute. RCW 9.94A.730.

Over the course of his life, Tonelli has demonstrated the crimes he committed as a youth or emerging adult were the mistakes of youthfulness. As an adult, Tonelli took full responsibility for his actions, expressing regret to the family of his victims. RP 24. According to others, Tonelli started from "horrible beginnings." RP 36. Tonelli explained to the court how his lack of family forced him into the streets. RP 25. His decisions as a child resulted in tragedy: "people lost lives and people's lives were changed, including my own." RP 26.

Tonelli is no longer the person he was when he was a youth or an emerging adult. Tonelli spends his time in prison

trying to make himself a better person, engaging in every program that is offered to him. CP 61-97. He 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.

As a young person, he was helped by the older prisoners, who taught him how to become a good person. RP 27. This was affirmed by corrections staff who describe Tonelli "level headed and mature," as well as helpful to others. CP 96. Tonelli 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. He is no longer the person he was when he was sentenced for the crimes he committed as a youth.

Despite this evidence, the trial court found Tonelli to be the "rare" if not the only child in Washington who should be

incarcerated for the rest of his life. CP 304. The trial court found Tonelli failed to prove that the evidence of transient immaturity at the time of his offenses justified 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.

The trial court's findings regarding Tonelli's underlying crime and of permanent incorrigibility and irretrievable depravity are not supported by substantial evidence. Tonelli has remained out of trouble since his convictions in 1997 when Tonelli was still a young and emerging adult. CP 163. He has shown the court his continuing efforts to rehabilitate himself. CP 61-88. Corrections staff describe him as a "leader" who shows a willingness to help others. CP95, RP 24. 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.

Tonelli offers no excuse for the tragic mistakes of his youth. He told the court that one of the most important things for him to do when he returned to court was to take responsibility for his crimes. 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.

There was no question that Tonelli's behavior as a youth and emerging adult demonstrates that the diminished culpability of youthfulness 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 v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)). 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.

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 as those convicted of aggravated first-degree murder was not supported by substantial evidence.

Because Tonelli was a youth when he committed his crimes, he is entitled to release within his lifetime. Bassett, 192 Wn.2d at 73. His sentence presents no such avenue. Tonelli asks this Court to remand this matter for a new sentencing hearing, with instructions to the trial court that the new sentence must provide Tonelli with an opportunity for release to meaningfully reenter society.

B. CONCLUSION

Article I, Section 14 of the Washington Constitution requires that 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.

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). Sentencing a youth to a life of incarceration "alters the offender's life by a forfeiture 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).

Because the sentence imposed for the crimes Tonelli committed as a youth prevent him from ever being released, resentencing is required. *Bassett*, 192 Wn.2d at 89. Tonelli asks this Court to remand this matter for a new sentencing hearing.

DATED this 11th day of September 2019.

Respectfully submitted,

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.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF SEPTEMBER, 2019, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JENNIFER JOSEPH, DPA [paoappellateunitmail@kingcounty.gov] [jennifer.joseph@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X] TONELLI ANDERSON 771172 MCC-WSR PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF SEPTEMBER, 2019.

X_____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

September 12, 2019 - 4:43 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	78255-0
Appellate Court Case Title:	State of Washington, Respondent v. Tonelli Anderson, Appellant

The following documents have been uploaded:

- 782550_Briefs_20190912164223D1337947_1768.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was washapp.091219-08.pdf

A copy of the uploaded files will be sent to:

- jennifer.joseph@kingcounty.gov
- lila@washapp.org
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Travis Stearns - Email: travis@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190912164223D1337947