NO. 78255-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TONELLI ANDERSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Sentencing law applicable to crimes committed when a defendant is under 18 has evolved in recognition that children are generally more impulsive, more vulnerable to negative influences and outside pressures, and less likely to have fixed antisocial character traits than adults who commit the same crimes. Because of these general traits and juveniles' presumptively greater prospects for reform, juveniles are generally less deserving of the most severe punishments: death or life-without-parole. Anderson's premeditated crimes do not reflect impetuosity, and he did not reform after he robbed and murdered two people and attempted to kill a third, even after a year of intensive rehabilitative therapy, choosing instead to continue to rob and assault people as an adult. Where an informed and conscientious sentencing court determines that none of the concerns raised in recent juvenile sentencing jurisprudence are present, does the state constitution deprive the sentencing court of authority to impose a lengthy term-of-years sentence?

2. In State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018), the Washington Supreme Court held that literal life-without-parole sentences violate the state constitution's prohibition on cruel punishment when imposed upon juvenile murderers. The court has not extended this holding to term-of-years sentences despite an opportunity to do so in

State v. Gilbert, 193 Wn.2d 169, 438 P.3d 133 (2019). Here, the resentencing court did not impose a literal life-without-parole sentence on Anderson and did not sentence Anderson under the statute at issue in Bassett. Is Bassett inapposite?

3 The Washington Supreme Court's decision in Bassett is predicated on a flawed legal analysis and has caused considerable uncertainty about the scope of a sentencing court's discretion to sentence the most dangerous juvenile offenders. Should our supreme court overturn Bassett because it is incorrect and harmful?

B. STATEMENT OF THE CASE

When Tonelli Anderson was 17.5 years old, living independently with his girlfriend, he and his friend Porshay Austin decided to rob Jason Bateman of a quarter-kilogram of cocaine and to kill any witnesses. CP 177-78, 188, 205-06, 302. They went to Bateman's home, where Austin had previously purchased cocaine, for that purpose. CP 154, 188. Bateman's partner Lynell Ricardos, their two-year-old son James, and Ricardos' friend Kristin McMullen were in a back bedroom while Bateman spoke with Anderson and Austin. CP 178-79. When Austin and Anderson saw the drugs they wanted, Austin shot Bateman multiple times, killing him. CP 178-79. Anderson ran down the short hallway to the bedroom and shot the two unarmed women each twice, killing McMullen

and severely wounding Ricardos. Id.; 1RP 12. Anderson then kicked the toddler, who ran, hid in a closet, and survived the attack. CP 5, 190. The murders went unsolved for several years.

The Bateman-McMullen double homicide was not the first crime Anderson committed. From age 14 to 17, Anderson had adjudications of guilt for VUCSA – delivery of cocaine (1994), unlawful possession of a weapon (1994), escape in the second degree (1992), robbery in the second degree (1992), taking a motor vehicle (1992), burglary in the second degree (1991), and a host of misdemeanor offenses. CP 9, 132, 198. In 1995, as a result of juvenile adjudications of guilt that occurred after the murders but before Anderson was charged with the murders, Anderson was committed to the Juvenile Rehabilitation Administration (JRA) for a year, where he received intensive treatment and programming. CP 100, 301.

While at the JRA, Anderson admitted the murders in letters to girlfriends, describing them as "premeditated" and stating that his sentence would be "life in prison or the death penalty" if he was caught. CP 174, 188, 244, 268, 269. He said he "messed up" by allowing Ricardos and her baby to live. CP 176, 268. He bragged that he and Austin "got away with murder." CP 272. He sent his "square" girlfriends photographs of the Bateman-Ricardos family and said they were the people "we did that to,"

to impress and frighten the young women into writing to him and giving him money. CP 174, 176, 207, 221, 240, 252-53, 261. He also admitted to committing similar robberies on other occasions. CP 264, 267-68.

Anderson did "very well" at JRA and told friends he wanted to change his life. CP 216-17, 237, 264, 302. Instead, when he got out, he returned to crime, rapidly amassing convictions for many serious adult felonies, including assault in the first degree (1997), robbery in the first degree (1997), unlawful imprisonment (1997), unlawful possession of a firearm in the first degree (later reversed), and VUCSA delivery of cocaine (1997). CP 9, 198-99, 301-02.

While Anderson was serving his sentence in prison on the adult felonies, the State received an anonymous tip that he was involved in the Bateman-McMullen murders. CP 185. The State's investigation led them to Anderson's inculpatory letters to his girlfriends. CP 185-86. In 1998, the State charged Anderson and Austin with the first-degree murders of Bateman and McMullen. CP 1-9. Despite grievous injury to Ricardos, who lost her eyesight in one eye and still has a bullet lodged in her brain, the State did not charge the men for that assault. CP 1; RP (3/30/2018) 12.

Anderson waived his right to a jury trial, apparently believing a judge would be more lenient. 2RP 41. The trial court, Judge Nicole MacInnes (Ret.), found Anderson guilty of two counts of first-degree

murder. CP 171-99. Despite the existence of numerous aggravating circumstances, the State did not seek an exceptional sentence above the standard range. CP 136-38, 184-93. The prosecutor explained, "Our recommendation also takes into account the defendant's age at the time that this offense occurred, and that he was 17 years old, and takes into account his attempts in schooling and education while he was in JRA." CP 138. Noting that it would have "seriously considered an exceptional sentence up if it had been requested," the trial court imposed an aggregate sentence of 736 months (about 61 years). CP 12.

Following changes in the law pertaining to sentencing for crimes committed as a juvenile, Anderson requested resentencing in 2018. CP 30. The State conceded that Anderson was entitled to a hearing to try to show that his culpability in the multiple murders was diminished by his youth. CP 102.

At the resentencing hearing, numerous surviving family members of the victims addressed the court about their loss, their continuing fear, and how difficult it was to have to face Anderson's sentencing again. RP 12-13. Lynell Ricardos returned from California to tell the court, "I fear for my life if he gets out. It is going to be a never-ending thing. Never ending. I suffer every day. Every day. It was hard for me to come up here today. I am hurt. Everyone in this courtroom is hurt. My son

[James] suffers from mental illness because of what happened in that house at the age that he was. … He witnessed it all." RP 12. She hoped that the resentencing, which unfortunately required them to "stir the pot," would finally give everyone closure. RP 13. Jason Bateman's sister explained how her family has had to provide care for Ricardos and her son every day since the murders. RP 30. "And to have to come through this again and to be drug through here because he wants a second chance, because our government decided he gets a second chance – we don't get a second chance." 2RP 30.

One person who had not spoken at the original sentencing was Kristy McMullen's biological brother. McMullen had been adopted at birth, and Tony Finley was her younger biological brother. CP 141-42. As a teenager, Kristy found her biological family, which abandoned Tony when he was 12 years old. CP 142; RP 36. Less than a week before Anderson shot her to death, Kristy became Tony's legal guardian. CP 142; 2RP 38. When Kristy died, Tony lost his only family. 2RP 38. "I was alone. She was the last thing I had on this earth. She was my only hope. She was going to adopt me. And when you took her away, you left me homeless from 13 to 18." 2RP 38. Tony pointed out that he and Anderson had both experienced trauma as young people, but only Anderson responded with such violence. 2RP 40. "You could have not

harmed innocent people. You could have made choices like I make …. But you made the decisions you made, and now you have to live with the consequences. But at least you are going to live." 2RP 40.

Anderson proposed a sentence of "320 months or time served"—less than half of the original standard range sentence. CP 38. The State adhered to its original recommendation of 736 months. CP 111. Following a Miller[1] hearing and consideration of juvenile brain development research, the resentencing court, Judge Barbara Mack (Ret.), rejected Anderson's claim that his culpability was substantially mitigated by his youth and refused Anderson's request for an exceptional sentence below the range, effectively reimposing the original sentence. CP 299-304.

C. ARGUMENT

1. BASSETT DOES NOT APPLY HERE.

Anderson contends that his 61-year sentence is barred by State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018), in which a bare majority of our supreme court held that the state constitution precludes life-without-parole (LWOP) sentences for juveniles convicted of aggravated murder. That argument should be rejected for three reasons. First, Bassett is

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

inapposite because it did not involve or discuss term-of-years or "de facto life" sentences, and its holding invalidated a statute that does not apply to Anderson. Second, Anderson's case is distinguishable from Bassett, in both substance and procedure. Unlike Bassett, who received a literal LWOP sentence, Anderson would have been able to petition for release after 20 years but for his choice to continue committing serious felonies after he became an adult, and after he received a year of intensive rehabilitative treatment. Third, Bassett was incorrectly decided and should be abandoned by our supreme court.

a. Bassett Pertains Only To Literal LWOP Sentences.

In Miller, the United States Supreme Court held that mandatory LWOP sentences for offenders who were under 18 when they committed homicide constitutes cruel and unusual punishment under the Eighth Amendment. 567 U.S. at 479-80. Miller did not categorically bar LWOP in appropriate homicide cases, but required that sentencing courts consider a child's "diminished culpability and heightened capacity for change" before imposing LWOP. Id.

Following Miller, the Washington State Legislature enacted legislation that eliminated mandatory LWOP as a sentence for juveniles convicted of aggravated murder and provided for those serving such sentences to be resentenced. RCW 10.95.030(3); 10.95.035(1). The

legislation provided that juveniles who commit aggravated murder before age 16 shall be sentenced to an indeterminate term of 25 years to life. RCW 10.95.030(3)(a)(i). For juveniles ages 16 and 17, the Legislature gave trial courts discretion to set the minimum term above 25 years, and as high as "life," in which case the person would be ineligible for release. RCW 10.95.030(3)(a)(ii). It was this last provision that was at issue in Bassett.

Bassett had been convicted of three aggravated first-degree murders he committed when he was 16. 192 Wn.2d at 73. He was originally sentenced in 1996, and consistent with pre-Miller law, Bassett received a mandatory LWOP sentence. Id. He was resentenced pursuant to RCW 10.95.035. Id. at 74-75. The superior court considered evidence of Bassett's maturity at the time of the murders, as well as his post-conviction efforts at rehabilitation, and re-imposed a minimum term of life under RCW 10.95.030(3)(a)(ii). Id. at 73. On appeal, Bassett argued that the provision of that statute that permits an LWOP sentence for those convicted of aggravated murder after their 16th birthday was categorically unconstitutional. Id. The supreme court agreed, invalidating that portion of RCW 10.95.030(3)(a)(ii). Id. at 90. The court remanded for resentencing, prohibiting the resentencing court from setting the minimum term at literal "life," but providing no indication that its holding would

also bar a numerical minimum term that would likely preclude release during Bassett's lifetime. Id. at 91. After a second resentencing, the trial court imposed a minimum aggregate term of 60 years.[2]

Anderson was not convicted of aggravated first-degree murder, he was not sentenced under RCW 10.95.030(3)(a)(ii), and he did not receive a literal life sentence. Accordingly, Bassett is not controlling.

Anderson argues, however, that the Bassett analysis "must apply equally to de facto life sentences." App. Br. at 17. He relies on our supreme court's pronouncement in State v. Ramos that "a juvenile homicide offender facing a de facto life-without-parole sentence" is "entitled to a Miller hearing, just as a juvenile homicide offender facing a literal life-without-parole sentence would be." 198 Wn.2d 420, 429, 387 P.3d 650 (2017). In Ramos, the court defined a de facto life sentence as one that "result[s] in a total prison term exceeding the average human life-span." Id. at 434. As Anderson will be released in his eighties, assuming he serves his total sentence, his sentence appears to meet the court's definition of a de facto life sentence.[3] His sentence is not inconsistent

[2] See "Bassett resentenced to 60 years for 1995 murder of parents, 5-year-old brother," The Daily World, June 7, 2019 (accessible at http://www.thedailyworld.com/news/bassett-resentenced-to-60-years-for-1995-murder-of-parents-5-year-old-brother/).

[3] See State v. Keodara, 3 Wn. App. 3d 1050 at *4 & n.6 (May 7, 2018) (unpublished) (relying on data from the Washington Insurance Commissioner to estimate Keodara's life expectancy as 77 years).

with the holding of Ramos, however, because it is undisputed that Anderson received a Miller hearing, and Ramos requires nothing else. 187 Wn.2d at 455. Indeed, the supreme court affirmed the 85-year de facto life sentence imposed on Ramos after a Miller hearing. Id.

There are reasons to doubt that the holding in Bassett applies to de facto life sentences. First, Ramos was an Eighth Amendment case, while both Bassett and Anderson have challenged their sentences under the state constitution. Our supreme court has never indicated what might constitute a de facto life sentence under the Washington Constitution. In State v. Gilbert, 193 Wn.2d 169, 438 P.3d 133 (2019), which challenged an aggregate 45-year-to-life sentence imposed on a 15-year-old convicted of two first-degree murders (one aggravated), the litigants disputed whether the 45-year minimum term was equivalent to a life sentence, and the State urged the supreme court to provide guidance as to how long a sentence could be without triggering Bassett's categorical rule against juvenile life sentences.[4] The court could have used its decision in Gilbert to expand Bassett's holding. Instead, the court avoided the issue, refusing to extend Bassett to term-of-years sentences at all. 193 Wn.2d 169, 171, 438 P.3d 133 (2019) (remanding for resentencing on grounds that

[4] Resp. Supp. Brief, No. 95814-9 at 17-18; Wash. Supreme Court oral argument, State v. Gilbert, No. 95814-9 (Jan. 22, 2019), at 22 min., 28 sec., *audio recording by* TVW, Washington State's Public Affairs Network, http://www.tvw.org.

resentencing court failed to appreciate its discretion to impose concurrent terms as an exceptional sentence).

Because Bassett involved a statute not implicated here, because the supreme court declined to expand Bassett's holding beyond literal LWOP sentences when it had the opportunity, and because its analysis does not support extension of its holding to de facto life sentences, this Court should conclude that Bassett's categorical prohibition on literal life sentences does not bar Anderson's lengthy term-of-years sentence.

b. Bassett Is Distinguishable On Its Facts.

Another reason to doubt that Bassett applies here is that Anderson and Bassett present dissimilar circumstances. When Bassett killed his family, he was 16 years old, had a diagnosed adjustment disorder, had been "kicked out" of his house and was "living in a 'shack,'" and had no significant criminal history. Bassett, 192 Wn.2d at 73; State v. Bassett, 198 Wn. App. 714, 719, 394 P.3d 430 (2017). Bassett had committed no felonies as an adult and had a largely infraction-free record in prison. 192 Wn.2d at 75. Under those circumstances, there was room to argue that Bassett's culpability for the murders was diminished by transient immaturity, and that his mature adult brain is probably no longer inclined toward violence. Bassett, 192 Wn.2d at 74-75. But Anderson's situation

is different, and the premise of recent trends in juvenile sentencing law is inapplicable.

Unlike Bassett, Anderson had an extensive juvenile criminal history including burglary, robbery, and weapons charges. CP 198. He had lived on his own with his girlfriend for a year before the murders. CP 205-06. He was supporting himself, albeit illegally, by selling drugs. CP 208. Unlike Bassett, whose triple homicide was presumably motivated by intense emotions and discord with his victim family members, Anderson and his accomplice preplanned the robbery and murders solely for financial gain through illegal drug sales. CP 188. Further, unlike Bassett, Anderson's early criminal history resulted in his commitment to the JRA for a year of intensive treatment designed to give him the education and skills necessary to pursue a different path upon his release. CP 302. And unlike Bassett, despite receiving rehabilitative treatment as a juvenile, Anderson continued to commit violent and serious violent crimes as an adult. CP 301-02.

Unlike Bassett's literal LWOP sentence, Anderson's sentence would allow a meaningful opportunity for release but for his *adult* convictions. When the legislature amended the aggravated murder sentencing statute to eliminate mandatory LWOP sentences for juveniles, it also enacted RCW 9.94A.730. That statute permits "any person

convicted of one or more crimes committed prior to the person's eighteenth birthday" to petition for early release after serving twenty years. RCW 9.94A.730(1). Under this provision, Anderson would soon be eligible for presumptive release. RCW 9.94A.730(3). But the Legislature limited this relief, deciding it was only appropriate when "the person has not been convicted for any crime committed subsequent to the person's eighteenth birthday[.]" RCW 9.94A.730(1). Anderson is not eligible for release not because his juvenile crimes were so egregious, but because his unabated violent criminality demonstrates that the murders of Jason Bateman and Kristy McMullen were not simply the result of transient immaturity.

The premise animating the recent evolution in juvenile sentencing law is that juveniles generally make worse decisions and engage in riskier behavior than adults because of developmental immaturity. See CP 47-48 ("Adolescent Development and Juvenile Justice" article, adapted from "Adolescent Development and the Regulation of Youth Crime" by Elizabeth Scott and Laurence Steinberg). That same research indicates that "most adolescent criminal behavior is specific to adolescence and will not continue into adulthood. … Much like a toddler outgrows temper tantrums, most adolescents will outgrow delinquent behavior." CP 48. *But not all of them*. Some, the scientists acknowledge, are "lifetime

persistent" offenders. CP 48. That is why researchers recommend "individualized assessment of an adolescent's developmental maturity when making decisions about culpability," CP 49, and why the United States Supreme Court permits life without parole for juvenile homicide offenders, but only after an individualized hearing where a judge considers the mitigating aspects of youth. Miller, 132 S. Ct. at 2469; Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718, 733-34, 193 L. Ed. 2d 599 (2016).

Anderson had such an individualized hearing. The superior court judge who presided over it was a former juvenile court judge who was familiar with the juvenile neurodevelopmental research. RP 55. In comprehensive oral findings, the court concluded that developmental immaturity does not explain Anderson's conduct:

> [A]dolescent brain development is very important, and it does affect how juveniles respond to things. But it is also important to note what is science and what is hypothesis. For example, the Steinberg/Scott article discusses heighten[ed] vulnerability due to coercive circumstances. There were no coercive circumstances in this case. But even if there were, Steinberg and Scott say it is reasonable to hypothesize that a youth would succumb more readily to peer influence than an adult in the same situation. Hypothesize. It is a hypothesis. They go on to say they do not have enough research to show this is true. They say also – and this is a quote – to be sure, some adolescents may be in the early stages of developing a criminal identity and reprehensible moral character traits, but most are not, unquote. This case is not like most. Here we have continuing assaultive criminal behavior after Mr. Anderson committed the crimes in this case, after he reached

> adulthood, after he had been in a structured environment with treatment at JRA, and before he was ever charged with these offenses.
>
> I disagree with the prosecutor's statement in her brief that neuroscience is not well suited to drive sentencing policy to the extent that it suggests courts shouldn't be influenced by it. We should. The science of adolescent brain developing is significant, it is evolving, and it is important to our understanding. There is no doubt that adolescent brains go through enormous changes that affect impulse control among other things. But courts must consider in this context whether science supports a defendant's position based, as Ramos says, on the facts of the particular case. So I'm going to address each of those factors individually as I read the documents submitted to me, and as I heard from people here. …

RP 55-56.

Anderson's actions were not impulsive or impetuous. RP 57. They were instead premeditated and goal-oriented: "This robbery and [the] murders were planned in advance. There is absolutely no evidence in the record before me or in the documents presented by Mr. Anderson that these crimes were due to a lack of impulse control. … They planned and initiated this attack. There was nothing impetuous about it." RP 58-59. Anderson did not have "limited control over [his] environment" or an "inability to extricate [himself] from horrific crime producing settings." RP 59. Rather, "Mr. Anderson was 17-1/2. He had been living … on his own with control over his environment. … He set up the crime producing setting in this case rather than being victimized by it." RP 59. The court

found that Anderson also did not fail to appreciate the risks and consequences of his behavior—he understood that these murders would subject him to life imprisonment. CP 268, 269. "He knew what the consequences were, and he knew what the consequences of committing crimes was before he got out and committed more felonies." RP 60. He had the benefit of intensive treatment and an opportunity to rehabilitate and chose not to. RP 60.

Even if the Bateman-McMullen murders could be explained by immaturity, Anderson is not subject to a life sentence simply because of his juvenile crimes, like Bassett was. Anderson continued to rob and assault people when he was an adult, and it is those adult convictions that ultimately deprive him of an opportunity for early release. These facts illustrate why extending Bassett's categorical bar to lengthy term-of-years sentences is inappropriate. Several years went by before police solved the Bateman-McMullen murders, and during this time Anderson's criminal conduct went on. One need not look far to observe a cold case situation where a murder is not solved until the defendant is already in his 70s.[5] In

[5] Consider the case of "Golden State Killer/East Area Rapist" Joseph DeAngelo, a 72 year old retiree and former police officer who was charged in more than a dozen rapes and murders committed in the 1970s and 1980s. See Breeanna Hare, "What we know about the Golden State killer case, one year after a suspect was arrested," CNN (April 24, 2019) (available at https://www.sacbee.com/news/local/crime/article209779364.html).

such a case, a bar on de facto life sentences would presumably prohibit any punishment at all.

Because Anderson's situation is both procedurally and substantively different from Bassett's, this Court should conclude that Bassett's categorical prohibition on life sentences does not apply here.

2. BASSETT IS INCORRECT AND HARMFUL, AND SHOULD BE OVERTURNED OR LIMITED.

Even if Bassett's analysis applies in this context, that decision is unsound and should be abandoned.[6] "The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned." State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). Bassett's categorical prohibition on LWOP sentences for juveniles convicted of multiple aggravated murders is incorrect because it unnecessarily abandons the long-established framework for considering cruel punishment claims under the state constitution, because it depends on a flawed Gunwall[7] analysis to erroneously conclude that Washington's constitution affords greater protection to juveniles than the Eighth Amendment, and because it illogically relies on United States Supreme

[6] The State is aware that the supreme court's holdings are binding on the Court of Appeals, and includes this argument to preserve it for supreme court review.

[7] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), requires that six neutral criteria must be addressed before it is appropriate to conduct an independent interpretation under the state constitution. State v. Ladson, 138 Wn.2d 343, 347-48, 979 P.2d 833 (1999).

Court precedent to categorically bar juvenile LWOP sentences, when the United States Supreme Court has expressly declined to do that. It is harmful because it injects uncertainty into how our supreme court will evaluate future constitutional claims, because it undermines trial court discretion in juvenile sentencing when that is what juvenile brain development researchers urge more of, and because its failure to provide trial courts with guidance on what sentences are constitutionally permissible virtually guarantees repeated resentencing at great cost to all parties, but especially surviving families of victims.

a. The Bassett Majority's Gunwall Analysis Is Flawed; The State Constitution Does Not Provide Greater Protection For Juveniles Than The Eighth Amendment.

The Bassett majority concluded that the state constitution provides greater protection for juveniles than its federal counterpart, which permits LWOP sentences for juvenile homicide offenders whose crimes do not reflect transient immaturity. 192 Wn.2d at 82. To reach this conclusion, the court embarked on a flawed and circular Gunwall analysis.

To determine whether the Washington Constitution should be interpreted as extending broader rights to its citizens than its federal counterpart, the court must address the six neutral criteria set forth in State v. Gunwall, 106 Wn.2d 54, 61-63, 720 P.2d 808 (1986). Only when these

criteria weigh in favor of independent interpretation does a court have a principled basis for departing from federal constitutional precedent. Id. at 59-63. Otherwise, a court risks "merely substitut[ing its] notion of justice for that of duly elected legislative bodies or the United States Supreme Court." Id. at 62-63. Even when the state constitution is held to provide broader protection in one context, it will not necessarily be found to be broader in all contexts. State v. Martin, 171 Wn.2d 521, 528, 252 P.3d 872 (2011).

The six Gunwall factors include (1) the textual language of the state constitution; (2) differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state or local concern. Gunwall, 106 Wn.2d at 58. Although the Bassett majority ostensibly addressed each of these factors, its approach to factors (3) and (4) was fundamentally flawed and "cannot obscure the fact that there is no independent source of state law categorically prohibiting LWOP in this context." Bassett, 192 Wn.2d at 98-99 (Stephens, J., dissenting).

The third factor, "state constitutional and common law history," is helpful in discerning whether the Washington Constitution extends greater protections than the federal constitution because it "may reveal an

intention that will support reading the [state constitutional] provision independently of federal law." Gunwall, 106 Wn.2d at 62. The purpose of the fourth factor, "preexisting state law," is to "help to define the scope of a constitutional right later established" by looking to "[p]reviously established bodies of state law, including statutory law," which "may be responsive to concerns of its citizens before they are addressed by analogous constitutional claims." Gunwall, 106 Wn.2d at 62. In Gunwall, the court concluded that our state constitution was more protective of individual privacy than the federal constitution by considering evidence that lawmakers at the state constitutional convention specifically rejected a proposal to adopt the exact language of the Fourth Amendment and elected to use broader terms, and by tracing the history of the pertinent law from territorial days to the present. Gunwall, 106 Wn.2d at 66.

Until Bassett, the court generally applied the same historical approach in considering Gunwall's constitutional and common law history and preexisting state law factors. See, e.g., Matter of Dependency of E.H., 191 Wn.2d 872, 885, 427 P.3d 587 (2018) (citing Territorial Code of 1881 to determine what "the general rule in Washington has historically been"); State v. Foster, 135 Wn.2d 441, 459, 957 P.2d 712 (1998) (considering territorial laws, the state constitutional convention, legislation from 1859 through 1982, and cases from 1896 through 1989 to determine that neither

constitutional and common law history nor preexisting state law support analysis of state confrontation clause independent of the federal right); Malyon v. Pierce County, 131 Wn.2d 778, 794, 935 P.2d 1272 (1997) (citing scholarly historical writings, material relating to the constitutional convention, and cases from 1918 onward); State v. Young, 123 Wn.2d 173, 179-80, 867 P.2d 593 (1994) (drawing evidence from the state constitutional convention and legislation and court decisions from the decades before the case to conclude that state constitution may provide greater protection); State v. Schaaf, 109 Wn.2d 1, 14-15, 743 P.2d 240 (1987) (preexisting state law factor required court to "take note of that 70-year history").

Thus, a Gunwall analysis typically "stretch[es] its memory back" as far back as there is pertinent law. In the present context, this analysis would be expected to take into account that there is no evidence of any discussion of juveniles at the state constitutional convention; that there was no juvenile court at statehood; and that juvenile courts eventually created by statute in 1905 were originally limited to "children under the age of seventeen years." See LAWS OF 1905, ch. 18, § 1. A thorough Gunwall analysis would recognize that children who were tried under the provisions of the generally applicable (nonjuvenile) criminal code, see LAWS OF 1913, ch. 160, § 12, were also sentenced under that code, with no

special dispensation on account of youth. State ex rel. Sowders v. Superior Court, 105 Wash. 684, 686-88, 179 P. 79 (1919). The analysis would acknowledge that children prosecuted under the criminal code were not shielded from the harshest possible penalties and could even be sentenced to death. See State v. Maish, 29 Wn.2d 52, 54, 67, 185 P.2d 486 (1947) (death sentence affirmed for 16-year-old murderer who was tried under the criminal code); State v. Carpenter, 166 Wash. 478, 479, 7 P.2d 573 (1932) (death sentence affirmed for defendant who murdered prior to eighteenth birthday). Proper consideration of preexisting state law and common law history would also consider that until Bassett, no Washington case had ever found that the state constitution is more protective of juveniles in sentencing matters than the federal constitution, and that Washington courts have repeatedly rejected constitutional challenges to juvenile LWOP sentences. See, e.g., State v. Furman, 122 Wn.2d 440, 458, 858 P.2d 1092 (1993) (ordering the imposition of LWOP after finding the 17-year-old murderer was not eligible for a death sentence); State v. Massey, 60 Wn. App. 131, 145-46, 803 P.2d 340 (1990), rev. denied, 115 Wn.2d 1021 (1990), cert. denied, 499 U.S. 960 (1991) (affirming LWOP sentence applied to a 13-year-old murderer under Eighth Amendment); State v. Stevenson, 55 Wn. App. 725, 737-38, 780 P.2d 873 (1989), rev. denied, 113 Wn.2d 1040 (1990) (affirming

LWOP as to a 16-year-old murderer); State v. Forrester, 21 Wn. App. 855, 870-71, 587 P.2d 179 (1978), rev. denied, 92 Wn.2d 1006 (1979) (affirming LWOP for a 17-year-old murderer). A thorough Gunwall analysis would acknowledge that, as recently as 1996, our courts rebuffed the argument that a juvenile cannot constitutionally be tried in adult court or receive an adult sentence. In re Boot, 130 Wn.2d 553, 570, 925 P.2d 964 (1996).

The Bassett majority took a very different approach in its Gunwall analysis. While it would be expected to consider how the state treated juveniles in territorial days, whether and how juvenile justice was addressed during the constitutional convention, and how the legislature and courts have considered juvenile justice matters since statehood, the Bassett majority confines its analysis of "preexisting state law" to consideration of how Washington's legislature and courts have reacted since being *forced* to change state law to comply with Miller. "Stretching its memory back" to only four years earlier, the court pointed out that it has "consistently applied the Miller principle that children are different." 192 Wn.2d at 81. The court cited as evidence of this its decision in State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), which involved no constitutional challenge and did not involve juveniles; State v. Ramos, 187 Wn.2d 420, 387 P.3d 650 (2017), in which the court refused to entertain a

challenge to a juvenile de facto life sentence under the state constitution; and State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), which considered only the Eighth Amendment in holding that the trial court had more discretion when sentencing juveniles in adult court. 192 Wn.2d at 81. The court also cited as evidence of "preexisting state law" legislative developments in Washington since 2014, including the Legislature's post-Miller legislation. Id.

In other words, to discern whether the Washington Constitution permits imposition of LWOP in the discretion of the sentencing court, like Miller held the United States Constitution does, or instead affords greater protection to juvenile offenders, the Bassett majority relied exclusively on evidence of Washington's adherence to Miller. But, as the legislature and every one of the court's Miller cases have recognized, Miller *allows* sentencing judges the discretion to impose harsh sentences on juveniles, including LWOP in rare circumstances. See O'Dell, 183 Wn.2d at 698-99; Ramos, 187 Wn.2d at 428; Houston-Sconiers, 188 Wn.2d at 21; RCW 10.95.030(3)(a)(ii) (2015). Thus, like pre-Miller Washington law, "[t]here is simply no foundation in Washington law post-Miller to support the majority's newfound interpretation of article I, section 14 to categorically prohibit juvenile LWOP sentences." Bassett, 192 Wn.2d at 98 (Stephens, J., dissenting).

b. Bassett Unnecessarily Abandons Settled Law Governing Review Of Cruel Punishment Claims Under Article I, Section 14 Of The Washington Constitution.

In State v. Fain, our supreme court adopted a proportionality analysis to determine whether a habitual offender sentence violated the cruel punishment clause of the state constitution. 94 Wn.2d 387, 396-97, 617 P.2d 720 (1980). That analysis directs the courts to consider four factors to determine whether a given sentence constitutes cruel punishment: (1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction. Id.; State v. Witherspoon, 180 Wn.2d 875, 887, 329 P.3d 888 (2014).

Fain was the sole constitutional framework for state cruel punishment claims for nearly forty years. During that time, Washington's appellate courts faithfully adhered to its four-part framework to decide cruel punishment claims.[8] Our supreme court never departed from its

[8] See, e.g., Witherspoon, 180 Wn.2d at 887; State v. Davis, 175 Wn.2d 287, 344, 290 P.3d 43 (2012); State v. Manussier, 129 Wn.2d 652, 676-77, 921 P.2d 473 (1996); State v. Hart, 188 Wn. App. 453, 461, 353 P.3d 253 (2015); State v. Whitfield, 132 Wn. App. 878, 900-01, 134 P.3d 1203 (2006); State v. Flores, 114 Wn. App. 218, 223, 56 P.3d 622 (2002); State v. Morin, 100 Wn. App. 25, 29-30, 995 P.2d 113, 116 (2000); In re Haynes, 100 Wn. App. 366, 375-76, 996 P.2d 637, 643 (2000); State v. Ames, 89 Wn. App. 702, 709, 950 P.2d 514, 517 (1998).

understanding that Fain is the "*controlling* Washington case interpreting the applicable provision of the Washington State Constitution" and "*requires* us to consider four factors in an article I, section 14 challenge[.]" Witherspoon, 180 Wn.2d at 895, 902 (Gordon-McCloud, J., concurring and dissenting) (emphasis added). Indeed, Washington courts have repeatedly held that the failure to address the Fain factors precludes consideration of cruel punishment claims. See State v. Davis, 175 Wn.2d 287, 343, 290 P.3d 43 (2012); In re Pers. Restraint of Haynes, 100 Wn. App. 366, 375-76, 996 P.2d 637 (2000). As recently as February 2016, our supreme court recognized that Fain constitutes the sole applicable analysis for determining whether punishment violates the state constitution's cruel punishment clause. Ramos, 187 Wn.2d at 454 & n.10 (declining to engage in independent state constitutional analysis because defendant "does not address" the Fain factors).

In Bassett, a bare majority of the court voted to abandon Fain in favor of a categorical bar analysis that it admitted had never been applied to such claims in this state. 192 Wn.2d at 85. The majority asserted that Fain's proportionality analysis was inappropriate in the context of Bassett's challenge because it "does not include significant consideration of the characteristics of the offender class," a claim completely and immediately contradicted by the majority's subsequent application of a

modified Fain analysis that does just that. 192 Wn.2d at 83, 90-91 (characterizing Fain's second factor as requiring the court to consider the purpose behind the Miller-fix statute, "to require sentencing courts to 'take into account mitigating factors that account for the diminished culpability of youth as provided in Miller.'"). As the Bassett dissent points out, the majority's application of Fain implicitly acknowledges that, "[p]roperly understood, our Fain analysis does not fail to account for youth and its attendant characteristics but, instead, folds these considerations into our constitutional review under article I, section 14." 192 Wn.2d at 95 (Stephens, J., dissenting).

It was a mistake for the Bassett majority to abandon Washington's longstanding constitutional framework for state cruel punishment claims in favor of a categorical bar test adopted in this context by only one other state.[9] As the majority purports to have reached the same result by applying Fain, it was plainly unnecessary to eschew decades of settled law. Further, by stating that "[t]his holding does not disturb our Fain decision," the majority leaves litigants unclear about which constitutional framework will apply to future cruel punishment claims. Indeed, the Bassett majority's assertion that it may freely apply whatever

[9] See State v. Sweet, 879 N.W.2d 811 (Iowa 2016).

constitutional framework it prefers at the moment leaves litigants in *any* case involving a state constitutional claim to wonder what analysis will ultimately be applied. The supreme court should return to the established Fain framework to evaluate state cruel punishment claims.

c. Bassett Undermines Miller's Mandate For Individualized Sentencing, With Trial Court Discretion To Impose Fair Sentences.

The Bassett majority's reasoning is enigmatic. Although it purports to rely on the principles enunciated by the United States Supreme Court in Miller, its categorical bar is inconsistent with those same principles. Miller did not prohibit juvenile LWOP sentences. Even as the Court recognized "the great difficulty … of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare offender whose crime reflects irreparable corruption,'" it preserved trial court discretion to impose a life sentence on individuals when the circumstances warrant the most severe punishment. Miller, 567 U.S. at 479-80 (internal citations omitted). But more than that, Miller *relies* on a sentencer's discretion to determine whether and when the mitigating qualities of youth make life imprisonment unjust. The final line of the Miller lead opinion summarizes: "Graham, Roper, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider

mitigating circumstances before imposing the harshest possible penalty for juveniles." 567 U.S. at 489. Our supreme court unanimously recognized the authority and ability of trial courts to make these decisions in Ramos:

> Although we cannot say that every reasonable judge would necessarily make the same decisions as the court did here, we cannot reweigh the evidence on review. The court clearly received and considered Ramos' extensive mitigation evidence, and was fully aware of its authority to impose an exceptional sentence below the standard range, and reasonably considered the issues identified in Miller when making its decision. Ramos has not shown that his second resentencing violated Miller's minimal requirements.

187 Wn.2d at 453.

The Bassett majority appears to no longer trust trial courts with these decisions. While acknowledging that "sentencing courts use their expert discretion in many aspects of sentencing," the majority concluded that "given the difficulty even expert psychologists have in determining whether a person is irreparably corrupt" any discretion in this area "produces the unacceptable risk that children undeserving of a life without parole sentence will receive one." 192 Wn.2d at 89. Whereas the United States Supreme Court relies on the sentencer's discretion to ensure that no juvenile is inappropriately imprisoned for life, the Bassett majority holds that it is discretion itself that poses the risk. As argued above, since the Bassett majority looks almost exclusively to Miller and its progeny and Washington's legislative and judicial responses to Miller to support its

categorical bar to juvenile LWOP, the court's departure from such a central tenet of Miller—individualized sentencing with discretion—is baffling.

The four dissenting justices in Bassett summarized the critical flaw in the majority's analysis:

> At the end of the day, the majority's circular path of reasoning leads back to Miller, and it attempts to reinterpret Miller in a way that expands the substantive holding in that case to make it more like Graham. The majority ultimately rejects Miller's actual holding, requiring individualized review of youth and attendant characteristics for LWOP sentencing of juvenile homicide offenders, because it elevates Graham's reasoning to an absolute. … Notwithstanding Graham's recognition of the mitigating impact of youth and its attendant characteristics, Miller determined it is sufficient that sentencers must consider individual differences among juvenile homicide defendants when imposing LWOP sentences. …
>
> Although the majority walks through the Gunwall factors to find that article I, section 14 is more protective than the Eighth Amendment to the United States Constitution, … its reasoning rests entirely on reinterpreting Miller to follow the categorical approach of Graham. … The problem with this analysis is that it uses Graham's general recognition that LWOP is often unconstitutional for children to overrule Miller's specific holding that it is sometimes allowed. … Reaching such a result by invoking state law rather than resting on federal law provides thin cover.

192 Wn.2d at 100 (internal citations omitted). For these reasons, the supreme court should overrule Bassett.

3. THE RESENTENCING COURT PROPERLY CONCLUDED THAT ANDERSON IS NOT ENTITLED TO AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE.

Anderson argues that there was insufficient evidence to support the trial court's finding that he is not entitled to an exceptional sentence below the standard range. In evaluating the claim, it is important to remember that it is the defendant's burden to prove that an exceptional sentence is justified. Ramos, 187 Wn.2d at 445-46; State v. Gregg, __ Wn. App. 3d __, __ P.3d __ , No. 77913-3-I at *3-5 (July 8, 2019). There is no presumption against a standard-range sentence, even for those convicted as juveniles, under either the state constitution or the Eighth Amendment. Ramos, 187 Wn.2d at 445-46; Gregg, at *5.

Factual findings are reviewed for substantial evidence, which is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. State v. Homan, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). There must be deference to the fact finder. In claiming evidentiary insufficiency, a defendant "necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." Id. at 106. "These inferences must be drawn in favor of the State and interpreted most strongly against the defendant." Id. The trial court's conclusions of law are reviewed de novo. Id.

While Anderson assigns error to many of the resentencing court's findings, his argument demonstrates that he simply disagrees with them. Anderson complains that the court gave too little weight to his testimony that he cared deeply about his reputation on the streets as a youth, was angry that he did not have more familial support, tried to fit in with older members of his gang, committed the murders in this case because "street sense kicked in," and failed to show remorse because showing such emotions "makes you a victim." RP 26, 27. He also suggests that the court "overlook[ed]" statements by McMullen's biological brother that Anderson started from "horrible beginnings" and statements by one of Anderson's supporters that he was "a dumb kid" and a "follower." Brief of Appellant at 22-23. But the resentencing court also had evidence that Anderson himself referred to his murders as "premeditated" and said he "messed up" by allowing Ricardos and her baby to live. CP 174, 176, 188, 244, 268, 269. The court had evidence that Anderson understood, even before he was a suspect in the case, that he would go to prison for life if caught. CP 174, 188, 244, 268, 269. The court knew that Anderson was living on his own with a girlfriend and supporting himself at the time of the murders. CP 177-78, 188, 205-06, 302. The court understood that Anderson committed the murders not in a fit of passion, but according to a preplanned effort to avoid responsibility for robbing Bateman of cocaine.

CP 154, 188. And, the trial court knew that Anderson continued to commit violent and serious violent crimes as an adult, even after he had had a year of rehabilitative treatment. CP 137, 216-17. This evidence is more than sufficient to support the trial court's decision that Anderson failed to prove that substantial and compelling reasons justified a downward departure from the standard range. While some courts might disagree, appellate courts "cannot reweigh the evidence on review." Ramos, 187 Wn.2d at 453.

Anderson also contends that the trial court erroneously found that LWOP was a permissible sentence for some juveniles in some circumstances. Brief of Appellant at 18 (citing 2RP 55). This is not a factual finding, and it was not inaccurate at the time. The resentencing court's full statement was in reference to Ramos: "The Ramos court said at a Miller hearing the Court must meaningfully consider how juveniles are different from adults, how those differences apply to the facts of the case, and whether those facts present the uncommon situation where a life without parole sentence for a juvenile homicide offender is constitutionally permissible." 2RP 55. This is a direct quote from Ramos. 187 Wn.2d at 434-35. Although our supreme court later held, under the state constitution, that LWOP is never constitutionally permissible for a

juvenile, it had not so held before this resentencing hearing. The court did not err in faithfully reciting the then-current state of the law.

Anderson challenges the court's finding that Anderson's childhood circumstances were not as tragic as those of Evan Miller, one of the defendants in Miller. According to the Supreme Court, Evan Miller was 14 years old when he committed murder, and "had by then been in and out of foster care because his mother suffered from alcoholism and drug addiction and his stepfather abused him. Miller, too, regularly used drugs and alcohol; and he had attempted suicide four times, the first when he was six years old." 132 S. Ct. at 2462. The resentencing court here stated, "The court is not aware that this defendant had any such history." CP 300-01.

Anderson argues that statement ignores testimony from the resentencing hearing that he had "horrible beginnings," citing the testimony of Kristy McMullen's biological brother Tony Finley. Brief of Appellant at 22 (citing RP 36). But the point Finley was making was that, even though he and Anderson both "started off with horrible beginnings" including "drug addicted parents" and having to "survive in the streets," "there is a big difference between you and I, and that difference is you have a ton of support. You have family. Whether or not they were having problems while you were going through those years, you had examples."

RP 36-37. Anderson claims that Finley acknowledged that Anderson's "older peers were his 'family,' who he looked up to and tried to please." Brief of Appellant at 23. Actually, Finley repeatedly stated that unlike him, Anderson had an *actual* family. This is consistent with testimony from Anderson's aunts at the resentencing hearing, as well as with Anderson's statement while in JRA that he could "count on [his grandmother] 100%." CP 271. Anderson points to no evidence that he was abused as a child, that he had substance abuse issues from an early age, or that he suffered such extreme mental health problems that he had repeatedly attempted suicide, like Miller. The trial court did not err by finding Anderson's childhood less horrible than Evan Miller's.

Anderson also suggests there is insufficient evidence to support the resentencing court's finding that Anderson's actions were not impetuous or evidence of immaturity. Brief of Appellant at 24. He does not point to any evidence that would show that his actions were impulsive. Instead, he just points to Bassett's arguably more horrible crimes and says, "Like Bassett, this Court cannot be confident Tonelli's actions were thought out in the deliberate and premeditated way the trial court found." Brief of Appellant at 24. But as explained above, Bassett and Anderson do not present similar circumstances. As the Bassett majority took pains to point out, Bassett was a troubled teen with a diagnosed mental illness when he

killed, and his record since then has been exemplary. While the State happens to agree that Bassett's premeditated triple homicide does not demonstrate transient immaturity, that is not at all relevant.

The resentencing court here reasonably inferred from Anderson's independent living situation, his admission to preplanning a drug robbery with premeditated intent to kill any witnesses and knowledge of the sentence that crime carries, the fact that there were no circumstances compelling him to shoot the unarmed women, and the fact that Anderson's violent criminality survived both adulthood and a year of intensive rehabilitative treatment, that the murders of Jason Bateman and Kristy McMullen were not the result of transient immaturity. This court should affirm.

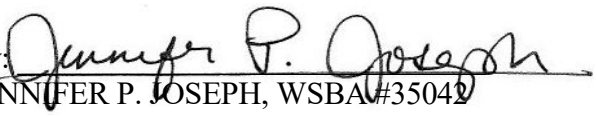
D. CONCLUSION

The State respectfully asks this Court to affirm.

DATED this 22nd day of July, 2019.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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