SUPREME COURT NO. 94556-0
COURT OF APPEALS NO. 47251-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

Vs.

BRIAN M. BASSETT,

Respondent.

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# BRIEF OF RESPONDENT

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## I. NATURE OF THE CASE

The Court of Appeals below declared that the practice of sentencing juvenile offenders like the Respondent to life in prison without the possibility of parole violates the prohibition against "cruel punishment" contained in Article 1, §14 of Washington's Constitution. The Respondent asks this Court to affirm the Court of Appeals.

## II. ISSUES PRESENTED FOR REVIEW

Whether RCW 10.95.030(3)(a)(ii), the statute used to sentence the Respondent, is unconstitutional, and, whether Article 1, §14 of Washington's Constitution, which provides even greater protection against "cruel punishment" than does its federal counterpart, prohibits sentencing juvenile offenders to life in prison without the possibility of parole.

## III. STATEMENT OF THE CASE

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

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1 Nicholaus McDonald, an older co-defendant, confessed to having actually killed Mr. Bassett's younger brother. Later, when facing trial himself, Mr. McDonald changed his story and blamed Mr. Bassett. See, *State v. McDonald,* 138 Wn.2d 680 (1998); see also, RP 4-1-96, p. 27-28.

2 For details of the crimes see, *State v. Bassett*, 198 Wn. App. 714, 717-720 (2017).

In 2014, in *Miller v. Alabama,*[3] the U.S. Supreme Court banned mandatory life without parole sentences for juveniles. In an attempt to comply with *Miller,* the Washington legislature amended RCW 10.95.030, the statutory scheme used to sentence Mr. Bassett.[4] As a result of that amendment Mr. Bassett was awarded a new sentencing hearing.

In 2015, when Mr. Bassett appeared in court for his re-sentencing hearing, he presented mitigating evidence consistent with the "diminished culpability of youth" pursuant to *Miller.*[5] That evidence included, but was not limited to, testimony from the pediatric psychologist treating Mr. Bassett in 1996 (prior to the murders) that Mr. Bassett's identity as a person was still being formed, that he faced psychological stressors such as teen homelessness, joblessness, and an unwanted sexual relationship from his older male co-defendant, that he suffered from an adjustment disorder, that his parents had rejected his attempt to reconcile with them, and that he was experiencing an untreated alcohol abuse problem. RP 1-30-15, p. 36-37, 41-43, p. 44-47 66, 80; CP 261.

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3 *Miller v. Alabama*, 567 U.S. 460 (2012).

4 See, RCW 10.95.030(3); RCW 10.95.035(1).

5 See, *State v. Bassett*, 198 Wn. App. 714, 719 (2017).

In addition to that mitigating evidence, Mr. Bassett presented evidence that he had changed dramatically from the troubled, homeless, 16-year old boy who had been sentenced to die in prison two decades earlier. For example, the evidence presented established that, since growing out of adolescence, Mr. Bassett had matured and rehabilitated.[6],[7] Consistent with his rehabilitation, Mr. Bassett also expressed true remorse for the crimes he'd committed 20 years earlier. RP 1-30-15, p. 78-82.

Mr. Bassett's judge, without having received any evidence contradicting Mr. Bassett's history of significant progress towards rehabilitation, simply re-sentenced Mr. Bassett to life in prison without

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6 E.g. Mr. Bassett has lived a faith based life since being baptized in prison, RP 22-23, CP 264; he successfully earned his GED, CP 190-191, then earned a full tuition scholarship into college, CP 193, where he excelled, earning a place on the Edmonds Community College Honor Roll. RP 1-30-95, CP 195. Mr. Bassett also learned a trade that would allow him to support himself if paroled, CP 232. To better understand his crimes, Mr. Bassett successfully completed courses examining stress and family violence, CP 279, 207. Mr. Bassett was selected as a teaching assistant for the Edmonds C.C. construction maintenance program, RP 21, CP 264. In 2010, after successfully completing numerous hours of pre-marital counseling, Mr. Bassett married a wonderful woman and each values the other and their relationship. CP 200. Significantly, Mr. Bassett had not violated a prison rule of any kind in 12 [now 14] years, RP 90-91, CP 207, and, despite serving a life without parole sentence, the DOC classified Mr. Bassett as a low to moderate security risk. CP 188.

7 Mr. Bassett served as a mentor to other inmates. *See,* CP 263- 293, 30 letters from people who support Mr. Bassett: "Brian is not your average inmate." CP 264. "Brian is concerned about the lives of others and wants them to succeed," "he leads through example," CP 265; "helps inmates make non-violent choices...guides them through educational opportunities." CP 266. "His dedication to being a better man permeates his daily life." CP 269. "Brian has succeeded despite being surrounded as a youth by the daily possibility of rape, murder, and deviant behavior one must endure [in prison]." CP 272. "Brian inspires people to keep the right path." CP 275. "Humble, kind and respectful." CP 276. "Patient and calm." CP 278.

parole just as though Mr. Bassett had not made any changes to his life during the previous two decades. RP 1-30-15, p. 51.

## IV. ARGUMENT

### A. Sentencing a juvenile offender to life in prison without the possibility of parole, as is allowed by RCW 10.95.030(3)(a)(ii), constitutes "cruel punishment" in violation of Article I, §14 of the Washington Constitution.

What defines an unconstitutionally cruel and unusual punishment is a concept that changes with "evolving standards of decency that mark the progress of a maturing society." *Miller*, 567 U.S. at 469 (citation omitted). While at one time our society readily accepted sentencing children and adolescents to spend their entire lives in prison, societal "standards of decency" have evolved to the point that that is no longer the case. See, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); also, *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016) (banning juvenile life without parole sentences).

#### 1. Under the federal constitutional standard, what is "cruel and unusual punishment" has evolved to the point that imposing juvenile life in prison without parole is now a "practical impossibility":

Beginning in 2005 the United States Supreme Court released a series of four opinions that dramatically altered juvenile sentencing practices in

America.[8] By 2016, when the Court released *Montgomery v. Louisiana*, the Court had determined that in almost every circumstance, sentencing a juvenile offender to life in prison without parole constitutes disproportionately cruel and unusual punishment in violation of the Eighth Amendment.

The impetus behind the Court's conclusion was its acknowledgment that emergent psychosocial and scientific evidence had proven that areas of the brain responsible for regulating behaviors such as impulsivity, recklessness, and the ability to consider potential consequences, did not fully develop until a person reached their mid-twenties. See, e.g. *Roper*, 543 U.S. at 569-570; *Miller v. Alabama*, 567 U.S. at 472 n.5 (citation omitted)[9]. The Supreme Court in *Roper*, *Graham,* and *Miller* also recognized that children and adolescents shared an emotional immaturity that left them less able than adults to appreciate the consequences of their actions and to avoid

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8 See e.g. *Roper v. Simmons*, 543 U.S. 551 (2005) (banning the death penalty for juvenile offenders); *Graham v. Florida*, 560 U.S. 48 (2010) (banning life without parole sentences for juvenile offenders convicted of non-homicide crimes); *Miller v. Alabama*, 567 U.S. 460 (2012) (banning mandatory life without parole sentences for juvenile offenders convicted of homicide); *Montgomery v. Louisiana*, 136 S. Ct. 718, 733-36 (2016) (interpreting *Miller* to have banned life without parole sentences for all juvenile offenders but for the uncommonly rare proven to be "permanently incorrigible").

9 *MIT Young Adult Development Project: Brain Changes*, MASS. INST. OF TECH, http://hrweb.mit.edu/worklife/youngadult/brain.html (2015) ("The brain isn't fully mature at ... 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.")

the behaviors that resulted in criminal activity. See, *Miller*, 567 U.S. at 475, 477. That undeveloped brain and emotional immaturity rendered juvenile offenders less culpable than adults, less deserving of sentences commonly meted out to adults, more deserving of sympathy, understanding, and leniency, and more likely than adults to learn from their mistakes and to become rehabilitated. See, e.g. *Miller,* 567 at 476-77. These significant differences between juveniles and adults meant that the traditional penological rationales behind punishment did not justify imposing our harshest punishments on juveniles, and that when juvenile offenders are sentenced, the focus must be on the offender, rather than just the offense. *Miller*, 567 U.S. at 472-73.[10]

In *Montgomery v. Louisiana*, the Court clarified that life without parole sentences for juvenile offenders could only constitutionally be imposed upon the exceptionally rare juvenile offender who is "permanently incorrigible" to the point that rehabilitation in the future is impossible. *See, Montgomery,* 136 S. Ct. at 733-36; see also, *Tatum v. Arizona*, 137 S. Ct. 11, 12-13 (2016) (Sotomayor, J., concurring). In practical terms, in order to

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10 The Supreme Court also analogized a juvenile life sentence to the adult death penalty, declaring, "If death is different, children are different too," and, for the first time, the Court extended its individualized sentencing requirement to juvenile offenders being sentenced for serious crimes. See, *Miller*, 567 U.S. at 474; also, *Graham v. Florida*, 560 U.S. at 70 (noting that a life sentence for a juvenile is actually a harsher punishment than when imposed on an adult because the juvenile would proportionately spend a much greater part of his life incarcerated.)

identify which were the permanently incorrigible juveniles, *Montgomery* required a sentencing judge to make a forward-looking prediction about whether a particular juvenile could experience meaningful, positive change at some point in his or her lifetime. If positive change in the future was possible, imposition of a juvenile life without parole sentence would be unconstitutionally cruel and unusual punishment in violation of the Eighth Amendment. Significantly, *Montgomery* did not limit the timeframe that a sentencer had to consider when making the prediction as to whether future change in a juvenile was possible. In other words, to comply with the federal constitution, before imposing juvenile life, *Montgomery* required a sentencing judge to accurately predict that there was no possibility the juvenile could ever rehabilitate at any point later in life regardless of the counseling, treatment, or attention that he or she might receive during the course of their lifetime.

In addition, *Montgomery* noted through the *Miller* line of cases that the Supreme Court had recognized that because juveniles were still forming their identities, one of the hallmark features of youth was their capacity for future change - making the judicial task of discerning which children will experience positive change in the future from those who will end up

"permanently incorrigible," all but impossible.[11] See, *Miller*, 567 U.S. at 472-73; *Graham*, 560 U.S. at 72-74. The complexities involved in requiring a judge to ferret out the "uncommonly rare" juvenile for whom positive change in their lifetime is not possible caused the *Montgomery* dissenters to admit that the majority decision rendered imposition of juvenile life without parole a practical impossibility under the federal constitution. *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting, joined by Thomas, J. and Alito, J.); See also, *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016); *People v. Nieto*, 52 N.E. 3d 442 (Ill. App. Ct. 2016).

**2. The Court of Appeals below was correct in applying the reasoning used in *State v. Sweet* to ban juvenile life without parole as a sentence:**

In *State v. Sweet*, 879 N.W.2d 811, 836-837 (2016), the Iowa Supreme Court addressed the fundamental problem with *Montgomery's* requirement that a sentencing judge make a speculative prediction about an adolescent's future rehabilitative prospects. *Sweet,* 879 N.W.2d at 838-39.

After examining the various processes by which a juvenile life sentence might comply with *Montgomery,* the *Sweet* court concluded that there was no approach - not even the use of an individualized death-penalty-

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11 See e.g. Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as *Amici Curiae* in Support of Petitioners, *Miller v. Alabama*, Nos. 10-9646, 10- 9647, 2012 WL 174239, at 21 (S. Ct. Jan. 17, 2012) (discussing how even trained social scientists cannot accurately predict which youth are subject to change and which youth are irredeemable).

type sentencing hearing - that would reduce to an acceptable level the risk that a juvenile could be undeservingly sentenced to life in prison. *Id.* at 837. The *Sweet* court agreed that for a judge to accurately identify those juvenile offenders who cannot be rehabilitated at some point in the future is an all but impossible task. *Id.* Interpreting its own state constitution, the *Sweet* court concluded that in order to avoid imposing an unconstitutionally disproportionate punishment, it was necessary to categorically ban juvenile life in prison without parole as a sentencing option.[12]

In Mr. Bassett's case, after its own careful analysis, Division Two of the Court of Appeals reached the same conclusion as the court in *Sweet.* In order to prevent imposition of unconstitutionally cruel punishment it is necessary to ban the practice of sentencing juvenile offenders to life in prison without parole.

**3. Washington's Constitution requires banning the practice of sentencing juveniles to life in prison with no hope of ever being released:**

Article I, §14 of Washington's Constitution prohibits unconstitutionally "cruel punishment."[13] The framers of our state

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12 The section of the Iowa Constitution applied in *Sweet* mirrored the language used under the federal constitutional standard. *Compare*, Iowa Const. Article I, §17, "cruel and unusual punishment shall not be inflicted" with U.S. Const, Amend VIII, "...nor cruel and unusual punishments inflicted."

13 "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." WASH Const. Art. 1, §14.

constitution considered, but rejected, the language used in the Eighth Amendment that prohibits only punishment that is both "cruel" and "unusual." *State v. Fain*, 94 Wn.2d 387, 393 (1980) (citing Journal of the Washington State Constitutional Convention: 1859, 501-02 (B. Rosenow ed. 1962). Based on the differences in text and history it is an established principle of Washington law that Article I, §14 provides an even broader protection against cruel punishment than does its federal counterpart. *State v. Thorne,* 129 Wn.2d 736, 772 (1996); *Fain*, 94 Wn.2d at 393.[14] As a consequence, a punishment acceptable under the federal constitutional standard may not be acceptable under Washington's more protective standard.

As noted above, the *Sweet* court, applying the "cruel and unusual" standard contained in its own state constitution, concluded that the judicial prediction required by *Montgomery* resulted in a process that was a practical impossibility to apply. *Sweet*, 879 N.W. 2d at 836-37. Consistent with that reasoning, if *Montgomery's* judicial prediction requirement renders imposition of a juvenile life without parole sentence a "practical impossibility" under a "cruel and unusual" constitutional standard, then the broader protections provided by Article I, §14 of Washington's Constitution

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14 *State v. Roberts*, 142 Wn.2d 471, 506 n. 11 (2000) (This "established principle" requires no analysis under *State v. Gunwall*, 106 Wn.2d 54 (1986)).

renders imposition of juvenile life without parole a "constitutional impossibility".

Further, this Court has already recognized that under the federal constitutional standard juvenile life without parole sentences may only be imposed in the "uncommon" and "rare" circumstance. See, *State v Ramos,* 187 Wn.2d, at 435 (citing to *Montgomery*, 136 S. Ct. at 734). It necessarily follows that in order to comport with the broader protections afforded under Washington's constitutional prohibition against "cruel punishment," juvenile life without parole sentences would be limited to only the *most* uncommon and *rarest* of offenders. *Bassett*, 198 Wn. App. at 742-43 (emphasis in original).

Based on the broader protections of Article I, §14, Mr. Bassett's case requires this Court to determine whether the value in retaining juvenile life in prison - a punishment that under Washington's Constitution can only be used in the rarest of circumstances, if at all - outweighs the risk that an undeserving adolescent might be mistakenly or arbitrarily identified as "permanently incorrigible" and sentenced to die in prison. Under the broader protections provided by Article I, §14, that risk is constitutionally unacceptable.

**a. Societal standards of decency favor now banning juvenile life without parole:** Although the constitutional prohibition

against imposing cruel punishment holds constant across generations, "its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 417, 419 (2008). The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citation omitted). When determining the societal acceptability of a punishment, "[i]t is not so much the number of these states that is significant, but the consistency of the direction of change." See, *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

Since *Miller*, the "consistency of the direction of change" is clear regarding sentencing juveniles to prison for life. Standards of societal decency, the barometer by which unconstitutionally "cruel punishment" is measured, have evolved to the point where sentencing a person to live their entire life in prison for an act committed as an adolescent is no longer acceptable punishment. In the five years since *Miller*, the number of states that have legislatively banned juvenile life sentences has more than tripled.[15] Currently, the number of states that have either abolished or functionally abandoned juvenile life has grown to 25 states and the District

15 See, http://fairsentencingofyouth.org/what-is-jlwop-juvenile-life-without-parole/; (last viewed October 30, 2017).

of Columbia.[16],[17] Consistent with that rapidly expanding movement, in the short period since the Court of Appeals below issued its opinion in *Bassett*, North Dakota and California have banned sentencing juveniles to life in prison without parole.[18], [19]

Similarly, although it involved an Eighth Amendment analysis, the recent *State v. Houston-Sconiers,* 188 Wn.2d 1 (2017), decision indicates a reluctance within this State to continue imposing our most extreme punishments on juveniles. *Houston-Sconiers* involved several mandatory sentencing enhancements levied upon two juveniles. Rejecting an argument that RCW 9.94A.730, a "*Miller* fix" statute, potentially provided the teens with sufficient relief from their harsh sentences, the court announced that

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16 **Alaska Stat.** §12.55.015(g)(1997); **Ark.** Code Ann. §5-4-108(2017); **Colo.** Rev. Stat. §§17-22.5-104(2)(d)(IV), 18-1.3-401(4)(b)(1)(2006) **Conn.** Gen. Stat. §§ 54-125a,(f)(2015); **Del.** Code Ann. Tit. 11 §§ 4209A(d)(2013); **D.C.** Code, §22-2104(a)(2001); **Haw.** Rev Stat. § 706-656 (2014); **Iowa,** *State v. Sweet*, 879 N.W. 2d 811 (2016); **Kan.** Stat Ann.§§21-6618 (2010); **Ky** Rev Stat Ann. §640.040(1) (1986); **Mass.** *Diatchenko v. D.A. Suffolk Co.*, 1 N.E. 3d 270, (2013); **Mont.** Code Ann.§46-18-222(1); **Nev.** Rev. Stat. §176.025 (2015); **Or.** Rev Stat. §161.620(1985); **S.D.** Codified Laws, §22-1-6-1(2016); **Tex.** Penal Code Ann. §12.31 (2013); **Utah** Code Ann. §76-3-209 (2016); **Vt.** Stat. Ann. tit. 13, §7045 (2015); **W. Va.** Code: §61-11-23 (2014); **Wyo.** Stat. Ann.§6-2-101(b)(2013).

17 Several states no longer have any juveniles serving life sentences. e.g. Indiana, Maine, New Jersey, New Mexico, New York, See, Juvenile Life Without Report of Phillips Black Project at 31, 63, 70,71, 89, 97 (July 2015)

18 http://fairsentencingofyouth.org/2017/04/20/north-dakota-bans-life-without-parole-prison-sentences-for-children/

19 http://faairsenttencingofyouth.org2017/10/12/California-becomes-20th-state-to-abolish-life-without-parole-sentences-for-children/

when sentencing a juvenile a judge has complete discretion to depart from even mandatory sentencing enhancements and that any precedent to the contrary was overturned. *Houston-Sconiers*, 188 Wn.2d at 9.

Under the broader protections provided by Article I, §14 of Washington's Constitution, this Court should affirm the Court of Appeals and ban juvenile life in prison as a sentencing option.

**4. Because the *Fain* proportionality analysis conflicts with the reasoning behind the *Miller* line of cases, this Court should affirm the categorical ban analysis used by the Court of Appeals below:**

When asked to determine whether a particular individual's sentence was unconstitutionally cruel, our courts have generally relied on the four-factor proportionality analysis articulated in *State v. Fain,* 94 Wn.2d 387, 397, 401 n.1 (1980).[20] Initially, however, it should be noted that Mr. Bassett did not limit his challenge to whether his own individual sentence was unconstitutionally cruel. Instead, Mr. Bassett argued that the practice of sentencing any member of the class to which he belongs - juveniles being sentenced for homicide - to life in prison without parole, violates Washington's Constitutional prohibition against "cruel punishment." The *Graham* court, when faced with a similar challenge, rejected use of a "case

20 The factors set forth in *Fain* are (1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would receive in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction. *Fain,* 94 Wn.2d at 397, 401.

by case" approach, like that utilized in *Fain,* and instead applied a categorical ban to invalidate a penalty for an entire class - juveniles being sentenced for non-homicide crimes. See, e.g. *Graham,* 560 U.S. at 77-80.

Further, the *Sweet* court observed that, due to the difficulties involved in applying the sentencing considerations mandated by *Miller,* the likelihood that a sentencing judge could apply a multi-factor test [like the type used in *Fain*] with any consistency was "doubtful at best." See, *Sweet,* 879 N.W.2d at 838. See also, *Diatchenko v. D.A. Suffolk County,* 1 N.E.3d 270, 284, (Mass. 2013). The *Sweet* court then observed that rather than continue to whittle away at the circumstances where juvenile life without parole could constitutionally be imposed, it was time to confront and resolve the larger problem. See, *Sweet,* 879 N.E.2d at 834.

In addition, the process used in *Fain* conflicts with some of the basic principles announced in *Roper, Graham,* and *Miller.* For example, *Fain* requires that a sentencer consider the "nature of the offense" to determine whether a punishment is constitutionally appropriate. But under *Miller,* a process used to sentence a juvenile offender that focuses on the nature of the offense unconstitutionally fails to account for the differences between children and adults and how those differences counsel against irrevocably sentencing a juvenile to a lifetime in prison. See *Miller,* 567 U.S. at 472.

*Fain* also requires an analysis of punishment meted out in other jurisdictions for the same offense. *Fain,* 94 Wn.2d at 401. However, that comparison is problematic when applied to juveniles like Mr. Basset because he was not an adult when his crimes occurred - he was a 16-year old boy - and *Miller* made clear that our courts commit error when treating juvenile offenders as equivalent to "miniature adults". *Miller*, 567 at 481 (citation omitted).

Because application of *Fain's* multi-factor process conflicts with the principles and reasoning required by the *Miller* line of case, this Court should apply the categorical ban analysis used by the *Sweet* court and by the Court of Appeals below.

### 5. RCW 10.95.030(3), the statute used to sentence Mr. Bassett to life in prison without possible parole, was constitutionally defective and his sentence is therefore void:[21]

In 2014, in an effort to comply with *Miller*, Washington's legislature amended RCW 10.95.030. Section RCW10.95.030(3)(b), a portion of statutory scheme used to sentence Mr. Bassett, required in general terms that a sentencing judge consider the "diminished culpability of youth,"

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[21] RCW 10.95.030(3)(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 v. Alabama*, 132 S. Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

including "age, life experience...and potential for rehabilitation" prior to imposing a juvenile life sentence.[22] That statute is constitutionally defective because it did not comply with the *Montgomery* requirement that, as a precondition of imposing juvenile life, a sentencer find by competent evidence that the juvenile being sentenced is one of the exceptionally rare offenders who is "permanently incorrigible" and for whom rehabilitation in the future is impossible.[23] A sentence in violation of the "substantive rule" announced by *Montgomery* is not just erroneous, but is contrary to the law and, as a result, void. See, *Montgomery*, 136 S. Ct. at 731.

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22 Although during sentencing Mr. Bassett's judge announced Mr. Bassett should "never be released in the community," that remark was made in the context of, and in connection with, the court's observations about the unpleasant facts surrounding Mr. Bassett's 1996 crime, RP 1-30-15, p. 93, and was not the distinct finding that the juvenile offender before the court was one of the exceptionally rare who could not be rehabilitated at some point in the future, as *Montgomery* requires.

23 See, e.g: *Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016) (juvenile life sentence is cruel and unusual punishment without sentencing court making a "*distinct determination*" of "permanent incorrigibility") (emphasis added); *State v. Valencia*, 370 P.3d 124, 127 (Ariz. Ct. App. 2016) (juvenile life sentence absent a finding of "permanent incorrigibility" is cruel and unusual punishment); *Landrum v. State*, 192 So.3d 459, 463 (Fla. 2016) (same); also, *People v. Nieto*, 52 N.E.3d 442, 455 (Ill. App. Ct. 2016).

### 6. Mr. Bassett's 2015 sentencing illustrates why a juvenile life without parole sentence is judicially unworkable in Washington.[24]

During his 2015 sentencing hearing, Mr. Bassett presented a broad range of evidence consistent with his rehabilitation and establishing that, despite entering prison as a 16-year old boy, he had succeeded both in improving himself and contributing positively to the lives of those around him. See, *supra*. Note 6 and 7. Nonetheless, without being presented with any evidence - let alone proof - that Mr. Bassett was "permanently incorrigible," Mr. Bassett's judge imposed a life in prison without parole prison sentence.

Although Mr. Bassett's sentencing judge acknowledged that *Miller* required consideration of the "diminished culpability of youth," he largely dismissed both the evidence mitigating Mr. Bassett's crimes and evidence of Mr. Bassett's rehabilitation. RP 1-30-15, p. 90-92. Instead, Mr. Bassett's judge focused primarily on the facts of Mr. Bassett's 20-year old crimes – a

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24 The arbitrariness of Washington's "*Miller* fix" statute is also illustrated by the fact that 15-year olds who commit murder are ineligible for a life without parole sentence. RCW 10.95.030(3)(a)(i). Mr. Bassett's crimes occurred 126 days after he turned 16. Science has proven, and *Miller* acknowledged, that the brain does not reach maturity until a person is well into their twenties. *Supra*, note 9. Accordingly, what was true about the deficiencies in Mr. Bassett's neurological and emotional development at age 15 when he was ineligible for a life without parole sentence, was equally true 126 days later when he had turned 16 and his crimes occurred.

process prohibited even under the less protective confines of federal Eighth Amendment constitutional analysis.[25]

Mr. Bassett's judge also attempted to justify imposition of a life without parole sentence as a means of ensuring that Mr. Bassett would never again be free. RP 1-30-15, p. 93. However, the *Miller* court previously declared that, due to the undeveloped juvenile brain and concordant emotional immaturity that characterize adolescence, traditional penological rationales for punishment, including incapacitation by incarceration, fail to justify sentencing juveniles to life in prison without parole. *Miller*, 567 U.S. at 472.

There can be little realistic argument that Mr. Bassett, who presented his sentencer with a lengthy and consistent history of rehabilitative achievements - despite being raised in an adult prison - is not one of the "extraordinarily rare for whom rehabilitation is not possible." In fact, Mr. Bassett's sentencing judge re-sentenced Mr. Bassett to die in prison without receiving *any* evidence that contradicted Mr. Bassett's rehabilitative

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25 Even when youthful offenders commit terrible crimes, sentencers must not be so overwhelmed by the facts of those crimes that they disregard the distinctive attributes of youth. *Graham*, 560 U.S. at 73. Because juveniles are still forming their very identities, even commission of heinous crimes does not establish an "irretrievably depraved character." *Roper*, 543 U.S. at 570. That a juvenile's crime might be heinous is not a basis to disregard *Miller's* central proposition – children are capable of change. *Montgomery*. 136 S. Ct. at 736.

accomplishments. The arbitrary result reached by Mr. Bassett's sentencer was inconsistent with the teachings of *Roper*, *Graham, Miller,* and *Montgomery*, was contrary to the uncontested evidence before the court, and illustrates how juvenile life without parole as a sentencing option is simply not judicially workable under the broad protections provided by Article I, §14 of Washington's constitution.

## V. CONCLUSION

Pursuant to Article I, §14 of our State Constitution, and for the reasons noted herein, this Court should affirm the Court of Appeals.

DATED this 11th day of December, 2017.

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## December 15, 2017 - 10:08 AM

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