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

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

BRIAN M. BASSETT,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

The question presented here is whether the Washington constitution permits a life sentence for a juvenile convicted of killing his parents and his little brother.

B. STATEMENT OF THE CASE

Brian Bassett was convicted by a jury in 1996 of three counts of aggravated first degree murder for shooting his mother and father to death and drowning his five-year-old brother. CP 134, 141-42. The facts of the crime are set forth in the original unpublished Court of Appeals decision affirming his conviction:

> Brian Bassett was convicted of the aggravated first degree murders of his parents, Michael and Wendy Bassett, and his five-year old brother, Austin Bassett. The State's theory of aggravation was that there were multiple victims and the murders were committed pursuant to a common scheme or plan. RCW 10.95.010(10). Bassett was sentenced to three consecutive terms of life in prison without the possibility of early release.
>
> Bassett committed the murders with the assistance of Nicholaus J. McDonald, who was tried separately and convicted of two counts of second degree murder. See State v. McDonald, 90 Wn. App. 604, 953 P.2d 470 (1998).
>
> At the time of the killings, both Bassett and McDonald had been "kicked out" of their homes and were living in a "shack" on the Bassett property. The rifle used in the killings had been stolen from a neighbor several days before the crimes. On August 10, 1995, Bassett and McDonald went to the Bassett residence late at night. Bassett used a ladder to enter an upstairs window. Inside the house, Bassett shot his father and mother multiple

> times. After shooting them, Bassett let McDonald into the house. Brian Bassett had already shot his father in the head and through the heart. An expert testified that either of these bullets would have been sufficient to kill Michael Bassett. McDonald, noting that Michael Bassett was still breathing, fired a final shot into Michael Bassett's head. Brian or McDonald then drowned Austin Bassett in a bathtub.
>
> The State introduced a statement Bassett had given to police in which he explained the events leading up to the killings. Bassett stated that he and McDonald had talked about killing his parents. During the week before the crimes, they went to the house several times to kill his parents, but each time "it got screwed up." One time his parents were not home; another time his older sister was there. When Bassett entered the home to shoot his mother and father, McDonald unhooked the phone "so they couldn't call." Before Bassett entered the home, he and McDonald had talked about unhooking the phone. Bassett claimed that it was McDonald's idea to take Austin into the bathroom, but he knew what McDonald was going to do. He claimed he was in the kitchen "barfing" when McDonald drowned Austin. When Bassett went into the bathroom he saw his brother lying face down in the bathtub. He and McDonald then rolled Austin in a blanket and put him in the car with his father. McDonald drove off and dumped both bodies somewhere. Bassett concluded: "We had planned to go in and shoot my parents. We didn't plan to shoot my brother."

State v. Bassett, 94 Wn. App. 1017 at *1-2, 1999 WL 100872 (Feb. 26, 1999). In its recitation of the facts in McDonald's case, this Court added the following disturbing details from McDonald's statement to police:

> ... McDonald told him that upon entering the home with Bassett he found Bassett's parents lying dead with their child, Austin, crying and touching his parents in an apparent effort to rouse them. The officer went on to say

> that McDonald told him that Bassett filled a bathtub and told Austin, who was covered in his parents' blood, "that he had to take a bath." The officer said that McDonald told him that "he then went into the bathroom and that Bassett was waiting just outside the door," and "that he feared Bassett would shoot him, so he held the boy under the water face down until he was drowned."

State v. McDonald, 138 Wn.2d 680, 684, 981 P.2d 443 (1999) (record citations omitted).

In 2012, the Supreme Court of the United States decided Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), holding that *mandatory* sentences of life without parole for those under age 18 at the time of their crimes violate the Eighth Amendment's prohibition on cruel and unusual punishment. 132 S. Ct. at 2460. 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. at 2469.

In response to Miller, our legislature amended RCW 10.95.030 to provide that those convicted of aggravated first degree murder committed prior to their 16th birthday will be sentenced to a minimum term of 25 years and a maximum term of life. RCW 10.95.030(3)(a)(i). For those who commit aggravated first-degree murder between the ages of 16 and 18 years, the legislature provided that the trial court could set the minimum term of confinement at life, "in which case the person will be

ineligible for parole or early release." RCW 10.95.030(3)(a)(ii). In setting the minimum term, the trial court must "take into account mitigating factors that account for the diminished culpability of youth as provided in Miller[,] including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated." RCW 10.95.030(3)(b). Those sentenced to LWOP as juveniles before June 1, 2014, would be resentenced consistent with the new provisions. RCW 10.95.035(1).

Bassett was resentenced in 2015; he was 35 years old. State v. Bassett, 198 Wn. App. 714, 718, 394 P.3d 430 (2017). Bassett offered mitigation information including evidence about his home life, education, and general lack of a criminal history, as well as evidence of his good behavior in prison. Id. The resentencing court[1] explicitly considered the Miller factors, including the immaturity and impulsivity attendant to youth in general, as well as the evidence Bassett produced about his life experience. 1/30/15 RP 83-85.

The resentencing court ultimately adhered to the original LWOP sentence. The court found that the premeditated murders reflected no impulsivity, but rather demonstrated significant advance planning and

[1] Because the judge who presided over Bassett's trial and original sentencing had retired, a different judge handled Bassett's resentencing.

efforts to avoid detection. 1/30/15 RP 86-87. The court noted that Bassett had planned to commit the murders for more than a week and had made at least one other attempt to do so. 1/30/15 RP 86-87. Bassett was never abused or neglected. 1/30/15 RP 87-88. His experience with homelessness, where he was "almost solely responsible for himself," indicated that he was capable of controlling his behavior. 1/30/15 RP 88-89. His efforts to reduce his risk of being caught, including using a silencer, cutting the phone lines, hiding the bodies, cleaning blood from the home, and eliminating a witness by drowning his little brother, all supported the conclusion that Bassett appreciated the risks and consequences of his actions. 1/30/15 RP 89-90. Evidence of Bassett's efforts at rehabilitation, including a largely infraction-free tenure in prison, completion of educational programs, development of woodworking skills, and marriage to a former cellmate's mother, did not persuade the resentencing court that Bassett had been or could be rehabilitated. 1/30/15 RP 17, 90-92.

The court found that the evidence presented made it "easy to distinguish this case from some of the cases that caused the Supreme Court to make its decisions." 1/30/15 RP 92.

> While Mr. Bassett was 16 years old at the time that he committed these acts, I don't find that list of these crimes was evidence of the adolescent brain taking over his

> decision making and resulting in the commission of these crimes. I – I think these crimes were the result of a cold and calculated and very well planned goal of eliminating his family from his life. And I don't believe that any amount of time in prison is going to ever result in his being rehabilitated such that he could safely return to any community. On each of the three counts he will be sentenced to a minimum term of life.

1/30/15 RP 92-93.

On appeal, Bassett argued that RCW 10.95.030 violates the state constitution's prohibition on cruel punishment by permitting a juvenile to be sentenced to LWOP. Bassett applied the four-factor Fain analysis to determine whether a given sentence is "cruel" under the state constitution. See Brief of Appellant (BOA) at 11-18. In a supplemental brief, Bassett further argued that juvenile LWOP sentences violate the federal "cruel and unusual" clause in light of Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), and the Iowa Supreme Court's decision in State v. Sweet, 879 N.W.2d 811 (2016).

The Court of Appeals, Division Two, held that discretionary juvenile LWOP sentences violate the state constitution, and remanded for resentencing. 198 Wn. App. at 744. The court adopted the Iowa court's "categorical bar" analysis and applied it, rather than the accepted Fain framework. Id. at 738-44. It concluded, "Under a categorical analysis, we hold that to the extent that a life without parole or early release sentence

may be imposed against a juvenile offender under the Miller-fix statute, RCW 10.95.030(3)(a)(ii), it fails the categorical bar analysis. Therefore, a life without parole or early release sentence is unconstitutional under article I, section 14 of our state constitution." Id. at 744.

C. ARGUMENT

1. THE EIGHTH AMENDMENT PERMITS LIFE SENTENCES FOR JUVENILES WHOSE CRIMES DO NOT REFLECT TRANSIENT IMMATURITY.

The Supreme Court's decisions in Miller and Montgomery reflect an evolution in the Court's Eighth Amendment jurisprudence related to juvenile sentencing. Beginning with Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), the Court has recognized that certain characteristics attendant to youth make juvenile offenders potentially less culpable and more redeemable than adults.

First, juveniles' lack of maturity can result in "impetuous and ill-considered actions and decisions," making their irresponsible conduct less morally reprehensible than an adult's. Roper, 543 U.S. at 569-70. Second, juveniles generally have less control over their environment and are more vulnerable to negative influences, so their failure to escape those influences is more forgivable. Id. Finally, the character of the juvenile is "not as well formed as that of an adult," so the possibility for reform is greater. Id. at 570. In light of these characteristics, the Roper court barred

sentencing a juvenile to death. Id. at 572. While the Court recognized that there might be some juveniles with sufficient maturity and depravity to justify the death penalty, jurors could not be tasked with making that irrevocable determination because "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 573.

In Graham v. Florida, the Court drew on these principles to hold that the Eighth Amendment also bars sentences of life without parole for juveniles convicted of non-homicide crimes. 560 U.S. 48, 82, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). "[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." Id. at 69. Accordingly, while a State "is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide offense," it must give juvenile defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 75. Significantly, the Court allowed that some juvenile offenders might never obtain release. "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." Id.

In Miller, the Court expanded its holding in Graham to bar *mandatory* LWOP sentences for juvenile homicide offenders because mandatory sentencing schemes prevent the sentencer from taking into account the attributes of youth. 567 U.S. at 474. The Court expressly refused to impose a categorical bar on sentencing a juvenile homicide offender to life in prison without parole, but opined that such sentences should be uncommon. Id. at 479.

Finally, in Montgomery, the Court held that Miller had both substantive and procedural components, and therefore applies retroactively. 136 S. Ct. at 734. Miller did not merely require a procedure by which youth could be considered in sentencing, but also required that life sentences not be imposed on juveniles whose crimes reflect transient immaturity. Id. The Court reiterated that "a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." Id. at 733.

In sum, the Supreme Court's recent Eighth Amendment jurisprudence recognizes that children are different, but does not categorically preclude LWOP sentences for juvenile murderers. Rather, the federal constitution permits courts to impose LWOP on those rare juvenile murderers whose crimes indicate "permanent incorrigibility." Montgomery, 136 S. Ct. at 734.

2. WASHINGTON'S CONSTITUTION PROVIDES NO GREATER PROTECTION FOR JUVENILES THAN THE EIGHTH AMENDMENT.

In determining that Washington's constitution bars imposition of LWOP sentences on juvenile murderers although the Eighth Amendment permits them, the Bassett court made the conclusory assertion that the "state cruel punishment proscription affords greater protection than its federal counterpart." 198 Wn. App. at 723 (citing State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996)). The whole of Bassett's analysis depends on this premise. It is incorrect.

For over thirty years, this Court has consistently held that the six neutral criteria set forth in State v. Gunwall, 106 Wn.2d 54, 61-63, 720 P.2d 808 (1986), 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). Only when these criteria weigh in favor of independent interpretation does this Court have a principled basis for departing from federal constitutional precedent. Gunwall, 106 Wn.2d at 59-63. Otherwise, the 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.

The six Gunwall factors include "(1) the textual language, (2) differences in the texts; (3) constitutional history; (4) structural

differences; and (6) matters of particular state or local concern." Gunwall, 106 Wn.2d at 58. Once this Court has conducted a Gunwall analysis and has determined that a provision of the state constitution independently applies to a *specific* legal issue, it is unnecessary to repeat the analysis in subsequent cases presenting the *same* issue. Ladson, 138 Wn.2d at 348; State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). However, just because the state constitution is held to provide broader protection in one context does not necessarily mean that it will be found to be broader in all contexts. State v. Martin, 171 Wn.2d 521, 528, 252 P.3d 872 (2011).

This Court performed a Gunwall analysis comparing the Eighth Amendment to the state's cruel punishment clause in State v. Dodd, 120 Wn.2d 1, 838 P.2d 86 (1992). The Dodd court considered whether a defendant convicted of a capital offense may waive appellate review under the state constitution. Id. at 4. Such a waiver was permissible under the federal constitution. Id. at 20.

In Dodd, this Court considered the text of the federal and state provisions and concluded that "it is not clear that the parallel provisions are significantly different." 120 Wn.2d at 21. The Court considered its prior constitutional jurisprudence and noted that it had twice interpreted the state provision more broadly than the Eighth Amendment. Id. at 21. However, in neither of those two cases, State v. Fain, 94 Wn.2d 387, 617

P.2d 720 (1980), and State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984), did the Court consider the specific issue presented in Dodd or perform a Gunwall analysis. The Dodd court then considered preexisting state law, and observed that the Legislature did not require automatic review of a death sentence or conviction before 1977, indicating that the matter was not considered a constitutional requirement at statehood. The Court concluded that structural differences between the state and federal constitutions generally favored independent review, but that "[p]reventing arbitrary or 'cruel' punishment is not a local concern." 120 Wn.2d at 22.

After considering all of the criteria, and despite having held the state constitution more protective in other contexts,[2] this Court held, "The Gunwall factors *do not* demand that we interpret Const. art. 1 § 14 more broadly than the Eighth Amendment." Id. (emphasis added). This Court has adhered to that conclusion as recently as 2014. In re Pers. Restraint of Cross, 180 Wn.2d 664, 731, 327 P.3d 660 (2014) (challenge to death penalty statute); State v. Yates, 161 Wn.2d 714, 792, 168 P.3d 359 (2007).

[2] The Bassett court's conclusory assertion to the contrary rested on State v. Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996), a decision rendered in the context of, and affirming life sentences under, the Persistent Offender Accountability Act. There, this Court simply cited Fain for the proposition that the state constitution provides greater protection than the Eighth Amendment and performed no Gunwall analysis.

A Gunwall analysis in the context presented here does not establish broader protections under the state constitution. The Dodd court's examination of the text and textual differences between the two provisions, state constitutional history, and structural differences between the state and federal constitutions need not be repeated here, except to recognize that these factors do not establish that the state constitution was meant to offer broader protection than its federal counterpart. See State v. Boland, 115 Wn.2d 571, 575-76, 800 P.2d 1112 (1990) (once this Court has examined Gunwall criteria regarding a particular constitutional provision, the first, second, third and fifth factors will generally not vary from case to case).

As to the fourth Gunwall factor, preexisting state law pertaining to juvenile sentencing also does not favor independent state constitutional analysis. There was no juvenile court at statehood; it was created by statute in 1905 and its jurisdiction was limited to "children under the age of seventeen years." See LAWS OF 1905, ch. 18, § 1. Children who were turned over to the proper authorities for trial under the provisions of the generally applicable (nonjuvenile) criminal code, see LAWS OF 1913, ch. 160, § 12, were sentenced under that code. State ex rel. Sowders v. Superior Court, 105 Wash. 684, 686-88, 179 P. 79 (1919). Children prosecuted under the criminal code were not shielded from even the

harshest possible penalties and could 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).[3]

Until Bassett, no Washington case had ever found that the state constitution is more protective of juveniles in sentencing matters than the federal constitution. Indeed, 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

[3] While the Carpenter court did not state the defendant's age in the opinion, the Washington State Department of Corrections' records indicate that he was 17 years old when he was executed. See Washington Department of Corrections, Persons Executed Since 1904 in Washington State (available at http://www.doc.wa.gov/docs/publications/reports/100-SR002.pdf (last visited 5/22/17).

(1979) (affirming LWOP for a 17-year-old murderer). This Court has 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).

Because the Gunwall criteria do not favor independent state constitutional review, the Eighth Amendment governs Bassett's cruel punishment claim. Juvenile LWOP sentences for aggravated murder are allowed by the Eighth Amendment so long as the sentencing court considered the mitigating aspects of youth. The resentencing court expressly considered Bassett's youth, as well as his rehabilitative efforts in prison, and found that Bassett's crime did not reflect transient immaturity but instead cried out for LWOP. That sentence is constitutionally sound and should be upheld.

3. FAIN CONTROLS STATE CRUEL PUNISHMENT ANALYSIS.

Even if a Gunwall analysis established the state constitution as more protective in this context, state constitutional evaluation of a cruel punishment claim must proceed under the framework set out in Fain. Despite this controlling precedent, Division Two abandoned Fain in favor of the "categorical bar" analysis promoted by the Supreme Court of Iowa

and adopted nowhere else. This Court should overrule Bassett and clarify how to apply Fain in juvenile sentencing contexts.

a. This Court Has Consistently Analyzed Cruel Punishment Claims Under Fain.

In Fain, this Court adopted a proportionality analysis to determine whether a habitual offender sentence under former RCW 9.92.090 violated art. I, § 14 of the state constitution. 94 Wn.2d at 396-97. That analysis directs appellate 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. (citing Hart v. Coiner, 483 F.2d 136, 140-43 (4th Cir. 1973)); State v. Witherspoon, 180 Wn.2d 875, 887, 329 P.3d 888 (2014).

Since Fain was decided nearly forty years ago, Washington's appellate courts have adhered to this four-part framework to decide state cruel punishment claims.[4] Fain is thus the "*controlling* Washington case interpreting the applicable provision of the Washington State

[4] 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).

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 held that the failure to argue the Fain factors precludes consideration of a cruel punishment claim. 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, this Court recognized that Fain constitutes the sole applicable analysis for determining whether punishment violates the state constitution. State v. Ramos, 187 Wn.2d 420, 454 & n.10, 387 P.3d 650 (2017) (declining to engage in independent state constitutional analysis where defendant "does not address" the Fain factors).

The Bassett court acknowledged that "no Washington case has applied the categorical bar analysis" rather than Fain. 198 Wn. App. at 733. The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. Witherspoon, 180 Wn.2d at 893. At the Court of Appeals, neither party argued that Fain was incorrect or harmful and Division Two did not so conclude. The Court of Appeals did not conclude that Fain should be overruled, but justified its departure from controlling precedent on three grounds. First, the court opined that the nature of Bassett's claim supports

a categorical analysis because it is a challenge to an entire class of offenders, as in Graham. Second, the court observed that this Court had extended Miller in three recent cases, Ramos, State v. O'Dell, 183 Wn.2d 680, 358 P.2d 359 (2015), and State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017). Third, the court deemed the Fain analysis inadequate to address the special concerns inherent to juvenile sentencing. None of these reasons support discarding this Court's binding precedent. See 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (Court of Appeals is bound by controlling decisions of supreme court).

In Graham, the United States Supreme Court explained that its Eighth Amendment proportionality cases fall within two categories. 560 U.S. at 59. The first category includes those challenging an individual's term-of-years sentence as unconstitutionally excessive. In these cases, the Court first compares the gravity of the offense with the severity of the sentence, and then compares the sentence imposed in that case with sentences imposed on other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions. Id. at 60. This parallels the established Fain framework in Washington. The second approach is the categorical analysis, in which the court considers whether there is a national consensus against a particular sentencing practice, and

then exercises its independent judgment to determine whether the punishment violates the constitution. Id. at 61. In Graham, the Court concluded the categorical approach was appropriate because the challenge to LWOP for juvenile nonhomicide offenders "implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." Id. at 61. Accordingly, "a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis." Id.

Graham does not support the use of categorical analysis in this case. The reason that it was not useful to consider Graham's challenge under the proportionality approach requiring comparison between the severity of the penalty and the gravity of the crime is that the sentencing practice at issue was applied to "a range of crimes." Any such comparison would have to include innumerable permutations of offenses and offenders. In contrast, Bassett challenges a sentencing practice that applies to only one crime—aggravated first degree murder—and only a subset of offenders—those over 16 and less than 18 at the time of the crime. Unlike in Graham, comparison of the gravity of the crime to the severity of the sentence in this situation is both possible and useful.

This Court's recent jurisprudence also does not justify the Court of Appeals' abandonment of Fain. The Bassett court argued that this Court

expanded Miller in Ramos, O'Dell, and Houston-Sconiers, and that this expansion "compels" application of the categorical bar analysis to Bassett's challenge. That justification fails because this Court did not expand Miller in Ramos or O'Dell, and articulated no state constitutional basis for expanding Miller in Houston-Sconiers.

In Ramos, this Court considered a de facto LWOP sentence for a juvenile convicted of four homicides. In holding that Miller compels the sentencing court to consider "the specific nature of the crime and the individual's culpability" before imposing an aggregate sentence amounting to LWOP, the Court emphasized that Miller itself compelled that result. 187 Wn.2d at 438-39. Thus, this Court did not expand Miller, it merely applied its mandate.

The O'Dell court did not expand Miller either. O'Dell did not even involve a constitutional claim. Rather, the issue was whether the Sentencing Reform Act (SRA) permits a sentencing court to consider an adult defendant's youth as a mitigating factor supporting a departure from the applicable standard sentencing range. 183 Wn.2d at 683.

A particular factor cannot justify an exceptional sentence if the legislature necessarily considered the factor when it established the standard sentence range. Id. at 690. This Court did not conclude that Miller required such consideration; rather, the Court referenced the

recency of juvenile brain studies underlying the Supreme Court's reasoning in Roper, Graham, and Miller to conclude that the legislature did not already account for an adult offenders' youth in setting the applicable sentencing range. 183 Wn.2d at 691-93. Thus, the Court did not expand Miller's constitutional holding, it merely referenced Miller principles in interpreting the SRA.

Houston-Sconiers also does not compel the use of a categorical analysis over the established Fain framework. While this Court arguably expanded Miller's individualized hearing requirement to any sentence imposed on a juvenile in adult court, 188 Wn.2d at 420, the basis of that expansion is unclear.[5] This Court indicated the holding was "in accordance with Miller" and specifically disclaimed any reliance on the state constitution. Id. at 420 & n.6.

The Bassett court's third justification for abandoning this Court's precedent is that the Fain framework is inadequate to address the special concerns inherent to juvenile sentencing. The court opined that the first Fain factor's consideration "purely of the crime's characteristics" is inconsistent with Miller's requirement that a sentencing court consider an offender's youth before imposing a particular penalty, and that the fourth

[5] Houston-Sconiers can be read to comport with Miller by requiring a Miller hearing whenever the operation of mandatory sentencing provisions, such as firearm enhancements, result in a potential de facto life sentence.

Fain factor's focus on the punishment meted out for other offenses in the same jurisdiction is inconsistent with Miller because it allows comparison with the punishment for adult offenders who commit the same crimes. 198 Wn. App. at 738. This reasoning is unpersuasive.

First, nothing in Miller precludes consideration of the nature of a juvenile's crime. Indeed, the whole point of Miller and Montgomery is that courts may not impose juvenile LWOP sentences without first considering whether the offender's "*crime* reflects unfortunate yet transient immaturity." Miller, 132 S. Ct. 2469; Montgomery, 136 S. Ct. at 735. This *necessarily* requires consideration of the nature of the juvenile's crime. Was the crime encouraged and committed as part of an initiation into a peer group, or was it planned for the juvenile's personal financial gain or to settle a personal grudge? Was the victim hurt as a result of an ill-considered split-second decision made under stress, or a well-planned and coldly calculated effort to kill and not get caught? Did the juvenile rob fellow teens of Halloween candy, or did he kill three people including a small child? These considerations are as appropriate under Miller as they are under Fain.

The fourth Fain factor requires the court to compare the sentence at issue to "the punishment meted out for other offenses in the same jurisdiction." Fain, 94 Wn.2d at 397. The Bassett court concluded that

this factor conflicts with Miller because "it allows comparison with the punishment for adult offenders who commit the same crimes." 198 Wn. App. at 738. But, again, the point of Miller is that most juveniles are less culpable than most adults who commit the same crimes and their sentences should so reflect. Thus, it is perfectly appropriate for a sentencing court to consider the sentence an adult would receive in deciding what presumably lesser sentence a less culpable juvenile should receive. Further, if this Court finds it problematic ever to compare a juvenile's sentence to that imposed on an adult offender, it may easily modify Fain's application in juvenile cruel punishment claims to confine such comparison to sentences imposed on other juvenile offenders.

The other two Fain factors can also be easily tailored to address juvenile sentencing concerns. The second factor requires the court to consider the legislative purpose behind the statute. That factor could be interpreted to require courts to consider the purpose of the Miller-fix statute, as well as the criminal statute that was violated. Likewise, the third Fain factor, which requires courts to consider the sentence the particular defendant would receive in other jurisdictions, could be interpreted to require consideration of the sentence that a juvenile sentenced in adult court would face if sentenced in juvenile court.

In sum, neither Graham, nor this Court's recent juvenile sentencing jurisprudence, nor perceived inadequacies in the Fain framework compel or justify departure from the traditional analysis of state cruel punishment claims. Division Two erred by applying the Iowa court's analysis instead.

b. Bassett's Sentence Is Not Unconstitutionally Cruel Under Fain.

Application of the four Fain factors demonstrates that Bassett's life sentence does not violate art. 1, § 14 of the Washington State Constitution.

Nature of the offense. The offense at issue is aggravated first degree murder, the most serious offense under Washington law. Here there was not only one aggravated murder, but three. The three murders were not spontaneous, but planned in advance and attempted on several other occasions. The murders were not motivated by parental abuse or neglect, but by Bassett's rage that his parents would not allow him to do whatever he wanted at age 16. The horrific drowning of five-year-old Austin after he became covered in the blood of his fatally wounded mother and father was a callous effort to avoid the consequences of the other killings. The nature of this crime plainly supports the severest sentence that can be imposed on a juvenile.

Legislative purpose behind the statute. The legislature amended RCW 10.95.030 specifically to comply with Miller. The final bill report

for the legislation discussed Miller and the legislature's intent to comply with its mandate:

> The court held when a youth is convicted of murder that occurred before age 18, the sentencing judge must focus directly on the youth and assess the specific age of the individual, the youth's childhood, and the youth's life experience; weigh the degree of responsibility the youth was capable of exercising; and assess the youth's chances of becoming rehabilitated. The judge can only impose a sentence of life without parole if the judge concludes the sentence "proportionally" punishes the youth, given all of the factors that mitigate the youth's guilt. The court reasoned that while it is not foreclosing the judge's ability to sentence a youth to life without parole, appropriate occasions for sentencing juveniles to this harshest penalty will be uncommon.

Final Bill Report 2SSB 5064. Thus, the purpose of the statute is to ensure that sentencing courts properly consider a juvenile's youth and attendant attributes, and impose LWOP only in the uncommon situations where it is truly merited.

Punishment defendant would receive in other jurisdictions. The majority of states continue to allow LWOP sentences for some juvenile murderers. Bassett, 198 Wn. App. at 740. See also Kallee Spooner and Michael Vaughn, Sentencing Juvenile Homicide Offenders: A 50-State Survey, 5 Va. J. Crim. L. 130, at 151 (Summer 2017) ("LWOP is the maximum recommended sentence in twenty-nine states and the federal

government, meaning a majority of jurisdictions allow for juvenile homicide offenders to be sentenced to LWOP.").

Punishments meted out for other offenses in the same jurisdiction. Life without parole is a severe sentence available only in cases of aggravated murder or for adult offenders who are sentenced under the Persistent Offenders Accountability Act. Washington also subjects certain sex offenders to indeterminate sentences that can equal life in prison. Thus, life sentences are reserved for the worst offenders and the worst crimes. Bassett murdered three people, including a small child. An LWOP sentence for this crime is consistent with Washington's sentencing scheme. See Ramos, 187 Wn.2d at 429 (approving de facto life sentence for 14-year-old convicted of murdering four people including children).

The Fain analysis demonstrates that neither Bassett's sentence, nor the legislation that makes it possible, violate Washington's constitutional ban on cruel punishment.

The Bassett court abandoned this Court's well-established, binding Fain framework for evaluating state cruel punishment claims on unpersuasive grounds and without evaluating under Gunwall whether the state constitution provides greater protection than the Eighth Amendment in this context. This Court should reverse.

4. THE CATEGORICAL ANALYSIS ADOPTED BY DIVISION TWO ENCROACHES ON BOTH THE AUTHORITY OF THE SENTENCING COURT AND THE PUNISHMENT-FIXING ROLE OF THE LEGISLATURE.

In addition to improperly abandoning this Court's binding precedent, the Bassett court subverted the constitutional authority of a duly-elected legislature to fix punishments for criminal offenses and encroached on the discretion of the sentencing court to determine the appropriate sentence for a given offender and offense within the legislature's guidelines.

"This court has consistently held that the fixing of legal punishments for criminal offenses is a legislative function." State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719 (1986). The power of the legislature in this respect is "plenary and subject only to constitutional provisions against excessive fines and cruel and inhuman punishment." Id. (quoting State v. Mulcare, 189 Wash. 625, 66 P.3d 360 (1937). It is "the function of the legislature and not of the judiciary to alter the sentencing process." Id. (quoting State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975)).

To comport with Miller and ensure that no juvenile is sentenced to life without parole in violation of the Eighth Amendment, our legislature enacted RCW 10.95.035 and amended RCW 10.95.030(3)(a)(ii) and (b).

The legislature directed sentencing courts to consider "mitigating factors that account for the diminished culpability of youth as provided in Miller ... including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated." RCW 10.95.030(3)(b). The legislature could have responded to Miller by forbidding LWOP, as some other states have, but opted not to do so.

The Bassett court evidently disagrees with the United States Supreme Court's conclusion that trial courts can be tasked with differentiating between juvenile offenders who deserve life imprisonment and those who do not. But this is exactly the sort of policy decision the legislature is entrusted to make, and our legislature's decision to allow trial courts to impose juvenile LWOP in rare cases keeps Washington in line with the federal government and the majority of other states. The Bassett court is "merely substituting [its] notion of justice for that of duly elected legislative bodies or the United States Supreme Court." Gunwall, 106 Wn.2d at 63. This Court must reject Bassett to preserve the constitutional separation of powers.

Further, the Bassett court's conclusion that the Miller framework is unworkable and meaningless is utterly inconsistent with this Court's recent decisions on juvenile sentencing. This Court upheld the imposition

of a de facto life sentence imposed upon a juvenile convicted of quadruple homicide in Ramos because the resentencing court in that case conducted an adequate Miller hearing. 187 Wn.2d at 450. This Court remanded for resentencing in Houston-Sconiers because the sentencing court imposed lengthy adult sentences without considering the Miller factors or recognizing its discretion to impose a mitigated sentence on the basis of youth. 188 Wn.2d at 421. Significantly, this Court expressly recognized that "Miller requires such discretion *and provides guidance* on how to use it." Id. (emphasis added). And in O'Dell, this Court pointed out that the trial court is best suited to consider a youthful adult's relative culpability by considering "impulsivity, poor judgment, and susceptibility to outside influences," held that a trial court must be allowed to do so, and remanded for such consideration in that case. 183 Wn.2d at 691, 699. Implicit in these decisions is this Court's recognition that sentencing courts are fully capable of considering the mitigating aspects of youth and exercising discretion to impose proportionate sentences. The Bassett court's conclusion that this task is impossible ignores these cases.

The Bassett court heavily relied on the Iowa Supreme Court's decision in State v. Sweet, 879 N.W.2d 811 (2016) for both the analytical framework it applied and for its conclusion that Miller fails to provide useful guidance for sentencing courts. It is worth noting that Sweet has

not been widely adopted. The decision has been cited by courts outside of Iowa only six times,[6] including twice in this state (Bassett and Ramos). No other state court has embraced the Sweet court's reasoning to invalidate statutes permitting juvenile LWOP sentences.

D. CONCLUSION

For the reasons expressed above, the State respectfully requests this Court reverse the Court of Appeals.

DATED this 15th day of December, 2017.

Respectfully submitted,

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[6] See People v. Hyatt, 316 Mich. App. 368, 435 (2016) (affirming LWOP for 17-year-old convicted of first degree felony murder and other crimes; quoting Sweet's recitation of argument in amicus brief); State v. Williams-Bey, 167 Conn. App. 744, 775-76 & n.23 (2016) (holding that parole hearings cure Miller error despite Iowa court requiring resentencing); Commonwealth v. Batts, 163 A.3d 410 (Pa. 2017) (citing Sweet in support of decision to adopt a presumption against LWOP for juvenile offenders).