(Court of Appeals No. 54110-6-II)

No. 100544-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

NGA NGOEUNG,

Respondent.

PETITION FOR REVIEW

MARY E. ROBNETT
Prosecuting Attorney

Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762/OID #91121
930 Tacoma Ave., Rm 946
Tacoma, WA 98402
(253) 798-7400

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal and other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

I. INTRODUCTION

At the Defendant Ngoeung's most recent resentencing, the court imposed the smallest sentence it could: concurrent sentences of 25 years to life on two counts of aggravated murder. The Defendant had already served 25 years confinement. Thus, he was immediately parolable, subject only to decision of the Indeterminate Sentence Review Board. The Defendant does not challenge these terms, and they are the only sentencing elements which affect the length of Ngoeung's confinement.

The court of appeals' opinion has remanded for a fourth sentencing hearing directing, contrary to *Jones v. Mississippi*, that the trial court is required to make an on-the-record assessment of every fact of possible mitigating value within the record. *Delbosque*, a case which reversed an unconstitutional *de facto* life sentence after determining that the court's finding (that the juvenile offender was beyond hope) was unsupported in the record, does not support this result. The opinion also requires

the trial court to justify a standard range sentence, a requirement that is contrary to well-established law.

II. CITATION TO COURT OF APPEALS DECISION

The State seeks review of the Unpublished Opinion, filed December 7, 2021. A copy of the decision is appended to this petition.

III. ISSUES

A. Whether requiring a sentencing court to make an on-the-record assessment of every mitigating fact is in direct conflict with *Jones v. Mississippi* and unjustifiable under *Delbosque* where the Defendant has not assigned error to any finding of fact and where the Defendant was immediately parolable on the new sentence?

B. Whether requiring the trial court to justify a standard range sentence is contrary to *Ammons* which holds that as a matter of law there can be no abuse of discretion in a standard range sentence?

IV. STATEMENT OF THE CASE

In 1995, a jury convicted the Defendant Nga Ngoeung of two counts of aggravated first-degree murder, two counts of first-degree assault, and taking a motor vehicle. CP 10-11, 51-52,

482-83. The court imposed a mandatory sentence of life without parole. CP 12, 16.

Because Ngoeung had been 17 years old at the time of his offenses, he was resentenced in 2015 under the *Miller*-fix statute. CP 10, 51-53; RCW 10.95.030(3)(a)(ii); RCW 10.95.035.

In 2019, the trial court sentenced him a third time, following the issuance of *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018) and *State v. Gilbert*, 193 Wn.2d 169, 438 P.3d 133 (2019). CP 482-91, 514-19; RP (9/6/19). The court imposed a minimum term of 25 years to life on each of the aggravated murders, to be served concurrently. CP 485. Having already served in excess of 25 years, the Defendant was immediately parolable on all counts, his release subject only to the decision of the Indeterminate Sentence Review Board (Board). RCW 9.94A.730 (1),(3); RCW 10.95.030(3)(f).

The parties understood that written findings may be required under RCW 9.94A.535 to support "an exceptional sentence of running counts one and two concurrently." CP 519.

Ngoeung drafted the findings and conclusions for Judge Rumbaugh's signature. CP 514-19.

Despite drafting the findings and conclusions, Ngoeung appealed the sentence. CP 492-505.

While the appeal was pending, the Board conducted a hearing to consider Ngoeung's release on all counts. Board Decision[1] at 1 (citing RCW 9.94A.730 and RCW 10.95.030). The only factor for the Board's consideration was whether Ngoeung was "more likely than not to commit a new crime if released with conditions that are designed to help better prepare him for a successful re-entry into society." *Id.* at 2. After a review of Ngoeung's many recent and serious infractions, the Board added 36 months to the sentence, recommended the Defendant engage in available programs, and indicated that "Mr. Ngoeung may request to be seen [for a release hearing] earlier." *Id*.

[1] The Board's decision was made a part of this appellate record on February 23, 2021.

In the contemporaneous appeal, Ngoeung challenged the judge's refusal to recuse himself and the symbolic, consecutive nature of his lesser assault counts. Op. at 1. The court of appeals' decision[2] remands for yet a fourth sentencing proceeding. It holds that, notwithstanding the imposition of a credit-for-time-served sentence, a judge imposes a constitutionally infirm sentence unless it makes an on-the-record consideration of "all favorable evidence of rehabilitation" and explains how each piece of evidence does or does not relate to the defendant's "potential for rehabilitation." Op. at 2, 20. It also holds that the trial court was required to explain why it imposed a standard range sentence on the lesser assault counts. Op. at 20-22.

[2] Initially, the court of appeals failed to address the first issue, under the mistaken belief that the transcripts from the 2015 resentencing had not been provided. The opinion was withdrawn when the State reminded the court that it had granted the State's motion to transfer the 2015 record prior to the State filing the Brief of Respondent.

V. ARGUMENT

A. A Court Which Imposes a Sentence for Which the Juvenile Offender is Immediately Parolable Cannot Be Said to Have Failed to Meaningfully Consider Youth.

This case presents a significant constitutional question. RAP 13.4(b)(3). Although the sentencing court imposed a sentence upon which the offender was immediately parolable, the court of appeals held that the sentencer's consideration of youth was not sufficiently meaningful. As a matter of law, that cannot be the case.

While the Defendant and court of appeals focus on the consecutive nature of the assault sentences, these terms do not impact either Ngoeung's potential minimum or maximum sentence. The minimum term which the Defendant may have served was 25 years, and the maximum term is life. CP 485; RCW 9.94A.730(1); RCW 10.95.030(3)(a)(ii).

Regardless of whether individual facts may have reduced Ngoeung's culpability, there was no functionally lesser sentence that the court could have imposed. The only factor relevant to

the Defendant's release now is whether the Board finds by a preponderance that Ngoeung is more likely than not going to reoffend. No resentencing will change this. No resentencing will obtain his earlier release.

This Court should accept review and hold that, as a matter of law, a sentencing court does not fail to meaningfully consider youth when it imposes an effective credit-for-time-served sentence, where release is subject only to the authority of the Board.

B. The Opinion Is in Direct Conflict with *Jones v. Mississippi.*

The court of appeals' decision is in direct conflict with *Jones v. Mississippi*, -- U.S. --, 141 S. Ct. 1307, 209 L. Ed. 2d 390 (2021), in requiring the sentencing court to address on the record every alleged mitigating factor available in the record. Op. at 20. The Washington Supreme Court has held that the Eighth Amendment requires a sentencing court to consider a juvenile offender's youth. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21 n.6, 391 P.3d 409 (2017) (declining to consider the claim

under WASH. CONST. art. 1, §14). The Eighth Amendment does not, however, require a court to "provide an on-the-record sentencing explanation" even when imposing a life sentence. *Jones*, 141 S. Ct. at 1319.

The court of appeals held that the sentencer is required to address on the record every alleged mitigating fact raised by the defendant and announce whether it finds the fact to be true and whether the fact reduced the defendant's culpability. Op. at 20. The opinion is in direct conflict[3] with *Jones*. RAP 13.4(b)(1), (3).

[3] It also conflicts with its own recent opinion in *State v. Fletcher*, No. 54502-1-II, 2021 WL 5897157, at *4 (Wn. Ct. App. filed Dec. 14, 2021) (unpublished opinion cited under GR 14.1 as persuasive authority only). There the court observed that "[n]owhere in the statute does the legislature require the sentencing court to issue findings about factors it considered but which did not ultimately influence its decision." *Id.* It would be "absurd" and "impractical, if not impossible" to "require sentencing courts to issue findings for every factor that could possibly be considered in sentencing, even factors that did not ultimately affect the decision." *Id.* "Findings are not meant to be an exhaustive summary of all the facts affecting any factor implicated in the case." *Id.*

In *Jones*, the Supreme Court stressed that although the Eighth Amendment requires that a sentencer consider youth and have the discretion to impose a different punishment, the Court has "unequivocally" and "squarely" rejected any suggestion that the Eighth Amendment imposes a formal factfinding requirement. *Jones*, 141 S. Ct. *Id.* at 1313-16 (citing *Montgomery v. Louisiana*, 577 U.S. 190, 211, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016)). If the sentencers are not required even to find facts, they cannot be required to make an on-the-record assessment of how those unfound facts weigh on culpability.

C. *Delbosque* Neither Requires nor Supports the Court of Appeals' Decision.

The court of appeals' decision claims that this Court's opinion in *Delbosque* requires the result reached here. Op. at 16-20 (discussing *State v. Delbosque*, 195 Wn.2d 106, 456 P.3d 806, 812 (2020)). It does not. RAP 13.4(b)(1), (3). In that case, despite evidence that the defendant was on the road to rehabilitation, the sentencer found Delbosque to be hopeless and imposed an unconstitutional *de facto* life sentence. In sharp

contrast, the trial court *did not* find Ngoeung to be beyond hope and, in fact, reduced the sentence such that Ngoeung was immediately parolable. In *Delbosque*, the Court reversed the sentence because the written findings were unsupported in the record. In our own case, Ngoeung did not assign error to any finding and the court of appeals did not determine the written findings to be unsupported in the record.

1. *Delbosque* is distinguishable in that it involved an unconstitutional *de facto* life sentence.

Delbosque and Ngoeung received sentences at opposite ends of the spectrum. When Ngoeung was resentenced in 2019, he was immediately parolable, having already served 25 years. Delbosque's sentencer, however, intended to impose a *de facto* life sentence. *Delbosque*, 195 Wn.2d at 113-14. In the time between the imposition of the sentence and its review, this would become a *per se* unlawful sentence. *Id.* at 112 (sentenced in 2016); *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018) (holding that WASH. CONST. art. 1, § 14 categorically prohibits life sentences for juvenile offenders).

Delbosque's sentencer relied upon federal jurisprudence which states that a life sentence imposed upon a juvenile offender is not unlike a death sentence, because it alters the offender's life by a forfeiture that is irrevocable and because a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. *Graham v. Florida,* 560 U.S. 48, 69-70, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Therefore, a life sentence is only appropriate for a juvenile offender who is beyond hope. *Miller v. Alabama*, 567 U.S. 460, 479-80, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)) (it is the rare juvenile offender whose crime reflects **irreparable corruption**); *Miller*, 567 U.S. at 472-73 (quoting *Simmons*, 560 U.S., at 72-73) (deciding that a juvenile offender forever will be a danger to society would require making a judgment that they are **incorrigible**, a characteristic that is inconsistent with youth); *Miller*, 567 U.S. at 471 (quoting *Simmons*, 543 U.S. at 570) (because a child's character is not as

well formed and their traits not as fixed as an adult's, their actions are less likely to be "evidence of **irretrievable depravity**").

In support of the life sentence, Delbosque's sentencer determined him to be "irreparably corrupt, permanently incorrigible, and irretrievably depraved." *Delbosque*, 195 Wn.2d at 118. The judge found this was "one of those rare cases where a life without the possibility of parole sentence would be appropriate, except for the potential reduction of risk caused by advancing old age." *Id.* at 114. This sentence damned Delbosque to a life behind bars until he was dead or sufficiently feeble to be harmless.

The sentencer's finding was primarily based upon Delbosque's offense. *Id*. at 117-18. But recent jurisprudence in juvenile offender sentencing requires courts to focus on mitigating factors. *State v. Haag*, 198 Wn.2d 309, 314, 495 P.3d 241, 243 (2021). Just as a single act that occurred in one's adolescence does not define a person for the rest of their life, nor

should it result in a life behind bars. Delbosque's prison history demonstrated that he was capable of rehabilitation. *Delbosque*, 195 Wn.2d at 118. In other words, there was hope.

Delbosque stands for the proposition that before a court throws away the key on a juvenile offender's life, it must satisfy this Court that this human being is beyond hope. In Washington, we recognize that no juvenile offender is beyond hope. *Bassett*, 192 Wn.2d 67. *Delbosque* does not speak to our own case where the sentencer did not find Ngoeung to be beyond hope, rendering a veritable credit-for-time-served sentence, the least penalty the judge could impose.

2. Unlike Delbosque, Ngoeung has not challenged any written finding.

Delbosque's sentence was reversed, because the written findings were not supported by substantial evidence. *Delbosque*, 195 Wn.2d at 120. But Ngoeung did not assign error to any of the written findings which he drafted and the court adopted. Opening Br. at 3. And the court of appeals did not determine that

any of the court's written findings were unsupported in the record. The opinion readily acknowledges this. Op. at 18 n. 12.

The court of appeals' opinion claims its decision is dictated by *Delbosque*. Op. at 2 n.3, 16-18. But *Delbosque* did not require the lower court to make an on-the-record assessment of every fact available at sentencing that arguably supports a mitigated sentence. Op. at 20. And even if it had, *Jones* would have superseded it.

Accordingly there is no basis under *Delbosque* to reverse Ngoeung's sentence. Insofar as the opinion claims it is authorized by *Delbosque*, it is in conflict with *Delbosque*. RAP 13.4(b)(1), (3).

D. The Sentencer Was Not Required to Explain Standard Range Sentences on Lesser Counts Which Had No Impact on the Release Date.

The court of appeals' opinion requires the trial court to explain why it imposed a standard range sentence on counts three and four, sentences which have no impact on the period of

incarceration. Op. at 20-22. This is contrary to established law and involves an issue of substantial public interest.

1. A sentencing court is only required to justify exceptional sentences, not standard sentences.

When sentencing juvenile offenders, a court has complete discretion. *Houston-Sconiers*, 188 Wn.2d at 21. This means that a court "may" impose the sentences on serious violent offenses concurrently. *Gilbert*, 193 Wn.2d 169. But when it does so, this is an exceptional sentence. *Id.* And if the court imposes an exceptional sentence, it must enter findings and conclusions. RCW 9.94A.535.

When an offender is sentenced on more than one "serious violent" offense on the same day, the standard, presumptive sentence is consecutive sentences in which all but one serious violent offense is determined using an offender score of zero. RCW 9.94A.589(1)(b). Counts three and four are serious violent offenses. CP 482; RCW 9.94A.030(46)(a)(v).

Here the court entered written findings related to its decision to run counts one and two concurrently. CP 514-19.

Murder is a serious violent offense. RCW 9.94A.030(46)(a)(i). Therefore it is possible that a higher court might require that aggravated murders should presumptively run consecutively under RCW 9.94A.589(1)(b). However, it is also likely that the consecutive sentence statute would not apply because aggravated murder is addressed under an entirely different title and chapter. Chapter 10.95 RCW. These findings, therefore, were entered in an abundance of caution to demonstrate that concurrent murder sentences would be justified under the exceptional sentence statute.

The court did not enter any findings regarding its decision to impose consecutive sentences on counts three and four. It did not because this was not an exceptional sentence, and only exceptional sentences require findings. *State v. Davis*, 47 Wn. App. 91, 96, 734 P.2d 500 (1987) (holding that a sentencing judge "need only enter findings in support of an exceptional sentence"). The court does not need to explain standard sentences because, as a general principle, standard range

sentences are unappealable. RCW 9.94A.585(1). "When the sentence given is within the presumptive sentence range then as a matter of law there can be no abuse of discretion and there is no right to appeal that aspect." *State v. Ammons*, 105 Wn.2d 175, 183, 718 P.2d 796 (1986). *See also State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214, 1215 (2003).

Insofar as the court of appeals requires an explanation for the consecutive sentence on counts three and four (Op. at 22), it is challenging a presumptive, standard aspect. Accordingly, its decision is in direct conflict with well-established controlling authority to the contrary. And this Court must accept review. RAP 13.4(b)(1).

2. Even if concurrent sentences were imposed on all counts, it would not affect Ngoeung's release date.

Insofar as the court of appeals' finds the sentences on counts three and four to be "inconsistent" with the sentences on counts one and two, they are not. The sentences on counts three and four do not actually affect the length of Ngoeung's

incarceration. Whether concurrent or consecutive, they do not result in a different release date or different release standard. The Defendant was releasable on those counts long before his second resentencing. And he was releasable on those counts *regardless* of the term the court imposed in resentencing, because he had already served in excess of 20 years. RCW 9.94A.730(1). Once the Board releases Ngoeung on the aggravated murders, it will have met the standard for release on the assaults, and vice versa. The standards are identical. RCW 9.94A.730(3); RCW 10.95.030(3)(f).

The State proposed consecutive sentences on counts three and four with an understanding that this would be purely symbolic. CP 323, 327, 329-31. Ngoeung had four victims, four boys his own age. Over the decades, their four families have endured repeated hearings for each of the three co-defendants. These interminable resentencings, parole board hearings, and,

most recently, a pardon hearing[4] have been excruciating for traumatized family members of the victims and surviving victims.[5] The consecutive terms were intended to be some

[4] Co-defendant Oloth Insyxiengmay told Ngoeung's sentencer that, unlike Ngoeung, he was not removable. CP 120. Subsequent to that attestation, he requested a pardon on the basis that Laos could conceivably enter into a repatriation agreement in his lifetime. https://tvw.org/video/washington-state-clemency-pardons-board-2021091072/

[5] Both Michael Welden's mother and Robert Forrest's mother are barely surviving the loss of their sons. CP 549; RP (1/23/15) at 50; RP (9/6/19) at 55.

John Forrest has protected his family from the hearings, usually appearing in court alone. RP (1/23/15) at 50; RP (9/6/19) at 55 ("I can't bring [my wife] here"). "[E]very time this comes up, I have to go sit in front of a panel of eight people who were appointed by I don't know who looking at me like, 'What's your problem?'" RP (9/6/19) at 56. "[A]ll we are asking is to let us get on with our lives, because it's already hard enough for us to live every day that our child is not with us." RP (1/23/15) at 51.

The victim statements at Insyxiengmay's pardon hearing begin at 1:53:00. https://tvw.org/video/washington-state-clemency-pardons-board-2021091072/ John Forrest said that it would take his wife months to recover after every hearing. Following Ngoeung's 2019 resentencing, his family closed up two businesses and left the state—because these incessant rehearings have caused them to lose faith in Washington's justice system. "We go through this every two or three years," and he expects to have "do this again" when Ngoeung is released and wants to avoid deportation. His daughter Kathleen Forrest agreed. "We don't lay in bed at night wanting to inflict harm on

symbol of solace, purely representative of the number of victims. CP 328, ll. 13-17; RP (9/6/19) at 60. Instead, the Defendant and the court of appeals have turned that gesture into yet another cudgel to reopen the victims' wounds. The only tangible, practical effect of a resentencing would be to cause the victims pain. A resentencing cannot obtain the Defendant's release. That makes this an issue of substantial public interest. RAP 13.4(b)(4).

VI. CONCLUSION

The State requests this Court accept review and reverse the decision of the court of appeals which is contrary to decisions of the supreme courts of Washington and the United States, unjustified under the constitution, incapable of obtaining any

---

those that murdered our family members. Nor do we want to prolong any other suffering from that night, even among those that killed them. What we ask for is closure and accountability."

Michael Welden's sister Courtney Vinson also testified at the pardon hearing. She expressed that she was "heartbroken" and wondered "at what point" the state would stop "reopening the wound."

earlier release for the Defendant, and only capable of causing the victims more pain.

This document contains 3490 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 6th day of January, 2022.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/ TERESA CHEN
Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762/OID 91121
Pierce County Prosecutor's Office
930 Tacoma Ave., Rm 946
Tacoma, WA 98402
Telephone: (253) 798-7400
Fax: (253) 798-6636
teresa.chen@piercecountywa.gov

Certificate of Service:
The undersigned certifies that on this day she delivered by E-file to the attorney of record true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

1-6-22 *s/Therese Kahn*
Date Signature

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

December 7, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NGA NGOEUNG, Appellant.	No. 54110-6-II UNPUBLISHED OPINION

VELJACIC, J. — In 1995, a jury convicted Nga Ngoeung of two counts of aggravated murder in the first degree, two counts of aggravated assault in the first degree, and one count of taking a motor vehicle without the owner's permission. The trial court resentenced Ngoeung in 2015 under the "*Miller*[1] fix" statutes, RCW 10.95.035 and .030(3). He appeals the sentence he received in 2019 on remand from this court's decision in *State v. Nga (NMI) Ngoeung*,[2] his second resentencing under the *Miller* fix.

Ngoeung argues that the sentencing court erred in denying his motion to recuse the sentencing judge. He also argues that the court failed to meaningfully consider all of the *Miller* factors, failed to take into account his history when evaluating his potential for rehabilitation, and failed to explain why it imposed standard range consecutive sentences for his two assault

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

[2] No. 47157-4-II (Wash. Ct. App. Dec. 27, 2018) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2047157-4-II%20Order%20Amending.pdf.

convictions. Finally, he asserts that the court improperly placed the burden to prove his youth as a mitigating factor on him, and that the burden of proof should instead have been on the State.

We affirm the trial court's decision not to recuse itself. Additionally, while recognizing the rapidly changing area of law related to life sentences in our state,[3] we conclude that the trial court both failed to meaningfully consider the *Miller* factors and failed to explain its reasoning in imposing Ngoeung's sentence. Accordingly, we reverse and remand for resentencing.

FACTS

I. THE CRIME [4]

In August 1994, four high school boys drove down a Tacoma street throwing eggs. Some of the eggs hit a house that turned out to be a hangout for a local gang. Ngoeung, then age 17, Oloth Insyxiengmay, age 15, and Soutthanom Misaengsay, age 13, were associated with the gang and were outside the house during the egging. Believing the attack was gang related, Insyxiengmay entered the house and took the owner's rifle. The three boys got in a car, and with Ngoeung driving, followed the other car. Insyxiengmay put the rifle out the window and shot at the other boys' car. Two of the boys in the other car were killed.

[3] During the pendency of this appeal, our state Supreme Court has issued several new opinions impacting sentencing of juveniles, one of which squarely impacts this very case: *State v. Delbosque*, 195 Wn.2d 106, 456 P.3d 806 (2020).

[4] The facts from this section are taken in part from the Ninth Circuit's opinion in *Insyxiengmay v. Morgan*, 403 F.3d 657 (9th Cir. 2005).

Insyxiengmay, Ngoeung, and Misaengsay then returned to the house and Insyxiengmay handed the rifle to someone inside the house, told her to get rid of it, and said, "[w]e shot them up. We shot them up. They threw eggs at us, the Rickets.[5] We shot them up." *Insyxiengmay v. Morgan*, 403 F.3d 657, 661 (9th Cir. 2005). Ngoeung was arrested on September 3, 1994 and confessed to police that he drove the car during the shooting.

In 1995, the court tried Ngoeung as an adult and a jury found him guilty of two counts of aggravated murder in the first degree, two counts of assault in the first degree, and one count of taking a motor vehicle without the owner's permission (TMVWP). The court sentenced Ngoeung to two consecutive terms of the then-mandatory sentence of life without possibility of parole (LWOP) for the two aggravated murder in the first degree convictions. *Former* RCW 10.95.030(1) (1993). The court also sentenced him to 136 months and 123 months for the two assaults, and 8 months for the TMVWP count, all to be served consecutively following his aggravated murder sentences.

II. FIRST RESENTENCING

Pursuant to the United States Supreme Court's decision in *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and the subsequent "*Miller* fix"[6] implemented by the legislature in 2014, the trial court resentenced Ngoeung in January 2015. At that hearing, the court again sentenced Ngoeung to two LWOP sentences on the aggravated murder in the first degree convictions and ordered that the sentences run consecutively. It left the sentences for the assaults and TMVWP unchanged.

[5] A slang term for certain rival gang members.

[6] RCW 10.95.030 and .035.

III. FIRST APPEAL

Ngoeung appealed his sentence, arguing in part that his LWOP sentences were unconstitutional and that he received ineffective assistance of counsel. *State v. Ngoeung*, No. 47157-4-II, slip op. at 1-2 (Wash. Ct. App. Dec. 27, 2018) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2047157-4-II%20Order%20Amending.pdf. While the appeal was pending, the Washington Supreme Court held that a LWOP sentence for a juvenile was categorically barred by the state constitution. *State* v. *Bassett*, 192 Wn.2d 67, 91, 428 P.3d 343 (2018).

Accordingly, in an unpublished opinion, this court held that Ngoeung's sentences for LWOP were unconstitutional under *Bassett* and remanded to the trial court for resentencing. *Ngoeung*, No. 47157-4-II, slip op. at 9, 12.

IV. SECOND RESENTENCING

Pursuant to the remand, in September 2019, Ngoeung appeared before the same judge who had sentenced him in 2015, for a second *Miller* resentencing. Prior to the hearing, Ngoeung filed a motion to have the judge recuse himself. He argued that the judge made statements during the first resentencing in 2015 that would make a reasonably prudent, disinterested observer conclude the hearing was not fair and impartial. The judge denied Ngoeung's motion.

At the second sentencing hearing, the court considered the parties' sentencing memoranda and appended materials, the testimony and report of defense expert Dr. Michael Stanfill, other expert reports, the testimony of and letters from Ngoeung's family, the testimony of the victim's families, and the prior submitted materials considered at the sentencing in January 2015.

A. Mitigation Materials

The mitigation evidence included a report by a mitigation specialist, summarizing the circumstances in Ngoeung's life and included the following:

Ngoeung's parents fled from the Cambodian genocide to a refugee camp in Thailand where Ngoeung was born prematurely. Eventually in 1980, the family migrated to the United States.

Ngoeung began school at age 6 and repeated first grade three times. His education ended after fourth grade due to his difficulty learning English and paying attention, frequent absences, and no significant involvement by his parents in his education. At age 16, Ngoeung was "jumped" into a gang by his cousins. Clerk's Papers (CP) at 135. The report stated that joining a gang was not a choice in Ngoeung's neighborhood and at that time there were no other resources available to gain acceptance, safety, and money. His family also stated that Ngoeung as a young man was "gullible and could be easily manipulated." CP at 135.

Dr. Terry Lee's 2014 report stated Ngoeung's cognitive and psychosocial functioning at the time of his offense was different than that of an adult and was delayed relative to other 17 year olds. Lee opined that Ngoeung's experiences as a refugee and immigrant, acculturation problems, cognitive and language delays, developmental immaturity, poverty, life in a high crime area, limited education, exposure to domestic violence and harsh parenting, lack of positive role models, socializing with antisocial and assertive peers, and his untreated mental health problems all rendered him less culpable than an adult. Dr. Lee further concluded that at age 17, Ngoeung's decision-making and problem-solving skills were not fully developed and left him vulnerable to impulsivity and poor choices.

The mitigation packet also included a letter from Insyxiengmay, Ngoeung's codefendant. Insyxiengmay discussed Ngoeung at the time of the crime, stating that he "rarely said no to what others asked him to do or wanted to do. Although we were all teenagers, cognitively, Mr. Ngoeung seem[ed] to be the youngest among our group." CP at 119. Additionally, their relationship "was one where he took guidance and direction from me although he was my senior by a couple years." CP at 119.

During the years of his incarceration, Ngoeung participated in relatively little "programming." The mitigation report and Insyxiengmay's letter noted a Department of Corrections (DOC) policy "that 'lifers' and those in the custody [of the] DOC with ICE detainers, will be placed on the 'lowest priority' for programming opportunities." CP at 120. However, the report noted that since his 2015 resentencing to LWOP, Ngoeung had attempted to engage in the "little programming [that had] been available to him," including "Aggression Replacement Therapy . . . , Advanced Skills Building, Motivation Engagement, and Anger Control Therapy." CP at 143-44.

The State's sentencing information included records showing Ngoeung's continuing involvement with gangs as well as 50 serious prison infractions. The most serious of which included aggravated assault on another inmate in 2018 and participation in a riot in 2016. Since 2001, Ngoeung was involved in five separate incidents that resulted in sanctions of a minimum of nine months in administrative segregation for each incident.

Dr. Stanfill testified at the resentencing hearing and submitted a report consistent with his testimony. He discussed Ngoeung's record of infractions while incarcerated. He opined that the incidents of violence or aggression "were in direct response to Mr. Ngoeung living in a very dangerous setting for the past 24 years where there were strong values associated with violence

and abiding by a 'code' was required to maintain one's sense of safety, regardless of consequence." CP at 256. Dr. Stanfill concluded that Ngoeung's prison infraction history stemmed from his arrested development and the high rate of violence in the prison that he had to negotiate.

The State recommended two mandatory 25-year terms for the aggravated murder in the first degree convictions and terms at the low end of standard ranges for the two convictions for assault in the first degree and the conviction for TMVWP. The recommendation included a request to run the assault and TMVWP terms consecutive to the aggravated murder terms for a total of 66.5 years.

B. The Court's Oral Ruling

The court discussed the evolution of case law covering the consideration of youth at sentencing. The court stated that it found *Bassett* "instructional because it's factually similar to the case at bar. Bassett was convicted at age 16 of three counts of aggravated murder in the first degree for killing his parents and a brother." Report of Proceedings (RP) (Sept. 6, 2019) at 90. However, the court noted that unlike Ngoeung, "Bassett had taken multiple steps toward rehabilitation." RP (Sept. 6, 2019) at 91.

The court acknowledged the evidence relating to Ngoeung's cognitive delay and mental health and concluded: "there is no doubt that at the time of the crime that was committed, the murders and assaults that were committed in this case, Mr. Ngoeung was operating at a level of cognitive function which was certainly well below normal." RP (Sept. 6, 2019) at 92. Also, "there is considerable evidence of psychological damage, something not behaviorally driven, but indeed part of an organic brain issue, whether that is genetic, related to earlier brain trauma or whatever." RP (Sept. 6, 2019) at 93.

The court continued by discussing rehabilitation, stating, "At the 2015 resentencing, the Court observed that Mr. Ngoeung had made no effort perceptively to engage in rehabilitative type of conduct, that being no further educational attainment, no skills acquisition. He eschewed mental health treatment, empathy training and the like." RP (Sept. 6, 2019) at 94.

The court noted that at the 2015 remand hearing Ngoeung's attorney argued "that with the prospect of a lifetime of imprisonment, there was no motivation for Mr. Ngoeung to rehabilitate since he needed to focus on adaption to survival in the penitentiary." RP (Sept. 6, 2019) at 94. The court continued:

> While that was an explanation for the choices Mr. Ngoeung made, it misses the point of what rehabilitation actually is.
>
> Rehabilitation must be internally driven and those efforts undertaken for their own sake to make the individual being rehabilitated a better functioning person, to make behavioral adjustments because it's the right thing to do, irrespective of the duration of a person's incarceration.
>
> . . . .
>
> It is a matter of judgment, and my judgment comes down to this:
>
> Mr. Ngoeung will be resentenced to two 25 year to life terms of imprisonment that will be served concurrently. And then they will be followed consecutively [with the two convictions for assault in the first degree] by 102 months []and 93 months[, respectively].
>
> By my rough calculation, that comes to 195 months that will be consecutive to the 25 years to life sentence for the murders.
>
> After all of that time is done, then the ISRB [Indeterminate Sentence Review Board] will be able to make its determinations.
>
> The eight months on the [conviction for TMVWP] can be served concurrent with all of the rest of this.

RP (Sept. 6, 2019) at 94-97.

C. Findings of Fact

The court entered findings of fact that stated in relevant part:[7]

> 10. [The] mitigation report on Mr. Ngoeung's family and social history detailed many instances and examples of seizures, head trauma, developmental delays, and difficulties in school while growing up suffered by Mr. Ngoeung.
>
> 11. Dr. Stanfill's report and testimony indicating that Mr. Ngoeung was immature, less cognitively complex, overly compliant to antisocial peers, and directly impacted by numerous socioeconomic, geographic, and other social factors outside his control.
>
> 12. Dr. Terry Lee's mental health report dated November 5[], 2014, was reviewed by the Court and was consistent with Dr. Stanfill's findings.
>
> 13. Dr. Kathleen Mayers's 1990 report found that [] Ngoeung was disabled for the purposes of social security. Mr. Ngoeung's Wechsler Intelligence test for children, taken during that evaluation and in widespread usage across the United States, yielded a full-scale IQ of 55, placing Mr. Ngoeung in the mildly retarded range of mental functioning.
>
> 14. At the time the crimes were committed in this case, Mr. Ngoeung was likely in a borderline range for mental retardation and certainly well below normal intellectual functioning.
>
> . . . .
>
> 17. The reports from DOC highlight that the deficits that were observed in 1995 have persisted longitudinally and add credibility to those initial findings.
>
> 18. There is considerable evidence of Mr. Ngoeung's psychological damage; it is likely some organic brain issue that is not behaviorally driven. It is unknown if the etiology is genetic or related to some earlier trauma to the brain.

CP at 517-18.

The court concluded:

> There are substantial and compelling reasons involving the attributes of youth and Mr. Ngoeung's personal attributes in this case to justify an exceptional sentence of running counts 1 and 2 concurrently (each a 25 years to life sentence) to each other under *State* v. *Gilbert*, 193 Wn.2d 169, 438 P.3d 133 (2019), and the non-exclusive mitigating factors of RCW 9.94A.535(1).

[7] The findings of fact regarding the crime and Ngoeung's general history are verities on appeal and are incorporated into the facts section above. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003) (unchallenged findings of fact are verities on appeal).

CP at 519. Ngoeung appeals.[8]

ANALYSIS

I. JUDICIAL BIAS

Ngoeung argues that the sentencing judge erred in denying his motion to recuse. The State argues that the issue of the resentencing judge's fairness or appearance of fairness was resolved in our previous decision, and therefore, Ngoeung's argument is barred by the law of the case doctrine. We disagree with the State that the law of the case doctrine bars our review. We also disagree with Ngoeung that the sentencing judge erred in denying his motion to recuse.

A. The Law of the Case Doctrine Does Not Apply.

"The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation." *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008).

In our previous opinion, we stated that, "[Ngoeung] also briefly discusses and acknowledges that the appearance of fairness doctrine probably does not require a new sentencing judge. We agree." *State v. Ngoeung*, No. 47157-4-II, slip op. at 9 n.8. Contrary to the State's characterization of the footnote, we did not hold that Ngoeung's right to be tried and sentenced by an impartial court was not violated. Rather, that footnote addressed a passing statement by Ngoeung in the context of his ineffective assistance of counsel argument. *See Ngoeung*, No. 47157-4-II, slip op. at 9. Because footnote 8 is not a holding, the law of the case doctrine does not apply. *See Schwab*, 163 Wn.2d at 672. Accordingly, we reject the State's argument.

[8] On November 18, 2020, after this appeal was filed the ISRB conducted a release hearing pursuant to RCW 10.95.030(3)(f) and RCW 9.94A.730. It declined to release Ngoeung. ISRB (Final Decision Date Dec. 14, 2020).

B. The Sentencing Judge Did Not Err In Denying Ngoeung's Motion To Recuse.

Ngoeung argues that a reasonable, disinterested observer would conclude that he did not receive an impartial hearing based on the judge's repeated comments about Ngoeung being a "sociopath" and describing his conduct as a "brutal and a murderous rampage." Br. of Appellant at 22-23. Ngoeung also contends that the judge's re-imposition of life without parole demonstrates their potential and actual bias. We disagree.

Under the state and federal constitutions, a criminal defendant has the right to be tried and sentenced by an impartial court. U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, § 22. The law requires more than an impartial judge; it requires that the judge also appear to be impartial. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). "Pursuant to the appearance of fairness doctrine, a judicial proceeding is valid if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing." *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017).

"The party asserting a violation of the appearance of fairness must show a judge's actual or potential bias. . . . The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts." *Id*. (internal citation omitted). If the record shows that the judge's impartiality might reasonably be questioned, then the appellate court should remand the matter to another judge. *Id*.

Here, Ngoeung directs our attention to two statements made by the judge at his resentencing hearing. During the State's argument, the judge said, "I think that *Miller* requires the Court to drill down deeper and determine what were the motivational or other factors that resulted in such a sociopathic response to nothing." RP (No. 47157-4-II, Jan. 23, 2015) at 40. After the

judge had sentenced Ngoeung to life without parole, the judge also said, "[d]espite my effort to gain understanding, Mr. Ngoeung, of your brutal and murderous rampage, I am unable to perceive any rational basis for your morally bankrupt and sociopathic behavior. You deserve, in the Court's opinion, to serve every day of the sentence that you have been given." RP (No. 47157-4-II, Jan. 23, 2015) at 55.

The above statements do not demonstrate the judge's actual or potential bias because they do not show that the judge had "already reached a firm conclusion about the propriety of a mitigated sentence" or that he "may not be amenable to considering mitigating evidence with an open mind." *Solis-Diaz*, 187 Wn.2d at 541. Specifically, the transcript demonstrates that, at the time, the judge believed that he had the authority to re-impose life without parole if he found insufficient evidence of mitigation, which defense counsel agreed was a correct statement of the law. The sentencing transcript also demonstrates that the judge considered and read all of the mitigation materials that Ngoeung submitted, which suggests that he approached the matter with an open mind.

Based on the totality of the 2015 resentencing transcript, a reasonably prudent, disinterested observer would conclude that Ngoeung received a fair, impartial, and neutral hearing because there is no evidence that the judge had already reached a firm conclusion to sentence him to life without parole. *See Solis-Diaz*, 187 Wn.2d at 541. Accordingly, we hold that the trial court did not err in denying Ngoeung's motion to recuse.

II. CONSIDERATION UNDER *MILLER*

Ngoeung requests that we reverse and remand for resentencing. He argues that the sentencing court (1) failed to meaningfully consider all of the *Miller* factors, including the extent of his participation in the crime and whether his youth and intellectual disability impacted his legal

defense; (2) failed to take into account his history when evaluating his potential for rehabilitation; and (3) failed to explain why it imposed a standard range, consecutive sentence for his assault convictions, despite finding that he was entitled to a minimum, concurrent sentence for the aggravated murder convictions. Before addressing each of these arguments in turn, we discuss general principles related to this subject matter.

A. General Legal Principles

Prior to *Miller*,[9] Washington imposed a mandatory sentence of life without the possibility of parole for an offender convicted of aggravated murder in the first degree, regardless of the offender's age. *Bassett*, 192 Wn.2d at 73-74. In response to *Miller*, our legislature enacted the "*Miller* fix" statute, which provides:

> (ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.
>
> (b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in [*Miller*, 132 U.S. 460] 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.

[9] In *Miller*, the United States Supreme Court held that it was unconstitutional to impose mandatory life without parole sentences for juvenile homicide offenders. 567 U.S. at 489. The Court based its determination on the fact that juvenile offenders have diminished culpability and are "'less deserving of the most severe punishments'" because they lack maturity and have an underdeveloped sense of responsibility, they are more vulnerable to outside pressures and negative influences, and their traits are less likely to be evidence of irretrievable depravity. *Id*. at 471 (quoting *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)).

RCW 10.95.030(3).[10]

Subsequently, the Washington Supreme Court held that, even if not mandatory, a sentence of life without parole for juvenile offenders was unconstitutional and, therefore, RCW 10.95.030(3)(a)(ii) was unconstitutional to the extent that it allowed such a sentence. *Bassett*, 192 Wn.2d. at 91.

Later, in applying *Miller* to a de-facto life sentence, the Washington Supreme Court held that if a sentencing court finds that an exceptional sentence is warranted, it has the discretion to "adjust the standard sentence to provide for a reduced term of years, for concurrent rather than consecutive sentences, or for both." *Gilbert*, 193 Wn.2d at 176-77.

We glean from these authorities that any life sentence without the possibility of parole for a juvenile is unconstitutional. Further, a sentencing court has discretion to depart from any statutory guidance for sentencing to provide for a lower sentence. Additional recent authorities require the sentencing court to consider several factors and to explain its reasoning. Those authorities are discussed below.

B. Standard of Review

An appeal from a resentencing under RCW 10.95.030 is a direct appeal of the newly-imposed sentence. *State v. Delbosque*, 195 Wn.2d 106, 128, 456 P.3d 806 (2020). We will reverse a sentencing court's decision only if we find "'a clear abuse of discretion or misapplication of the law.'" *Id*. at 116 (internal quotation marks omitted) (quoting *State v. Blair*, 191 Wn.2d 155, 159,

[10] The "*Miller* fix" bill also created RCW 10.95.035, which required resentencing for any juvenile offender sentenced to life without parole prior to passage of the bill (SSSB 5064). RCW 10.95.035(1) requires resentencing of these offenders to be performed consistent with the amended RCW 10.95.030. The bill also enacted RCW 9.94A.730, which allows most juvenile offenders to petition the ISRB for release once they have served 20 years in prison, excluding sentences for aggravated murder in the first degree under RCW 10.95.030. RCW 9.94A.730(1).

421 P.3d 937 (2018)). A trial court abuses its discretion when "'its decision is manifestly unreasonable or based upon untenable grounds.'" *Delbosque*, 195 Wn.2d at 116 (internal quotation marks omitted) (quoting *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012)). Significantly, a trial court "lacks the discretion to impose a standard range sentence without first considering the mitigating circumstances of youth where the defendant committed the crime as a juvenile." *State v. Backstrom*, 15 Wn. App. 2d 103, 106, 476 P.3d 201 (2020). We next address Ngoeung's arguments in turn.

C. Requirement of "Meaningful Consideration" of Youth Under RCW 10.35.030, *Gilbert*, and *Delbosque*.

In exercising its discretion in sentencing a juvenile, the court must consider

> the mitigating circumstances related to the defendant's youth, including, but not limited to, the juvenile's immaturity, impetuosity, and failure to appreciate risks and consequences—the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, the way familial and peer pressures may have affected him or her, how youth impacted any legal defense, and any factors suggesting that the juvenile might be successfully rehabilitated.

Gilbert, 193 Wn.2d at 176.

Trial courts, whether sentencing a juvenile pursuant to RCW 10.95.035 or whether sentencing under title 9.94A RCW, have the affirmative duty to "'*meaningfully* consider'" the individual circumstances of the particular youthful offender and the offense. *Delbosque*, 195 Wn.2d at 121 (quoting *State v. Ramos*, 187 Wn.2d 420, 434-35, 387 P.3d 650 (2017)). In doing so, the court must "tak[e] care to thoroughly explain its reasoning." *Gilbert*, 193 Wn.2d at 176; *see also Ramos*, 187 Wn.2d at 443-44 ("[A] court conducting a *Miller* hearing must do far more than simply recite the differences between juveniles and adults and make conclusory statements that the offender has not shown an exceptional downward sentence is justified. . . . The sentencing

court must thoroughly explain its reasoning, specifically considering the differences between juveniles and adults identified by the *Miller* Court and how those differences apply to the case presented.").[11]

1. Factors Relating to Culpability at the Time of the Offense

The Supreme Court has not mandated that sentencing courts address on the record a specific number of factors in order to have "meaningfully" considered a defendant's youth. Nonetheless, the trial court was required at the very least to meaningfully consider whether youth diminished Ngoeung's culpability. RCW 10.95.030(3)(b); *Delbosque*, 195 Wn.2d at 115, 121.

Demonstrating a thorough study and understanding of the legal framework at the time, the court here outlined the case law covering *Miller* sentencings and discussed the findings of the reports in the mitigation package. The court acknowledged in its oral ruling that "there is no doubt that at the time of the crime that was committed, . . . Ngoeung was operating at a level of cognitive function which was certainly well below normal." RP (Sept. 6, 2019) at 92. Additionally, the court's written findings of fact focus primarily on Ngoeung's impaired cognitive functioning.

However, and despite these findings, the court did not explain how Ngoeung's cognitive delay related to the attributes of youth like immaturity, impetuosity, and failure to appreciate risks and consequences. *Gilbert*, 193 Wn.2d at 176. More importantly, as required by *Delbosque*, it did not discuss whether Ngoeung's youth diminished his culpability.

The court did not, on the record, discuss "the degree of responsibility that [Ngoeung] was capable of exercising." RCW 10.95.030(3)(b). Thus, it failed to account for "the way familial and

[11] Although *Ramos* and *Basset* did not involve a *Miller* resentencing as is the case here, the Supreme Court noted "although neither case directly applied RCW 10.95.035, both discuss issues that are highly relevant to what is required when setting a minimum term pursuant to the *Miller*-fix statute. Much of their analysis therefore applies to this case and to *Miller* hearings pursuant to RCW 10.95.030." *Delbosque*, 195 Wn.2d at 120.

peer pressures may have affected [Ngoeung]" despite mitigation evidence that due to his age and cognitive delay he was "easily manipulated" and "gullible." *Gilbert*, 193 Wn.2d at 176; CP at 135. According to the record, the court also did not consider the extent of Ngoeung's participation in the crime, as the driver rather than the shooter.

Defense counsel addressed Ngoeung's lack of education, cognitive delay, and language barrier, and how that affected his decision whether to plead guilty and testify against his friends like Misaengsay did. However, the court did not discuss how Ngoeung's youth "impacted any legal defense." *Gilbert*, 193 Wn.2d at 176.

The sentencing court here did not have the benefit of the *Delbosque* decision, which issued several months after the sentencing at issue here. In *Delbosque*, the Supreme Court noted its concern that the trial court had "oversimplified and sometimes disregarded Delbosque's mitigation evidence." 195 Wn.2d at 118-19. The Supreme Court also expressed concern that the sentencing court's ruling did "little to acknowledge Delbosque's mitigation evidence demonstrating his capacity for change." *Id*. at 119. The trial court heard testimony regarding Delbosque's qualification for lower security levels, his minimal number of infractions while incarcerated, and his low risk for future dangerousness. *Id*. This testimony was "not addressed" in the sentencing court's analysis, which suggested to the Supreme Court that the sentencing court "did not adequately consider" it. *Id*. at 119-20.

Similarly here, Ngoeung submitted mitigation evidence and testimony demonstrating his lack of culpability due to his immaturity, the nature of his surrounding environment and family circumstances, the extent of his participation in the crime, the way peer pressure may have affected him. However, this evidence was not addressed in the sentencing court's analysis, suggesting that the sentencing court "did not adequately consider" it. *Id*. at 119-20.[12]

If the court did "specifically consider[] the differences between juveniles and adults identified by the *Miller* Court and how those differences apply to [Ngoeung's case,]" it failed to thoroughly explain its reasoning on the record. *Ramos,* 187 Wn.2d at 444. So, although we could infer that the concurrent sentences for these horrible murders reflected some diminished culpability, a sentencing court must *expressly* consider the impact of youth on culpability so that this consideration appears on the record.

2. Potential for Rehabilitation

The court also failed to meaningfully consider all of Ngoeung's evidence regarding his potential for rehabilitation because it did not address how the evidence related to Ngoeung's capacity to change. Its oral ruling focused primarily on Ngoeung's pre-2015 incarceration record and his failure to engage in programming; the court discussed this in relation to the requirement that "sentencing courts [] meaningfully consider 'mitigating factors that account for the diminished culpability of youth,' including 'the youth's chances of becoming rehabilitated.'" *Delbosque,* 195 Wn.2d at 120 (quoting RCW 10.95.030(3)(b)). The court found the explanation for Ngoeung's apparent lack of effort in engaging in rehabilitation unpersuasive, stating, "[r]ehabilitation must

[12] Delbosque challenged the court's factual findings and the court reversed because substantial evidence did not support findings of fact, however, the requirement that a sentencing court adequately consider mitigation evidence applies here regardless.

be internally driven . . . because it's the right thing to do, irrespective of the duration of a person's incarceration." RP (Sept.6, 2019) at 94.[13]

The court was well within its discretion to consider evidence of lack of rehabilitation. *Ramos*, 187 Wn.2d at 449. Indeed, "'[t]he key question is whether the defendant is capable of change.'" *Delbosque*, 195 Wn.2d at 122 (quoting *United States v. Briones*, 929 F.3d 1057, 1066 (9th Cir. 2019)). But, the court also should have considered the evidence of rehabilitation since Ngoeung's 2015 hearing, and addressed how it related to Ngoeung's capacity for change given the crucial role such information plays in juvenile sentencing.[14] Specifically, the court here failed to mention that, according to the mitigation report, since his 2015 resentencing to LWOP, Ngoeung had attempted to engage in the "little programming [that] had been available to him," including "Aggression Replacement Therapy . . . , Advanced Skills Building, Motivation Engagement, and Anger Control Therapy." CP at 143-44. Under *Delbosque*, the court is required to meaningfully consider such evidence. 195 Wn.2d at 120 (the trial court must engage in a meaningful, forward looking assessment of the individual's capacity for change).

[13] But, the Supreme Court has recognized the impact that a life sentence alone has on a juvenile's rehabilitation, stating, "A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual." *Graham v. Florida*, 560 U.S. 48, 79, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

[14] "In clarifying what is required in a *Miller* hearing, the Ninth Circuit declared that sentencing courts 'must reorient the sentencing analysis to a forward-looking assessment of the defendant's capacity for change or propensity for incorrigibility, rather than a backward-focused review of the defendant's criminal history.'" *Delbosque*, 195 Wn.2d at 1222 (quoting *Briones*, 929 F.3d at 1066).

The *Delbosque* sentencing court similarly omitted favorable rehabilitation evidence in its analysis:

> Similarly, the oral ruling does little to acknowledge Delbosque's mitigation evidence demonstrating his capacity for change. The Court of Appeals highlighted testimony that Delbosque "would qualify for minimum security except for the term of his sentence and an immigration detainer." [*State v.*] *Delbosque*, 6 Wn. App. 2d [407,] 410, 430 P.3d 1153 [(2018)]. In addition, Dr. Saint Martin testified that Delbosque's relatively few infractions over a 23-year period, coupled with his progressive decrease in security level, were proof that he was not irreparable and in fact could safely be released. He further opined that Delbosque's risk for future dangerousness would be low. This evidence, however, was not addressed in the trial court's analysis.

195 Wn.2d at 119.

The sentencing court here erred in not addressing all favorable evidence of rehabilitation in its analysis and in not explaining how it relates to Ngoeung's potential for rehabilitation.

Next, Ngoeung argues that the sentencing court failed to consider how his cognitive disability diminished his opportunity for rehabilitation. He asserts that this failure provides an independent basis for reversal. Because we remand for resentencing, we do not address this argument.

D. Failure to Explain Standard Sentence Range for Assault Charges

Ngoeung argues that the court failed to explain why it imposed a standard range, consecutive sentence for his assault convictions, despite finding that he was entitled to a minimum, concurrent sentence for aggravated murder convictions.

In *Gilbert,* the court held that the sentencing court could consider the mitigating circumstances related to the defendant's youth, "the convictions at issue, the standard sentencing ranges, and any other relevant factors—and should then determine whether to impose an

exceptional sentence, *taking care to thoroughly explain its reasoning*." 193 Wn.2d at 176 (emphasis added).

We also note that after oral argument on this case, Division I of this court decided *State v. Rogers*, 17 Wn. App. 2d 466, 487 P.3d 177 (2021). In that case, the court addressed the State's appeal of an exceptional sentence below the standard range based on youth as a mitigating factor. *Id*. at 468. In response to the State's argument that the sentence was too lenient and thus unlawful, Rogers argued that an exceptional sentence based on youth cannot be reviewed on appeal. *Id*. Judge Dwyer wrote for the court, which rejected Rogers's argument, noting the importance of meaningful appellate review to prevent arbitrary sentencing decisions. *Id*. Accordingly, it held that when a sentencing judge determines that youth is a mitigating factor and exercises their discretion to impose an appropriate sentence, they "(1) must explain the reasons for their determination, and (2) those reasons must be rationally related to evidence adduced at trial or present at sentencing." *Id*. at 480. The court continued, "We do not require that sentencing courts explain the calculation leading to the precise length of the sentence imposed. Instead, the court must provide sufficient reasoning to allow for meaningful appellate review as to whether any reasonable judge could make the same decision based on the evidence and information before the sentencing judge." *Id*. at 481. We adopt the approach of the *Rogers* court.

In resentencing Ngoeung, the court did not explain why it imposed the particular sentence it did. It did not explain why the mitigating factors of youthfulness warranted an exceptional sentence in the form of running the aggravated murder charges concurrently, while still imposing standard sentence ranges for the assaults and simultaneously running those consecutively.

The trial court has broad discretion in imposing an appropriate sentence. However, here the trial court abused its discretion by failing to articulate a full and meaningful consideration of

Ngoeung's youth as a mitigating factor during sentencing and by failing to explain its reasoning in imposing a sentence seemingly inconsistent with its findings of fact. Therefore, we reverse and remand for the trial court to resentence Ngoeung consistent with this opinion.

E. Eligibility for Release as a "Sufficient Remedy"

The State appears to argue that because he is eligible for release by the ISRB, Ngoeung has received a "sufficient remedy." Br. of Resp't at 32. At oral argument, the State also asserted that this case is now moot for the same reason. Wash. Court of Appeals, *State of Washington v. Nga Ngoeung*, No. 54110-6-II (April 8, 2021), at 9 min., 31 sec. through 9 min., 53 sec. (on file with court). But the State's argument is inapposite. In *Houston-Sconiers*, the Supreme Court recognized that the existence of a statute that "may offer the possibility of another remedy in the future, or on collateral review, does not resolve whether petitioners' sentences are unconstitutional and in need of correction now. . . . Statutes like RCW 9.94A.730 may provide a remedy *on collateral review* . . . but they do not provide sentencing courts with the necessary discretion to comply with constitutional requirements in the first instance." 188 Wn.2d at 22-23 (emphasis added).

III. BURDEN OF PROOF

Ngoeung argues that the court erroneously applied the Sentencing Reform Act of 1981's exceptional sentencing provision, and thus improperly placed the burden on Ngoeung to prove that an exceptional sentence of concurrent terms was warranted. Because we remand for resentencing, we do not address this argument.

IV. PRESUMPTION OF EXCEPTIONAL SENTENCE

Ngoeung also argues that the authorities necessitate that the court presume his youth required an exceptional sentence. He further asserts that given this presumption, the prosecution

"failed to show by any standard of proof that [Ngoeung]'s sentence should exceed the presumptive minimum." Br. of Appellant at 54.

In *State v. Gregg*, which was decided after the parties submitted briefing, the Washington Supreme Court expressly rejected the argument that when sentencing a juvenile, the court "must start with a general presumption that a mitigated sentence is required unless the State proves otherwise." 196 Wn.2d 473, 482, 474 P.3d 539 (2020). Ngoeung's argument is without merit because it is contrary to law.

CONCLUSION

Accordingly, we reverse the sentence previously imposed and remand for resentencing consistent with this opinion and current authority.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Maxa, P.J.

Cruser, J.

PIERCE COUNTY PROSECUTING ATTORNEY

January 06, 2022 - 10:49 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	54110-6
Appellate Court Case Title:	State of Washington, Respondent v. Nga Ngoeung, Appellant
Superior Court Case Number:	94-1-03719-8

The following documents have been uploaded:

- 541106_Petition_for_Review_20220106104737D2440685_9545.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Ngoeung Pet for Review.pdf

A copy of the uploaded files will be sent to:

- katebenward@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us
Filing on Behalf of: Teresa Jeanne Chen - Email: teresa.chen@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20220106104737D2440685