No. 45374-6-II
(Consolidated)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TRESON ROBERTS,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Judge John R. Hickman (trial), and
the Honorables Megan Foley and Bryan Chuschcoff (motions)

OPENING BRIEF OF APPELLANT ROBERTS

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A. ASSIGNMENTS OF ERROR

1. Under Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and its antecedents, RCW 13.04.040(1)(e)(v), our state's"automatic decline" statute, is unconstitutional in violation of the Eighth Amendment and due process, both in isolation and when coupled with mandatory consecutive, "flat-time" sentencing enhancements. The 1996 decision in In re Boot, 130 Wn.2d 553, 925 P.2d 560 (1996), holding to the contrary, depends upon caselaw which has been overruled and is no longer good law.

2. There was insufficient evidence to support the imposition of firearm enhancements.

3. Appellant Treson Roberts was deprived of his state and federal confrontation clause when testimonial evidence was admitted against him at trial and he was not allowed an opportunity to cross-examine the declarant, who was missing from trial.

4. Roberts was deprived of his state and federal rights to effective assistance of counsel when his attorney did not clearly join in a confrontation clause objection.

5. There was insufficient evidence to support the conviction as a principal or accomplice to the second-degree assault.

6. There was insufficient evidence to prove the required nexus between the firearm and the agreement which was the basis for the conspiracy.

7. The prosecutor committed flagrant, prejudicial misconduct which deprived Roberts of his rights to a fair trial.

8. The trial court erred as a matter of law in failing to comply with RCW 10.01.160(3) when imposing discretionary legal financial obligations.

9. Pursuant to RAP 10.1(g), Roberts adopts and incorporates the arguments presented by codefendant Zyion Houston-Sconiers in his opening brief on appeal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In Miller, supra, the U.S. Supreme Court explicitly recognized the very significant distinctions between juveniles and adults and held that any criminal justice

system which did not honor those distinctions and instead automatically treated juveniles as if they were adults was improper.

RCW 13.04.040(1)(e)(v), our state's "automatic decline" statute, transfers juveniles who committed certain types of crimes at age 16 or 17 to adult court for trial without any consideration of the factors which make juveniles different and without any individual review of whether the particular juvenile should be so tried.

Is the "automatic decline" statute unconstitutional in light of Miller and does it violate the Eighth Amendment and due process to automatically treat a child like an adult without any considerations of his individual culpability?

2. In In re Boot, our Supreme Court upheld the automatic decline statute as constitutional in the face of Eighth Amendment and due process challenges. Since that time, however, the underpinnings for the holding in Boot have all been eroded or overturned. Is Boot no longer good law?

3. Because he was treated as an adult, Roberts was subjected to adult firearm enhancements, which are mandatory and run consecutively and as "flat time" regardless of the offender. Does imposition of adult mandatory sentencing enhancements also run afoul of Miller, due process and the Eighth Amendment?

4. Was there insufficient evidence to support the imposition of firearm enhancements where the state's expert testified that he did not know if the gun could have fired at the time of the crime and the gun thus did not meet the statutory definition of "firearm?"

5. Roberts and his codefendant were accused of committing robbery of a victim who did not testify at trial but whose claims were instead related by an officer who took his statement after the event. Were Roberts' rights to confrontation violated when the statements were testimonial and he had no prior opportunity for cross-examination?

6. Further, was counsel prejudicially ineffective to the extent that he failed to clearly join codefendant's confrontation clause objection at trial?

7. Was there insufficient evidence to prove second-degree assault when the state's theory was that the victim had been

placed in reasonable fear of imminent bodily harm when there was evidence she was not placed in such fear?

8. Was there insufficient evidence to prove that the conspiracy was committed while "armed with a firearm?"

9. Did the prosecutor commit serious, flagrant and prejudicial misconduct in repeatedly denigrating defense counsel and invoking his own special status or role, repeatedly raising the specter of uncharged crimes, suggesting that the witnesses were afraid and commenting on one witness' testimony by talking about perjury?

10. Under RCW 10.01.160(3), did the trial court err as a matter of law in failing to determine the defendant's actual ability to pay and the potential effect of the imposition of more than a thousand dollars of costs on the indigent defendant before imposing legal financial obligations?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Treson Roberts was charged by amended information with 7 counts of first-degree robbery, all with firearm enhancements, as well as one count each of second-degree assault with a firearm enhancement and first-degree unlawful possession of a firearm. CP 283-88; RCW 9.41.010, RCW 9.41.040, RCW 9A.28.040, RCW 9A.56.190, RCW 9A.56.200(1)(a)(i)(ii), RCW 9.94A.530, RCW 9.94A.533. The charges were brought in the same proceeding as charges against several others, but only Roberts and Houston-Sconiers ended up being prosecuted at trial. See CP 136-95. Motion and continuance hearings were held before several judges including the Honorable Judges Bryan Chuschcoff and Megan Foley on November 5, 2012, February 20 and March 13, 2013. 1RP 1, 2RP 1. Pretrial and jury trial proceedings were held before the Honorable John R. Hickman on June 12-13, 24-17, July 8-11, 15-18, 22,

24-25, 29-31, and August 1-2, 2013.[1] The jury acquitted Roberts of two counts of first-degree robbery and of the unlawful possession offense but convicted him of the remaining charges. CP 404-20; RP 2372-77.[2]

On September 13, 2013, at the prosecution's recommendation, Judge Hickman imposed an exceptional sentence below the standard range which consisted of all of the mandatory enhancements running consecutively as required, for a total sentence of 317 months of "flat time." CP 428-42; RP 2417-19. This appeal timely follows. See CP 443.

2. Testimony at trial

Mr. Roberts and his co-defendant, Mr. Houston-Sconiers, were charged with multiple first-degree robberies, an assault and unlawful possession of a firearm based upon an hour or so of alleged crimes on Halloween night, 2012. See CP 283-88. Pursuant to RAP 10.1(g), Mr. Roberts hereby adopts and incorporates the statement of facts set forth regarding the case as set forth in the opening brief of Houston-Sconiers. In addition, Roberts submits the following:

Roberts was acquitted of the alleged robberies of the Donnelly brothers (counts I and II) and of possessing the firearm found in the Cadillac. RP 1124-25; CP 283-88; CP 404-406. He was convicted,

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[1]The verbatim report of proceedings will be referred to as follows:
the volume containing the proceedings of November 5, 2012, and March 13, 2013, as "1RP;"
February 20, 2013, as "2RP;"
the morning of June 26, as "3RP;" and
the chronologically paginated volumes containing the proceedings of June 12-13, 24-25, the afternoon of June 26, June 27, July 8-11, 15-18, 22, 24-25, 29-31, August 1-2 and September 13, 2013, as "RP."

[2]Codefendant Houston-Sconiers was convicted of all charges and all enhancements. RP 2370-72.

however, of the first-degree robbery charges which had Peterson-Mims, Greene, Bradley and Wright and of the assault of Guice, as well as the conspiracy to commit robbery. CP 404-420.

The red devil's mask was found in the back seat, and a white Halloween mask was in the open glove box. RP 1154. Roberts was found in the front driver's seat. An officer who searched the car found "[n]othing of note" under the driver's seat. RP 1157-58.

Tredell[3] Roberts, Mr. Roberts' twin, testified that they were hanging out that afternoon. RP 2011-18. He said Alexander was not at their house that day, as Alexander had claimed at trial, and that their house did not have a basketball hoop to play with at that time, although Alexander claimed he had done so with Roberts on that Halloween. RP 2019-23. Roberts was watching a movie when Tredell took his niece out to trick-or-treat around 7:30, and Tredell put the baby to bed about 8:30. RP 2027. At that time, Tredell thought he saw Roberts go to the back porch and he was gone for about 10-15 minutes. RP 2028. Roberts returned, went into his room, and then left again right around 9 or 9:30, but did not come back, because he had been arrested. RP 2028.

Tredell did not think Roberts could have gotten to where the crimes were committed during the time he was gone. RP 2029.

Tredell said that, at the time, Roberts smoked marijuana. RP 2032. When he went out onto the back porch that night, he smelled like "weed." RP 2032.

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[3]Because he shares the same last name as Roberts, Tredell will be referred to herein for clarity by his first name, with no disrespect intended.

Tredell admitted that the house where Roberts and the others were arrested was known as a "smoke" house where kids could go and "get high." RP 2035.

Tredell told his mom and Roberts' initial attorney about seeing Roberts that night but did not go to police to tell them what had happened. RP 2033, 2037.

Shantall Bush, Roberts' girlfriend, had known him almost four years and said that, on Halloween night, 2012, she was there with Roberts, watching a movie, at about 7 or 7:30 p.m. RP 2059-58. At some point, he went out on the back porch and smoked some "weed," and he ended up leaving the house slightly before she left, around 10 "ish." RP 2060. He was headed to the Cadillac, which was known to be a place to hang out and get "high," where Malik, his friend, also lived. RP 2060. Dorothy Worthey confirmed that her grandson, Malik, lived with her at the home where the young men were found. RP 1228-29. Bush, too, told Roberts' mom and the previous attorney about the events that night but did not go to police. RP 2060-64, 2074-79.

D. ARGUMENT

1. REVERSAL AND REMAND IS REQUIRED UNDER MILLER V. ALABAMA BOTH BASED ON THE "AUTOMATIC DECLINE" OF 16-YEAR OLD ROBERTS AND BECAUSE OF THE APPLICATION OF MANDATORY ADULT ENHANCEMENTS

At the time of the crimes, Roberts, who was born on May 8, 1996, was 16 years old. See CP 17-22. Because of the nature of the offenses, he was subjected to "automatic decline" under RCW 13.04.030(1)(e)(v)(A). Under that statute, the adult court has exclusive original jurisdiction over

juveniles who are 16 or 17 when they commit certain crimes, including first-degree robbery. See RCW 13.04.030(1)(e)(v)(A); see State v. Posey, 161 Wn.2d 638, 643, 167 P.3d 560 (2007).

The application of the "automatic decline" statute to Roberts and the resulting trial in adult court runs afoul of his state and federal constitutional rights under the U.S. Supreme Court's decision in Miller v. Alabama, supra, in two ways. First, automatically treating a child like an adult is no longer constitutional in light of the reasoning of Miller, the Eighth Amendment and due process. Second, the combined effect of "automatic decline" and statutorily mandated flat-time, consecutive sentencing enhancements also runs afoul of Miller, the Eighth Amendment and due process.

Until 1994, in this state, children under the age of 18 were always automatically under the jurisdiction of the juvenile court, unless and until that court "declined" jurisdiction. Boot, 130 Wn.2d at 562-63. Such a "decline" could occur only after a hearing, at which the juvenile court was required to consider many factors relating not only to the nature of the crime but also the specific offender herself. Those factors included such things as the nature of the offense but also the sophistication and maturity of the specific juvenile, in light of his living situation, history, emotional development and other relevant circumstances. See State v. Williams, 75 Wn.2d 604, 453 P.2d 418 (1969); Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966); RCW 13.40.110 (providing the factors a court is required to consider in deciding whether to decline jurisdiction).

In 1994, however, the Legislature created "automatic decline," a system where an offender who is 16 or 17 who commits one of "the most serious violent crimes" is tried in adult court, without a Kent factor or other "decline" hearing. Boot, 130 Wn.2d at 563; see RCW 13.04.030(1)(e)(v)(A). There is no consideration of any social, emotional, developmental or similar factors specific to the offender. Boot, 130 Wn.2d at 563-64. Further, the juvenile court has *no discretion* whatsoever when the statute applies, because, the Boot Court found, there is no "latitude to vest jurisdiction" anywhere other than with adult court, regardless of the facts of a specific case. Id.

In Boot, the Supreme Court held that the "automatic decline" system did not violate the Eighth Amendment or due process. 130 Wn.2d at 564-68. Those holdings, however, depend upon reasoning and caselaw now rejected by our highest court.

The Boot Court found that subjecting a juvenile to adult court jurisdiction was not a violation of the Eighth Amendment, even though being tried in adult court meant adult-level punishment and even though such punishment was imposed without consideration of a juvenile's specific situation. 130 Wn.2d at 569. The Court's reasoning was that caselaw established that subjecting a juvenile to adult court jurisdiction was not in itself a punishment, and that, while some might think the risk of adult punishment would raise an Eighth Amendment issue, age was not a factor in Eighth Amendment analysis, as evidenced by the upholding of a sentence of life without the possibility of parole for a 13-year old in State v. Massey, 60 Wn. App. 131, 803 P.2d 340, review denied, 115 Wn.2d

1021 (1990), cert. denied, 499 U.S. 960 (1991). Boot, 130 Wn.2d at 569-70. In Massey, the appellate court had specifically rejected the idea that determining whether a punishment was "cruel and unusual" had anything to do with the defendant's age. 60 Wn. App. at 146. Put simply, the Massey Court found, the analysis used to decide whether something was cruel and unusual "does not embody an element or consideration of the defendant's age, only a balance between the crime and the sentence imposed." 60 Wn. App. at 146.

The Boot Court's analysis on the Eighth Amendment in part led to one of its other conclusions - that "automatic decline" did not violate due process. The defendant argued that his due process rights were violated by the statute, because it had the effect of

> taking away his 'substantive constitutional right to punishment in accordance with one's culpability, which in turn, depends, in part on one's ability to make reasoned adult judgments about the consequences of one's acts.'

Boot, 130 Wn.2d at 571. The defendant noted that the U.S. Supreme Court had held, in Thompson v. Oklahoma, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988), that the Eighth Amendment was violated by executing juveniles who committed crimes when younger than 16 years old 487 U.S. at 571.

In ruling, the Boot Court first noted that, despite Thompson, the U.S. Supreme Court had subsequently upheld imposition of the death penalty for older (16-17 year old) juveniles in Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), abrogated by, Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Boot,

130 Wn.2d at 571. The Boot Court then pointed out that the two defendants in Boot were 16 at the time of the crimes, and neither had been subjected to death.

Further, the Boot Court was unconvinced that the discussion in Thompson of the lesser culpability of juveniles should apply outside of a capital case. Boot, 130 Wn.2d at 572. The Boot Court pointed out that the defendants in Boot had not cited any authority "for the proposition the reasoning in Thompson, a capital case, applies to crimes not calling for the death penalty." Boot, 130 Wn.2d at 571. The death penalty is "qualitatively different" from any other sentence, the Boot Court said, even life without the possibility of parole. Id. The Boot Court thus concluded that Thompson's recognition that juveniles should be treated differently did not apply outside of capital cases. Boot, 130 Wn.2d at 571-72.

Since Boot was decided in 1996, however, the reasoning upon which it has relied in finding no Eighth Amendment or due process violations has been rejected.

First, the Court specifically overruled one of the cases upon which Boot relied. See Roper, 543 U.S. at 569-70. In Stanford, supra, a plurality of the U.S. Supreme Court had found no Eighth Amendment violation in imposing the death penalty on children who committed a crime when 16 or 17 years old.. See Roper, 543 U.S. at 57-475. But the Roper Court found the analysis of Stanford flawed, because that decision had failed to honor the concept of proportionality. Roper, 543 U.S. at 574-75.

Further, the Roper Court noted, since the decision in Stanford, the

understanding of the mental and emotional development of juveniles had changed, so that the Court now recognized that "juvenile offenders cannot with reliability be classified among the worst offenders." Roper, 543 U.S. at 569-70. Put simply, the Roper Court found, the irresponsibility of a juvenile is not as "morally reprehensible" as the same acts in an adult, because the failings of the minor might be simply transitory immaturity and could well be reformed, as opposed to the adult. Id. Further, although juveniles can commit heinous crimes, the Roper Court noted, because of the serious differences in maturity, impulse control and other factors, juveniles should not be treated the same as adults. Id.

Ultimately, the Roper Court held, imposition of the death penalty on someone who committed even a heinous crime at ages 16 or 17 was "disproportionate punishment," and violated the Eigth Amendment. Id.

A few years later, the Court expanded on its holding in Roper and its understanding of the differences between juveniles and adults, in Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2011). In that case, the Court held that it was a violation of the Eighth amendment to sentence a juvenile to life without the possibility of parole for any crimes other than homicide. Again the Court was concerned with evidence that there was a significant difference between juveniles in adults, especially in "brain functioning" and lack of maturity. 560 U.S. at 68-69. Quoting Roper, the Court noted the brain, behavior and impulse control issues of juveniles, noting that they were more "capable of change than are adults," so that the actions of a juvenile "are less likely to be evidence of 'irretrievably depraved character' than are the actions of

adults." 560 U.S. at 68-69.

Further, the Graham Court noted, compared to "an adult murderer," a juvenile offender who did not kill or intend to kill had less "moral culpability" in the same situation. Id. Thus, the Graham Court concluded, contrary to the holding in this state in Massey and contrary to the reasoning in Boot, "[t]he age of the offender and the nature of the crime each bear" on Eighth Amendment analysis. Graham, 540 U.S. at 69-70.

In addition, for the first time, the Court compared a death sentence to the sentence of life without the possibility of parole, finding that the two sentences "share some characteristics. . .that are shared by no other sentences." 560 U.S. at 70. Although the offender sentenced to "life" is not put to death, the Court noted, a sentence of life without the possibility of parole is an irrevocable, permanent loss; a "denial of hope" because regardless of any efforts at rehabilitation, there will be no release. Id. Further, the Court found, a "life without" sentence is "especially harsh" for juveniles, because the juvenile "will on average serve more years and a greater percentage of his life in prison than an adult offender." Id.

The Court concluded that, while a juvenile is "not absolved of responsibility for his actions," his "transgression is not as morally reprehensible as that of an adult" and the life without parole sentence "improperly denies the juvenile offender a chance to demonstrate growth and maturity." Graham, 560 U.S. at 72-73. Given the "limited culpability of juvenile nonhomicide offenders" and the severity of the penalty, the Court held, it was required to draw a "clear line," prohibiting all such

sentences in non-homicide juvenile cases in order to prevent the possibility that "life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." Id. The Court concluded that, while "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," it is required to give such offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id.

More recently, in Miller v. Alabama, supra, the U.S. Supreme Court held that the 8th Amendment was violated by any sentence of life without the possibility of parole imposed on a juvenile for even a homicide if that sentence is not imposed after full consideration of the mitigation of youth. 132 S. Ct. at 2468-69. Mandatory sentences such as life without the possibility of parole run afoul of the Eighth Amendment when imposed on a juvenile, the Court held, because the sentencing court is not allowed to take into account the youth of the juvenile, his immaturity, and other factors relevant to culpability which are affected by age. 132 S. Ct. at 2468-69. Although the Miller Court did not foreclose the possibility that a sentencing authority might decide to impose a "life without" sentence after consideration of the relevant facts, the Court required a specific analysis first: "we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them" under mandatory "life without the possibility of parole" provisions. What might be permissible for an adult is not necessarily permissible when the defendant is a juvenile, the Court noted. Id.

Indeed, the Miller Court specifically declared that Roper and Graham "establish that children are constitutionally different from adults for sentencing purposes," because of what we know about their emotional and mental development, susceptibility to outside pressure and other factors. Miller, 132 S. Ct. at 2458.

All of these cases undercut or eliminate the bases upon which Boot was decided. For example, the holding of Boot that the automatic decline statute did not violate the Eighth Amendment was based upon the belief that the defendant's age was irrelevant to Eighth Amendment analysis - a holding set completely aside by Graham and Miller. And the holding of Boot that there was no due process violation was based upon the belief that the U.S. Supreme Court's recognition, in Thompson, of the significant differences between juveniles and adults was only applicable to the unique situation of capital cases, which, at the time, was the law of the land. See Boot, 130 Wn.2d at 571-72. But Graham and Miller extended Thompson's recognition beyond capital cases. And further, Graham recognized that capital cases and cases involving sentences of life without the possibility of parole *are* similar in many ways. 560 U.S. at 73-74.

Thus, the holding in Boot, years ago, that our automatic decline system does not violate the Eighth Amendment or due process rights of juveniles was based upon caselaw and reasoning which no longer holds true. Further, that system simply fails to consider any of the relevant issues regarding the age of the offender, instead treating all youths of a particular age as adults without any consideration of the unique developmental and maturity issues that should apply. But all of the recent

U.S. Supreme Court caselaw establishes that juveniles are *not* to be treated as "little adults" but instead are to be dealt with in light of our understanding of the limits of their maturity and culpability. The "automatic decline" statute in this state fails to take into account *any* factors relevant to those issues. As such, the statute is no longer good law, and this Court should so hold.

The remaining question is the remedy. In In re the Personal Restraint Petition of Dalluge, 152 Wn.2d 772, 785, 100 P.3d 279 (2004), the Supreme Court found that, where a person who committed a crime as a juvenile has shown that transfer from juvenile court was in error, "the proper remedy is a de novo hearing in superior court on whether the declination of juvenile jurisdiction would have been appropriate." 152 Wn.2d at 786. If the answer is "yes," the adult convictions are affirmed, but if the answer is "no," the Court found, the defendant is entitled to a retrial in *adult* court, because juvenile court presumably had lost its jurisdiction.

But this is a remedy in name only. Mr. Roberts has already had a trial in adult court - that is the problem. He should have been tried in juvenile court and subjected to the much more lenient disposition he would have gotten in juvenile court. Further, he should have been given the opportunity for rehabilitation, as permitted in the juvenile court system, rather than warehoused in the adult system. See, e.g., Posey, 161 Wn.2d at 645) (noting the "critical distinction between" the adult and criminal systems is that the juvenile system has a policy of "responding to the needs of juvenile offenders," and that this is "rehabilitative in nature,

whereas the [adult] criminal system is punitive").

While there may be some benefits of being tried as a juvenile which are part of being tried in that system, the primary issue here is the adult sentence that Roberts received. And this Court can at least partially remedy the error in treating Roberts as an adult by ordering that Roberts should receive the disposition that he would have been facing in juvenile court, instead of the adult sentence which was imposed. Posey, supra, is instructive. In that case, the defendant was charged with offenses for which automatic decline applied, but convicted of lesser offenses which were not subject to automatic decline. 161 Wn.2d at 647. He was nevertheless tried and sentenced in adult court. By the time the case was decided on appeal, however, the defendant was older than 21, and the juvenile court no longer had jurisdiction. 161 Wn.2d at 657. Because the defendant should have been tried in juvenile court, the Supreme Court ordered the case remanded to juvenile court for further proceedings. Id. On remand, the trial court imposed a juvenile standard range disposition, and the defendant again appealed, this time arguing that *no* court had authority to sentence him because he had already turned 21. State v. Posey (Posey II), 174 Wn.2d 131, 272 P.3d 840 (2012). In rejecting this theory, the majority of the Supreme Court found that the superior court had authority to impose a juvenile sentence on the now-adult defendant, in superior court. 174 Wn.2d at 142. The dissent would have deprived Posey of any remedy whatsoever, believing that, at him to serve the sentence which would have been imposed in that court, instead of the adult sentence he had received. 174 Wn.2d at 142 (Madsen, C.J., dissenting).

It is true that this Court held in 2008 that Posey does not apply to improper initial decline situations. See State v. Meridieth, 144 Wn. App. 47, 180 P.3d 867 (2008), review denied, 165 Wn.2d 1003 (2008). But that decision ignored the fact that, in both situations, the defendant has been deprived of the same thing - the opportunity to have his case decided in a juvenile court, with juvenile-level sentencing as a result. While an adult defendant cannot be tried in juvenile court after the age of 21, he can nevertheless be resentenced in a way consistent with what should have happened. Only in this way is the wrong done to the defendant remedied - not perfectly, but at least in part.

In any event, resentencing is already required under Graham and Miller, because the imposition of adult mandatory, consecutive flat-time enhancements on a juvenile without any consideration of the relevant factors of youth is unconstitutional under those cases and under the Eighth Amendment. For adults, firearm enhancements are mandatory, running consecutive to eachother and all underlying charges and not counting towards earned early release time. Further, a trial court has no discretion at all to decline to impose such enhancements, nor can it run them any way other than as flat-time, running consecutive.

In Graham, the Court held that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." Graham, 560 U.S. at 72-73. That is exactly what the mandatory enhancements here do. Here, the enhancements alone added up to more than 25 *years*. Further, they were imposed without any consideration of Roberts' youthfulness at the time of the crimes. The automatic imposition

of mandatory, flat-time, consecutive terms without any consideration of the mitigating factors of the defendant's youth runs afoul of Graham and of the increasing recognition that juveniles are not just "little adults." See e.g., State v. Lyle, __ N.W.2d ___ (2014 WL 3537026) (Iowa) (7/18/14) (striking mandatory 7 year enhancements under Miller and the state's constitution).

The automatic decline statute is in violation of the Eighth Amendment and due process and Boot is no longer good law. This Court should so hold and should reverse and remand for resentencing.

2. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FIREARM ENHANCEMENTS

Under both the state and federal constitutions, the prosecution is required to prove every essential element of an allegation of a firearm enhancement beyond a reasonable doubt. State v. Pam, 98 Wn.2d 748, 752, 659 P.2d 454 (1983), overruled in part and on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989); State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980). In reviewing the sufficiency of the evidence to prove an enhancement, this Court determines whether, viewed in the light most favorable to the state, a rational trier of fact could have found the facts supporting it, beyond a reasonable doubt. See State v. Myers, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). Enhancements not supported by sufficient evidence must be stricken. See State v. Valdobinos, 122 Wn.2d 270, 282-84, 858 P.2d 199 (1993).

In this case, none of the firearm enhancements were supported by sufficient evidence.

a. Relevant facts

At trial, TPD Detective Brian Vold testified that part of his job was to test firearms "for operability," and that he did so with a firearm submitted for testing in this case. RP 1272-77. As part of that testing, Vold said, "importantly," he checked to make sure the caliber is what officers reported that it was, because he needed to make sure to insert the correct ammunition. RP 1277. He then gives what he called a "function test," which required the officer to "test fire it empty" to make sure the cylinder and barrel line up, in order to make sure it is "safe to shoot." RP 1277-78. Under Washington State Patrol rules, he was supposed to fire three test cartridges with each firearm by first loading them and then seeing if the weapon successfully fires three times. RP 1278.

In this case, Vold said, he was given a .32 caliber revolver. RP 1279. He first said he "test-fired" on May 7. RP 1280. When the prosecutor asked if Vold had tested the firearm "for operability," the officer said, "[i]t fired as its designed to do without any problems." RP 1280.

But Vold admitted that, when the gun was taken into custody, the cartridges which were in it were ".32 auto, which is different than the .32 long or .32 long Colt." RP 1281. Although it was the same caliber, that ammunition was not "an exact match for what this weapon is designed to shoot." RP 1281. The officer put a sample cartridge like the ones found in the gun and was able to put it in the gun and close the cylinder. RP 1282. As a result, his opinion was, the gun "should fire." RP 1282.

Vold did not, however, test that supposition by actually trying to fire the gun with the type of ammunition it had in it during the crimes. RP 1288. Indeed, he said, trying to fire the gun with the ammunition found in it could have been potentially hazardous and could have several effects:

> It could fail to function and not fire at all. Part of that, you wouldn't know until you put the wrong ammunition [in] and pulled the trigger. I've seen film of guns coming apart with the wrong ammunition. I actually inadvertently fired the wrong ammunition in a gun once and it worked just fine.

1288-89. The officer admitted he had never fired the gun in evidence with the type of ammunition it had in it at the time of the incidents. RP 1288-89, 1292.

When asked if he could say with any reasonable certainty that the gun would have fired as it was that night, the detective first said that he could only say he had done some "research" on the topic. RP 1288. He again conceded, however, that one of the hazards of having it loaded with the wrong ammunition as it was at the time of the incidents was that the gun would just fail to fire. RP 1288. Although he could have settled the question by firing it with the same type of ammunition found in the gun, the officer never did so. RP 1288-89.

Ultimately the officer again conceded he could not tell if the gun would have fired as it was the night of the incident. RP 1293.

b. <u>The evidence was insufficient to support the firearm enhancements</u>

That evidence was insufficient to support the firearm enhancements. The Legislature chose to specifically define "firearm" for

the purposes of Title 9.41 RCW. In the "definitions" applicable for the title, contained in RCW 9.41.010, "firearm" is defined as follows:

> (1) "Firearm" means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.

In State v. Pam, supra, the Washington Supreme Court interpreted this language, contained in a previous incarnation of the statute, and declared that, under that statute, it was not enough for the prosecution to prove the presence of an object which appears to be a gun. 98 Wn.2d at 754. Instead, the Court held, "the State must prove the presence of a 'firearm'" as specifically defined in the statute. 98 Wn.2d at 754. Proof that there was a "gun like" object was insufficient without proof that object could be fired. 98 Wn.2d at 754.

Put simply, the Court declared, "a gun-like object which is incapable of being fired is not a 'firearm' under this definition." Id; see also, State v. Mathe, 35 Wn. App. 572, 668 P.2d 599, (1983), affirmed, 102 Wn.2d 537 (1984).

It is true that, in the past, this Court has held that the prosecution was not required to prove that an object is a "firearm" at the time of the crimes. In State v. Faust, 93 Wn. App. 373, 967 P.2d 1284 (1998), the Court addressed whether a firearm sentencing enhancement could be imposed when the gun in question was malfunctioning at the time of the crime. 93 Wn. App. at 376. While admitting that the definition of the statute required that the relevant "device" must be capable of being fired at some point, the Court found the statute "ambiguous" on when that capability must be shown to exist. Id.

Rather than applying the "rule of lenity" to the ambiguity, however, the Court looked at "other sources" regarding the imposition of firearm sentencing enhancements. Id. The Court concluded that the issue was not whether the gun was capable of firing, but was a gun "in fact." 93 Wn. App. at 380-81. In reaching this conclusion, the Court relied on the reasons underlying imposition of weapons enhancements, including that an unloaded or non-functioning gun could still create a reasonable apprehension of harm in another. 93 Wn. App. at 381.

Faust, however, was wrongly decided and did not follow the mandatory rules of statutory construction. Faust declared that, under RCW 9.41.010, an object "need not be loaded or even capable of being fired to be a firearm." 93 Wn. App. at 379. But RCW 9.41.010(1) specifically requires that an object, however "gun-like," is only a firearm if it is "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010. While Faust is correct that the statute is ambiguous about exactly *when* the object must be so capable, there is no ambiguity in the statute about *whether* that capability must exist.

Further, Faust failed to apply the rule of lenity to the question of when a gun must be capable of firing a projectile as required. Once Faust found that there was an ambiguity, it was required under the rule of lenity to apply the interpretation of the statute most favorable to the defendant. See State v. Roberts, 117 Wn.2d 576, 585, 817 P.2d 855 (1991). The most favorable interpretation is to require that the firearm meet the definition of being capable of firing a projectile *at the time of the crime.* By failing to

apply or even discuss the rule of lenity, Faust failed to properly interpret the statute as required.

Reversal is required. Where, as here, the prosecution fails to present sufficient evidence to prove its case, the double jeopardy clauses of the state and federal constitutions prohibit retrial. See State v. Devries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003); State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982), cert. denied, 459 U.S. 842 (1982). Because the state failed to present sufficient evidence to prove the gun met the statutory definition of a "firearm" as required, this Court should reverse and dismiss the firearm enhancements imposed on Roberts in this case.

3. THE CONVICTION FOR THE ROBBERY OF JAMES WRIGHT MUST BE REVERSED BECAUSE ROBERTS WAS DEPRIVED OF HIS RIGHT TO CONFRONT WRIGHT AND COUNSEL WAS INEFFECTIVE

Both the state and federal constitutions guarantee a person accused in a criminal case the right to confront and cross-examine the witnesses against them. See State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998); Sixth Amend.; Art. I, § 22. In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. 2d. 2d 177 (2004), the U.S. Supreme Court departed from its previous holdings on confrontation and held that it is a violation of the defendant's rights to allow the admission of out-of-court testimonial statements at trial if the declarant does not take the stand and the defendant had no prior opportunity for cross-examination.

In this case, Roberts was deprived of his state and federal rights to confrontation when the court admitted an officer's testimony about what

he said James Wright had told him about being robbed, because Wright's statements were testimonial, Wright did not testify and Roberts had no prior opportunity for cross-examination.

Pursuant to RAP 10.1(g), Mr. Roberts hereby adopts and incorporates the arguments made on this issue in codefendant Houston-Sconiers' brief. In addition, Roberts submits the following:

Roberts was also convicted of the robbery of Wright. CP 416. At trial, when the prosecution tried to admit the hearsay from the officer, codefendant's counsel objected on confrontation clause grounds. RP 1023-24, 1045-56, 1968-70. In closing argument, the prosecutor repeatedly relied on the testimonial hearsay the officer had introduced as the evidence supporting a conviction for Roberts for the Wright robbery. RP 2230-31.

The prosecution cannot prove the error was constitutionally harmless in this case. The only way to meet that burden is for the prosecutor to show that *any and every* reasonable jury would necessarily still have convicted even absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied sub nom Washington v. Guloy, 475 U.S. 1020 (1986). This standard is far different than the deferential standard used in cases where the issue is sufficiency of the evidence. See State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002). In those cases, this Court will affirm unless *no* reasonable jury could have convicted, taking the evidence in the light most favorable to the state. See State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546,

165 L. Ed. 2d 466 (2006). In stark contrast, with the constitutional harmless error test, the "overwhelming evidence" test, the Court is *required* to "reverse unless it is convinced - beyond a reasonable doubt - that the constitutional error could not have had *any* effect on the fact-finder's decision to convict. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Here, the prosecution cannot prove that every reasonable jury would necessarily have convicted Roberts of the robbery of Wright without hearing the claims from the officer attributed to Wright. Other than the testimonial statements from Wright, there was no evidence of any such robbery. While Alexander claimed that Houston-Sconiers and Roberts approached a man and took his cell phone, there was no testimony identifying that man or in any way even suggesting that man to have been Wright. While that might be sufficient evidence to support a conviction under the very forgiving "sufficiency" test, the prosecution simply cannot show that every jury hearing only Alexander's testimony would necessarily have convicted Roberts of having robbed Wright. The error was not harmless and this Court should so hold.

To the extent that counsel for Roberts did not clearly join in the confrontation clause objection made by counsel for Houston-Sconiers, counsel was constitutionally ineffective. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70,

127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. It is well-settled that, to be effective, counsel has a duty to be aware of the law relevant to his client's case. See, State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); Strickland, 466 U.S. at 690-91. Crawford clearly mandated that more than simply examining the issue under the rules of evidence was required. Further, the failure to object to admission of testimonial hearsay on confrontation clause grounds is ineffective assistance when the evidence is inadmissible under Crawford and the evidence was crucial to the prosecution's case. State v. Hendrickson, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007), affirmed, 165 Wn.2d 474, 198 P.3d 1029, cert. denied, 557 U.S. 940 (2009). Further, any attorney practicing criminal law was certainly aware of the decision in Crawford, which represented a sea change in our understanding of the proper analysis to be used with hearsay and missing declarants at trial. See, e.g., In re Markel, 154 Wn.2d 262, 271, 111 P.3d 249 (2005) (noting that Crawford was a new rule and excluded evidence previously held admissible). Further, there can be no tactical reason to fail to join in the objection and ensure that your client's rights are preserved. To the extent counsel may be seen to have failed to clearly join in the motion on confrontation clause grounds, he was prejudicially ineffective and this Court should so hold.

4. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE ASSAULT CONVICTION

Due process mandates that the prosecution bear the burden of proving all of the essential elements of a charged crime, beyond a reasonable doubt. See Green, 94 Wn.2d at 221-22; Jackson v. Virginia,

443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). If the prosecution fails to meet that burden, the conviction must be reversed and dismissed. State v. Smith, 155 Wn.2d 496, 504-505, 120 P.3d 559 (2005).

In this case, this Court should reverse and dismiss Roberts' conviction for the assault of Guice, because there was insufficient evidence to support that conviction. Pursuant to RAP 10.1(g), Mr. Roberts hereby adopts and incorporates the arguments made on this issue in codefendant Houston-Sconiers' brief. In addition, Roberts notes that the prosecutor's theory in closing argument was that Houston-Sconiers had put Guice in fear of bodily harm "when that gun was pulled" and his intent was to scare her. RP 2247. Because there was no evidence that Guice felt a reasonable apprehension of imminent bodily injury, the prosecution failed to prove the assault, beyond a reasonable doubt. Roberts was not guilty as either a principal or an accomplice, and this Court should reverse and dismiss the assault conviction and enhancement.

5. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT ANYONE WAS "ARMED" WITH A FIREARM AT THE TIME OF THE ALLEGED CONSPIRACY

Reversal and dismissal of the firearm enhancement for the conspiracy charge is also required, because there was insufficient evidence the young men were "armed" with a firearm at the time of the crime. Pursuant to RAP 10.1(g), Mr. Roberts hereby adopts and incorporates the arguments made on this issue in codefendant Houston-Sconiers' brief. Because the prosecution failed to prove that anyone was "armed" at the time of the commission of the conspiracy, there was insufficient evidence

to support that conviction and this Court should so hold and should reverse and dismiss.

6. THE PROSECUTOR'S FLAGRANT, PREJUDICAL MISCONDUCT COMPELS REVERSAL

As quasi-judicial officers, prosecutors have a duty to ensure that an accused receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to refrain from engaging in conduct at trial which is likely "to produce a wrongful conviction." State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). Because of her role, the words of a prosecutor carry great weight with the jury, so misconduct does not just violate her duties but may also result in deprivation of a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367; 5th Amend.; 6th Amend.; 14th Amend.; Art. I, § 22.

In this case, reversal is required, because the prosecutor committed serious, prejudicial misconduct.

Pursuant to RAP 10.1(g), Mr. Roberts hereby adopts and incorporates the arguments made on this issue in codefendant Houston-Sconiers' brief. In addition, Roberts submits the following:

While much of the prosecutor's denigration of counsel seemed

focused on his former coworker, counsel for Houston-Sconiers, counsel for Roberts was also targeted, with the prosecutor saying that counsel was trying to invoke sympathy and denigrate the prosecutor for acting "very aggressive" with Ms. Bush. RP 2246.

The prosecutor's misconduct in this case compels reversal for Roberts, as well. All of the misconduct went to the heart of the state's case against Roberts. First, the prosecutor repeatedly raised the idea that there might have been other crimes committed by the defendants on Halloween, not only by saying these were only the crimes "we know about" but also noting that there were backpacks in the car which were *not* discussed by any witnesses as having been taken from them, implying they were stolen in other, uncharged crimes. Even though counsel objected, the specter was raised. RP 2350-51. The prosecutor's repeated denigration of counsel and other misconduct could not be deemed "harmless," given the weakness of the evidence in this case.

7. THE SENTENCING COURT ERRED IN FAILING TO COMPLY WITH STATUTORY REQUIREMENTS IN IMPOSING LEGAL FINANCIAL OBLIGATIONS

Like other parts of sentencing in this state, the authority to order a defendant in a criminal case to pay court costs is wholly statutory. See, State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992); RCW 9.94A.760. Where a court acts without statutory authority in ordering a sentence, that issue may be raised for the first time on appeal. See State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999); State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Pursuant to RAP 10.1(g), Mr. Roberts hereby adopts and

incorporates the arguments made on this issue in codefendant Houston-Sconiers' brief. In addition, Roberts submits the following:

Here, the court acted outside its statutory authority in ordering Roberts to pay costs of $1300, $500 of it discretionary costs for attorney fees. CP 237. Under RCW 10.01.160(1), a trial court can order a defendant convicted of a felony to repay court costs as a part of a judgment and sentence, but another subsection of the same statute prohibits a court from entering such an order without considering the defendant's financial situation:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3). No such findings were actually made in relation to the specific facts and circumstances of this case. Instead, in a pre-printed portion of the judgment and sentence, the document provided:

> ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 238-39. Boilerplate language also imposed interest "from the date of the judgment until payment in full." CP 239. But there was no evidence whatsoever to support this bald declaration, apparently pre-printed on *every* judgment and sentence in the county. Such a "boilerplate" finding is not evidence that the trial court actually gave independent thought and consideration to the facts of the particular case. See, e.g., Dependency of

K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011). Indeed, there is not even a "box" next to the preprinted language for the judge to "check off" if she makes the relevant finding in the particular case - the "boilerplate" finding is presumptively entered in *every* case, regardless of the evidence or circumstances involved.

Thus, the "boilerplate" language did not amount to a proper finding by the court sufficient to show compliance with the mandates of RCW 10.01.160(3). See, e.g., State v. Bertrand, 165 Wn. App. 393, 404 n. 13, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014 (2012). And while the Supreme Court has held that there is no constitutional requirement that a court enter formal, specific findings regarding ability to pay, where, as here, an unnecessary finding is made in "boilerplate" language, that "finding" is subject to this Court's scrutiny. See Curry, 118 Wn.2d at 918; Bertrand, 165 Wn. App. at 404 n. 13. The trial court's "boilerplate" "finding," included by virtue of being in the judgment and sentence in every case, was unsupported by the record and wholly improper.

There was thus no true finding or consideration under RCW 10.01.160(3) before imposition of the costs in this case. Further, because interest is already running and accruing against Roberts, he is already suffering from the improper order.

It is important to remember that imposition of costs on indigents must not result in them being punished for that indigency. Thus, recoupment of costs under RCW 10.73.160 was held constitutional in State v. Blank, 131 Wn.2d 230, 237, 930 P.2d 1213 (1997), because the trial court must consider ability to pay and because procedures for

modification of the financial obligation existed for those with the inability to pay. The failure to include a pre-imposition consideration of ability to pay was upheld because the defendant might later acquire the means to pay but could raise an objection to enforcement later based on inability to pay and/or ask for "remission" of those costs later. 131 Wn.2d at 242-43. And the Supreme Court specifically required that "ability to pay (and other financial considerations) must be inquired into before enforced payment or imposition of sanctions for nonpayment" and relied on the remission procedures in concluding that RCW 10.73.160 was not unconstitutional. 131 Wn.2d at 246-47.

Now, however, we know that, in fact, the remission process is broken, as are many of the protections detailed in Blank. The imposition of costs and their substantial impact on the lives of indigents has recently been detailed at length by the ACLU, which discovered that lower courts in this state are requiring people to give up public assistance and other public monies given to cover their basic needs and even imprisoning poor people for failure to pay on such debt. *See* ACLU/Columbia Legal Services Report: Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor (February 2014).[4]

Similarly, a study from the Washington State Minority and Justice Commission examined the impact of such costs, finding that the imposition of them reduces income, worsens credit ratings, makes it more difficult to secure stable house, hinders "efforts to obtain employment,

[4]Available at aclu-wa-org/news/report-exposes-modern-day-debtors-prisons-washington.

education, and occupational training" and has other serious effects "which in turn prevents people from restoring their civil rights" and becoming full members of society. *See* Washington State Minority and Justice Commission, The Assessment and Consequences of Legal Financial Obligations in Washington State (2008).[5]

Further, once such an order is entered, the defendant may be subject to arrest for failure to pay and is immediately liable not only for the amount ordered but also to pay the astronomical interest rate of 12%. See RCW 10.82.090.

Roberts is aware that the Supreme Court has a similar issue before it in State v. Blazina, 174 Wn. App. 906, 301 P.3d 492, review granted, 178 Wn.2d 1010 (2013), in which the defendant did not object to the trial court's failure to comply with the requirements of RCW 10.01.160. He is also aware that this Court recently held, in State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013), that a lower court order imposing legal financial obligations is not "ripe for review" until the prosecution tries to enforce them, as Division One held in State v. Calvin, 176 Wn. App. 1, 302 P.3d 509 (2013) (as amended 10/22/13), review granted, __ Wn.2d __ (2014) (currently stayed pending Blazina).

Regarding the latter issue, however, our courts have repeatedly held that a defendant may challenge sentencing rulings for the first time on appeal when the ruling in question is in violation of statutory requirements. See, e.g., State v. Paine, 69 Wn. App. 873, 884, 850 P.2d

[5]Available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

1369 (1993) ("when a sentencing court acts without statutory authority in imposing a sentence, the error can be addressed for the first time on appeal"). And the Supreme Court has rejected the idea that challenges to sentencing conditions are not "ripe" where, as here, the issues are primarily legal, do not require further factual development and involve a final decision of the court. Bahl, 164 Wn.2d at 751. Here, the order of costs is immediately enforceable as of the day of its entry and starts gathering interest upon that date and the issue is legal - did the trial court act outside its statutory authority in ordering costs? No further factual development or proceedings are required for that question to be answered by this Court.

Notably, in its decision in Calvin, Division One focused solely on whether there was a *factual* issue with the trial court's decision below, finding that the failure to identify such a dispute below had waived the issue on appeal. The issue here, however, is legal - did the trial court act outside its statutory authority in failing to comply with RCW 10.01.060 in imposing the discretionary legal financial obligations. The question of whether a court acts outside its statutory authority is reviewed de novo, as it is a matter of law. See, State v. Burns, 159 Wn. App. 74, 77, 244 P.3d 988 (2010).

RCW 10.01.160(3) mandates that a court "shall not order a defendant to pay costs" unless and until the court finds the defendant "is or will be able to pay them," and further that the court "shall" take the defendant's financial resources and the nature of the financial burden into account before imposing it. Here, the state provided no evidence

establishing Roberts' ability to pay, nor did it ask to have the trial court make any determination under RCW 10.01.160 in asking for imposition of the costs. But Roberts was a juvenile and represented by appointed counsel. This Court should hold that the trial court failed to comply with statutory requirements in imposing the discretionary costs for attorney's fees in this case, and should reverse.

E. CONCLUSION

Treson Roberts was just 16 on Halloween night in 2012. He was subjected to automatic decline, tried as an adult, and given mandatory, back-to-back "flat time" adult enhancements, in violation of Miller, the Eighth Amendment and due process. The evidence against him was thin and the trial was riddled with errors. Roberts' rights to confrontation of Wright were violated. There was insufficient evidence to prove the gun in question actually met the definition of "firearm" and thus the firearm enhancements were unsupported. Roberts was convicted of a second-degree assault even though the state did not prove all the essential elements of that offense. And the prosecutor committed serious, prejudicial, flagrant and ill-intentioned misconduct, telling the jury over defense objection that there could have been other uncharged crimes committed by the defendants that night, denigrating counsel and otherwise depriving Roberts of his right to a fair trial. Even if reversal were not required, the sentencing court's error in imposing costs without complying with the statutory requirements would compel remand for resentencing. This Court should grant Mr. Roberts the relief to which he is entitled.

DATED this 24th day of July, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at pcpatcecf@co.pierce.wa.us, and to codefendant's counsel at sccattorney@yahoo.com, and to Mr. Treson Roberts, DOC 368924, Green Hill School, 375 S.W. 11th Street, Chehalis, WA. 98532.

DATED this 24th day of July, 2014.

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