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NO. 96938-8

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BRANDON DALE BACKSTROM,

Petitioner.

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ANSWER TO PETITION FOR REVIEW

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## **I. STATEMENT OF THE CASE**

The petitioner Brandon Backstrom was convicted of two counts of aggravated first degree murder while armed with a deadly weapon in November 1998. The petitioner was 17 years old at the time he committed the murder. In accordance with former RCW 10.95.030 he was sentenced to two life without parole sentences and 24 months for each of the deadly weapon enhancements. Each of the term of confinement ran consecutive to each other.

The petitioner returned to court in 2017 for re-sentencing pursuant to Washington's Miller-fix statute, RCW 10.95.035. The trial court considered: (1) the transcript from the trial and motion for new trial, (2) the court's decision at sentencing, (3) the decision on the motion for new trial, (4) the decision of the Court of Appeals affirming the conviction, (5) the sentencing memorandums submitted by the defense and the State, (6) the forensic psychological evaluation performed by Dr. Muscatel and his testimony at the hearing, (7) the mitigation report and the testimony from the mitigation specialist, (8) letters submitted and statements made on behalf of the defendant, (9) the victim impact letters, and statements from the victims' family, (10) the defendant's statements

made at the hearing, and (11) argument of counsel. The court also studied the law relative to the re-sentencing hearing. RP 179-80.

Before imposing sentence the court set out its reasoning. It found some of the defendant's personal characteristics mitigated his culpability in the crime while others did not. It weighed the mitigating factors against the nature of the crime and the degree of the defendant's involvement in the crime. It then imposed a minimum term of 42 years confinement on each count of murder to run concurrent. It did not impose any additional time for the sentencing enhancements. RP 181-88.

The defendant appealed the sentence, arguing that the court failed to properly weigh the evidence when coming to its decision. Specifically the defendant argued that the court failed to give the facts supporting the court's finding that the defendant's "brain and accompanying decision making abilities were not fully formed" sufficient weight while giving too much weight to the facts of the case. BOA at 9.

The Court of Appeals affirmed the sentence in an unpublished opinion. It found that the trial court had not abused its discretion at the Miller-fix re-sentencing because it had carefully and thoughtfully considered all of the relevant mitigating factors

related to youth, as well as the circumstances of the crime. Slip Op. at 6-7.

The defendant petitioned for review, arguing the Court of Appeals decision conflicts with State v. Delbosque, 6 Wn. App .2d 407, 430 P.3d 1153 (2018), affirmed, \_\_\_ Wn.2d \_\_\_, 456 P.3d 806 (2020). He also asserts that he raises an issue that is a matter of public interest that this Court should consider. This Court called for an answer to the petition addressing its decision in Delbosque.

## II. ARGUMENT

### A. THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DEFENDANT'S SENTENCE DOES NOT CONFLICT WITH A DECISION OF THIS COURT.

The Supreme Court will accept review of a decision of the Court of Appeals only under the circumstances set out in RAP 13.4(b). This Court may accept review of a decision if it conflicts with another decision of the Court of Appeals or a decision of this Court. RAP 13.4(b)(1), (2). Because this Court has now issued an opinion in Delbosque, the relevant inquiry is whether the Court of Appeals decision conflicts with a decision of this Court. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (A Supreme Court decision is binding on all lower courts).

The Court of Appeals applied the standard for review for personal restraint petitions. Slip Op. at 2-3. That part of the decision conflicts with this Court's holding that a defendant is entitled to a direct appeal from a re-sentencing hearing pursuant to RCW 10.95.035. Delbosque, 456 P.3d at 819, ¶ 59. However that conflict does not warrant review because even under the standard for direct appeal, the Court of Appeals decision affirming the sentence imposed is not in conflict with substantive holding in Delbosque or other cases that have examined the sentencing court's duty when re-sentencing pursuant to the Miller-fix statute.

A threshold question in either a direct appeal or a personal restraint petition alleging constitutional error is whether in fact a constitutional error occurred. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (when considering whether to permit review pursuant to RAP 2.5(a)(3) the court does not presume a constitutional error occurred); In re Yates, 177 Wn.2d 1, 19-23, 296 P.3d 872 (2013) (dismissing the petitioner's Sixth Amendment claim when he failed to make a prima facie case that such a violation occurred). Here the defendant claims a violation of his Eighth Amendment right at re-sentencing on the basis that the trial court did not adequately consider the mitigating qualities of youth

that may have diminished his culpability before imposing sentence. The trial court did consider all of the qualities of youth identified in Miller and the cases which preceded it and the factors set out in RCW 10.95.035. As a result the defendant fails to make the threshold showing of a constitutional violation.

This Court said that at a Miller hearing the court must meaningfully consider how juveniles are different from adults, how those differences apply to the facts of the case, and whether those facts present the uncommon situation where a life-without-parole sentence for a juvenile homicide offender is constitutionally permissible. State v. Ramos, 187 Wn.2d 420, 434–35, 387 P.3d 650, 658 (2017). To do so the court must receive and consider relevant mitigation evidence that bears on the circumstances of the offense and the culpability of the offender. Id. at 443. Factors such as the offender's characteristics of youth, i.e. impetuosity and failure to appreciate risks and consequences, the offender's family and home life, the circumstances of the crime and the offender's degree of participation and whether his participation was the result of peer pressure, and how his youthful characteristics may have impacted his ability to deal with law enforcement, prosecutors, and his attorneys are all relevant to the inquiry. Id. at 444. The court



must also consider the offender's capacity for rehabilitation. Id. at 449. The court must explain its reasoning and how those factors applied in the particular case. Id. at 444.

In DelBosque this Court further refined the requirements for a Miller hearing. When considering the offender's capacity for rehabilitation, the court must take into account whether the offender has shown that he has changed, or is capable of change. Delbosque 456 P.3d at 815, ¶ at 35. In addition, under Washington Constitution Art 1, § 14, a court may not constitutionally sentence a juvenile offender to life without parole. State v. Bassett, 192 Wn.2d 67, 91, 424 P.3d 343 (2018). Thus every court must set a minimum term that is less than life at a Miller resentencing hearing. Delbosque, 456 P.3d at 815, ¶ 36.

The record in this case demonstrates that the trial court conducted a Miller sentencing hearing in accordance with these requirements. Unlike the trial court in Delbosque, here the trial court here had the benefit of appellate court decisions in Ramos and Bassett.<sup>1</sup> The trial court reviewed these authorities and followed the guidelines outlined in those cases for imposing sentence. RP 180.

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<sup>1</sup> Ramos was decided by this Court in January 2017. The Court of Appeals had decided Bassett in April 2017. The Miller hearing in this case was in May 2017.

The court fully explained its reasoning on the record. RP 181-88. It first considered the mitigating circumstances. It considered the defendant's age at the time of the crime. As the court remarked "it was a time at which all the science, and of course our own common sense tells us that his brain and accompanying decision making abilities were not fully formed." RP at 181. The court found that the defendant had demonstrated the capacity for rehabilitation. It noted that the defendant was a "far different" person before the court than he had been 20 years earlier at the time of the crime. Relying on the defense expert's testimony, the court concluded that the defendant's prospects for rehabilitation and reintegration into society were "fairly strong." RP 184. The court found that although the defendant's maintained that he had less responsibility for the murders than his co-defendant, there were practical reasons for maintaining that position. Therefore his position regarding what happened had no real effect on the defendant's prospect for rehabilitation. RP 184-85.

The court also took into account the defendant's lifestyle and family circumstances that provided little guidance or control over his actions. RP at 181-82. It concluded that the role of peer pressure

was a neutral factor since the defendant did as he pleased, and was not subject to anyone's control. RP at 183.

The court also considered the degree of the defendant's participation in the crime. It found that the defendant's participation was much greater than his co-defendant's role. RP at 182-83. It did not find that there was anything that could have precluded the defendant from being responsible for the murders, noting that by all accounts the defendant was an intelligent and capable 17 year old. RP 185.

The court considered how the defendant's youthful characteristics may have impacted his defense. After reviewing the entire transcript of the trial and motion for new trial, the court concluded the defendant had received a vigorous defense. Whatever youthful characteristics the defendant had, they did not affect his defense. RP 183-84.

The court then weighed the circumstances of the crime and the defendant's relative culpability against the mitigating factors. It concluded that the defendant deserved a greater sentence than the co-defendant, who had been sentenced to 29.5 years confinement. RP 186-87. It then set a minimum term that was less than life in prison. RP 188.

Thus the trial court did consider everything that this Court has said it must when conducting a hearing pursuant to RCW 10.95.035. The Court of Appeals acknowledged that when sentencing a juvenile offender who was tried in adult court, this Court has stated that trial courts have complete discretion to weigh the mitigating factors relating to youth. Slip Op. at 4-5, citing State v. Houston-Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). In addition, reviewing courts do not reweigh the evidence. Slip Op. at 5, citing Ramos, 187 Wn.2d at 453. The defendant's appeal challenged this very process, arguing that the court emphasized the facts of the crime too heavily while not giving enough weight to the mitigating factors. However since the trial court followed the procedure for a constitutionally adequate Miller hearing, and reviewing courts do not reweigh the trial court's evaluation of the evidence, the decision of the Court of Appeals does not conflict with any decision of this Court. Review should be denied.

**B. REVIEW IS NOT WARRANTED ON THE BASIS THAT THE DEFENDANT HAS RAISED AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DECIDED BY THIS COURT.**

Alternatively the defendant seeks review under RAP 13.4(b)(4), arguing the petition involves an issue of substantial

public interest which this court should decide. He argues that there are relatively few appellate court decisions that are available to guide trial court's exercise of discretion at hearing conducted pursuant to RCW 10.95.030(3)(b).

An issue of substantial public interest can be one which involves an issue which may recur and for which it is desirable to have an authoritative decision. Randy Reynolds and Associates, Inc. v. Harmon, 193 Wn.2d 143, 152, 437 P.3d 677 (2019) (setting out the factors for considering a moot issue). The State agrees that the requirements for sentencing juvenile offenders in adult court is an issue of substantial public interest. However at this time there are a number of cases this Court has already decided that can guide trial courts in conducting these kinds of hearings. Houston-Sconiers, Ramos, Bassett, and Delbosque provide trial courts adequate guidance. The defendant has not raised the one issue that this Court has yet to decide; how long a sentence must be in order to trigger the Miller requirements. Delbosque, 456 P.3d at 815. Because the issue in this case is one that the Court has already provided guidance on, RAP 13.4(b)(4) does not justify review.

**III. CONCLUSION**

For the foregoing reasons the State asks the Court to deny review.

Respectfully submitted on March 24, 2020.

ADAM CORNELL  
Snohomish County Prosecuting Attorney

By:

A handwritten signature in blue ink that reads "Kathleen Webber". The signature is written in a cursive style with a large initial 'K'.

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IN THE SUPREME COURT  
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STATE OF WASHINGTON

Respondent,

No. 96938-8

BRANDON DALE BACKSTROM,

Petitioner.

DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

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The undersigned certifies that on the 24<sup>th</sup> day of March, 2020, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to the attorney(s) for the Petitioner; Washington Appellate Project; [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org); [nancy@washapp.org](mailto:nancy@washapp.org)

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 24<sup>th</sup> day of March, 2020, at the Snohomish County Office.



Diane K. Kremenich  
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**SNOHOMISH COUNTY PROSECUTOR'S OFFICE**

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