Supreme Court No. 97502-7
(COA No. 77646-1-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SETH FRIENDLY,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Seth Friendly,[1] petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals decision dated July 1, 2019, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Was Seth deprived of his fundamental right to a fair trial and to be convicted for the crime he was accused of committing when the court allowed gang affiliation evidence along with evidence of an uncharged shooting to be heard by the jury?

2. Where the trial court lamented its options for sentencing a child subject to automatic decline and stated it lacked sufficient information to link Seth to studies on youthful culpability, was it an abuse of discretion to fail to seek out sufficient information necessary to make

[1] Because Seth was 16 years old when he was charged with this crime, he will be referred to by his first name. All other juveniles will be referred to by initials.

an informed decision on how youthfulness impacted Seth's culpability, as required by *State v. Houston-Sconiers*[2] and *Miller v. Alabama*[3]?

D. STATEMENT OF THE CASE

1. Seth was one week past his 16th birthday when he was automatically declined to adult court.

Seth was one week past his 16th birthday when the government charged him with assault in the first degree while armed with a firearm. CP 29, 168. The court automatically declined Seth's case to adult court over his objection, based on the nature of the charges and his age. CP 136, 9/9/16 RP 8.[4]

The government alleged Seth had been one of two people who shot at S.L.S.'s car. CP 165-66. S.L.S. said she was leaving her boyfriend's house on Casino Road in Everett when two people began running towards her car, firing handguns. RP 238. She believed one of them was Seth, a fellow student at Mariner High School. RP 232. S.L.S. was not injured, but one bullet hit her car. RP 161. Spent cartridges were found, but no slugs were recovered. RP 170.

[2] 188 Wn.2d 1, 391 P.3d 409 (2017).

[3] 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012).

[4] The transcripts are largely sequential, with the exception of the transcript dated 9/9/16 and 10/19/17. When referring to these transcripts, the date will be included. Otherwise, references to the transcript will be by page number.

2. The trial court allowed the government to tell the jury Seth was affiliated with a street gang.

S.L.S. was dating an older man who was a member of a local gang known as "LAC," the "Los Angeles Crazy Lunatics Sureños," or the "Los Angeles Crazies." RP 234, 235, 331. She believed Seth was a member of a rival gang known as "DSM" or "Don't Stop Mobbing." RP 233, 330. She thought his neck tattoo identified him as a gang member. RP 233. At trial, she testified the gangs were rivals. RP 235. The lead detective testified both the "LAC" gang and the "DSM" gang wore the color blue. RP 331. He did not testify they were rival gangs.

The government moved to introduce evidence of Seth's involvement in a gang to establish motive and identity. RP 35. Seth objected to the government's motion, recognizing that calling him a gang member was the equivalent to "guilt by association." *Id*. The court acknowledged jurors have an "inherent" negative reaction to the term "gang." RP 36. The court found the government established a link between the two incidents, finding that the only significant contact between the two incidents was gang affiliation. RP 37. The court then found the probative value of the evidence outweighed its prejudicial effect. *Id*. The jury was never instructed on the limited purposes for how this evidence could be used.

3. The trial court allowed the government to tell the jury Seth had been involved in an uncharged second shooting.

The government alleged Seth was at the scene of a second shooting that occurred days later, which was never charged. CP 168-69. On that day, shots were fired near S.L.S. RP 172, 205, 279. The police conducted a search and ultimately arrested four boys in a nearby golf course, including Seth. RP 207-08. Two boys were arrested together, while Seth was arrested separately. RP 283, 286. A fourth boy was then arrested carrying two guns, including a .45 caliber handgun. RP 317.

The government moved to allow the jury to hear evidence of this second shooting, even though Seth was charged with no crimes related to the incident. Sup CP, sub. no. 49 (pg. 9). The court allowed the jury to hear evidence of this second uncharged crime over Seth's objection. RP 34. The court never instructed the jury on the limited purposes for which this evidence could be used.

4. Despite his youthfulness, the trial court sentenced Seth within the standard range and imposed the maximum time allowed for the firearm enhancement.

Seth was convicted of assault in the first degree while armed with a firearm. RP 575. He asked the court to consider his youthfulness and sentence him to his 21st birthday, which would allow ample time for rehabilitation in a juvenile facility. 10/19/17 RP 38. Dr. Ron

Roesch, an expert on juvenile brain development and culpability, evaluated Seth and testified at sentencing. 10/19/17 RP 33. He recognized the great achievements Seth had made since his arrest. Seth had developed positive relationships with detention staff, done well in school, and demonstrated a growing maturity. 10/19/17 RP 34. Dr. Roesch believed incarcerating Seth until he was 21 would allow for continued maturation and rehabilitation. 10/19/17 RP 38. If sentenced beyond 21, Seth would be incarcerated in an adult prison, which would have negative consequences for his rehabilitation. 10/19/17 RP 37.

The court declined to sentence Seth as recommended by the expert. The court said it did not have enough information to determine whether the studies on juvenile culpability applied to Seth, and did not have sufficient information to determine how the information on how impulse control affected Seth's culpability. 10/19/17 RP 52. The court sentenced Seth to the standard range and to the maximum firearm enhancement allowed, for a total of 153 months. 10/19/17 RP 53.

E. ARGUMENT

1. Review should be granted on whether Seth was deprived of his right to a fair trial by the court's error in allowing the jury to hear inflammatory gang evidence and about an uncharged shooting.

This Court should take review of whether the trial court abused its discretion when it allowed the jury to hear evidence Seth belonged to a gang and of a second uncharged shooting. App. at 7-8. Seth was entitled to the protections of the constitution forbidding the government from convicting a person based on character, but was denied those protections when the government relied on these other acts to convict him of the charged crime. Wash. Const. art. I, § 22. This question is reviewable because the Court of Appeals decision is in conflict with others of this Court, is a significant question of constitutional law, and involved an issue of substantial importance. RAP 13.4(b).

a. The prejudicial effect of generalized gang-evidence prevented Seth from receiving a fair trial.

Prior act evidence is only admissible where it is relevant, its probative value outweighs its prejudicial effect. In *State v. DeLeon*, this Court "urged courts to use caution when considering generalized gang evidence. Such evidence is often highly prejudicial, and must be tightly constrained to comply with the Rules of Evidence." 185 Wn.2d 478,

491, 374 P.3d 95 (2016). In *DeLeon*, the co-defendants were charged with first-degree assault while armed with a firearm. *Id*. at 481-82. The government's theory was that the shooting was gang-related, as the government believed the shooting was an act of retaliation by a Norteño-affiliated gang against a rival Sureño-affiliated gang. *Id*. at 482. Like here, the prosecutor in *DeLeon* offered the evidence to establish a motive. *Id*. The trial court permitted the evidence, along with testimony from a gang expert. *Id*.

This Court held that the generalized gang evidence was irrelevant and prejudicial. *Id*. at 489. This Court urged trial courts to use caution when considering generalized gang evidence as it is "often highly prejudicial, and must be tightly constrained to comply with the Rules of Evidence." *Id*. at 490. Reversal was also required because of the use of the defendant's involuntary statements, so this Court did not reach the issue of whether reversal was required on its own for the misuse of generalized gang testimony. *Id*.

In *State v. Arredondo*, this Court again stated courts must guard against using "motive and intent as 'magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.'" 188 Wn.2d 244, 259, 394 P.3d 348

(2017) (quoting *State v. Saltarelli*, 98 Wn.2d 358, 364, 655 P.2d 697 (1982)). In a split-decision, this Court held that the trial court did not commit reversible error when it allowed the jury to hear gang-affiliation evidence at Mr. Arredondo's trial. *Id*. at 271-72.

Unlike *Arredondo*, the evidence that this shooting was gang-related was minimal. While S.L.S. testified the DSM and LAC gangs were rivals to each other, she did not explain why there was a rivalry or what she meant, except to say the two gangs both liked blue clothing. RP 235, 251. Different from the expert in *Arredondo*, the detective, in this case, did not testify that the gangs were rivals or that the shooting was related to any past criminal act. *See* RP 331. And while the evidence in *Arredondo* showed a history for why the fatal shooting occurred, no such evidence was ever proffered in Seth's case.

The minimal evidence of gang affiliation, in this case, puts the Court of Appeals decision in conflict with this Court's decision in *DeLeon*. 185 Wn.2d at 489. The generalized gang evidence permitted the jury to speculate about motive, where no gang-related motive existed. Instead, it permitted the jury the made the "forbidden inference" that Seth was part of a pervasive gang problem and was a

criminal-type who had a propensity to commit crimes. *Id*. at 490; *see also State v. Mee*, 168 Wn. App. 144, 159, 275 P.3d 1192 (2012).

b. Evidence of an uncharged shooting should not have been admitted because of the likelihood it was used as propensity evidence and not for a proper purpose.

When jurors hear of prior unlawful conduct that is not charged, they may "feel that the defendant should be punished somehow, for a broad swath of general criminal wrongdoing." *United States v. Bradley*, 5 F.3d 1317, 1321 (9th Cir. 1993). Because substantial prejudice is inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative value. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). Evidence Seth had been arrested near where a second shooting took place did not meet this standard.

While the government sought to introduce evidence of the second shooting to establish intent for the first incident, the question of intent was never at issue. No one contested someone shot at S.L.S. while she was driving her car. Instead, the defense focused on whether Seth was one of the assailants. Given the highly prejudicial nature of the evidence, it should have been excluded. Instead, in a case where intent was not at issue, the prosecution's assertion that evidence of the second shooting was necessary to establish motive and intent became

"magic passwords" to allowing the jury to hear improper evidence at Seth's trial. *See Saltarelli*, 98 Wn.2d at 364.

c. The Court's error in allowing the jury to hear improper evidence was compounded by the failure to give a limiting instruction on its use.

While the Court of Appeals did not find the failure to instruct the jury on the limited use of prior act evidence, this Court has maintained that gang-affiliation evidence may only be admitted when it is tightly constrained by the Rules of Evidence. *DeLeon*, 185 Wn.2d at 491, cf., App. at 8. Consistently, this Court has held that in order for evidence of prior wrongdoings to be admitted, an ER 404(b) analysis must be conducted on the record and, if the evidence is admitted, "a limiting instruction is required." *Arredondo*, 188 Wn.2d at 257 (quoting *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)).

In affirming the conviction in *Arredondo*, this Court held that the trial court "reasonably applied each prong on the record and issued the appropriate limiting instruction." *Arredondo*, 188 Wn.2d at 257 (emphasis added). This Court has also held that the trial court is not required to issue a limiting instruction absent a request by the parties. *State v. Russell*, 171 Wn.2d 118, 124, 249 P.3d 604 (2011). While it is not an independent error that the trial court did not give such an

instruction here, the impact of the lack of an instruction should not be ignored. Without an instruction, the error in allowing the jury to hear the improperly admitted evidence was compounded, further depriving Seth of his right to a fair trial.

d. Review should be granted on whether the prosecution's use of prior act evidence prevented Seth from receiving a fair trial.

Review should be granted on whether the use of gang-affiliation evidence and evidence of a second uncharged shooting deprived Seth of his right to a fair trial. The Court of Appeals decision is in conflict with this Court's decisions on an issue that is a significant question of constitutional law and involves an issue of substantial importance. RAP 13.4(b). Seth asks this Court to accept review.

2. Review should be granted on whether Seth is entitled to resentencing because of the trial court's error in failing to adequately consider the role youthfulness plays in juvenile culpability.

This Court should accept review of whether Seth is entitled to resentencing, where the trial court stated it had inadequate information to make an informed decision on how youthfulness impacted Seth's culpability. 10/19/17 RP 52. When sentencing a youth to a term of years that is nearly as long as he has been alive, the solution is not to defer to the adult standard range, but to seek more information.

This Court should accept review of whether the failure to afford Seth the necessary process needed to determine the role youthfulness played in his actions requires reversal. This question is reviewable because the Court of Appeals decision is in conflict with others of this Court, is a significant question of constitutional law, and involved an issue of substantial importance. RAP 13.4(b).

a. When a youth is sentenced in adult court, the Eighth Amendment requires sentencing courts to determine how the mitigating qualities of youth effect culpability.

This Court has held that trial courts are required to consider a juvenile defendant's youth at sentencing. *Houston-Sconiers*, 188 Wn.2d at 8-9. "Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." *Id.* at 21. In its decision, the Court of Appeals determined that the trial court did not abuse its discretion when it sentenced Seth within the standard range, holding that the failure to seek the information it needed to consider the mitigating factors of youth was not an abuse of discretion. App. at 13.

This is in clear conflict with the decisions of this Court. Instead, this Court has provided guidance to trial courts on the requirement to

consider youthfulness at sentencing. *Houston–Sconiers*, 188 Wn.2d at 23. Sentencing courts must consider mitigating circumstances of youth, factors including nature of the juvenile's surrounding environment, and how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated. *Id*. The Eighth Amendment and criminal procedure laws require courts to take youthfulness into account, sentencing courts must have absolute discretion when sentencing a youth. *Id*. at 9. This is premised on the principle that juveniles are developmentally different from adults and that these differences are relevant to the juvenile's constitutional rights. *State v. Watkins*, 191 Wn.2d 530, 544, 423 P.3d 830 (2018). Any constitutional analysis weighing the culpability or decision-making skills of a youthful defendant must take youthfulness into account. *Id*. It is insufficient to proceed with sentencing without the ability to consider the factors of youthfulness when a court sentences a youth.

b. The trial court failed to adequately consider Seth's youthfulness at sentencing.

Nonetheless, the Court of Appeals held that the trial court did not err at sentencing. App. at 12. For while this Court has held it is mandatory to consider how youthful culpability informs the fairness of an adult sentence, the Court of Appeals determined it is sufficient that

the trial court knew it had to consider Seth's youthfulness and could exercise its discretion in departing from the standard range. App. at 13.

For reasons it did not explain, the trial court proceeded with sentencing, even though it claimed it had insufficient information to determine how youthfulness affected culpability. App. 12-13. The Court of Appeals determined the trial court is under no authority to do more. *Id*. at 13. This is in error. The obligations of the trial court when sentencing a child to an adult sentence are not only to know it can depart from the standard range but to apply the factors of youthfulness. *Houston–Sconiers*, 188 Wn.2d at 23 (quoting *Miller*, 567 U.S. at 477).

This Court has remanded for a new sentencing hearing when the Court of Appeals has upheld adult sentences for youth where youthful culpability was not properly considered. In *Houston-Sconiers*, this Court remanded for resentencing where the trial court believed it lacked authority to impose a sentence below the standard range for sentencing enhancements. *Houston-Sconiers*, 188 Wn.2d at 9. In *State v. Gilbert*, this Court ordered remand where the trial court failed to apply the factors of youthful culpability to all convictions, instead of focusing only on the life without parole sentence. 193 Wn.2d 169, 171, 438 P.3d 133 (2019). In *State v. Bassett*, this court required remand

where the trial court on resentencing imposed a minimum term of life, after considering the factors of youth. 192 Wn.2d 67, 91, 428 P.3d 343 (2018). Like these cases, the Court of Appeals holding in Seth's case is in conflict with the clear mandate from this Court that youthfulness must be considered at sentencing. Review should be granted.

c. Many of the factors of youth this Court has identified as those requiring a new sentencing hearing were present in Seth's case.

Seth was sentenced to a term of years equal to three-quarters of his life. 10/19/17 RP 29, 53. At his sentencing hearing, the court heard considerable expert opinion about why sentencing Seth to his 21st birthday was right. 10/19/17 RP 32. In fact, mitigating circumstances related to the defendant's youth—including "age and its 'hallmark features,' such as the juvenile's 'immaturity, impetuosity, and failure to appreciate risks and consequences'" must be considered at trial. *Houston-Sconiers*, 188 Wn.2d at 23 (quoting *Miller*, 567 U.S. at 477). The failure to do so requires remand for a new sentencing hearing. *Id*.

i. <u>The crimes Seth committed were immature and impetuous acts, committed without appreciating the risks and consequences.</u>

Seth's crimes were they type frequently committed by juveniles. *See, e.g., State v. Solis-Diaz*, 187 Wn.2d 535, 537, 387 P.3d 703

(2017); *DeLeon*, 185 Wn.2d at 481; *State v. Saenz*, 175 Wn.2d 167, 170, 283 P.3d 1094 (2012). While a serious crime, it was the kind of behavior juveniles do not appreciate the serious consequences of, particularly where there are no injuries.

Seth's behavior after the crime occurred highlights this factor. After the assault occurred, he waited for his girlfriend's mother to pick him up from the side of the road to take him home, where he stayed until he was finally arrested. RP 467. He then spent several days at their house. RP 469. Likewise, there appeared to be no apparent plan to avoid detection when the second uncharged assault occurred. Nothing about either crime shows any level of sophistication, which is exactly what would be expected when youth commit crimes.

ii. Seth's environment, including family circumstances and peer pressure, were negative impacts on Seth's behavior.

Seth's environment also highlights why a sentence below the standard range should have been imposed. Seth's childhood was marked by "severe to extreme emotional abuse." CP 36. Seth and his mother were victims of domestic violence. *Id*. His father beat and strangled him. *Id*. at 26. Seth also witnessed his mother's brutalization, which resulted in severe injuries. *Id*. at 36. Seth lived in shelters at various times as a child, in order to avoid his father's wrath. *Id*.

These circumstances left Seth vulnerable to the influence of other peers. This is evidenced by his lack of criminal history and then his decision to commit these acts with other gang-related youth. Other than a dismissed charge for malicious mischief, Seth had no prior arrest record and had no previous convictions. CP 38. Once separated from his peers while in custody, Seth did extremely well. He recognized the negative effects of his gang. *Id*. at 36. He discussed with staff how to create positive outlooks and not to be angry at everything. *Id*. at 37.

iii. Seth's youth impacted his legal defenses and demonstrated his capacity for change.

Seth stopped attending school regularly in 7th grade. CP 37. He was diagnosed with ADHD in the 3rd grade but only received treatment for it for a short while before his mother took him off his prescribed medication. *Id*. He tried to return to school in 10th grade and was doing well until his school asked him to leave because of gang affiliations. *Id*.

In detention, Seth became a good student, progressing in both math and reading. CP 37. He completed certificates in career skills, Toastmasters, pro-social skills training, and domestic violence prevention. *Id*. He read at a 12th-grade level and hoped to go to college. *Id*. He was on the highest privilege level. *Id*. at 38. Seth demonstrated his intelligent and capacity to do well. *Id*. at 37.

Seth was amenable to treatment and would have benefitted from the interventions of the juvenile detention. 10/19/17 RP 38. Programs developed at Green Hill School, including one addressing gangs, were specifically aimed at him. CP 44. Holding Seth beyond his 21st birthday would increase his likelihood to re-offend as young offenders who are sent to prison are particularly vulnerable. *Id*. at 37. They are five times more likely to be sexually assaulted, twice as likely to be beaten by prison staff, and 50% more likely to be attacked with a weapon than persons serving time in a juvenile institution. CP 47. Because of this, the juvenile expert believed adult incarceration was dangerous to Seth and the community. 10/19/17 RP 37, 39.

When Seth spoke at the sentencing, he demonstrated his capacity for change. He told the court:

> I don't want my family to feel that they're missing a hole in them because I'm not there, but I also don't want people to be scared of me in my community. I know they say I'm scary and stuff, but if you actually talk to some of the people in my community, they say I'm not even -- I'm not what they think.

Id. He concluded by saying "I just want to do something with my life that doesn't involve hurting people, you know." 10/17/19 RP 47.

d. *The trial court failed to properly account for Seth's youthfulness, asserting it lacked sufficient information.*

The trial court was moved by Seth's statement. It stated the great difficulty it had when sentencing youth. 10/17/19 RP 48. It recognized the criminal justice system's primary function was "just warehousing for punishment for crimes." *Id*. at 49. The court even recognized Seth was a nice kid with a good personality. *Id*. at 51. Nevertheless, the court sentenced Seth to the standard range and the total firearm enhancement. 10/19/17 RP 53.

e. Review should be granted to address the trial court's failure to properly assess how youthfulness impacted Seth's culpability.

A court abuses its discretion when it fails to conduct a meaningful and individualized inquiry into whether youthfulness should mitigate a young person's sentence. Solis-Diaz, 187 Wn.2d at 539 (citing *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015).

The sentencing court made clear it lacked the information it needed to make an informed decision on Seth's culpability. 10/19/17 RP 52. It stated it needed additional information on how the juvenile studies applied to Seth and how they impacted his impulse control. *Id*. When sentencing a youth to a term that is nearly as long as he has been alive, the solution to not having enough information is not to defer to

the standard range, but to seek more data. The failure to do so is an abuse of discretion.

The question of how juveniles who have been convicted of crimes should be treated is never to be taken lightly. *Miller*, 567 U.S. at 471-72. The sentence imposed on Seth will ensure he spends years in an adult prison. The Court abused its discretion when it failed to properly consider youthfulness at sentencing. *Solis-Diaz*, 187 Wn.2d at 539. This Court should accept review to correct the error of the Court of Appeals in affirming Seth's sentence and to hold that before sentencing a youth to an adult sentence, the sentencing court to have the time and data it needs to properly consider the role youthfulness played in Seth's culpability. *See Houston-Sconiers*, 188 Wn.2d at 24.

F. CONCLUSION

Based on the foregoing, petitioner Seth Friendly respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 31st day of July 2019.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

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FILED
7/1/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SETH LAMAR FRIENDLY, Appellant.	No. 77646-1-I DIVISION ONE UNPUBLISHED OPINION FILED: July 1, 2019

CHUN, J. — The State charged Seth Friendly with one count of first degree assault with a firearm. Because Friendly was over 16 years old and charged with a serious violent offense, his case was automatically declined to adult court. After a jury convicted him, the court sentenced Friendly to the low-end of the standard range (93 months) plus 60 months for the firearm enhancement.

Friendly appeals, claiming the trial court erred by: (1) not providing him with a decline hearing before transferring his case to adult court, (2) denying his motion to dismiss under CrR 8.3(b) for governmental misconduct, (3) violating ER 404(b) by admitting propensity evidence, and (4) abusing its discretion by failing to consider his youthfulness when sentencing him. Because the trial court did not err, we affirm.

I.
BACKGROUND

A. The Shootings

Around 10 p.m. on June 6, 2016, S.L.S. left the apartment of her friend, Mario Jimenez. Jimenez belonged to the LAC gang. S.L.S. understood the LAC

gang to have a rivalry with the DSM gang.

As S.L.S. began driving out of the apartment complex, she saw two boys running toward her from the opposite side of the street. The boys began shooting at her car. S.L.S. recognized one of the boys as Friendly because she had gone to high school with him. Friendly has "DSM" tattooed on his neck. S.L.S. put her head down and accelerated. After driving away, S.L.S. saw a police officer, Sergeant Adam Fortney, and flagged him down. S.L.S. told Sergeant Fortney about the shooting.

Officer Ryan Hanks received a call to respond to shots fired. When he arrived at the scene, another officer informed him that they had found five .45 shell casings. The police had also found fresh, blue-colored spray painting on a nearby electrical box. Because of the color and content of the spray painting, the police believed it was DSM gang graffiti.

Five days later, on June 11, 2016, police responded to another report of a shooting outside of Jimenez's apartment. Police located six shell casings. While driving to his containment position, Sergeant Joseph Woods saw four individuals walking. One turned around and saw Sergeant Woods driving toward them. All four individuals then began to run. Police arrested three of them, including Friendly, at a nearby golf course. Police separately arrested the fourth individual, who had a .45 caliber pistol. Subsequent testing of the shell casings determined that the pistol had fired the rounds from both the June 6 and June 11 shootings.

B. Trial

Friendly had turned 16 years old on May 29, 2016. Seventeen days later, on June 15, 2016, the State charged him with one count of first degree assault while armed with a firearm. The charge related to the June 6 shooting involving S.L.S.

Because Friendly was 16 years old and the State charged him with a serious violent offense, his case was automatically declined to adult court. Friendly filed a Motion Objecting to Auto-Declination, but the trial court denied the motion.

Shortly before the trial began, Friendly received a forensic report from the State that the shell casings from the June 6 and June 11 shootings matched each other and the .45 caliber pistol recovered after the June 11 shooting. Friendly claimed that because he received the report so late, he did not have enough time to hire an expert to review the results. The court continued the trial over Friendly's objection.

On June 5, 2017, during motions in limine, Friendly moved to dismiss his case under CrR 8.3(b). He argued the State's delay in providing the forensic report constituted governmental misconduct and prejudiced him by forcing a choice between his speedy trial right and being prepared for trial. The court denied his motion. The State then moved to admit evidence of Friendly's involvement in both the DSM gang and the June 11 shooting. The court allowed testimony on both issues.

The jury convicted Friendly as charged on June 8, 2017. At the

sentencing hearing held on October 19, 2017, Friendly presented an expert who recommended juvenile detention until his 21st birthday. The expert indicated that juvenile detention provided Friendly with the best chance at rehabilitation. The court declined to follow the expert's recommendation. Instead, it sentenced Friendly to the low-end of the standard range (93 months) with a 60-month firearm enhancement, for a total of 153 months.

Friendly appeals.

II.
ANALYSIS

A. Automatic Decline

Friendly first argues the trial court violated his right to due process by refusing to provide him with a hearing before automatically declining his case to adult court. In his opening brief, Friendly asks us to reject the Washington Supreme Court's 1996 decision in In re Boot, which held that automatic decline is constitutional. 130 Wn.2d 553, 570-71, 925 P.2d 964 (1996). Friendly argues that because of subsequent developments in the United States Supreme Court's case law, "Boot stands in tension with current jurisprudence on how youth must be treated when they are charged with crimes." Friendly also offers several policy arguments, including better protection of youth and lower recidivism rates in the juvenile system.

After Friendly submitted his opening brief, the Washington Supreme Court revisited whether automatic decline violates a juvenile's right to due process. State v. Watkins, 191 Wn.2d 530, 423 P.3d 830 (2018). A majority of the Court

reaffirmed its holding that "automatic decline does not violate due process because juveniles do not have a constitutional right to be tried in juvenile court." Watkins, 191 Wn.2d at 533.

In his reply brief, Friendly acknowledges Watkins but asks us to "reexamine this issue, relying on the arguments made in his opening brief." App. Reply at 1. But we are bound by majority opinions of the Supreme Court. See In re Pers. Restraint of Kiet Hoang Le, 122 Wn. App. 816, 820, 95 P.3d 1254 (2004). Because Friendly provides no legal reason to do otherwise, we adhere to the holding in Watkins. Accordingly, we determine that automatic decline is constitutional.

B. 404(b) Evidence

Friendly next contends the trial court violated ER 404(b) by admitting evidence that he had a gang affiliation and that he had been involved in a second, uncharged shooting. The State argues the court properly admitted the evidence to show motive. We agree with the State.

1. Legal Standards

We review a trial court's decision to admit or exclude evidence under ER 404(b) for an abuse of discretion. State v. Arredondo, 188 Wn.2d 244, 256, 394 P.3d 348 (2017). A trial court abuses its discretion if no other reasonable trial court would have made the same ruling, or if it based its ruling on untenable grounds. Arredondo, 188 Wn.2d at 256.

Under ER 404(b), courts may not admit evidence of a defendant's prior acts to show propensity, but may admit it for certain other purposes:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before admitting evidence of a past act, ER 404(b) requires the court to conduct a four-part analysis where it must:

> "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the [permissible] purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect."

Arredondo, 188 Wn.2d at 257 (alteration in original) (internal quotation marks omitted) (quoting State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012)). If the trial court admits the evidence, it must give a limiting instruction. Arredondo, 188 Wn.2d at 257.

Friendly claims the trial court erred under the third and fourth prongs when it admitted evidence of his gang affiliation and his involvement in the second shooting.

2. Gang Affiliation

Friendly argues the gang affiliation evidence did not demonstrate motive because S.L.S. identified him and "[t]here was no question this shooting was an intentional act." But this argument misses the point. The State's theory of the case was that Friendly, a member of the DSM gang, shot at S.L.S. because she had befriended a member of the rival LAC gang. The State used the evidence of gang affiliation to show that Friendly, as a member of the DSM gang, disliked people that associated with the LAC gang. See State v. Yarbrough, 151 Wn.

App. 66, 84, 210 P.3d 1029 (2009); see also Arredondo, 188 Wn.2d at 259 (upholding admission of evidence that defendant belonged to the Norteño gang to show motive and intent because it demonstrated his "animosity toward people who are of the Sureño persuasion"). Thus, the evidence helped establish Friendly's motive for shooting at S.L.S.

Additionally, this evidence was highly probative as to the State's theory of the case. Without the rivalry between the two gangs, Friendly seemingly had no motive for shooting at S.L.S., whom he apparently did not know well. That the State also presented other evidence that the shooting was gang-related—namely that Friendly had a DSM tattoo on his neck, DSM graffiti was found at the scene, and S.L.S. had been leaving the home of an LAC gang member—lessened the prejudicial impact of the evidence. Accordingly, we find that the gang affiliation evidence, on balance, was not unduly prejudicial. See Yarbrough, 151 Wn. App. at 85. The trial court did not abuse its discretion by admitting it.

3. Involvement in Second Shooting

Friendly also claims the trial court erred by admitting evidence of his involvement in the second shooting. He says the evidence is not probative of intent because "S.L.S. testified that she saw someone shooting directly at her." This argument again fails to recognize that the evidence seeks to demonstrate motive rather than intent. Under ER 404(b), a court may admit evidence of an attack by a defendant towards a group of people if the evidence demonstrates an ill feeling between the two. Arredondo, 188 Wn.2d at 260. Friendly's involvement in the second shooting demonstrates his animosity toward people

associated with the LAC gang, and thus goes to his motive for the first shooting.

And again, the evidence's probative value outweighed its prejudicial effect. The evidence was highly probative to show motive because it demonstrated on-going violence and a rivalry between Friendly and the LAC gang. This evidence also had increased probative value because the shell casings discovered at each scene linked the two crimes. The trial court did not abuse its discretion by admitting the evidence.

4. Limiting Instruction

Friendly asserts that even if the court properly admitted the evidence under 404(b), it erred by failing to give limiting instructions. But neither party requested a limiting instruction. The Washington Supreme Court has held that there is no "affirmative duty on the part of the trial court to sua sponte give a limiting instruction in the context of ER 404(b) evidence." State v. Russell, 171 Wn.2d 118, 123, 249 P.3d 604 (2011). Thus, we reject this argument.

C. Governmental Misconduct

Friendly next contends that the trial court should have dismissed the case for governmental misconduct because the State failed to provide him with the forensic report linking the shell casings from the June 6 and June 11 shootings until days before the trial. The State claims the court properly denied Friendly's motion to dismiss on this ground. We conclude the trial court did not manifestly abuse its discretion by denying the motion.

We review a trial court's decision on whether to dismiss charges for a manifest abuse of discretion. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d

587 (1997). "A decision is 'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable [judge] would take,' and arrives at a decision 'outside the range of acceptable choices.'" State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Lewis, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990); State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

CrR 8.3(b) permits a trial court to dismiss a criminal case due to arbitrary action or governmental misconduct that prejudiced the defendant:

> (b) On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

The Washington Supreme Court has interpreted CrR 8.3(b) to require a two-pronged showing. See State v. Sherman, 59 Wn. App. 763, 767, 801 P.2d 274 (1990). First, the defendant must show arbitrary action or governmental misconduct. Sherman, 59 Wn. App. at 767. Governmental misconduct includes "simple mismanagement," and does not need to be of an "evil or dishonest nature." Michielli, 132 Wn.2d at 239. Second, "[t]he trial court should grant dismissal only if the defendant is prejudiced to the extent of a denial of [their] right to a fair trial." State v. Teems, 89 Wn. App. 385, 388, 948 P.2d 1336 (1997).

Here, Friendly claims the State committed governmental misconduct because it withheld a forensic report for 82 days. Though the lab had conducted

the testing in January 2017, the State did not know that the report existed until early April. A different prosecutor took over the case only a week before trial, which began on April 10, 2017. Upon reviewing the discovery, she realized she did not have a forensic report for the shell casings and asked the Everett police if they had sent the casings for testing. The prosecutor stated that when she learned they had, she notified defense counsel and made her best effort to obtain the report as expeditiously as possible. The State believes it did not initially receive the report because the June 6 and June 11 shootings were listed under different cause numbers.

After hearing arguments, the court stated that the affidavit of probable cause "clearly speaks to both events, June 6th and June 11th." It noted the State had also discussed the connection between the two shootings when it objected to Friendly's request for a hearing on automatic decline. Defense counsel had represented Friendly since his case began, and thus presumably knew of the association drawn between the shootings. Because of these previous discussions of the relationship between the two shootings, the court said that it "really [didn't] see a violation of, frankly, any discovery or court rules or anything on behalf of the State. This thing was out there. It was known. It's not a surprise how the State was going to use it." The court then continued the case over Friendly's objection, so that he could prepare and hire an expert.

The record reflects that, in denying Friendly's motion to dismiss, the trial court considered the totality of the circumstances. The State provided reasonable justifications for the delay in providing the report and had made clear

for some time that the prosecution had intended to link the two shootings at trial. Therefore, the court's determination that the State did not commit governmental misconduct was not outside the range of acceptable choices and does not constitute a manifest abuse of discretion. See Rohrich, 149 Wn.2d at 654.

D. Sentencing

Finally, Friendly contends the trial court abused its discretion by not considering his youthfulness when sentencing him. The State argues that this court cannot review the sentence because it was within the standard range and the court did not commit any legal errors. We determine that this case does not require remand for resentencing.

At sentencing, Friendly faced a standard range of 93 to 123 months plus a 60-month firearm enhancement. The State asked the court to sentence Friendly to 123 months—the high end of the standard range—which, with the firearm enhancement, would result in a total sentence of 183 months. The defense requested that the court sentence Friendly to juvenile detention until his 21st birthday. The court sentenced Friendly to 93 months—the low end of the standard range—plus the firearm enhancement, for a total of 153 months in adult prison. Friendly claims the trial court abused its discretion at his sentencing by failing to adequately consider the role youthfulness plays in juvenile culpability. The record, however, does not support his contention.

At sentencing, the defense presented expert testimony that trauma from domestic violence caused Friendly to have a significant distrust of adults. Additionally, the expert noted that Friendly had behaved well during his detention

and would benefit from one of the treatment programs offered in the juvenile system. Despite this testimony, the court decided to sentence Friendly to the low-end of the standard range (93 months) plus 60 months for the firearm enhancement. In explaining its sentence, the court discussed the defense's evidence and Friendly's personality, but stated that it did not see a link between Friendly's behavior and the studies on youthfulness:

> There is no doubt that dealing with juveniles is terrifically hard. There is no doubt that their development hasn't reached the level of development you see in [sic] adult population. There's no doubt that the majority are dealing with trauma in one form or another that other folks, normal folks don't have to deal with.
>
> And a juvenile, to get their personality and their minds wrapped around that while at the same time trying to survive, you can see impulse control. I have no question about the studies.
>
> The question I have, though, is, do the studies support it here? And that's what I'm having difficulty with.
>
> . . .
>
> In reading his history, which is lacking for purposes today, I don't get a real sense of being an outcast or somebody who's [sic] been fighting all the time every day. I don't have a history here, criminal history. I don't have sociological history. I don't have anything from schools. I don't have dependencies. I don't have a lot of other things that normally I will see that brings people to the criminal justice system at this age.
>
> He's smart. He's intuitive. Takes a while to get trust of other people. No significant serious mental health issues, intellectually appropriate for his age, bright. I'm not seeing what these studies are asking me to look for. Lack of impulse control.
>
> . . .
>
> Nothing with the doctor about how he did this or didn't do this, how he felt about it, why he did it, what pressures he was under. No information about any gang membership, who he was with, when did he get into the gang, what were the pressures, was he directed to do this, did he do it on his own. Peer pressure as the studies indicate? There's no evidence, no discussion of that or anything today to be able to make an analysis of that.

> I don't know what he faced or where his mind was at at the time of these crimes. And without that, I'm unable to say that these applicable studies apply to him. Nobody's given me any information on this impulse control or lack thereof for Mr. Friendly in this specific instance.

The record demonstrates that the court knew it had to consider Friendly's youthfulness and that it could exercise its discretion to sentence him below the standard range. See State v. Houston-Sconiers, 188 Wn.2d 1, 8, 391 P.3d 409 (2017). Despite this discretion, the court did not believe there was a reason to deviate from the standard range. Friendly claims the court erred by sentencing him even though "it lacked the information it needed to make an informed decision on [his] culpability." He offers no authority, however, to support the contention that a trial court's failure to ask for more information before sentencing a juvenile amounts to an abuse of discretion for failing to properly consider youthfulness. We do not remand for resentencing.

Affirmed.

Chun, J.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 77646-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Mary Kathleen Webber
[kwebber@co.snohomish.wa.us]
[Diane.Kremenich@co.snohomish.wa.us]
Snohomish County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: July 31, 2019
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