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NO. 49534-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD KRENTKOWSKI,

Appellant.

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

The Honorable Stephanie Arend, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's refusal to allow appellant's trial attorney to withdraw based upon an actual conflict of interest denied appellant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

2. Appellant was deprived of his due process rights when juvenile court jurisdiction was automatically declined and no hearing was held to determine whether juvenile court should retain jurisdiction.

3. The trial court's imposition of "mandatory" consecutive sentences for firearm enhancements without considering its discretion to impose a sentence below the mandatory sentencing enhancements for juveniles violated the Eighth Amendment ban on cruel and unusual punishment.

4. Defense counsel was ineffective in failing to argue at sentencing that the trial court had discretion concerning imposition of the firearm enhancements.

5. Pursuant to RAP 10.1(g)(2), appellant adopts the assignments of error set forth in the opening briefs of co-appellants Jermohnn Gore and Alexander Kitt.¹

¹ RAP 10.1(g) provides that: "In cases consolidated for the purpose of review and in a case with more than one party to a side, a party may (1) join with one or

Issues Pertaining to Assignments of Error

1. The right to the effective assistance of counsel encompasses the right to representation free from conflicts of interest. A conflict of interest arises when a defense attorney owes duties to a party whose interests are adverse to those of the defendant. Here, defense counsel asserted repeatedly that his prior representation of the person who was the alleged target of appellant's shooting incident presented a conflict of interest that prevented his effective representation of appellant. The trial court repeatedly denied counsel's motion to withdraw. Was appellant's constitutional right to effective assistance of counsel denied when the trial court refused to allow appellant's trial attorney to withdraw based upon an actual conflict of interest?

2. Due process requires an individualized assessment of amenability to juvenile court jurisdiction before juvenile court jurisdiction may be declined and the charged youth may be prosecuted in adult superior court. Juvenile court jurisdiction is automatically declined when juveniles of a certain age are charged with particular offenses. Automatic declination offends due process. Was seventeen-year-old appellant denied his due process rights where he was prosecuted in adult court without a

more other parties in a single brief, or (2) file a separate brief and adopt by reference any part of the brief of another." On October 28, 2016, this Court consolidated this appeal with State v. Alexander Kitt, No. 49534-1-II, and State v. Jermohnn Gore, No. 49555-4-II.

court first making an individualized assessment of whether juvenile court jurisdiction should be declined?

3. The trial court concluded that based on the facts of the case, an exceptional downward sentence of zero months imprisonment for each of appellant's five convictions was warranted. In sentencing appellant to five consecutive firearm enhancement sentences totaling 300 months however, the trial court concluded that it "ha[d] no discretion" and that firearm enhancements "are mandatory and they must be run consecutively to each other." 3RP² 139. Is remand for resentencing required where the trial court violated the protections of the Eighth Amendment when it imposed mandatory consecutive firearm enhancement sentences without exercising its discretion and considering the appellant's youth?

4. Defense counsel failed to object to the trial court's mistaken belief that it had no discretion concerning imposition of the firearm enhancements against appellant. Did this failure to object deny appellant his constitutional right to effective representation?

5. Pursuant to RAP 10.1(g)(2), appellant adopts the issue statements set forth in the opening briefs of co-appellants Gore and Kitt.

² This brief refers to the verbatim reports as follows: 1RP -- April 1, 2016; 2RP -- July 5, 7, 11, 12, 13, 18, 19, 20, 21, 25, 26, 27, 28, 2016 & August 1, 2, 3, 4, 8, 9, 11, 2016; 3RP -- October 12, 2016.

B. STATEMENT OF THE CASE

1. Procedural History.

The Pierce county prosecutor charged 17-year-old appellant Clifford Krentkowski with one count of first degree murder by extreme indifference, and one count of second degree felony murder for allegedly causing the death of Brandon Morris during an incident alleged to have occurred on May 1, 2015. The State also charged Krentkowski with four counts of first degree assault for the same incident on May 1, 2015. The State further alleged that each of the charged incidents was committed with a firearm. CP 601-04; 2RP 60.

Before trial, Krentkowski's case was joined with Jermohnn Gore and Alexander Kitt. Each of Gore and Kitt's charges arose from the same alleged incident. 1RP 4-7; CP 615-19. A jury found Krentkowski, Gore, and Kitt guilty as charged. CP 818-19, 821, 823-24, 826-27, 829-30, 832-33; 2RP 3682-86. The jury also returned special verdicts finding that Krentkowski, Gore, and Kitt were armed with firearms during the murder and assault offenses. CP 820, 822, 825, 828, 831, 834; 2RP 3682-86.

Based on an offender score of 0, the State recommended that Krentkowski receive an exceptional downward sentence of zero months for each of the five convictions. 3RP 133-36. The State argued however, that Krentkowski's five 60-month firearm enhancements were required to

run consecutively to each other, for a total prison term of 300 months. Defense counsel agreed that a "downward departure" was appropriate. Counsel also noted the imposition of each firearm enhancement was mandatory. 3RP 137.

The trial court agreed that "a downward, exceptional sentence to zero for the underlying sentence is appropriate[.]" 3RP 140. The trial court imposed however, five, 60 month consecutive sentences for the firearm enhancements. The trial court explained that it "has no discretion[.]" and that the firearm enhancements "are mandatory and they must be run consecutively to each other." 3RP 139.

Based on the firearm enhancements, the trial court sentenced Krentkowski to 300 months imprisonment. The trial court also imposed 36 months of community custody. 3RP 140; Supp. CP ____ (Judgement and Sentence, filed 10/12/16). The trial court dismissed the conviction for felony second degree murder "without prejudice".³ Supp. CP ____ (Judgement and Sentence, filed 10/12/16). The trial court imposed only mandatory legal financial obligations, agreeing that Krentkowski was indigent. 3RP 140.

³ Krentkowski did not ask the court to dismiss his conviction for felony second degree murder with prejudice. Kitt's attorney however requested dismissal of the felony second degree conviction with prejudice. 3RP 157. Under RAP 2.5(a), a party may raise a claim of error on appeal "if another party on the same side of the case has raised the claim of error in the trial court."

Krentkowski timely appeals. CP 889, 897.

2. Trial Testimony.

Krentkowski is an adolescent from south Tacoma. On May 1, 2015, he was only 17-years-old. 2RP 3187-88; CP 601-04. At the time, he was living in a neighborhood where it was not uncommon to hear gunshots. RP 756, 1025, 2401.

In fact, early that morning, witnesses saw two African-American men shooting at each other in the area of South 15th Street and South M Street in Tacoma. 2RP 745, 755, 758-61, 776-90. When police responded, they found a bullet hole in a nearby residence and truck, and shell casings on the street. 2RP 748, 816, 820-21, 824-25, 838.

Later that same afternoon, a group of five friends walked to a marijuana dispensary located at the corner of South 45th and South Union Avenue. 2RP 1139-40, 1243, 1763, 1979. Although the friends were not associated with a gang, the dispensary was across street from a grocery store that is a known hangout for the Knoccoutz Crips gang. 2RP 1004, 1143-44, 1340, 1500-01. As the friends walked away from the dispensary through the alley, a white Cadillac Escalade drove down the alley near the store. 2RP 852-57, 982-83, 1140-46, 1176, 1244-49, 1763-65, 1980. Several of the friends saw a black skinned hand holding a pistol out of the back passenger window of the Escalade. 2RP 1142, 1181, 1249-52, 1765-

67, 1984, 1987. Several gunshots were fired toward the store. 2RP 1142, 1176-81, 1246-52, 1765, 1984-89. In response, the friends ducked behind a Jeep parked in a carport between the alley and the store. 2RP 1146, 1245-46, 1284, 1765, 1770, 1985-86. One of the men, Brandon Morris, was accidentally shot in the head. 2RP 1175, 1252-53, 1961, 1990. He died a few days later. 2RP 732.

Several other people were near the store at time of the shooting. Jerry Hoffman saw shots fired from a white SUV as it drove past the front of the market. 2RP 1216-18, 1274-75, 1720-26, 1731, 1739, 1792, 2357-58. Hoffman heard several more gunshots after the SUV turned into the alley. 2RP 1723. Carlmisha Jives was in the alley putting her children into her car when she heard the gunshots. 2RP 2802-05. Jives saw a gun being pointed out of the right rear window of a white SUV as it drove down the alley. 2RP 2802-07, 2814.

Kayle Moss turned her car into the alley behind her office break as she returned to work from her lunch break. 2RP 1904. She saw a white SUV speeding down the alley towards her. The SUV came to a rapid stop, and she saw several young male African-American occupants yelling at her to get out of the way. 2RP 1904, 1911-13. The SUV then pulled forward and out of the alley, bumping into the passenger side of her car as it passed. 2RP 1904-05.

Amber Fetcher also heard the gunshots and looked out of her apartment window to see a blue Chevrolet Corsica driving past the alley. 2RP 3233-35. Fetcher saw several African-American males in the car, and one of them was hanging out the back window pointing a gun in the direction of the alley. 2RP 3235-36, 3258. Fetcher heard several more gunshots coming from the direction of the blue car. She did not see any other cars in the area. 17RP 3235, 3247-49.

When police responded to the shooting scene they found bullet strikes on the east and south sides of the market, a bullet hole through a garbage can and storage shed in the alley, and a bullet fragment in the hood of the Jeep parked in the carport. 2RP 1004-08, 3234. Police collected bullet fragments and shell casings on the ground in front of the grocery store, in the alley and carport, and on wooden pallets stacked next to the store. 2RP 1005-06, 1084, 1098, 1101. Some of the casings were .40 caliber, while others were 9mm. 2RP 1005, 1086, 1098, 1103-06.

At first, police had no suspects in the shooting incident. Two days later however, police found a white Cadillac Escalade parked on the street with body damage on the right side near the front tire. 2RP 1826-32, 1843. After impounding and searching the Escalade, police found a spent .40 caliber shell casing behind the right rear passenger seat. 2RP 1832, 1851-52, 1857.

Police identified the owner of the Escalade, and interviewed the owner's daughter, Jade Dukes. 2RP 1654, 1855. The day of the incident, Dukes let her boyfriend, Lance Milton-Ausley drive the Escalade while she was at school. 2RP 1652, 2975-80. When Milton-Ausley picked Dukes up from school he told her that something happened, and someone had been shot. 2RP 1657-58, 2987, 2992. Milton-Ausley did not tell her who did the actual shooting. 2RP 1657-58, 2982-83.

Dukes previously told investigators that Milton-Ausley told her that his friend, "Too Real", had opened the back door of the SUV and fired a gun. 2RP 3003, 3033. She also told police that the shooting was in retaliation for the shooting incident earlier in the day in which one of Milton-Ausley's friends had been targeted. 2RP 3003.

Milton-Ausley, and Trevion Tucker, both occupants of the Escalade, agreed to cooperate with the State in exchange for favorable plea agreements. By pleading guilty and testifying against their friends, both men anticipated receiving prison sentences of only 10 years. 2RP 1303, 1363-65, 2519-20.

Tucker and Milton-Ausley explained the shooting at the store was in retaliation for a shooting that happened earlier that morning. 2RP 738-39, 752-60, 1318-19, 2440. The shooters were aiming at the store, not at the group of people in the carport. 2RP 1281, 1293-95, 2600. No one

inside the Escalade was aware that the people were inside the carport. 2RP 1503, 1601, 2468, 2713. The shooters did not learn until later that someone had been shot. 2RP 2478, 2600.

Milton-Ausley drove Dukes to school in her parents' Cadillac Escalade on the morning of May 1, then picked up his friends, Jeremy Bolieu, Krentkowski, and Gore. 2RP 1303, 1363-65. All of the young men inside the Escalade were members of the Hilltop Crips, a rival gang of the Knoccoutz. 2RP 1327-28, 2388. When Gore got into the Escalade, he told the others that LeShaun Alexander, a member of the Knoccoutz, had fired several gunshots at Kitt. 2RP 1318, 1331, 2400-09. The young men then picked up Kitt, also known as "Too Real," and Tucker, also known as "Baby Fold'em." 2RP 1322, 1330.

Milton-Ausley noticed that Kitt had a blue and black backpack with him. 2RP 1323. He testified that Kitt showed him two pistols inside the backpack. 2RP 1325. Kitt also confirmed that someone had fired a gun at him that morning, and said the shooter was driving a black Monte Carlo. 2RP 1331. Kitt also suspected the shooter was Alexander because he drove a black Mont Carlo. 2RP 1331, 1500.

Milton-Ausley first drove the group to an apartment shared by Rebecca Timpe and Maria Baker, because Timpe owed Kitt money. 2RP 1334-35, 2329-31, 2340, 2827. The apartment was located near South

45th Street and South Union Avenue, an area considered Knoccoutz territory. 2RP 1333, 1340, 2328.

Timpe decided to walk to a nearby store to withdraw money and repay Kitt. 2RP 2343, 2345-46, 2832. But the group got tired of waiting for Timpe to return, so they left the apartment and drove towards the store. 2RP 1338-39, 2451. Milton-Ausley was driving, Bolieu was in the front passenger seat, and Krentkowski, Gore, Tucker and Kitt were in the back seat of the SUV. 2RP 1339. According to Milton-Ausley, their plan was to drive by the store and take pictures of themselves in Knoccoutz territory to post on Facebook as a show of disrespect. 2RP 1333, 1340, 1341-42.

They saw Timpe on the way, and they stopped so Timpe could give Kitt the money she owed him. 2RP 2451-52, 2839, 2842, 2845. Timpe testified that the young men seemed to be in a hurry to leave. 2RP 2843. Shortly after the group drove away, Timpe heard gunshots from the area where the Escalade had gone. 2RP 2846-48.

According to Milton-Ausley, they left Timpe and drove towards the store. They turned onto South 45th Street and noticed several Knoccoutz gang members standing outside of the market. 2RP 1344. They also saw Alexander's Monte Carlo. 2RP 1345-46. As they turned into the alley, Kitt and Gore began shooting towards the market. 2RP 1347. Milton-Ausley also testified that, after the gunshots, Kitt told him

to “Go, go, go; I just got off on them.” 2RP 1600. As they left the alley, they encountered a small car going the other way, and Milton-Ausley sideswiped it as he drove past. 2RP 1351-52.

Tucker testified the group wanted to find Alexander and his fellow Knoccoutz gang members and shoot at them in retaliation for all the times the Knoccoutz had shot at them. 2RP 2440. According to Tucker, Kitt had a small blue backpack containing a .40 caliber pistol and 9mm handgun. 2RP 1322-24, 2434. Kitt gave the 9mm handgun to Gore. Kitt used the .40 caliber himself. 2RP 1357, 2435, 2462-63. Gore also brought a nylon guitar case containing an assault rifle. 2RP 1312-13. Krentkowski held the rifle on his lap but did not use it. 2RP 2437-39, 2455, 2462-63.

Gore and Kitt sat in the back seat, with Kitt next to the passenger side window. 2RP 2454. As they approached the store, they saw Knoccoutz gang members standing outside and saw the black Monte Carlo parked nearby. 2RP 1322, 2440, 2457-60, 2465. Milton-Ausley turned the Escalade into the alley, and Kitt and Gore began shooting towards the store. 2RP 2459-62.

Police arrested Kitt and Gore on May 5. 2RP 2018, 2023, 3316. During a subsequent search of the car that Kitt and Gore had been riding in, police found a blue and black backpack. 2RP 2020-21, 2043, 2047.

Police found two firearms inside the backpack, including a loaded .40 caliber pistol. 2RP 2086-89, 2095, 2152.

The State's firearm expert opined that the .40 caliber casings collected from the alley were fired from the .40 caliber pistol found in the backpack because of the distinctive markings created on the casings when the gun is fired. 2RP 2171-72, 2186-87, 2211. The firearm expert was unable to match the 9mm casings with any firearm submitted into evidence. 2RP 2188-2206.

Krentkowski was arrested on July 6, 2015. 2RP 2246, 3089-92. Police matched no fingerprints from the Escalade to Krentkowski. 2RP 3330, 3336.

3. Conflicted Counsel.

Walter Peale was appointed to represent Krentkowski after his first defense attorney withdrew in February 2016. Once it became apparent in late June 2016, that Krentkowski's case would proceed to trial, Peale informed Krentkowski that a conflict of interest existed. Peale also simultaneously represented LeShaun Alexander in a separate first degree assault with a firearm case. 2RP 407; CP 607-09, 713-57.

As Peale explained, Alexander was a rival gang member, the alleged cause, and also the intended target, in the shooting incident that led to Krentkowski being charged with murder and assault. 2RP 4-7; CP 713-

57. Although Alexander was not separately charged as a result of the May 1 incident, neither Krentkowski, nor Alexander, were willing to waive the conflict after being advised by independent counsel. CP 718; 2RP 26-27. Prosecutor Gregory Greer, did not oppose Peale's withdrawal from Alexander's case, acknowledging the appearance of a conflict of interest because Alexander and Krentkowski were the "particular individuals involved factually in the case, not just rival gangs". CP 753; 2RP 14, 21. On June 29, 2016, Peale was discharged from Alexander's case at Alexander's request based on the conflict of interest. CP 609, 753-54.

On July 5, 2016, Peale appeared before the trial court in Krentkowski's case. Peale noted that Krentkowski had not had an opportunity to meet with independent counsel to assess the conflict. 2RP 4-8, 25.

Prosecutor Greer argued there was no conflict pertaining to Krentkowski's case because Alexander was not involved in the case and would not be called as a witness in the State's case-in-chief. 2RP 10-11, 18, 28-30. As Peale explained however, while there was no "personal interest" that prevented him from exercising his responsibility or giving proper advice to either client, a conflict of interest nonetheless existed:

Whether the State calls this client [Alexander] as a witness, whether I continue to act as an attorney on a filed charge has nothing to do with my obligation to maintain

confidences and how I deal with information that I have received as a result of the attorney-client relationship. I think we all understand that's a basic principle.

Mr. Alexander has been a client of mine. I'm aware of information that I received exclusively because of my representation of Mr. Alexander. Now, I can't divulge what that information is. I cannot divulge to Mr. Krentkowski whether or not any information I receive from Mr. Alexander would help or hurt my representation of him. I can only tell him that I have represented Mr. Alexander.

Mr. Krentkowski is facing a charge where one of the reasons that he is accused of a crime is because of conduct alleged to have been committed by Mr. Alexander.

2RP 13-14, 20.

The trial court denied Peale's request to withdraw as Krentkowski's attorney noting it did not see a conflict of interest because the Alexander and Krentkowski matters were unrelated and therefore not adverse. 2RP 31-33.

Krentkowski renewed his motion to have Peale replaced based on a conflict of interest on July 7, 2016. The request was denied. 2RP 167-68.

Krentkowski again requested conflict free counsel on July 12, 2016, noting that independent counsel had spoken with Krentkowski and advised him that a conflict of interest did in fact exist. The trial court again denied Peale's request to withdraw and have substitute counsel appointed. 2RP 658-62.

Later that morning, during opening statements, the State noted that Alexander had previously shot at Gore, Kitt, and Krentkowski, which lead

to the retaliatory shooting for which Krentkowski was charged with murder and assault. 2RP 686. In response, Peale renewed his motion to withdraw for a fourth time, explaining:

That [opening] statement creates a relationship that is entirely different than what we presented to you before as the possible basis for a conflict. I raise it because it's new, and I have to bring it to your attention before evidence is presented because it affects how I can respond to evidence. This is very much different now. My client is alleged to be the victim of my former client.

2RP 709-10. The trial court denied the motion to withdraw the following morning. 2RP 718-19.

On July 20, 2016, Peale noted that the gang conflict that existed between Alexander and Krentkowski which led to the May 1 shooting incident, "raise[d] the implications whether or not there is a self-defense claim to be made based on the state of mind of one party when they're confronted by another, whether there's any particular act taken or not because of the ongoing confrontations." 2RP 1471. Pealed noted however, that because of his prior representation of Alexander he was prevented from ascertaining facts relevant to a self-defense claim on Krentkowski's behalf, including:

[W]hat was in the mind of Mr. Alexander? What was his reputation? What do I know about him that would offer up an explanation in defense of Mr. Krentkowski? And why am I not pursuing that? And the reason I can't pursue it is because he's a former client.

2RP 1470-74, 1476-77. The trial court denied Peale's fifth request to withdraw as Krentkowski's attorney based on a conflict of interest. 2RP 1477.

Peale renewed his motion to be allowed to withdraw based on a conflict of interest for a final time on July 28, 2016. Peale again noted that information gathered from his representation of Alexander might be relevant to presenting a self-defense claim on Krentkowski's behalf, but to do so would violate his continuing confidentiality requirements pertaining to Alexander. 2RP 2370-2373.

The State again disputed that a conflict of interest existed because Alexander was not being called as witness. 2RP 2373-76. The trial court again denied the request to withdraw based on a conflict of interest, explaining:

So I haven't heard anything that would suggest that this isn't, and hasn't always been, public information and that there's any confidence that Mr. Peale has from a former client that he can use to his advantage -- is basically the way the rule usually works -- in his representation of his current client against a former client. So I'm going to, again, deny the motion, including any motion to disqualify Mr. Peale or sever the matter or find that there is, in fact, a conflict.

2RP 2376-77.

C. ARGUMENT

1. THE TRIAL COURT'S REFUSAL TO ALLOW KRENTKOWSKI'S ATTORNEY TO WITHDRAW BASED UPON AN ACTUAL CONFLICT OF INTEREST DENIED HIM EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

The Sixth Amendment and Wash. Const. art. 1, § 22 guarantee an accused's right to effective counsel. State v. Regan, 143 Wn. App. 419, 425, 177 P.3d 783 (2008), rev. denied, 165 Wash.2d 1012 (2008). Effective assistance includes the duty of loyalty to a client and the duty of loyalty to avoid conflicts of interest. State v. McDonald, 143 Wn.2d 506, 511, 22 P.3d 791 (2001) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995), rev. denied, 129 Wn.2d 1012 (1996). The "right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." Mickens v. Taylor, 535 U.S. 162, 183, 122 S. Ct. 1237, 152 L. Ed. 2d. 291 (2002) (quoting Von Moltke v. Gillies, 332 U.S. 708, 725, 68 S. Ct. 316, 92 L. Ed. 309 (1948)).

Where an actual conflict of interest adversely affected counsel's performance, reversal is required even without a showing of prejudice. Cuyler v. Sullivan, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 64 L. Ed. 2d

333 (1980); Regan, 143 Wn. App. at 427; In re Personal Restraint of Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983), abrogated in part on other grounds, State v. Dhaliwal, 150 Wn.2d 559, 571, 79 P.3d 432 (2003). In order to show adverse effect, an accused need only demonstrate “that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.” Regan, 143 Wn. App. at 428 (quoting United States v. Stantini, 85 F.3d 9, 16, (2nd Cir. 1996)). Whether a conflict exists is a question of law subject to de novo review. Regan, 143 Wn. App. at 428.

Such conflict is not limited to joint representation of codefendants. The problem arises in any situation where defense counsel represents conflicting interests. Regan, 143 Wn. App. at 426-27 (citing Richardson, 100 Wn.2d at 677-78.) The Washington Rules of Professional Conduct recognize a conflict of interest when a lawyer's responsibilities to another client or third party are directly adverse or materially limit the lawyer's representation. RPC 1.7(a). RPC 1.7(a) provides that a concurrent conflict of interest exists if:

1. the representation of one client will be directly adverse to another client; or
2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's

responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

An actual conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant. White, 80 Wn. App. at 411-12. For example, in State v. MacDonald, 122 Wn. App. 804, 95 P.3d 1248 (2004), a defendant appealed his conviction for two counts of rape, arguing that he was denied an attorney free from conflicts of interest because his trial attorney had represented the mother of one of the complaining witnesses. This Court agreed and reversed his conviction, holding as follows:

Here, Yoseph attempted to represent a client accused of raping the daughter of one of his other clients. MacDonald argues that Yoseph has not worked on L.P.'s mother's case for more than one year, but Yoseph was still the attorney of record for L.P.'s mother when he agreed to represent MacDonald on the rape charges. Like the trial court, we believe that this presents a conflict of interest and requires Yoseph's disqualification.

MacDonald, 122 Wn. App. at 813, rev. denied, 153 Wn.2d 1006, 103 P.3d 1247 (2005).

A conflict of interest can also exist when a defendant's interests are adverse to those of defense counsel himself. In re Personal Restraint of Benn, 134 Wn.2d 868, 890, 952 P.2d 116 (1998). When a defense attorney asserts to the trial court that he has a potential conflict of interest, the court must appoint substitute counsel or take adequate steps to

ascertain whether the risk of a conflict of interest is too remote to warrant substitute counsel. See Holloway v. Arkansas, 435 U.S. 475, 484-85, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (reversal for ineffective assistance where counsel told court prior to trial that he had a conflict in representing multiple defendants). The court's failure to take these steps deprives defendant of the guarantee of assistance of counsel. Holloway, 435 U.S. at 484. Our Supreme Court has stated the rule as follows:

[A] trial court commits reversible error if it knows or reasonably should know of a particular conflict [of interest] into which it fails to inquire.

Richardson, 100 Wn.2d at 677.

In Richardson, the defendant brought an action for collateral relief from his conviction for second degree assault. The original charge had arisen out of a fight outside a bar. The defendant argued, among other things, that he was denied his right to effective assistance of counsel because his appointed attorney also represented one of the state's witnesses in other legal matters, although the exact extent of the representation was never ascertained.

In addressing this argument, the court first reviewed the United States Supreme Court's decisions in three cases: Holloway v. Arkansas, supra; Cuyler v. Sullivan, and Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220, 1097 (1981). In Holloway, the court held that (1) a

trial court's failure to either ascertain whether or not an actual conflict existed after being put on notice of its possibility per se deprived the defendant of effective assistance of counsel, and (2) that the error cannot be deemed harmless because prejudice is conclusively presumed. In Sullivan, the court held that while there is no duty to enquire if the court has no notice, a defendant who shows that a conflict of interest adversely affected his attorney's performance is also entitled to relief regardless of a showing of prejudice. Finally, in Wood, the court held that when a court "knows" or "reasonably should know" that a conflict of interest exists, then failure to inquire mandates reversal.

After examining these three cases, the court in Richardson summarized as follows:

Taken together, Holloway, Sullivan, and Wood create two rules. First, a trial court commits reversible error if it knows or reasonably should know of a particular conflict into which it fails to inquire. Second, reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting his lawyer's performance. In neither situation need prejudice be shown.

Richardson, 100 Wn.2d at 677.

Here, there is no question that Krentkowski's trial attorney had an actual conflict of interest. As counsel candidly and repeatedly explained to the court in his motions to withdraw: (1) he had represented LeShaun Alexander, the alleged target of Krentkowski's charged incident, in

another shooting case; (2) that despite withdrawing as Alexander's counsel, his joint representation affected his duty to maintain confidences and privileged information; (3) that as a result of his privileged communications with Alexander he had information that was favorable to Krentkowski but adverse to Alexander, including information that would be relevant to Krentkowski asserting a claim of self-defense; and that (4) revealing or using this information to Krentkowski's benefit would necessarily violate his duty of confidentiality to Alexander. 2RP 4-33, 709-11, 1471-77, 2370-77. This goes well beyond the potential conflict that existed in Richardson and constituted an actual conflict of interest.

On its face, a conflict existed under the substantial risk standard of RPC 1.7, and under RPC 1.9,⁴ particularly where the case involved a

⁴ Rules of Professional Conduct 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

potential claim of self-defense. A wide variety of evidence as to the victim may be admissible in a case where the defendant asserts self-defense. 13B Seth A. Fine & Douglas J. Ende, *Washington Practice: Evidence* § 3310 (2013– 2014 ed.); ER 404(a)(2). In the appropriate factual context, this can include the victim’s reputation for violence, and prior acts of violence. State v. Hutchinson, 135 Wn.2d 863, 886, 959 P.2d 1061 (1998); State v. Alexander, 52 Wn. App. 897, 900, 765 P.2d 321 (1988); State v. Cloud, 7 Wn. App. 211, 218, 498 P.2d 907 (1972). But counsel was bound by attorney-client privilege as to Alexander, which was never waived. State v. Perrow, 156 Wn. App. 322, 328, 231 P.3d 853 (2010) (citing RCW 5.60.060(2)(a)).

For his part, counsel clearly and repeatedly indicated a direct conflict existed. An attorney’s request for withdrawal based on his representations as an officer of the court regarding a conflict of interest should be granted, because he is in the best position to assess the ethical conflict of interest. Holloway, 435 U.S. at 485.

The trial court nonetheless maintained that counsel's withdrawal in Alexander's case cured the conflict. This did little to alleviate the conflict

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- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
 - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

in Krentkowski's case however. First, in order to effectively represent Krentkowski, counsel had the duty to effectively cross-examine all of the State's witnesses about all facts favorable to Krentkowski, including using the confidential information he received from Alexander. However, he could not do so without breaching both his general duty to Alexander as well as his specific duty to keep Alexander's confidences.

The State also suggested that the conflict did not rise to the level of an actual conflict because it did not call Alexander as a witness in its case-in-chief. 2RP 10-11, 18, 28-30, 2373-76. This "solution" ignores the fact that representing a defendant involves a lot more than merely cross-examining a witness. Rather, it also involves such critical duties as effectively presenting closing argument, attacking the state's witness, effectively using the fruits of cross-examination, and calling witnesses in support of the defense theory of the case. Thus, here Krentkowski was left with an attorney who had a conflict of interest in not only effectively presenting closing argument regarding the issues and veracity surrounding Alexander's alleged involvement in the shooting incident, but also, in utilizing information gathered from representing Alexander in support of Krentkowski's self-defense claim.

Counsel's relationship and duty of loyalty to Alexander materially limited counsel's representation of Krentkowski and demonstrates an

actual conflict that adversely affected counsel's performance. Since prejudice is conclusively presumed, the trial court's refusal to grant defense counsel's motion to withdraw in this case denied the defendant effective assistance of counsel and he is entitled to a new trial.

2. APPELLANT WAS DENIED HIS DUE PROCESS RIGHTS WHEN HE WAS PROSECUTED IN ADULT COURT WITHOUT A COURT FIRST MAKING AN INDIVIDUALIZED ASSESSMENT OF WHETHER JUVENILE COURT JURISDICTION SHOULD BE DECLINED⁵

a. Introduction.

The juvenile court has original jurisdiction over most criminal offenses committed by juveniles. See RCW 13.04.030(e). Under RCW 13.34.030(1)(e)(v) however, the juvenile court's exclusive jurisdiction for certain crimes committed by persons who were sixteen or seventeen years old on the date the alleged offense was committed are specifically exempted without the necessity of an individualized hearing on whether to decline juvenile court jurisdiction. Such an automatic decline of juvenile jurisdiction is inconsistent with due process.

⁵ Whether RCW 13.04.030(1)(e)(v) violates due process principles in automatically conferring jurisdiction in adult court over 16-and 17-year old juveniles charged with certain crimes without the necessity of an individualized hearing on whether to decline juvenile court jurisdiction, and whether In re Boot, 130 Wn.2d 553, 925 P.2d 964 (1996), which upheld the constitutionality of the statute's predecessor, remains good law, is currently pending before the Washington State Supreme Court in State v. Watkins. (No. 94973-5). Oral argument in that case is scheduled for March 13, 2018.

The United States Supreme Court explained that “there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons” as the question of when a youth may be transferred to adult court. Kent v. United States, 383 U.S. 541, 554, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). The liberty interests at stake in the transfer of a youth from juvenile to adult criminal court are “critically important,” and they call for heightened procedural protections not provided under Washington’s automatic decline statute, RCW13.04.030(1)(e)(v). Id. at 553-54.

In State v. Houston-Sconiers, Washington’s Supreme Court recognized that In Re Boot, 130 Wn.2d 553, 925 P.2d 964 (1996), which upholds the constitutionality of automatic decline in Washington, stands in “tension” with United States Supreme Court precedent. 188 Wn.2d 1, 26, 391 P.3d 409 (2017).

Because of the vital importance of the liberty interests at stake when juvenile court jurisdiction is declined, due process requires a hearing prior to transfer. At this hearing, the court must conduct an individualized assessment of the youth’s amenability to juvenile court jurisdiction. Because no such hearing was conducted here, Krentkowski’s conviction should be reversed and his case remanded for a hearing.

- b. It is no longer acceptable for course to automatically treat youth like adults.

Procedures for adults do not automatically satisfy the constitutional requirements for youth. In J.D.B. v. North Carolina, the Supreme Court recognized that, because juveniles lack the maturity and experience of an adult, procedures put in place for adults must instead adapt to the attributes of youth. 564 U.S. 261, 272-74, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). J.D.B. acknowledges a fact the non-judicial world had long understood: children do not have the education, judgment, and experience of adults and are not simply “miniature adults.” Id. at 274. Likewise, the Washington Supreme Court has recognized the attributes of youth are legally significant and justify maintaining the longstanding rehabilitative purpose of juvenile court. State v. S.J.C., 183 Wn.2d 408, 434, 352 P.3d 749 (2015).

Youth is now clearly recognized as a mitigating factor for culpability, based on the same legal principles relevant to a due process analysis. Roper v. Simmons established that because juveniles have lessened culpability they are less deserving of the most severe punishments. 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). In Graham v. Florida, the Supreme Court held a life sentence could not be imposed without the creation of a procedure which would provide a

meaningful opportunity for release. 560 U.S. 48, 75, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). These decisions incorporate both common sense – what “any parent knows” – and recent developments in brain science supporting the lesser culpability of youth. Miller v. Alabama, 567 U.S. 460, 471, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012). The courts have made abundantly clear that the law can no longer simply assume adult sentences apply to youth; to the contrary, long adult sentences like those at issue here are presumptively invalid for youth unless “irreparable corruption” is proven. Montgomery v. Louisiana, ___ U.S. ___, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016).

Likewise, Washington courts have recognized that because “children are different,” courts must take a defendant’s youthfulness into account and have absolute discretion to depart below otherwise applicable sentence ranges and sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there. Houston-Sconiers, 188 Wn.2d at 9, 18-21.

Even when a young adult is convicted of a crime, the Washington Supreme Court has recognized that it must consider the person’s lesser ability to control emotions, identify consequences and make reasoned decisions about actions, while at the same time having greater capacity for rehabilitation. State v. O’Dell, 183 Wn.2d 680, 692-93, 358 P.3d 359

(2015). Where these attributes are identified, a sentencing court must at least consider whether a sentence below the standard range is warranted for the young adult. Id.

There are good reasons for this trend. Youth who remain in juvenile court are more likely to be rehabilitated. Those who are prosecuted in the adult system are thirty-four percent more likely to recidivate and with more violent offenses. Ziedenberg, J., *You're An Adult Now, Youth in the Criminal Justice System*, U.S. Dep't of Justice, National Institute of Corrections, 4 (2011).⁶ Youth who are sentenced to adult facilities are also thirty-six times more likely to commit suicide and to be victims of physical and emotional abuse, including sexual assault. Campaign for Youth Justice, *The Impact of Mandatory Transfer Rules*, 1 (2016).⁷ It is counterproductive to transfer most youth to adult court. They are unable to access necessary services, are likely to be abused by adult prisoners, and are more likely to recidivate. Ziedenberg, at 4.

Without holding a hearing, juvenile court jurisdiction should not be declined. Because of the increased likelihood of rehabilitation within the juvenile system, courts should hold a hearing to determine amenability before declining a child to adult court. It is only by conducting an

⁶ <http://static.nicic.gov/Library/025555.pdf>.

⁷ http://campaignforyouthjustice.org/images/factsheets/Mandatory_Transfer_Fact_Sheet_FINAL.pdf.

individualized assessment of whether a child should be transferred to adult court that due process can be satisfied. See Kent, 383 U.S. at 546; Miller, 567 U.S. at 489.

- c. Due process requires a hearing before juvenile jurisdiction may be denied to a youth charged with a crime.

Due process requires a hearing before juvenile court jurisdiction is declined for a youth charged with a crime. “[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.” Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). At a minimum, compliance with due process and fundamental fairness requires the court to identify the private interest affected by the official action, the risk of erroneous deprivation, the probable value of additional safeguards and, finally, the State’s interest. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). To satisfy this due process requirement, courts must conduct an inquiry into the youth’s needs, amenability to treatment, and the underlying 9 facts to determine whether decline is appropriate. Kent, 383 U.S. at 546; Miller, 567 U.S. at 489; see also In Re Gault, 387 U.S. 1, 31, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

In Kent, the United States Supreme Court held that the transfer of a youth from juvenile court to adult criminal court imposes a significant deprivation of liberty and warrants substantial due process protection. 383 U.S. at 554. Juvenile court offers “special rights and immunities” to youth they lose upon transfer to the adult system. Id. at 556. For many youth, decline can mean the difference between confinement until the age of twenty-one and the harshest sentences imposed upon adults. Kent, 383 U.S. at 557. In light of those circumstances, the Court found it “clear beyond dispute that the waiver of jurisdiction is a ‘critically important’ action determining vitally important statutory rights of the juvenile,” and thus it must “satisfy the basic requirements of due process and fairness.” Id. at 553, 556.

- d. Automatic decline fails to adequately protect the significant interests of juveniles charged with crimes.

For a youth like Krentkowski, the most important question is which court will hear the case. State v. R.G.D., 108 N.J. 1, 4–5, 527 A.2d 834 (1987). Transfer of a juvenile to adult court is “the single most serious act that the juvenile court can perform.” State in Interest of N.H., 226 10 N.J. 242, 252, 141 A.3d 1178, 1184 (2016) (quoting Hahn, P., *The Juvenile Offender and the Law*, 180 (3d ed.1984)). There is a “fundamental difference between juvenile courts and adult courts— unlike

wholly punitive adult courts, juvenile courts remain ... rehabilitative.” State v. Saenz, 175 Wn.2d 167, 173, 283 P.3d 1094 (2012). Our Supreme Court has many times recognized the importance of this distinction. State v. Rice, 98 Wn.2d 384, 393, 655 P.2d 1145 (1982).

The Supreme Court has also recognized the important benefits a juvenile receives by remaining in juvenile court. State v. Maynard, 183 Wn.2d 253, 259, 351 P.3d 159 (2015). While the clearest difference between adult and juvenile court is the length of time a youth will serve if convicted of a crime, many other differences also exist. See State v. Chavez, 163 Wn.2d 262, 271, 180 P.3d 1250 (2008). Youth may seek a deferred disposition for eligible offenses. RCW 13.40.127. Most youth who remain in juvenile court are entitled to have their records sealed. RCW 13.50.260 (4); JuCR 7.12 (c)-(d). Legal financial obligations are mostly eliminated. RCW 7.68.035. Many evidence-based programs exist which seek to rehabilitate the youth and reduce recidivism. See, e.g., Washington State Department of Social and Health Services, *Juvenile Justice Evidence Based Programs: Evidence Based Programs – Research Based Programs – Promising Practices* (2016).⁸

⁸<https://www.dshs.wa.gov/ra/juvenile-rehabilitation/juvenile-justice-evidencebased-programs>.

- e. *In re Boot* is no longer good law, as it violates due process rights established by both the United States and Washington State Supreme Court.

Washington's courts have also long recognized the important benefits of juvenile court and applied due process principles to youth. See Maynard, 183 Wn.2d at 259 (citing State v. Dixon, 114 Wn.2d 857, 860, 792 P.2d 137 (1990)). Even prior to the United States Supreme Court ruling in Kent and Gault that juvenile offenders were entitled to fundamental due process, Washington's juvenile courts employed most of the required practices. S.J.C., 183 Wn.2d at 424; see also Const. art. 1, § 3. Washington's courts "have built a constitutional wall around juvenile justice; and while the dimensions of this wall have changed, its structural integrity has not." S.J.C., 183 Wn.2d at 417.

Despite the substantial due process required by Kent and recognized by the courts, the Washington Supreme Court held automatic decline constitutional in Boot, 130 Wn.2d at 557-58. The court relied upon Stanford v. Kentucky to justify automatic decline, arguing that since the Eight Amendment did not preclude the death penalty for sixteen and seventeen-year-old defendants, it did not require hearings for youth of the same age who were automatically declined to adult court. Boot, 130 Wn.2d at 571 (citing Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989)).

Stanford has, of course, been abrogated by Roper. 543 U.S. at 574. Since Roper, the United States Supreme Court has consistently made clear that youth who are charged with crimes must be treated differently than adults. Graham, 560 U.S. 48; Miller, 567 U.S. at 471; Montgomery, 136 S. Ct. 718. These cases have overruled almost all of the cases relied upon to justify automatic decline, demonstrating that both the law and newer scientific information no longer support transferring youth to adult court without a hearing.

Likewise, Washington's Supreme Court has recognized the special status juveniles have in the criminal justice system. Most recently, the court recognized in Houston-Sconiers that "children are different." 188 Wn.2d at 21. The recognition led to the court to hold that sentencing courts must have absolute discretion in sentencing juveniles who have been declined to adult court. Id.

Houston-Sconiers is consistent with other recent opinions where the Washington Supreme Court has examined youthfulness. In O'Dell, the court held that a sentencing court may consider a defendant's youth as a mitigating factor justifying an exceptional sentence below the sentencing guidelines of the Sentencing Reform Act, even when the youth is over eighteen. 183 Wn.2d at 688-89. Likewise, in Maynard, the Washington Supreme Court required the prosecutor to reoffer a plea proposal only

available to juveniles, even though juvenile court jurisdiction had lapsed before Maynard had attempted to take advantage of the offer. 183 Wn.2d at 264. No such disposition would have otherwise been available in adult superior court. Id.

While the Supreme Court did not reach the issue of whether automatic decline was constitutional in Houston-Sconiers, the Court recognized that the cases on which the constitutionality of automatic decline was premised were no longer good law. 188 Wn.2d at 422-23. The court acknowledged that the holding in Boot “stands in tension” with United States Supreme Court holdings in Roper, Graham, and Miller. Houston-Sconiers, 188 Wn.2d at 422-23. As Stanford has been abrogated, there is no longer a basis to find automatic decline is still constitutional. Boot is no longer good law.

- f. Krentkowski's conviction should be reversed and the trial court should be ordered to hold a decline hearing.

Krentkowski's matter should have been prosecuted in juvenile court rather than adult court. By keeping Krentkowski in juvenile court, the likelihood that he will commit a future crime is also reduced. Youth who are automatically declined have a higher rate of recidivism than those who are not. Washington Institution for Public Policy, *The Effectiveness of Declining Juvenile Court Jurisdiction of Youth*, 6 (2013). The findings

of the Washington Institute for Public Policy are consistent with other studies regarding the likelihood a juvenile sent to adult court is likely to reoffend. See, Drake, E., *The Effectiveness of Declining Juvenile Court Jurisdiction of Youthful Offenders* (2013); Fagan, J., Kupchick, A., & Liberman, A. (2007), *Be Careful What You Wish For: Legal Sanctions and Public Safety Among Adolescent Offender in Juvenile and Criminal Court*, Columbia Law School, (2007). In fact, the very act of sending a juvenile to adult court without a hearing may increase their likelihood to reoffend.

For all juveniles, including Krentkowski, due process requires a hearing before juvenile court jurisdiction is declined. The liberty interests at stake for Krentkowski are “critically important” and call for heightened procedural protections not provided to youth who are not provided a hearing before juvenile court declines to take jurisdiction over their case. Kent, 383 U.S. at 553-54.

Boot is no longer good law. Its underpinnings have been overturned and it stands not only in “tension” with United States Supreme Court precedence, but in direct contradiction to the requirement that children are different and must be accorded individualized assessment of their amenability to juvenile court before they are declined to adult court. Houston-Sconiers, 188 Wn.2d at 21; Miller, 567 U.S. at 471.

3. REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN FAILING TO PROPERLY CONSIDER ITS DISCRETION WHEN IMPOSING THE FIREARM ENHANCEMENTS THEREBY VIOLATING THE PROTECTIONS OF THE EIGHTH AMENDMENT

“Children are different than adults.” Houston-Sconiers, 188 Wn.2d at 21 (citing Miller, 567 U.S. at 471). That difference has constitutional ramifications: “An offender's age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.” Graham, 560 U.S. 48; U.S. Const. Amend. VIII; Houston-Sconiers, 188 Wn.2d at 21. Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable sentencing reform act range. Houston-Sconiers, 188 Wn.2d at 21; O'Dell, 183 Wn.2d 680.

In O'Dell, the Court found persuasive the scientific and technical advances in understanding the adolescent brain which served as the foundation for the U.S. Supreme Court decisions in Graham, Miller, and Roper, 543 U.S. 551; O'Dell, 183 Wn.2d at 694-98.⁹

More recently, in Houston-Sconiers, the Court found “[a]n

⁹ At the time of his charged crime, O'Dell was over eighteen years old. Nevertheless, the Court held the trial court could consider whether youth diminished his culpability. Id. at 683.

offender's age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.” 188 Wn.2d at 20. Relying on Miller, the Court held that in exercising its discretion, the court must consider circumstances related to the defendant's youth—such as age and its “hallmark features,” of “immaturity, impetuosity, and failure to appreciate risks and consequences.” Id. at 23. “It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and “the way familial and peer pressures may have affected him [or her].” Id. And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated. Id. at 23.

In Houston-Sconiers, two defendants who committed crimes while under 18 years of age, appealed their sentences of 31 and 26 years on grounds that, in part, the difference between children and adults rendered their mandatory firearm enhancements unlawful. 188 Wn.2d at 13. There, the trial court had imposed no time on the underlying crimes but imposed all of the mandatory “flat time” triggered by the firearm enhancements: 312 months for Roberts and 372 months for Houston-Sconiers. Id. The trial court believed it was precluded from exercising its discretion about the appropriateness of the mandatory sentence increase

outlined in RCW 9.94. Id.

On appeal, the Supreme reversed the sentences and remanded for resentencing. The Supreme Court concluded that "[t]he mandatory nature of these enhancements violates the Eighth Amendment protections." Houston-Sconiers, 188 Wn.2d at 25-26. The Court also held that "sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable ranges and/or sentencing enhancements when sentencing juveniles in adult court." Id. at 9.

Like the teens in Houston-Sconiers, here Krentkowski was 17-years-old at the time of the alleged offenses, and 18-years-old at the time of sentencing. The trial court imposed zero incarceration on the base substantive offenses, but believed it was precluded from exercising any discretion as to the incarceration imposed for the firearm enhancements, explaining that it "ha[d] no discretion" and that firearm enhancements "are mandatory and they must be run consecutively to each other." 3RP 139.

Under Miller, O'Dell, and Houston-Sconiers, the trial court here had discretion to depart from the "mandatory" firearm enhancements. By failing to exercise that discretion, the trial court failed to take into consideration Krentkowski's youth when sentencing him, thereby violating his Eighth Amendment rights.

In response, the State may nonetheless argue that the trial court did

not have the benefit of the Houston-Sconiers decision at the time of sentencing. Such an argument should be rejected for two reasons. First, here the trial court was aware of the Miller decision, but admitted it was uncertain whether that case applied to imposition of firearm enhancements. 3RP 166-68. Second, as this Court has recently recognized, "[b]oth Miller and Houston-Sconiers are intended to apply retroactively." In re Matter of Smith, 200 Wn. App. 1033, 2017 WL 3723086, *3, (2017) (unpublished);¹⁰ See also In re Pers. Restraint of Light-Roth, 200 Wn. App. 149, 153, 165-66, 401 P.3d 459 (2017), rev. granted, ___ Wn.2d ___, ___ P.3d ___, (Sup. Ct. No. 94950-6, oral argument scheduled March 20, 2018) (Considering Court of Appeals determination that O'Dell announced a significant, material change in the law that applies retroactively).

In light of Miller, O'Dell, and Houston-Sconiers, the trial court erred when it concluded that it "ha[d] no discretion" to impose any sentence other than "mandatory" consecutive firearm enhancements. Consequently, the trial court did not adequately consider mitigating circumstances associated with Krentkowski's youth when sentencing him. Reversal and remand for resentencing is required. Houston-Sconiers, 188

¹⁰ Pursuant to GR 14.1(a), Krentkowski cites this unpublished case as a nonbinding authority but, given its relevance to Krentkowski's case, asks that the case be accorded significant persuasive value.

Wn.2d at 21; O'Dell, 183 Wn.2d at 683; Light-Roth, 200 Wn. App. at 165-66.

4. COUNSEL WAS INEFFECTIVE IN FAILING TO ALERT THE TRIAL COURT TO ITS DISCRETION WHEN IMPOSING THE FIREARM ENHANCEMENTS

Alternatively, if necessary to raise this issue, this Court should find defense counsel ineffective for failing to ensure the trial court was aware of its discretion when sentencing Krentkowski on the firearm enhancements.

Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The standard of review for an ineffective assistance claim involves a two-prong test. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 LEd. 2d 674 (1984)). To satisfy the first prong, the defendant must show counsel's performance fell below an objective standard of reasonableness. To satisfy the second prong, the defendant must show prejudice, meaning a reasonable probability that but for counsel's performance, the result would have been different. State v. Townsend, 142 Wn.2d 838, 843-44, 847, 15 P.3d 145 (2001).

Defense counsel agreed with the exceptional downward sentence of zero months imprisonment for the underlying sentence. Counsel also agreed however, that imposition of each of the firearm enhancements was mandatory. Counsel also did not correct the trial court's erroneous belief that it had no discretion regarding imposition of the firearm enhancements. This was deficient performance.

“Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-691). While defense counsel did not have the benefit of the Houston-Sconiers decision at the time of sentencing, defense counsel did have the benefit of decisions in Graham, Miller, and O'Dell.

Moreover, a search of the Supreme Court's pending issues would have shown that Houston-Sconiers had been accepted for review by the time of sentencing. See 3RP; Houston-Sconiers, 188 Wn.2d 1 (sentencing occurred on October 12, 2016 while Houston-Sconiers was argued October 18, 2016). Defense counsel did nothing to alert the trial court to the pending decision in Houston-Sconiers when the court admittedly expressed uncertainty as to whether the Miller opinion applied to firearm enhancements. 3RP 167-68.

Krentkowski has also shown prejudice. The Eighth Amendment requires the court to exercise its discretion at the time of sentencing itself, regardless of what opportunities for discretionary release may occur down the line. Houston-Sconiers, 188 Wn.2d at 20. In other words, the court must conduct a full Miller hearing at the time of sentencing notwithstanding the “Miller fix” statute, RCW 9.94A.730¹¹; Id. At 20-23.

At such hearing, the court must consider the individual characteristics of the child and the crime. Miller, 567 U.S. at 477. The court must also take account of the child’s “chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” Id. The court must also consider the child’s family and home environment. And finally, the court must also consider “the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure

¹¹ RCW 9.94A.730(1) provides:

Notwithstanding any other provisions of this chapter, any person convicted of one or more crimes committed prior to the person’s eighteenth birthday may petition the indeterminate sentence review board for early release after service no less than twenty years of total confinement, provided the person has not been convicted for any crime committed subsequent to the person’s eighteenth birthday, the person has not committed a disqualifying serious infraction as defined by the department in the twelve months prior to filing the petition for early release, and the current sentence was not imposed under RCW 10.95.030 or RCW 9.94A.507.

may have affected him. Id. A juvenile cannot forfeit his right to a full Miller hearing by failing to request it. State v. Ramos, 187 Wn.2d 420, 443, 387 P.3d 650 (2017).

Moreover, given the trial court's willingness to impose an exceptional downward sentence on the underlying crimes, and mistaken belief about its lack of discretion as to the firearm enhancements, there is a reasonable probability the trial court would have exercised discretion when imposing the firearm enhancements had it understood it had such discretion. Thus, ineffective assistance of counsel provides another basis on which to hear the claim and remand the matter to the trial court for resentencing.

5. ADOPTION OF ARGUMENTS OF CO-APPELLANTS.

Pursuant to RAP 10.1(g)(2), Krentkowski adopts the arguments set forth in the opening briefs of co-appellants Gore and Kitt.

D. CONCLUSION

For the reasons discussed above, and those set forth in co-appellant's opening briefs, this Court should reverse Krentkowski's convictions and remand for a new trial. Alternatively, this case should be remanded for resentencing. This Court should also exercise its discretion and deny appellate costs.¹²

DATED this 8th day of February, 2018.

Respectfully submitted,

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¹² RAP 14.2 now provides, with regard to appellate costs:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

The trial court found Krentkowski indigent for purposes of the appeal. CP 890-96; 3RP 140. That finding remains in effect. Krentkowski therefore does not include argument in his opening brief asking this Court to deny costs under State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612, rev. denied, 185 Wn.2d 1034 (2016).

NIELSEN, BROMAN & KOCH P.L.L.C.

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