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NO. 35408-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN J. BOOT,

Appellant.

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

APPELLANT'S SUPPLEMENTAL BRIEF
RE *STATE v. DELBOSQUE*

Marla L. Zink
Luminata, PLLC
2033 Sixth Avenue, Suite 901
Seattle, WA 98121
(360) 726-3130
marla@luminatalaw.com

Attorneys for Kevin J. Boot

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A. INTRODUCTION

Our Supreme Court's decision in *State v. Delbosque*[1] and recent related developments further support Kevin J. Boot ("KJ")'s opening brief and personal restraint petition. These decisions support reversal of KJ's 50-year minimum-term sentence on five independent and alternative bases. First, as in *Delbosque*, KJ's resentencing court failed to meaningfully consider mitigating evidence and substantial evidence does not support the court's findings. Second, KJ was prejudiced by counsel's ineffective assistance of counsel in failing to investigate and present mitigating evidence. Third, the court misapplied the burden to KJ and started from the presumption KJ was an adult at 17 years old, in violation of *Delbosque*'s holding that no party bears the burden and resentencings must be conducted without presumptions. Fourth, recent decisions confirm RCW 10.95.030 cannot be read to require a 25-year minimum term because the trial court must have full discretion when resentencing a juvenile. Finally, recent decisions also confirm KJ's minimum 50-year term constitutes an unconstitutional, de facto sentence of life without parole.

The Court should reverse and remand for resentencing.

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[1] __ Wn.2d __, 456 P.3d 806 (2020).

B. PROCEDURAL POSTURE

KJ appeals from his resentencing under RCW 10.95.035, which mandates trial courts to apply the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) to those convicted of certain crimes committed when they were juveniles. In addition to the direct appeal, KJ filed a Criminal Rule 7.8 motion alleging ineffective assistance of resentencing counsel, which KJ supported with records from his childhood, trial records, an expert psychological report, and declarations. CP 2433, 2461-2783, 2787-94, 2840-42; No. 35408-3, App'ts Op. Br. (filed May 17, 2018). The CrR 7.8 motion was transferred to this Court as a personal restraint petition (PRP). KJ's PRP has been consolidated with this appeal.

The Court stayed this appeal pending the outcome of a juvenile resentencing case in the Washington Supreme Court, *State v. Delbosque*, ___ Wn.2d ___, 456 P.3d 806 (2020). On March 11, 2020, the Court lifted the stay and permitted the filing of this supplemental brief regarding the applicability of *Delbosque*.

C. ARGUMENT

Cristian Delbosque was resentenced for one count of aggravated murder committed when he was 17 years old, during events that left a second victim dead. 456 P.3d at 810. Delbosque's resentencing court

imposed a 48-year minimum term sentence. *Id*. The Supreme Court affirmed the Court of Appeals, reversing the 48-year minimum sentence because two of the resentencing court's findings were not supported by substantial evidence. *Id*. at 812. The Court provided guidance to resentencing courts, requiring the courts meaningfully consider the juvenile's youthful attributes, how they affected the circumstances of the crime, the juvenile's rehabilitation and other mitigating evidence. *Id*. at 814-16. Conclusory statements and recitation of evidence are insufficient. *Id*. at 814.

KJ was also only 17 years old, but unlike Delbosque, KJ committed a single count of aggravated murder with his cousin during a carjacking. Yet, KJ was resentenced to an even higher minimum term than Delbosque—50 years without the possibility of parole. *Delbosque* and other recent developments confirm KJ's resentencing was unconstitutional.

1. The Court should reverse because, as in *Delbosque,* KJ's resentencing court failed to meaningfully consider the distinctive attributes of youth.

Delbosque confirms KJ's resentencing court failed to meaningfully consider the attributes of KJ's youth consistent with *Miller*. App'ts Op. Br. (Section E.3). As the Supreme Court held in *Delbosque*, resentencing courts must <u>meaningfully</u> consider how juveniles are different from adults.

Delbosque, 456 P.3d at 814. The court must meaningfully consider how those differences apply to the facts of the case. *Id*. And it must meaningfully consider whether the facts of the case present the uncommon situation where a juvenile homicide offender is incapable of rehabilitation. *Id*. This requires the resentencing court to do "far more than simply recite the differences between juveniles and adults and make conclusory statements that the offender has not shown an exceptional downward sentence is justified." *Id*. (emphasis added) (quoting *State v. Ramos*, 187 Wn.2d 420, 443, 387 P.3d 650 (2017)).

The Supreme Court also recently clarified the breadth of evidence a resentencing court must meaningfully consider. *State v. Gilbert*, 193 Wn.2d 169, 176-77, 438 P.3d 133 (2019). The sentencing court must consider

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

together with "the convictions at issue, the standard sentencing ranges, and any other relevant factors." *Id*. at 176-77.

Delbosque emphasized that, among these other factors, resentencing courts must meaningfully consider "the measure of rehabilitation that has occurred since a youth was originally sentenced to life without parole." 456 P.3d at 815. Resentencing courts "must reorient the sentencing analysis to a forward-looking assessment of the defendant's capacity for change or propensity for incorrigibility, rather than a backward-focused review of the defendant's criminal history." *Id.* (quoting *U.S. v. Briones*, 929 F.3d 1057, 1066 (9th Cir. 2019)).[2]

Delbosque makes clear the high burden required to prove a juvenile's permanent incorrigibility. *Delbosque*, 456 P.3d at 813 (citing *Bassett*, 192 Wn.2d at 89). "The key question is whether the defendant is capable of change. If subsequent events effectively show that the defendant has changed or is capable of changing, [a finding of permanent incorrigibility] is not an option." *Delbosque*, 456 P.3d at 815 (quoting *Briones*, 929 F.3d at 1067).

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[2] At KJ's 2017 resentencing, the court below did not have the benefit of the federal decision in *Briones*. Our Supreme Court remanded for a new sentencing hearing in *Delbosque* explicitly to allow the resentencing court the benefit of intervening opinions applying *Miller* to resentencings. The resentencing court in this case would also benefit on remand from more recent decisions—including *Delbosque*, 456 P.3d 806, *Gilbert*, 193 Wn.2d 169, and *State v. Bassett*, 192 Wn.2d 67, 89, 428 P.3d 343 (2018).

Supporting its decision to reverse Delbosque's sentence, the Supreme Court found the resentencing court "oversimplified and sometimes disregarded Delbosque's mitigation evidence." *Delbosque*, 456 P.3d at 813. Where evidence demonstrated Delbosque's life experiences had an impact on his 17-year-old decision making, the court found only that his experiences had the "potential" to impact Delbosque. *Id*. at 813-14. The Supreme Court held the resentencing court's findings were not supported by substantial evidence. *Id*.

The Supreme Court also held the resentencing court did "little to acknowledge Delbosque's mitigation evidence demonstrating his capacity for change." 456 P.3d at 814. The resentencing court failed to address favorable mitigation evidence. This failing constituted a failure to meaningfully consider the distinctive attributes of youth. *Id*.

Delbosque holds substantial evidence did not support the resentencing court's finding Delbosque was permanently incorrigible because it reached the conclusion "without reconciling, much less acknowledging, significant evidence to the contrary." 456 P.3d at 814.

Here, the resentencing court failed to heed *Delbosque*'s mandate that courts meaningfully consider how juveniles are different from adults. *Delbosque*, 456 P.3d at 814. Instead, the resentencing court treated 17-year-old KJ as the equivalent of an adult. For example, the court found:

- "Mr. Boot was essentially an adult at the time of the crime." CP 176 (FF 13);
- "Mr. Boot was seventeen years and three hundred and fifty days old at the time of the offense . . . He was not a child and was two weeks from being an adult." CP 175 (FF 2);
- "Mr. Boot's mental and emotional development was no different than a like person or someone who had turned eighteen or reached the age of majority." CP 175 (FF 4);
- KJ "was essentially an adult. He was fifteen days shy of being able to vote or enlist in the military." CP 176 (FF 9).

Presuming KJ was an adult because he was weeks away from turning 18 is not the kind of meaningful consideration *Delbosque* requires.

The court also overlooked KJ's argument and evidence regarding youthful development. As Dr. Roesch testified, "Eighteen is an arbitrary bright line. In terms of developmental psychology, we talk about development continuing into the 20s." RP (5/24/17) 77-78, 104-08. Resentencing counsel discussed the evidence and law surrounding KJ's chronological age. RP (5/24/17) 142-4.3 Nevertheless, the court's findings treat 18 years of age as absolute adulthood. In fact, the findings show the court considered KJ's age, at 17-approaching-18 years old, to be

equivalent to any and every fully matured adult. CP 175-76 (FF 2, 4, 9, 10, 13).

The court also failed to consider evidence showing KJ's adolescent risk-taking behavior near the time of the crime. RP (5/24/2017) 88 (during adolescence, KJ "liked to jump off high cliffs into water, run across a busy freeway . . . . He said it gave him a rush, made him feel good. He wanted to show other people that he could do things that he didn't think, or they didn't think he would do."). Dr. Roesch explained such risk taking and impulsivity was indicative of youthful behavior within the *Miller* framework. RP (5/24/17) 88, 90 (explaining attempted suicide demonstrated impulsivity consistent with lack of maturation), 95-96 (KJ's gang involvement reflected his risk taking and impulsivity), 127. Dr. Roesch further explained his expert assessment of KJ showed KJ had matured out of that rush-seeking behavior. RP (5/24/17) 100-01. Yet, the court failed to reconcile or meaningfully consider any of this evidence.

Moreover, as in *Delbosque*, the court below overlooked KJ's other mitigating evidence. 456 P.3d at 813. In finding KJ was raised by "loving and supportive grandparents," the court oversimplified KJ's childhood and failed to reconcile his parental abandonment. CP 98, 117; *see* CP 175 (FF

2).[3] The court further ignored KJ's childhood sexual abuse, CP 105, his difficulties as a child, CP 105, 118, and his mental health history, CP 106; RP (5/24/17) 90. The court did not grapple with expert Ronald Roesch's opinion that KJ associated with a gang in order to fit in and try to fill other voids. CP 108; RP (5/24/17) 96. By failing to meaningfully consider, or even acknowledge, these mitigating factors, the resentencing court failed to faithfully apply *Miller* and its progeny.

Just as in *Delbosque*, KJ's resentencing court claimed KJ had the potential for rehabilitation where the evidence showed KJ's actual rehabilitation. 456 P.3d at 813-14. The court noted KJ's "possibility for rehabilitation . . . is strong." CP 175 (FF 6). This finding is not supported by substantial evidence. The record shows KJ has not received an infraction since 2001. RP (5/24/17) 59. He maintains an excellent work ethic and positive attitude and works "really hard to make sure there's not another victim like the one I have caused." RP (5/24/17) 129-31; CP 123. He engages extensively in programs, excelling in the Roots of

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[3] Finding of Fact 2 states, "Mr. Boot had loving and supportive grandparents who had afforded him an opportunity to attend school and provided him a nurturing environment until he decided to commit crimes and engage in gang activity. He had a father in prison and a mother who left early and was addicted to drugs. Mr. Boot chose to engage in escalating violence and leave his grandparent's home to move in with his girlfriend when he was seventeen. The evidence does not support negative influences by family or gang peer pressure." CP 175.

Success program and leading groups focused on helping other inmates. RP (5/24/17) 58; CP 120-21, 126, 127, 130-32. Supporters attest to his sincere, compassionate character. *E.g.*, CP 127.

In *Briones*, the Ninth Circuit reasoned rehabilitation evidence was particularly strong "evidence of capacity for change" for a prisoner serving a life without parole sentence. 929 F.3d at 1067.

> [F]or the first fifteen years of Briones's incarceration, his LWOP sentence left no hope that he would ever be released, so the only plausible motivation for his spotless prison record was improvement for improvement's sake. This is precisely the sort of evidence of capacity for change that is key to determining whether a defendant is permanently incorrigible, yet the record does not show that the district court considered it. This alone requires remand.

Id. (citation omitted). KJ, like Briones, has excelled while incarcerated despite his sentence to die in prison. *See, e.g.*, RP (5/24/17) 109-10 (Roesch testimony), 145 (counsel's argument). KJ even noted the relevant timeline at his resentencing. RP (5/24/2017) 92-94 (testimony that KJ's maturation and transition to productive, prosocial behavior occurred 10 years before *Miller*). "This is precisely the sort of evidence of capacity for change" that would be entirely inconsistent with permanent incorrigibility. *Briones*, 929 F.3d at 1067.

As in *Delbosque*, 456 P.3d at 813-14, and *Briones*, 929 F.3d at 1066-67, the record supports KJ's actual rehabilitation. The court's finding of a possibility of rehabilitation is not supported by substantial evidence. Also as in *Delbosque*, the court below reached its sentencing conclusion without "reconciling, much less acknowledging, significant evidence to the contrary." 456 P.3d at 814. This court should reverse and remand for resentencing, as in *Delbosque*, 456 P.3d at 819.

2. *Delbosque* demonstrates KJ's resentencing counsel acted ineffectively. The Court should reverse and remand on this alternative basis, presented in KJ's consolidated personal restraint petition.

In *Delbosque*, the Supreme Court emphasized the requirement that resentencing courts meaningfully consider all circumstances related to the juvenile's youthful attributes, mitigation, and rehabilitation to comply with *Miller* and RCW 10.95.035. *Delbosque*, 456 P.3d at 810, 812-15. Repeating the holding from *Ramos*, which was decided before KJ's resentencing hearing, the Supreme Court reiterated, "the [resentencing] court must 'receive and consider relevant mitigation evidence bearing on the circumstances of the offense and the culpability of the offender, including both expert and lay testimony as appropriate.'" *Delbosque*, 456

P.3d at 815 (quoting *Ramos*, 187 Wn.2d at 443)). The court cannot "receive and consider" relevant evidence if counsel does not provide it.

To act effectively under the Sixth Amendment and article I, section 22, resentencing counsel must provide the court with this relevant mitigation evidence necessary for the court to meaningfully evaluate the *Miller* factors. *E.g.*, *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987) ("Sentencing is a critical stage of the proceedings, at which a defendant is constitutionally entitled to be represented by counsel."); *Williams v. Taylor*, 529 U.S. 362, 390, 395-97, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (reversing on habeas because defense counsel acted ineffectively at sentencing by failing to investigate and present mitigating evidence related to defendant's adverse childhood and mental health).

As set forth in KJ's consolidated personal restraint petition, resentencing counsel failed to provide effective assistance in six areas. CP 2433-60. Resentencing counsel acted ineffectively at resentencing by:

(1) asserting KJ was found to be the shooter at trial when the trial record explicitly establishes KJ denied being the shooter and the jury did not resolve the issue;

(2) failing to become familiar with the trial court record, to present inconsistencies between that record and the testimony presented at

resentencing that disfavored KJ's case, and to present mitigating evidence that supported KJ's case;

(3) failing to investigate reasonably available witnesses and records relating to the circumstances of KJ's childhood;

(4) failing to explain the effect of KJ's adverse childhood experiences on his adolescent developmental process;

(5) failing to fully connect KJ's maturation into his mid-twenties to the newly-understood trajectory of adolescent development, which commonly continues into the mid-twenties; and

(6) failing to be familiar with case law that prohibited the court from considering a mandatory minimum sentence for a homicide committed while KJ was a juvenile.

Viewed individually or collectively, this ineffective assistance of counsel provides an alternative basis to reverse and remand for resentencing.

3. *Delbosque* holds that resentencing courts cannot assign juveniles the burden of proving transient immaturity or start from any presumptions. Reversal is required because KJ's court assigned him the burden and started from the presumption that KJ was a mature adult at 17 years old.

In *Delbosque*, the Supreme Court held no party may be assigned a burden of proof and no presumptions should exist at the outset of a *Miller*

resentencing. 456 P.3d at 815-16. In violation of this requirement, the resentencing court below started from the presumption that KJ should be treated like an adult. CP 193 (court's oral ruling that murder was "not the result of transient youth"). The court also accepted the State's argument that KJ bore the burden at resentencing. RP (5/24/17) 133-34, 168 (court states KJ bears the burden of proof). Because *Delbosque* holds no party may be assigned the burden and the resentencing court's starting presumption was unlawful, the Court should strike the sentence and remand for a new resentencing hearing.

4. Recent decisions further support KJ's argument that RCW 10.95.030(3)(a)(ii)'s 25-year-minimum term is unconstitutional.

Recent developments further prove the mandatory 25-year minimum sentence in RCW 10.95.030(3)(a)(ii) is unconstitutional. *See* App'ts Op. Br. (Section E.1). *Delbosque* requires *Miller* resentencings to start from a blank slate—one free from presumptions. 456 P.3d at 815-16. Yet, KJ's resentencing started with the presumption that 25 years was the minimum sentence KJ could receive. Such a presumption runs contrary to *Delbosque*.

State v. Gilbert also counsels that even a seemingly mandatory statutory provision must be interpreted to provide discretion to a court when sentencing or resentencing a juvenile. 193 Wn.2d 169, 438 P.3d 133

(2019). A resentencing court, like KJ's, is required to consider the mitigating circumstances of youth as a basis to depart from any mandatory sentencing scheme. *Id*. Thus, under *Gilbert* and *Delbosque*, in addition to the argument set forth in the opening brief, the 25-year-minimum term in RCW 10.95.030(3)(a)(ii) cannot be mandatory. A sentencing court must have discretion to depart from this minimum term.

The matter should be reversed and remanded for a new resentencing hearing either because the court and parties started from the improper presumption that 25 years was the minimum term KJ must serve or because KJ's resentencing attorney acted ineffectively when he treated 25 years as the minimum term the court could impose and failed to advocate for a lesser sentence. *See* App'ts Op. Br. (Section E.1); CP 2456-58 (CrR 7.8 Motion for Relief from Judgment & Resentencing Order, pp.24-26).

5. Recent decisions confirm KJ's 50-year minimum term is an unconstitutional de facto life sentence.

Recent decisions also further demonstrate KJ's 50-year minimum term is an unconstitutional de facto life sentence. Since the filing of KJ's opening brief, our Supreme Court held that the Washington constitution offers greater protections to juveniles at sentencing than the Eighth Amendment. *Bassett*, 192 Wn.2d at 82; Const. art. I, § 14. In *Bassett*, the

court concluded that sentencing a juvenile to a life sentence without the possibility of parole or early release constitutes cruel punishment in violation of article I, section 14. *Id*. at 90. Thus, a life sentence without the possibility of parole may never be imposed upon a juvenile.

In *Bassett*, the Court further confirmed—as KJ argued in his opening brief—Washington courts do not distinguish between literal life sentences and de facto life sentences. *Bassett*, 192 Wn.2d at 81 (citing *Ramos*, 187 Wn.2d at 438); App'ts Op. Br. (Section E.2).

State v. Ronquillo remains good law. 190 Wn. App. 765, 774-75, 361 P.3d 779 (2015). There, this Court reversed a 51.3-year sentence for a 16-year-old as a de facto life sentence. *Id*.

In 2019, the Supreme Court of Oregon held a sentence that required a 15-year-old to serve at least 54 years—making release possible for the first time at age 68—is equivalent to life without parole. *White v. Premo*, 443 P.3d 597, 604-05 (Or. 2019).

More courts have joined Washington, Oregon, and the other jurisdictions relied on in KJ's opening brief to hold a 50-year sentence is an unconstitutional de facto life sentence. *E.g.*, *Illinois v. Buffer*, 137 N.E.3d 763, 774 (2019) (holding any sentence imposed on a juvenile that is greater than 40 years constitutes an unconstitutional de facto life sentence; reversing 50-year sentence imposed on 16-year-old); *Carter*

v. Maryland, 461 Md. 295, 362-63, 192 A.3d 695 (2018) (eligibility for parole after 50 years for juvenile is a de facto life without parole sentence).

These cases substantiate the argument that reversal is required under Washington's more protective article I, section 14, because KJ's minimum 50-year term is the functional equivalent of an unconstitutional life without parole sentence.

6. *Delbosque* holds that KJ is entitled to review on direct appeal.

At the time KJ filed his opening brief, Division Two had held there was no right to direct appeal from RCW 10.95.035 resentencings. *State v. Bassett*, 198 Wn. App. 714, 721-22, 394 P.3d 430 (2017), *affirmed in part by* 192 Wn.2d 67, 428 P.3d 343 (2018) (not deciding procedural question). In *Delbosque*, the Supreme Court held resentencings under RCW 10.95.035 are subject to review by direct appeal (in addition to a PRP). 456 P.3d at 819. Applying *Delbosque*, the fifth issue raised in KJ's direct appeal is settled. He is entitled to review through a direct appeal.

D. CONCLUSION

Each of the errors asserted in KJ's opening brief and collateral attack is strengthened by developments in the law since his briefs were filed in May 2018. Because the sentencing statute, the resentencing

procedure, counsel's performance, the court's findings, and the sentence imposed suffer from constitutional and legal errors, the Court should reverse KJ's sentence and remand for resentencing.

DATED this 31st day of March, 2020.

Respectfully submitted,

Marla L. Zink, WSBA 39042
Luminata, PLLC
2033 Sixth Ave., Suite 901
Seattle, WA 98121
(360) 726-3130
marla@luminatalaw.com
Attorneys for Kevin J. Boot

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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STATE OF WASHINGTON,	)	
Respondent,	)	
	)	
v.	)	
	)	CERTIFICATE OF
KEVIN J. BOOT,	)	SERVICE
Appellant.	)	OF COUNSEL
	)	

I, Marla Zink, state that on the below indicated date, I caused to be filed in the Court of Appeals, Division Three the foregoing document dated March 31, 2020 and a true and correct copy of the same to be served on the following in the manner indicated below:

Gretchen Eileen Verhoef	gverhoef@spokanecounty.org;scpaappeals@spokanecounty.org

SIGNED and DATED this 1st day of April, 2020 in Seattle, WA:

s/ Marla L. Zink_____

Marla L. Zink, WSBA 39042
Luminata, PLLC
2033 Sixth Ave., Suite 901
Seattle, WA 98121
(360) 726-3130
marla@luminatalaw.com

LUMINATA, PLLC

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SEATTLE, WA, 98121-2568
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