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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 OPENING BRIEF

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A. INTRODUCTION

Kevin J. Boot (“KJ”) exhibited the telltale signs of transient immaturity—recklessness, impulsivity, heedless risk-taking, susceptibility to outside pressure, and capacity for development. He had been abandoned by his parents, abused, and struggled with suicidal thoughts. While a teenager, KJ was attracted to a life without rules or structure. He moved out of his grandparents’ home to live with his girlfriend and found community in a gang. When he was 17 years old, he participated in a carjacking with his cousin and killed one person. By his mid-twenties, KJ was a model inmate, disavowing gangs, learning self-improvement and teaching others, and abiding by the prison rules. A prison supervisor attested that he believed in KJ’s rehabilitation.

Yet, KJ had been sentenced to life without parole. A new sentencing hearing was held in 2017 because KJ’s youthful attributes had not previously been considered. The Department of Corrections recommended a 35-year minimum term. KJ advocated for a 25-year minimum term. The State told the court it just needed to set a minimum term that fell short of KJ dying in prison. The resentencing court ordered KJ to serve a 50-year minimum term.

Because it is cruel and unusual, the 50-year de facto life sentence is unconstitutional under the Eighth Amendment and article I, section 14.

B. ASSIGNMENTS OF ERROR

1. The resentencing court failed to recognize its full discretionary authority to depart from the 25-year minimum term set forth in RCW 10.95.030(3).

2. RCW 10.95.030(3) is unconstitutional because it restricts the sentencing court's ability to consider sentences less than 25 years for juveniles aged 16 to 18.

3. The imposition of a 50-year minimum term is a de facto life sentence in violation of the constitution.

4. The sentencing court failed to meaningfully apply RCW 10.95.030(3)(b) and *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

5. Finding of Fact 2 is not supported by substantial evidence and fails to meaningfully consider RCW 10.95.030(3)(b) and *Miller*.¹

6. Finding of Fact 3 is not supported by substantial evidence and fails to meaningfully consider RCW 10.95.030(3)(b) and *Miller*.

7. Finding of Fact 4 is not supported by substantial evidence and fails to meaningfully consider RCW 10.95.030(3)(b) and *Miller*.

¹ The insufficiency of the findings is interwoven in the argument section.

8. Finding of Fact 5 is not supported by substantial evidence and fails to meaningfully consider RCW 10.95.030(3)(b) and *Miller*.

9. Finding of Fact 7 is not supported by substantial evidence and fails to meaningfully consider RCW 10.95.030(3)(b) and *Miller*.

10. Finding of Fact 9 is not supported by substantial evidence and fails to meaningfully consider RCW 10.95.030(3)(b) and *Miller*.

11. Finding of Fact 10 is not supported by substantial evidence and fails to meaningfully consider RCW 10.95.030(3)(b) and *Miller*.

12. Finding of Fact 12 is not supported by substantial evidence and fails to meaningfully consider RCW 10.95.030(3)(b) and *Miller*.

13. Finding of Fact 13 is not supported by substantial evidence and fails to meaningfully consider RCW 10.95.030(3)(b) and *Miller*.

14. Finding of Fact 14 is not supported by substantial evidence and fails to meaningfully consider RCW 10.95.030(3)(b) and *Miller*.

15. Finding of Fact 15 is not supported by substantial evidence and fails to meaningfully consider RCW 10.95.030(3)(b) and *Miller*.

16. Finding of Fact 16 is not supported by substantial evidence and fails to meaningfully consider RCW 10.95.030(3)(b) and *Miller*.

17. The trial court erred in sentencing KJ to a minimum term of 50 years of incarceration with a maximum term of life.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Eighth Amendment and article I, section 14 require individualized sentencing determinations for juveniles. Sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant. Does RCW 10.95.030(3) afford resentencing courts discretion to sentence juveniles to less than a 25-year minimum term and, if not, is the statute unconstitutional?

2. Article I, section 14 prohibits imposing life without parole sentences for juveniles. De facto life sentences must be treated the same as explicit life sentences. Is KJ's resentencing unconstitutional where he was sentenced to at least 50 years in prison for a crime committed at age 17?

3. *Miller* and subsequent decisions from this state set forth a variety of criteria regarding a juvenile's youth, which the sentencing court must meaningfully consider. These factors include age and lack of maturity, the family and home environment, characteristics of the offense, and the possibility of rehabilitation. Did the resentencing court fail to meaningfully consider these factors where the court emphasized KJ's proximity to age 18 rather than considering how far KJ was from full maturation of his mid-twenties, focused on the stability of his grandparents' home rather than the destabilizing effect of parental

abandonment, stressed KJ made choices without acknowledging a child's undeveloped decision-making skills, and sentenced KJ to a 50-year minimum term although he has been a model prisoner for almost two decades?

4. Federal and state cases make clear only rare or rarest of the rare juvenile offenders will be permanently incorrigible or otherwise comparable to a mature adult offender. The presumption is that children exhibit the attributes of youth and related factors that militate against a lengthy prison term. Was the resentencing unconstitutional where the resentencing court started with the presumption that KJ's culpability should be should be likened to that of an adult?

5. Whether this appeal from a new felony judgment and sentence should be treated as a direct appeal and not a personal restraint petition?

D. STATEMENT OF THE CASE

When KJ was sentenced in 1996 for a single count of first-degree murder committed when he was 17 years old, our justice system failed to account for the inherent differences between juveniles and adults. CP 15-24. KJ was sentenced to the standard range, a term of life without the possibility of parole. CP 20.

Washington has since amended its juvenile sentencing scheme, in an attempt to conform with evolving notions of decency and our increased

scientific understanding of brain development. *See* RCW 10.95.035 (directing resentencing for juveniles sentenced to life without parole before 2014). The statute now provides,

(3)(a) . . . (ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.

(b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

RCW 10.95.030.²

In light of the new statute, KJ appeared before the Spokane County Superior Court for resentencing in 2017. In the presentence investigation, DOC recommended a 35-year minimum term. RP (5/24/17) 55-56.³

² Copies of RCW 10.95.030 and RCW 10.95.035 are included in the appendix.

³ Transcripts from the resentencing hearing are contained in a single volume filed on appeal; the hearings are referred to by date, “RP (5/24/17)” and “RP (5/27/17).” Appellant has supplementally designated the 22 volumes of transcripts from 1996 trial; those are referred to by volume number, e.g. “RP (Vol. 1)” and the page number.

KJ advocated for a 25-year minimum term. RP (5/24/17) 150; *see* CP 88-130 (defense presentence report). KJ's capacity for decisionmaking at age 17 was not the same as an adult's or even other older adolescents. CP 97. KJ was abandoned by his parents when he was very young—his father was imprisoned and his mother was an addict and could not care for him. CP 98. KJ's babysitter sexually abused him when KJ was six years old. CP 105. He was hospitalized with mental health concerns around age 13 or 14 and attempted suicide as well. CP 106. KJ acted impulsively in deciding to move out of his grandparents' home to live with his girlfriend. CP 97. He had joined a gang, and was abusing drugs and alcohol. CP 97, 105-06. KJ was not thinking of the risks involved in his behavior. CP 106.

At resentencing, KJ recognized the underlying crime cannot be justified, but noted it was a carjacking gone bad with a single victim. CP 99. All homicides are horrible, so the type of crime cannot render it one of the uncommon cases. CP 98.

By approximately age 24, KJ demonstrated serious reform. CP 100. Since 2001, he has been a model inmate. CP 106-07. He severed all gang ties. *Id.* He completed every program available to him, and has been involved with the Redemption Project since 2012. *Id.*

An expert psychologist, Ronald Roesch, evaluated KJ and reviewed his background and the history of the crime. CP 104. He

concluded positive consideration should be given to KJ at resentencing. CP 114. When KJ was 17, he did not have the same reasoning capacities as an adult would. *Id.*

Despite KJ's model prison behavior once he reached his mid-twenties, his childhood environment, and evidence his teenage years were marked by the hallmark characteristics of youth, the State argued KJ is one of the uncommon cases contemplated by *Miller*. CP 51; *see generally* CP 42-87 (prosecution's sentencing memorandum).

After listening to witnesses on both sides and reviewing the parties' reports, the court sentenced KJ to a 50-year minimum term. CP 134-49.⁴ It is clear the court would have sentenced KJ to life without the possibility of parole, if the Court of Appeals had not recently held that sentence unconstitutional. CP 180-81, 193; *State v. Bassett*, 198 Wn. App. 714, 732-38, 394 P.3d 430, *review granted* 189 Wn.2d 1008 (2017) (oral argument heard Feb. 22, 2018).

E. ARGUMENT

Quite simply, KJ is not among the rarest of juvenile offenders who can be said to be irreparably depraved. It is now well-known that young adults as a class temporarily lack volitional control while their brain

⁴ A copy of the resentencing court's findings of fact and conclusions of law, which attach a transcript of its oral ruling, is included in the appendix.

continues to develop. *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015). Throughout adolescence and into the age of majority, humans generally lack the ability to effectively control their behaviors to the degree of fully-developed adults. “[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”—for example, in “parts of the brain involved in behavior control.” *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

Indeed, “adolescents are overrepresented statistically in virtually every category of reckless behavior.” *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Rev.* 339 (1992)). There are three reasons why.

First, juveniles have a “‘lack of maturity and an underdeveloped sense of responsibility,’” leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). Second, they are more susceptible to outside pressures, negative influences, and psychological damage. *Roper*, 543 U.S. at 569; *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). Third, a

juvenile's character is not as "well formed" as an adult's; his traits are "less fixed." *Roper*, 543 U.S. at 570.

A teenager's brain has powerful impulses and poor control. Michele Deitch et al., The Univ. of Tex. at Austin, *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System*, at 13 (2009). It is "like a car with a good accelerator but a weak break." *Id.* The likely result is a crash. *Id.*

Because their brains are still developing, juveniles "react based on emotional impulses rather than by thoroughly processing thoughts and ideas." Deitch et al., *supra*, at 14; accord Marsha Levick, et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment through the Lens of Childhood and Adolescence*, 15 U. Pa. J. L. & Soc. Change 285 (2012) (discussing neuro-imaging research). Studies show that "even when adolescents are familiar with the law, they still act as risk takers who magnify the benefits of crime and disregard the consequences associated with illegal actions." Deitch et al., *supra*, at 15. "[T]hese neurological differences make young offenders, in general, less culpable for their crimes." *O'Dell*, 183 Wn.2d at 691 (emphasis in original).

As a result, a juvenile's actions are less likely to be "evidence of irretrievabl[e] deprav[ity]." *Roper*, 543 U.S. at 570. Juveniles who demonstrate an inability to control their behavior or act in a risky manner

generally do so not because of an entrenched characteristic but because of developmental and hormonal changes that will subside with age.

1. By requiring a 25-year minimum term, the resentencing statute unconstitutionally denies juvenile offender's like KJ an individualized sentencing determination.

Courts are constitutionally required to consider the youthful attributes of the accused to make an individualized sentencing determination. Because it purports to constrain the sentencing court with a mandatory minimum sentence for crimes committed by individuals under 18 years old, RCW 10.95.030(3)(a)(ii), violates article I, section 14 of the Washington State Constitution and the Eighth Amendment to the United States Constitution. To the extent the broader state constitutional provision becomes critical, no *Gunwall*⁵ analysis is necessary because our courts have already held article I, section 14 provides greater protection than the Eighth Amendment to the federal constitution. *E.g.*, *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000); *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996); *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980).

The constitutionality of a statute is a question of law reviewed de novo. *State v. Ramos*, 187 Wn.2d 420, 433, 387 P.3d 650 (2017). Even if

⁵ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

the provision can be read to comply with the constitution, KJ is entitled to resentencing because the minimum term was presumed for his resentencing. *See State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 23-26, 391 P.3d 409 (2017).

In *Miller*, the Supreme Court held that “a sentencer [must] follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.” 567 U.S. at 463. Importantly, “*Miller* implemented a categorical prohibition by requiring the sentencing court to consider the offender’s youth along with a variety of other individual facts about the offender and the crime to determine whether [a particular] sentence is appropriate.” *State v. Lyle*, 854 N.W.2d 378, 386 (Iowa 2014). Stated differently, “*Miller* effectively crafted a new subset of categorically unconstitutional sentences: sentences in which the legislature has forbidden the sentencing court from considering important mitigating characteristics of an offender whose culpability is necessarily and categorically reduced as a matter of law, making the ultimate sentence categorically inappropriate.” *Id.* at 386.

Our state has held a juvenile offender facing a possible or de facto life-without-parole sentence must be afforded an “individualized *Miller* hearing” that takes into account his or her youthful attributes. *Ramos*, 187 Wn.2d at 428. “[W]hen a juvenile facing a standard range life-without-

parole sentence shows that his or her crimes reflect transient immaturity, the juvenile has necessarily proved that substantial and compelling reasons justify an exceptional sentence below the standard range.” *Id.* at 442-43. The juvenile is constitutionally entitled to a *Miller* hearing at which the juvenile can demonstrate youthfulness compels a sentence below the standard range. *Id.* at 443.

Our statute, RCW 10.95.030(3)(a)(ii), violates the individuality analysis by requiring all sentencers to fix at least a 25-year minimum term for all 16 to 18 year old children sentenced for aggravated first degree murder. As the Supreme Court held, “sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant.” *Houston-Sconiers*, 188 Wn.2d at 21. The statute here improperly focuses on the nature of the crime to the exclusion of the offender’s youthful attributes. *See Bassett*, 198 Wn. App. at 738. Although the statute requires the court take into account mitigating factors, it prohibits the sentencer from finding that an individual’s particular circumstances merit a minimum term below 25 years. RCW 10.95.030(3)(a)(ii). The mandatory minimum cannot be squared with *Miller*’s requirement that the sentencing court consider a juvenile defendant’s “chronological age and its hallmark features.” *Ramos*, 187 Wn.2d at 443 (quoting *Miller*, 567 U.S. at 477).

As in *Bassett*, this Court should hold the mandatory minimum 25-year sentence is unconstitutionally cruel and unusual punishment under a categorical bar analysis. *Bassett*, 198 Wn. App. at 732-38. Certain modes of punishment are unconstitutional in violation of article I, section 14. *Manussier*, 129 Wn.2d at 676. A challenge to a particular sentencing practice, rather than the length or even type of a sentence, lends itself to the categorical approach. *Bassett*, 198 Wn. App. at 734-35.

Our courts have interpreted *Miller* to require sentencing courts have discretion when sentencing juvenile offenders. *O'Dell*, 183 Wn.2d at 690 (defendant's youthful attributes support departure from standard range); *Ramos*, 187 Wn.2d 420 (individualized *Miller* sentencing hearing required); *Houston-Sconiers*, 188 Wn.2d at 9 ("sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable [sentencing] ranges and/or enhancements").

Because "children are different" under the Eighth Amendment and hence "criminal procedure laws" must take the defendants' youthfulness into account, sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there.

Houston-Sconiers, 188 Wn.2d at 9.

These cases evidence societal standards of decency favor a sentencing court's ability to individualize sentencing for youthful

offenders. *See Bassett*, 198 Wn. App. at 739 (societal standards of decency evaluated under first step of categorical approach). Without an ability to depart from standard range sentences, sentencing courts are unable to meaningfully consider an individual's youthful attributes.

Miller explicitly requires sentencers to consider an offender's youth and attendant characteristics before imposing a particular penalty. 132 S. Ct. at 2471; *accord Houston-Sconiers*, 188 Wn.2d at 21. Yet, RCW 10.95.030(3)(a)(ii) violates *Miller's* individualized sentencing requirement by setting a mandatory minimum term for certain juvenile offenders like KJ. The statute purports to remove any discretion from the sentencing court to sentence offenders like KJ to a term of less than 25 years. Accordingly, RCW 10.95.030(3)(a)(ii) is unconstitutional.

Consistent with *Ramos* and *Houston-Sconiers*, this Court should hold that the sentencing court has the authority to enter an exceptional sentence below the 25-year minimum term elucidated in RCW 10.95.030(3)(b). *Ramos*, 187 Wn.2d at 434 (*Miller's* individualized sentencing requirements may, on the facts of particular cases, justify an exceptional sentence below the standard range). Alternatively, the Court should hold that provision unconstitutional. In either case, KJ is entitled to a new sentencing hearing where the court and the parties understand that 25 years is not a mandatory minimum term and the court fully takes into

account KJ's youthful attributes in determining his minimum term in prison.

2. KJ's de facto life without parole sentence is unconstitutional.

Even if the statute is constitutional, KJ's de facto life sentence of a minimum 50-year prison term is unconstitutional. Const. art. I, § 14; *Bassett*, 198 Wn. App. at 744; *Ramos*, 187 Wn.2d 420. “[L]ife without parole is an excessive sentence for children whose crimes reflect transient immaturity.” *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 735, 193 L. Ed. 2d 599 (2016). The same considerations apply to literal life without parole and de facto life without parole sentences. *Ramos*, 187 Wn.2d at 438-39. A lengthy term-of-years sentence for a juvenile offender becomes the functional equivalent of life sentence at some point. *Id.* at 439. “*Miller*’s reasoning clearly shows that it applies to any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation.” *Id.* at 438.

In *Bassett*, this Court held article I, section 14 prohibits imposing life without parole sentences for juveniles. 198 Wn. App. at 743. Washington’s ban on life without parole sentences keeps good company with 20 other states and the District of Columbia. The Campaign for the

Fair Sentencing of Youth, <https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/> (May 10, 2018); see *Bassett*, 198 Wn. App. at 741 (“19 states currently ban juvenile life without parole sentences, and most of those states have done so within the last five years”).⁶ It avoids the “unacceptable risk that juvenile offenders whose crimes reflect transient immaturity will be sentenced to life without parole or early release because the sentencing court mistakenly identifies the juvenile as one of the” most uncommon, “irretrievably corrupt juveniles” and rarest of juveniles. *Id.* at 742-43. Banning life without parole sentences for juveniles also balances the amorphous nature of the *Miller* inquiry. *Id.* at 743.

This holding applies equally to de facto life sentences. See *Ramos*, 187 Wn.2d at 438-39. A fifty-year minimum sentence is a de facto life sentence for KJ. *State v. Ronquillo*, 190 Wn. App. 765, 774-75, 361 P.3d 779 (2015) (holding 51.3 years is a de facto life sentence for a 16 year old); *Casiano v. Comm’r of Corr.*, 317 Conn. 52, 77-78, 115 A.3d 1031 (2015) (holding 50-year sentence imposed on 16 or 18 year old constitutes functional equivalent of a life sentence based on federal life expectancy

⁶ Five other states do not use a life without parole sentence: Florida, Maine, New Mexico, New York, and Rhode Island. <https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/>

statistics, the impact of numerous years in prison, and other evidence). It is approximately twice the standard range, if KJ were subject to the SRA. CP 50 (prosecutor asserts standard range would be 271 to 361 months; KJ received 600 months). In fact, the resentencing court was clear that, but for this Court's decision in *Bassett* holding life without parole unconstitutional under article I, section 14, it would have sentenced KJ to an explicit life without parole term. CP 177 ("The court feels constrained by *State v. Bassett* . . . and therefore cannot sentence to life without the possibility of parole."). The prosecutor had argued the court simply had to set a minimum term of "something less than" KJ "d[ying] in prison." RP (5/24/17) 165.

Courts in other states have likewise held that 50-year sentences fall within the strictures of *Miller* and its progeny. *People v. Contreras*, 4 Cal. 5th 349, 411 P.3d 445, 455, 229 Cal. Rptr. 3d 249 (Cal. 2018) (citing *State v. Zuber* 152 A.3d 197, 212-13 (N.J. 2017) (minimum 55 and 68-year terms are "the practical equivalent of life without parole"); *Casiano*, 317 Conn. at 72-80 (50-year sentence for juvenile is functional equivalent of life without parole); *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014) (same for 45-year minimum term sentence); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (same for 75-year sentence with parole eligibility after

52.5 years)).⁷ Judging KJ will be incorrigible for at least the next 50 years bears the same inaccuracy risks as determining that he will be incorrigible forever. *See Contreras*, 411 P.3d at 454-55 (applying such reasoning based on *Miller* and *Montgomery*, among others, to hold juvenile nonhomicide offenders cannot be sentenced to 50 year terms under the Eighth Amendment).

Because life without parole, and de facto life without parole, sentences are unconstitutional for juveniles, under *Bassett*, *Miller*, and *Ramos*, among others, KJ's 50-year minimum sentence is unconstitutional.

3. The resentencing court failed to meaningfully consider the distinctive attributes of youth.

“*Miller* ‘establishes an affirmative requirement that courts fully explore the impact of the defendant’s juvenility on the sentence rendered.’” *Ramos*, 187 Wn.2d at 443 (quoting *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572 (2014)). To satisfy constitutional concerns, the

⁷ For a discussion why using life expectancy tables only to determine a juvenile’s sentence length produces unconstitutional results, see Adele Cummings & Stacie Nelson Colling, There is No Meaningful Opportunity in Meaningless Data: Why it is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences, Vol. 18:2 U.C. Davis J. of Juv. Law & Policy 268 (2014), <https://jilp.law.ucdavis.edu/archives/vol-18-no-2/Cummings-Colling.pdf>.

court “must do far more than simply recite the differences between juveniles and adults and make conclusory statements.” *Id.*

Miller is grounded in the belief that “only a relatively small proportion of adolescents’ who engage in illegal activity develop entrenched patterns of problem behavior.” 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 570 (internal quotation and alteration omitted)). KJ has demonstrated he was not one of those adolescents. In particular, he has been a near perfect adult inmate. The resentencing court failed to meaningfully apply the *Miller* factors. As a result, it improperly concluded KJ was the uncommon adolescent incapable of rehabilitation.

a. KJ’s chronological age and its hallmark features

The court failed to give proper consideration to KJ’s “chronological age and its hallmark features.” *Miller*, 567 U.S. at 477. The constitutionally significant attributes of youth do not magically disappear when an individual turns 18. *Roper*, 543 U.S. at 574; *O’Dell*, 183 Wn.2d at 695. “[A]ge may well mitigate a defendant’s culpability, even if that defendant is over the age of 18.” *O’Dell*, 183 Wn.2d at 695. In fact, “the brain does not reach full maturation until the age of 25.” Deitch et al., *supra*, at 13; accord RP (5/24/17) 77-78, 104-05 (“Eighteen is an arbitrary bright line. In terms of developmental psychology, we talk about development continuing into the 20s.”); Levick, et al., *supra* at 298-99

(discussing neuro-imaging research). The brain’s frontal lobe, which controls advanced functions including imagination, abstract thought, judgment of consequences, planning and controlling impulses, continues to develop into an individual’s early twenties. Deitch et al., *supra*, at 13-14. Though a steady decline in impulsivity begins in adolescence, it remains elevated into an individual’s mid-twenties. Levick, et al., *supra* at 295.⁸

The trial court misapplied this factor when it found significant that KJ was close to his 18th birthday at the time of the underlying crime. CP 175 (FF 2). The court found, “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.” *Id.* It emphasized in other findings, KJ “was essentially an adult. He was fifteen days shy of being able to vote or enlist in the military.” CP 176 (FF 9); *accord* CP 176 (FF 13) (“Mr. Boot was essentially an adult at the time of the crime.”). But, KJ would not cross some magic threshold when he turned 18. *See, e.g.,*

⁸ Further demonstrating the law’s conformance to juvenile’s continuing maturation past age 18, the American Bar Association now urges jurisdictions that impose capital punishment to prohibit imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense. Am. Bar Ass’n, Resolution 111 (Feb. 2018), <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf>.

O'Dell, 183 Wn.2d at 695-96, 698-99 (continuing neurological development remains a significant sentencing factor past a person's 18th birthday). The attributes of youth would continue to evolve into KJ's twenties.

Moreover, "a sentencer misses too much if he treats every child as an adult." *Miller*, 567 U.S. at 477. "the Eighth Amendment and article I, section 14 require courts to treat children differently from adults regardless of whether they are 14 or 17. *Id.* at 467-77. The court's findings completely misapply this aspect of *Miller*. For example, the court found that "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 maturity." CP 175 (FF 4); *accord* CP 176 (FF 10) ("He was essentially at the age of majority so there is no finding of impetuosity, emotion or impulsiveness, either chronological age or by the evidence presented to the court."). But, the point of the constitutional requirements of *Miller* and related cases is that "like persons" in adolescent development—even 18 years olds—are presumptively less mature and less culpable than their mature adult counterparts. *E.g.*, *O'Dell*, 183 Wn.2d at 695-96, 698-99. Thus, the court's finding that KJ "was no less mature than most people eighteen years of age" actually counsels in favor of finding transient immaturity rather than permanent incorrigibility.

The court also failed to appreciate the import of an individualized sentencing inquiry. The court’s findings conflate 17-year-old KJ, “like” people, “someone who had turned eighteen” and someone who had “reached the age of maturity.” CP 175 (FF 4). The precise requirement of the *Miller* inquiry is an individualized sentencing inquiry. *Ramos*, 187 Wn.2d 420. Yet, here the court grouped KJ with a broad swath of developmental groups.

Finally, the court acknowledged that KJ dissociated with gangs and stopped receiving infractions in his mid-twenties. CP 176 (FF 11, 15). These findings precisely track the development process underlying *Miller* and related cases. Many individuals do not reach full maturation of volitional control and frontal lobe development until their mid-twenties. The fact that KJ’s behavior conformed beginning in his mid-twenties actually supports a finding that, at age 17, KJ exhibited the hallmark characteristics of his youth rather than permanent incorrigibility. Yet, the court held these facts supported KJ being among the uncommon permanently incorrigible youths.

Thus, the court misapplied this factor by misunderstanding the significance of KJ’s chronological age and improperly focusing on KJ’s proximity to his 18th birthday.

b. KJ's family and home environment

With regard to KJ's family and home environment, the court found, KJ "had loving and supportive grandparents who had afforded him an opportunity to attend school and provided him a nurturing environment . . . He had a father in prison and a mother who left early and was addicted to drugs. . . . The evidence does not support negative influences by family." CP 175 (FF 3); *accord* CP 175 (FF 5) ("Mr. Boot's home environment and ability to extricate himself from adverse home circumstances is the same as findings #3 and 4 above.").

The court failed to give meaningful consideration to KJ's abandonment by his parents. His parents were unable to care for him. CP 98. His father was imprisoned since KJ was very young. *Id.*; CP 117. His mother was an addict. CP 98. KJ was pulled from his mother's home to be raised by his grandparents. CP 117; *see Miller*, 567 U.S. at 479 (finding relevant that Miller was neglected by his alcoholic and drug-addicted mother). While KJ's grandparents ultimately took him in provided a home for him, he lost his initial caregivers—his biological parents—and was never returned to their care.

KJ's childhood was fraught with other issues, too. He was sexually abused by a babysitter for several months when he was six years old. CP 105; *see Miller*, 567 U.S. at 479 (finding prior abuse relevant). He was

described as a difficult young child, and was subsequently discarded by school system. CP 105, 118. Concerned about KJ's behavior, his grandparents initiated inpatient mental health treatment for him when he was 14 or 15 years old. CP 106. At age 15, KJ attempted suicide. RP (5/24/17) 90.

The court found, "he decided to commit crimes and engage in gang activity. . . . The evidence does not support . . . gang peer pressure." CP 175 (FF 3). The court emphasized "choice" throughout its discussion of gangs. CP 175 (FF 4) ("He was a good student until he chose to join a gang."); CP 176 (FF 14) ("Regarding the degree of responsibility Mr. Boot was capable of exercising, he could have decided to study and develop a trade like his grandfather but instead purposefully chose to follow the life of a Crips gang member."); CP 186 (in oral ruling, court states "It was a matter of choice" to engage in escalating violence and to move out of his grandparents home).

The import of *Miller* is not that the defendants claimed they did not choose to commit a crime. Rather, the constitutional problem was in the court treating that purported choice the same as it would if made by an adult. Because children are constitutionally different, even if it is a "choice," the choice is informed differently when "made" by a child.

Dr. Roesch, moreover, opined KJ associated with a gang out of a desire to fit in. CP 108. At trial, the detective remarked most “kids” join gangs because they are not getting the love and attention they are seeking at home. RP (Vol. 1) 197. They lack a sense of belonging that they look to in the gang. RP (Vol. 10) 1774.⁹ “[A]dolescents are frequently haunted by fears of being abandoned and betrayed.” Mark Warr, *Companions in Crime: The Social Aspects of Criminal Conduct*, 48 (2002) (internal quotation omitted). “Among adolescents, for whom acceptance among peers is often a priceless commodity, and for whom ridicule is a familiar form of interchange, the mere risk of ridicule may be sufficient to provoke participation in behavior that is undeniably dangerous, illegal and morally reprehensible.” *Id.* at 46 (internal citation omitted, emphasis in original). This need is heightened for adolescents from minority and economically disadvantaged groups, like KJ. *Id.* at 53 (“If adolescence carries with it a general problem of status deficiency, imagine what it means to be an adolescent and a member of a minority group and to live in an

⁹ “[T]hey [join to] have a sense of belonging. Like all of us, we want to belong. And if they can’t belong to a social group or a church group or get that love or attention that they are craving at home, they are going to seek out that second family, i.e. the gang. And that’s where they are going to get that notoriety and support. And if they can’t get that through their family through the schools, through their church programs then they want to belong so they are going to seek out that type of recognition or affiliation.” RP (Vol. 10) 1774.

economically depressed area.”); CP 24 (KJ is black and Native American); CP 117-18 (relative describes KJ’s upbringing in a “very working class family” with extensive foster children throughout the years).

KJ’s gang affiliation is a significant factor to consider because, as the United States Supreme Court recognized in *Miller* itself, “exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency.” *Miller*, 567 U.S. at 472 n.5. The “gang setting magnifies the developmental differences that the Court has held [in *Miller*, *Graham*, *Roper*, and *Montgomery*] make juveniles less culpable than adults.” Sarah A. Kellogg, *Just Grow Up Already: The Diminished Culpability of Juvenile Gang Members After Miller v. Alabama*, 55 B.C. L. Rev. 265, 283-85, 299 (2014). The court failed to meaningfully consider both the drivers and the effects of KJ’s association with a gang. Both aspects reflect the transient immaturity the court must consider during sentencing.

c.. The circumstances of the offense

“[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” *Ramos*, 187 Wn.2d at 438 (quoting *Miller*, 567 U.S. at 472). Nonetheless, the circumstances of the offense may be considered at sentencing.

Here, too, the trial court missed the mark. The court presumed KJ shot Felicia Reese. But, whether KJ was the shooter was a contested issue at trial and one that the jury did not resolve. CP 38-39 (this Court’s opinion on direct appeal);RP (5/24/17) 18; RP (Vol. 12) 2144-46, 2185 (closing arguments). KJ has consistently maintained he was not the shooter. *E.g.*, RP (Vol. 9) 1592-93, 1702-03. Thus, the trial court’s unsupported finding should not have been included in a proper *Miller* resentencing.

The resentencing court also found, KJ’s “murder of Ms. Reese was horrific, calculated and cold-blooded. It was a premeditated execution. He shot Ms. Reese three times in the face to cover up the crime of kidnapping and robbery and to enhance his gang status.” CP 175 (FF 7); *accord* CP 176 (FF 10, 11, 12); CP 177 (FF 16). These findings fail to take into account that the crime was a single murder based on thin evidence of premeditation. KJ and his cousin hatched an ill-conceived plan to steal a car. *See* CP 99-100. He is responsible for the remainder that occurred, but it is not necessarily evidence of adult culpability.

Further, the court also failed to consider that, like the defendant in *Miller*, KJ was “high on drugs” when he committed the underlying offense and had been using alcohol since the seventh grade. RP (5/24/17) 56-57, 95; RP (Vol. 11) 2002; CP 105, 108; *Miller*, 567 U.S. at 478. KJ also had

not slept and had been using methamphetamine the week leading up to the crime. CP 109-10; RP (Vol. 11) 2002.

d. KJ's demonstrated rehabilitation

Miller and RCW 10.95.030 require the trial court to consider the juvenile's capacity for rehabilitation. *Ramos*, 187 Wn.2d at 449. This can include "actual subsequent rehabilitation at the time of resentencing to the extent it bears upon the offender's culpability." *Id.*

The court recognized KJ's strong potential for rehabilitation. CP 175 (FF 6).

The possibility of rehabilitation for Mr. Boot is strong. Mr. Boot's prison supervisor informed . . . the author of the pre-sentence investigation, that if anyone with a murder background could make it, it was Mr. Boot. Dr. Roesch, an expert psychologist for Mr. Boot, testified that Mr. Boot can rehabilitate if he has a sentence that gives him more access to programs. Mr. Boot also said he leads groups that focus on helping other inmates.

Id. Yet, the court also found "The pre-sentence report notes doubt about actual remorse. It is unknown whether he can be outside the structure and supervision of a prison without hurting someone or when he will be safe to return to society." CP 176 (FF 15). The findings do not comport with the record.

Since he reached his mid-twenties, KJ has led an exemplary life in prison. He has not received an infraction since 2001. RP (5/24/17) 59. He

makes above average effort to seek out programs in prison. RP (5/24/17) 58. He was one of the best students in the Roots of Success program. CP 126. He leads groups that focus on helping other inmates. CP 120-21, 127. He works work “really hard to make sure there’s not another there’s not another victim like the one I have caused.” RP (5/24/17) 129-31. He maintains an excellent work ethic and a positive attitude. CP 123. His manager finds he is not afraid to take on challenges and “keeps a cool head while under pressure” CP 123. He is genuinely sweet and considerate. CP 127.

His counselor said KJ was very amenable to rehabilitation and, if there was someone he was going to take a risk on, it would be KJ. RP (5/24/17) 58-60.

Furthermore, KJ has a support system and home awaiting him if released. CP 126 (director of Roots of Success prepared to write reference letter to employers), 129 (supportive and economically stable home available to KJ).

KJ continues to maintain he was not the shooter, but he accepts “total responsibility.” RP (5/24/17) 57-58, 88-89.

As Dr. Roesch found, KJ’s behavior in prison suggests he is capable of making prosocial choices. RP (5/24/17) 113. He is not irreparably corrupt. *Id.*

Individually or on the whole, the resentencing court failed to meaningfully consider the *Miller* criteria when it resentenced KJ to a minimum 50-year term in prison.

4. The resentencing court erred by starting with the presumption that KJ should be treated like a mature adult.

The Eighth Amendment and article I, section 14 prohibit courts from considering all but the rarest juvenile offenders to be permanently incorrigible or comparable to a mature adult offender. *Montgomery*, 136 S. Ct. at 734 (only “rarest” of juvenile offender’s crimes reflect permanent incorrigibility); *Miller*, 567 U.S. at 479 (“uncommon” for juvenile to compare to a mature adult); *Roper*, 543 U.S. at 573 (only “rare” juvenile offender’s crimes will reflect irreparable corruption); *Graham*, 560 U.S. at 77 (“few” juvenile offenders are incorrigible).

Under federal law, life without parole sentences for juvenile homicide offenders are to be “uncommon” and “rare.” *Ramos*, 187 Wn.2d at 435, 450 (quoting *Montgomery*, 136 S.Ct. at 734). Washington’s article I, section 14 protections are even broader than federal law. *Bassett*, 198 Wn. App. at 742. “Thus, to comport with Washington’s broader protections, life without parole or early release sentences may be imposed upon only the most uncommon and rarest of offenders.” *Id.* at 742-43.

Children are presumed to be less culpable and more amenable to reform than their adult counterparts. *Miller*, 567 U.S. at 471. Thus, they are less deserving of the most severe punishments. *Id.*

However, the resentencing court 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’s flawed framework might have stemmed from the prosecutor’s assertion that KJ bore the burden at the resentencing hearing. RP (5/24/17) 133-34. As discussed, there is a constitutional presumption against sentencing children like adults. Because the resentencing court started from the opposite—presuming KJ was like an adult and was required to prove to the court he was actually a child—the resulting sentence was decided in a legally flawed framework. It is unconstitutional, and should be reversed.

5. This appeal is properly before the Court as a direct appeal and should not be considered as a personal restraint petition.

Sentencing proceedings, like that proscribed by RCW 10.95.030, are subject to the accused’s constitutional rights under the Washington constitution. Article I, section 22 enshrines the accused’s “right to appeal in all cases.” Const. art. I, § 22 (“In criminal prosecutions the accused shall have . . . the right to appeal in all cases.”). This provision “grants not a mere privilege but a ‘right to appeal in all cases’. . . it is to be accorded

the highest respect by” our courts. *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). Because KJ appeals from a new sentencing hearing, at which the full panoply of article I, section 22 rights applied, KJ likewise has a right to direct appeal.

To the extent RCW 10.95.035(3) restricts KJ’s right to appeal the new judgment and sentence entered in his case, it is unconstitutional. Subsection 3 provides: “The court’s order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986.”

In *State v. Bassett*, Division Two interpreted this subsection to mean there is no right to direct appeal from a sentencing under RCW 10.95.035. *Bassett*, 198 Wn. App. at 721-22. Division Two reached this decision because the statute states an order setting a minimum term pursuant to RCW 10.95.035 is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986. *Id.* at 721 (citing RCW 10.95.035(3)). And, Division Two reasoned, parole board decisions setting a minimum term could be reviewed only through a personal restraint petition. *Id.* Although the Supreme Court accepted review in *Bassett*, the petition did not address appealability. 189 Wn.2d 1008 (review granted); *Petit. for Rev., State v. Bassett*, No. 94556-0 (filed May 24,, 2017).

Sentencings by the superior court pursuant to RCW 10.95.035, however, are patently distinct from the parole board's administrative determination of an inmate's minimum term. Under the indeterminate sentencing scheme that predated the SRA, the superior court did not set the minimum term, but instead only set a maximum term. The sentencing process in the superior court was subject to direct appeal. *See* Const. art. I, § 22; *In re Sinka*, 92 Wn.2d 555, 565-66, 599 P.2d 1275 (1979) (noting setting of minimum term is unlike the other parts of a criminal prosecution in terms of due process); *see also State v. Williams*, 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003) (even under the SRA, "underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision" are appealable); *State v. Ammons*, 105 Wn.2d 175, 182-83, 713 P.2d 719 (1986) (even under the SRA, "appellant, of course, is not precluded from challenging on appeal the procedure by which a sentence within the standard range was imposed"). Following the defendant's transfer to the Department of Corrections, the parole board "fixed" the minimum term. Laws 1986, ch 224, §9 (former RCW 9.95.040).

Unlike the proceeding here, the parole board was an administrative agency. D. Boerner, *Sentencing in Washington*, 1-1 (1985). The State was not a party, and the administrative setting of a minimum term was not a

part of the criminal proceeding. *In re Matter of Bonds*, 26 Wn. App. 526, 529-30, 613 P.2d 1196 (1980). It was not an adversarial proceeding. *Id.* (“the setting of a minimum term [by the parole board] is not part of a criminal prosecution and the full panoply of rights due a defendant in such a proceeding does not apply to a minimum term setting.” *Id.* (quoting *Sinka*, 92 Wn.2d at 566); *Sinka*, 92 Wn.2d at 561 (“The actual setting of a minimum term occurs at a meeting between the inmate and a two-person panel of the Parole Board; that meeting averages 15-20 minutes in length. . . . counsel, family and friends are not allowed to attend.”)).

The statute at issue here sets forth an entirely new sentencing proceeding. In RCW 10.95.035, which subjects juveniles like KJ to process under RCW 10.95.030(3), the sentence results from an adversarial criminal proceeding presided over by the superior court. It is not an administrative act. The State is a party. KJ was present and represented by counsel. In short, his article I, section 22 rights attached.

In *State v. Smissaert*, 103 Wn.2d 636, 638, 694 P.2d 654 (1985), the sentencing court corrected an error in the sentence after the accused’s time for appeal had expired. Our Supreme Court held Smissaert had the right to appeal the revised sentence, even though a direct appeal from the original judgment and sentence would be untimely. 103 Wn.2d at 638.

“Timely appeal of the resentencing itself is valid.” *Id.* at 642. The Court upheld the right to appeal.

In *State v. McNeal*, this Court explained that when resentencing on remand from a prior appeal involves “an entirely new sentencing proceeding,” the accused is entitled to a direct appeal of the resentencing. 142 Wn. App. 777, 786-87 & n.13, 175 P.3d 1139 (2008). KJ, like McNeal, received an entirely new sentencing proceeding. As with McNeal, KJ is entitled to appeal that new sentencing.

On the other hand, a ministerial correction of a sentence is not subject to appeal. *State v. Kilgore*, 167 Wn.2d 28, 39-44, 216 P.3d 393 (2009). Such a ministerial function far more closely resembles the parole board’s setting of a minimum term prior to July 1, 1986 than it resembles the full resentencing proceeding that occurred here under RCW 10.95.035 and RCW 10.95.030.

Relatedly, in *Ramos*, our Supreme Court held that the possibility of another remedy in the future (a petition for early release) “cannot displace [the accused’s] right to appeal his sentence on the basis that it was unlawfully imposed in the first instance.” 187 Wn.2d at 435. Ramos had a right to have his *Miller* sentencing reviewed through direct appeal. KJ has the same right.

Resentencings under *Miller* and RCW 10.95.035, moreover, implicate constitutional concerns. *E.g.*, *Ramos*, 187 Wn.2d at 428 (“When a juvenile offender is sentenced in adult court, youth matters on a constitutional level.”); sections E.1-4, *supra*.

The Rules of Appellate Procedure enshrine these principles. Under RAP 2.2, an order granting or denying a motion for a new trial or an amendment of the judgment are appealable by the accused as of right. RAP 2.2(a)(9). Orders granting or denying a motion to vacate a judgment or arresting or denying arrest of a judgment in a criminal case are also appealable by the accused as of right. RAP 2.2(a)(10), (11). Further, “[a]ny final order made after judgment that affects a substantial right” is subject to direct appeal. RAP 2.2(a)(13). Of course, a final judgment is also appealable as of right. RAP 2.2(a)(1); *see* RCW 9.94A.585(2). And, even the State has the right to appeal a criminal sentence that is outside the standard range, involves a miscalculation of the standard range or omits or includes provisions contrary to law. RAP 2.2(b)(6); *accord* RCW 9.94A.585(2). It would defy logic and reason to permit appeal in these circumstances but to deny the right of appellate review to juveniles like KJ after a new criminal sentencing proceeding.

Alternatively, even if this Court reviews this appeal as a personal restraint petition, KJ is entitled to relief. First, this appeal should be treated

as a personal restraint petition to facilitate review on the merits. *Bassett*, 198 Wn. App. at 721-22 (citing *In re Pers. Restraint of Rolston*, 46 Wn. App. 622, 623, 732 P.2d 166 (1987); RCW 10.95.035(3)); RAP 1.2; RAP 18.8. Next, because KJ has had no prior opportunity for judicial review of these claims, he only needs to show he is subject to unlawful restraint under RAP 16.4. *Bassett*, 198 Wn. App. at 722; *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 299, 88 P.3d 390 (2004) (where petitioner lacked prior opportunity for judicial review, courts do not apply heightened threshold requirements of a personal restraint petition).

F. CONCLUSION

The signature qualities of youth are inherently transient. *Miller*, 567 U.S. at 476. KJ's maturation shows in his prison record. He grew out of the susceptibilities of his teenage years.

KJ should be resentenced because RCW 10.95.030(3) is unconstitutional. The resentencing court's failure to meaningfully apply the *Miller* factors provides an independent basis to strike the sentence and remand for a new sentencing hearing.

DATED this 17 day of May, 2018.

Respectfully submitted,

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APPENDIX

<u>Document</u>	<u>Pages</u>
RCW 10.95.030	App. 1-3
RCW 10.95.035	App. 4
Findings of Fact and Conclusions of Law with transcript of oral ruling attached	App. 5-26

APPENDIX

RCW 10.95.030**Sentences for aggravated first degree murder.**

(1) Except as provided in subsections (2) and (3) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person had an intellectual disability at the time the crime was committed, under the definition of intellectual disability set forth in (a) of this subsection. A diagnosis of intellectual disability shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of intellectual disabilities. The defense must establish an intellectual disability by a preponderance of the evidence and the court must make a finding as to the existence of an intellectual disability.

(a) "Intellectual disability" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

(3)(a)(i) Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person's sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.

(ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.

(b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

(c) A person sentenced under this subsection shall serve the sentence in a facility or institution operated, or utilized under contract, by the state. During the minimum term of total confinement, the person shall not be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release authorized under RCW 9.94A.728, or any other form of authorized leave or absence from the correctional facility while not in the direct custody of a corrections officer. The provisions of this subsection shall not apply: (i) In the case of an offender in need of emergency medical treatment; or (ii) for an extraordinary medical placement when authorized under *RCW 9.94A.728(3).

(d) Any person sentenced pursuant to this subsection shall be subject to community custody under the supervision of the department of corrections and the authority of the indeterminate sentence review board. As part of any sentence under this subsection, the court shall require the person to comply with any conditions imposed by the board.

(e) No later than five years prior to the expiration of the person's minimum term, the department of corrections shall conduct an assessment of the offender and identify programming and services that would be appropriate to prepare the offender for return to the community. To the extent possible, the department shall make programming available as identified by the assessment.

(f) No later than one hundred eighty days prior to the expiration of the person's minimum term, the department of corrections shall conduct, and the offender shall participate in, an examination of the person, incorporating methodologies that are recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the person will engage in future criminal behavior if released on conditions to be set by the board. The board may consider a person's failure to participate in an evaluation under this subsection in determining whether to release the person. The board shall order the person released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released. If the board does not order the person released, the board shall set a new minimum term not to exceed five additional years. The board shall give public safety considerations the highest priority when making all discretionary decisions regarding the ability for release and conditions of release.

(g) In a hearing conducted under (f) of this subsection, the board shall provide opportunities for victims and survivors of victims of any crimes for which the offender has been convicted to present statements as set forth in RCW 7.69.032. The procedures for victim and survivor of victim input shall be provided by rule. To facilitate victim and survivor of victim involvement, county prosecutor's offices shall ensure that any victim impact statements and known contact information for victims of record and survivors of victims are forwarded as part of the judgment and sentence.

(h) An offender released by the board is subject to the supervision of the department of corrections for a period of time to be determined by the board. The department shall monitor the offender's compliance with conditions of community custody imposed by the court or board and promptly report any violations to the board. Any violation of conditions of community custody established or modified by the board are subject to the provisions of RCW 9.95.425 through 9.95.440.

(i) An offender released or discharged under this section may be returned to the institution at the discretion of the board if the offender is found to have violated a condition of community

custody. The offender is entitled to a hearing pursuant to RCW **9.95.435**. The board shall set a new minimum term of incarceration not to exceed five years.

[**2015 c 134 § 5; 2014 c 130 § 9; 2010 c 94 § 3; 1993 c 479 § 1; 1981 c 138 § 3.**]

NOTES:

***Reviser's note:** RCW **9.94A.728** was amended by 2015 c 156 § 1, changing subsection (3) to subsection (1)(c).

Effective date—2015 c 134: See note following RCW **9.94A.501**.

Application—Effective date—2014 c 130: See notes following RCW **9.94A.510**.

Purpose—2010 c 94: See note following RCW **44.04.280**.

RCW 10.95.035

Return of persons to sentencing court if sentenced prior to June 1, 2014, under this chapter or any prior law, for a term of life without the possibility of parole for an offense committed prior to eighteenth birthday.

(1) A person, who was sentenced prior to June 1, 2014, under this chapter or any prior law, to a term of life without the possibility of parole for an offense committed prior to their eighteenth birthday, shall be returned to the sentencing court or the sentencing court's successor for sentencing consistent with RCW **10.95.030**. Release and supervision of a person who receives a minimum term of less than life will be governed by RCW **10.95.030**.

(2) The court shall provide an opportunity for victims and survivors of victims of any crimes for which the offender has been convicted to present a statement personally or by representation.

(3) The court's order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986.

(4) A resentencing under this section shall not reopen the defendant's conviction to challenges that would otherwise be barred by RCW **10.73.090**, **10.73.100**, **10.73.140**, or other procedural barriers.

[**2015 c 134 § 7**; **2014 c 130 § 11**.]

NOTES:

Effective date—2015 c 134: See note following RCW **9.94A.501**.

Effective date—2014 c 130: See note following RCW **9.94A.510**.

FILED

SEP 29 2017

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

CN: 199501003100

SN: 191

PC: 22

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON)	
)	
Plaintiff,)	No. 95-1-00310-0
)	
v.)	PA# 95-9-88687-0
)	RPT# 001-94-0105716
KEVIN JEREMY BOOT)	RCW 9A.32.030(1)(A)AGG(7)OL-F (#23607)
BM 01/11/77)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
Defendant(s).)	
)	
)	

THIS MATTER having come on for re-sentencing on MAY 26, 2017, and the defendant, KEVIN JEREMY BOOT, having been present as well as counsel for defendant, DEREK REID and ANNIE WASILEWSKI, and counsel for the State of Washington, JOHN F. DRISCOLL JR., Deputy Prosecuting Attorney, and the court having heard from all the above, as well as witness testimony, the court now makes the following:

FINDINGS OF FACT

I.

1. The court carefully reviewed the case file and all the materials submitted for the hearing, and fully listened to and considered all the testimony and the argument of counsel.

Findings of Fact and Conclusions of Law

Page 1

1 2. Mr. Boot was seventeen years and three hundred and fifty days old at the time of the offense,
2 which occurred on December 27, 1994. He was not a child and was two weeks away from being
3 an adult.

4 3. Mr. Boot had loving and supportive grandparents who had afforded him an opportunity to attend
5 school and provided him a nurturing environment until he decided to commit crimes and engage in
6 gang activity. He had a father in prison and a mother who left early and was addicted to drugs. Mr.
7 Boot chose to engage in escalating violence and leave his grandparent's home to move in with his
8 girlfriend when he was seventeen. The evidence does not support negative influences by family or
9 gang peer pressure.

10 4. Mr. Boot's mental and emotional development was no different than a like person or someone
11 who had turned eighteen or reached the age of majority. He was a good student until he chose to
12 join a gang.

13 5. Mr. Boot's home environment and ability to extricate himself from adverse home circumstances
14 is the same findings as #3 and 4 above.

15 6. The possibility of rehabilitation for Mr. Boot is strong. Mr. Boot's prison supervisor informed
16 Jeremy Wilson, a Community Corrections Officer from the Department of Corrections, and the
17 author of the pre-sentence investigation, that if anyone with a murder background could make it, it
18 was Mr. Boot. Dr. Roesch, an expert psychologist for Mr. Boot, testified that Mr. Boot can
19 rehabilitate if he has a sentence that gives him more access to programs. Mr. Boot also said he
20 leads groups that focus on helping other inmates.

21 7. Mr. Boot's murder of Ms. Reese was horrific, calculated and cold-blooded. It was a
22 premeditated execution. He shot Ms. Reese three times in the face to cover up the crime of
23 kidnapping and robbery and to enhance his gang status.

24 8. There was no evidence at trial, or during the Miller hearing, that Mr. Boot was unable to work
25 with a lawyer or deal with law enforcement because of his youth.

Findings of Fact and Conclusions of Law

Page 2

1 9. Mr. Boot was able to appreciate the wrongfulness of his act. He was essentially an adult. He
2 was fifteen days shy of being able to vote or enlist in the military. The jury finding that he
3 premeditated the murder to cover up other crimes supports this finding.

4 10. Mr. Boot was also able to plan a carjacking. He had attempted an earlier carjacking. No
5 reason existed to kidnap Ms. Reese. He could have just taken her purse but instead he chose to
6 rob and kidnap her and then execute her to cover up those crimes. He was essentially at the age
7 of majority so there is no finding of impetuosity, emotion or impulsiveness, either by
8 chronological age or by the evidence presented to the court.

9 11. Mr. Boot was more than reckless. He chose to kill and cover up his crime. His own expert
10 acknowledged that adult offenders perform similar acts. Mr. Boot continued to participate with
11 gangs in prison for approximately five years. The jury found him guilty of murder and his crime was
12 the product of intent not recklessness.

13 12. Mr. Boot showed no willingness to walk away from the circumstance on December 27, 1984.

14 13. Mr. Boot was essentially an adult at the time of the crime. He was no less mature than most
15 people eighteen years of age. He had moved in with a woman and chose the gang lifestyle, which
16 he continued until approximately age twenty four. There is no finding of immaturity.

17 14. Regarding the degree of responsibility Mr. Boot was capable of exercising, he could have
18 decided to study and develop a trade like his grandfather but instead purposefully chose to follow
19 the life of a Crips gang member.

20 15. Mr. Boot's character traits remained unlawful up to five years in prison and age twenty four or
21 so. The pre-sentence report notes doubt about actual remorse. It is unknown whether he can be
22 outside the structure and supervision of a prison without hurting someone or when he will be safe
23 to return to society.

24
25
Findings of Fact and Conclusions of Law

Page 3

1 16. Mr. Boot was fully aware of his actions and the resulting consequences. He had enough
2 appreciation for risk that he executed Ms. Reese to attempt to cover up the kidnapping and
3 robbery.

4
5 From the foregoing Findings of Fact the Court now makes the following:

6
7 CONCLUSIONS OF LAW

8 In the interest of justice and to accomplish the purposes of the Sentencing Reform
9 Act, to ensure that punishment for defendants' crime(s) are proportionate to the seriousness of
10 those crimes, to provide protection to the public as well as to provide deterrence to the commission
11 of these types of offenses, substantial and compelling reasons exist to depart from the guidelines
12 and impose the sentence herein. The court feels constrained by State v. Basset, 198 Wn.App.
13 714, 394 P.3d 430 (2017), and therefore cannot sentence to life without the possibility of parole.
14 The court therefore sets a minimum term of fifty (50) years incarceration and a maximum term of
15 life without the possibility of parole.

16
17 Dated this 29th of September, 2017.

18 
19 The Honorable Raymond F. Clary

20 Presented by:

21 
22 JOHN F. DRISCOLL JR.
23 Deputy Prosecuting Attorney
24 WSBA # 14606

Approved by:

21 
22 DEREK REID
23 Attorney for Mr. Boot
24 WSBA # 34186

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SPOKANE

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.) No. 95-1-00310-0
)
 KEVIN J. BOOT,)
)
 Defendant.)

VERBATIM REPORT OF PROCEEDINGS

BEFORE: Honorable Raymond F. Clary

DATE: May 26, 2017

A P P E A R A N C E S

FOR THE PLAINTIFF: JOHN F. DRISCOLL
Deputy Prosecuting Attorney
1100 W. Mallon
Spokane, Washington 99260

FOR THE DEFENDANT: DEREK REID
Assistant Public Defender
1033 W. Gardner
Spokane, Washington 99260

COPY

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1116 W. Broadway Dept. #3
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SENTENCING

(May 26, 2017.)

1
2
3 THE COURT: Please have a seat.

4 Good afternoon. This is the matter of *State of*
5 *Washington vs. Kevin Boot*. Spokane County Superior Court
6 Cause No. 95-1-00310-0. This is the time for the Court to
7 deliver its sentence.

8 The lawyers for the parties have each had an
9 opportunity to address the Court. The Court has taken
10 evidence from witnesses and experts and the Court has heard
11 from family members of Felicia Reese and has heard from
12 Mr. Boot and his significant other.

13 I first want to say to Ms. Bucher, I am deeply sorry
14 for your loss, as is everybody that knows you or knows
15 anything about this case.

16 At the same time, I wanted to tell Mr. Boot that I
17 have a heavy heart today in rendering this sentence. It's
18 one of the most difficult things, if not the most difficult
19 thing, that a lawyer does as a judicial officer.

20 I'm first going to give the parties some background
21 so you have a sense of where the Court is coming from.
22 Numerous cases have analyzed proper sentencing and
23 sentencing considerations for children or juveniles and the
24 cases regularly talk in terms of children or juveniles.
25 They include *Miller vs. Alabama*, which is a United States

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1 Supreme Court case; *Graham vs. Florida*, which is a United
2 States Supreme Court case; *Roper vs. Simmons*, which is a
3 United States Supreme Court case; *State vs. O'Dell*, which
4 is both a Court of Appeals and Washington State Supreme
5 Court case; *State vs. Ramos*, which is both a Court of
6 Appeals and State Supreme Court case, and most recently
7 *State vs. Bassett*, which was decided by Division II of our
8 Court of Appeals.

9 When a judicial officer sentences, he or she does so
10 under what Washington refers to as the Sentencing Reform
11 Act. The Sentencing Reform Act sets forth policies for a
12 judge to follow. I'm going to use them to structure how I
13 reached my sentence.

14 First, the case of *State vs. Bassett* declared that
15 the *Miller* fix is unconstitutional. It is a state Court of
16 Appeals decision that I have concluded I'm bound by, even
17 though it is from a different division. Washington has
18 three divisions. The division that's directly above me
19 here in Spokane County is Division III.

20 *Bassett* analyzes all of the cases that I mentioned
21 to you, as well as our State Constitution and particularly
22 art. 1, §14, and held that "to the extent that a life
23 without parole or early release sentence may be imposed
24 against a juvenile offender under the *Miller* fix statute,
25 it fails the Constitutional categorical bar analysis."

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1 Thus, Bassett held a sentence of life without parole is
2 unconstitutional based on Washington State's Constitution,
3 article 1, section 14.

4 Prior to *Bassett*, the law in Washington was based on
5 the United States Supreme Court court precedent of *Miller*.
6 *Miller* required sentencing courts to consider certain
7 factors, and I emphasize now only in uncommon cases
8 involving juveniles impose life without the possibility of
9 parole. Thus, prior to *Bassett*, in most cases life without
10 possibility of parole was unconstitutional in cases
11 involving juveniles who assisted in or committed murder.

12 For context, *Miller* was decided in 2012. *Miller*
13 involved the consolidation of a case from Arkansas and a
14 case from Alabama. Both of those cases involved 14-year-
15 old boys who were involved in what Justice Kagan described
16 as botched robberies. In the Arkansas case, a 14-year-old,
17 whose name was Kuntrell Jackson, went along with other boys
18 to a store. On the way, Jackson learned that one of the
19 boys had a sawed off shotgun up his sleeve. At first
20 Jackson waited outside the store. Subsequently, he went
21 in. The boy with the shotgun was being met with resistance
22 by the shopkeeper. Eventually, the boy with the shotgun
23 shot the shopkeeper.

24 My sense is that Kuntrell Jackson's case is very
25 different from the case here with Mr. Boot, including the

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1 boy's age. He was 14. His role in the homicide was one of
2 complicity. In other words, he was present. He wasn't the
3 shooter.

4 In the *Alabama* case, a 14-year-old boy named Evan
5 Miller was in and out of foster care. His mother suffered
6 from alcoholism and drug addiction and his stepfather
7 abused him. Miller used drugs and had attempted suicide
8 four times, once while he was six years old. Miller's
9 mother sold drugs. A man named Cannon came to Miller's home
10 to buy drugs from Miller's mother. Another boy by the name
11 of Colby Smith and Miller followed Cannon to Cannon's home
12 and there they smoked marijuana and drank alcohol with
13 Cannon. Eventually Cannon fell asleep. The boys
14 spontaneously decided they were going to try to rob
15 Mr. Cannon. Mr. Cannon woke up and Smith grabbed a
16 baseball bat and struck Cannon because Cannon had put his
17 hands around Evan Miller's neck and was choking him. Once
18 Miller got to his feet, he took the bat and beat Mr. Cannon
19 severely. At one point Miller said, "I am God and I have
20 come to take your life." Cannon was rendered unconscious.
21 The boys left and returned and burned the residence in an
22 effort to cover up their crimes.

23 In my assessment, *Miller* is much different than this
24 case. Again, Miller was much younger. He was 14. He
25 wasn't 15 days away from being 18, as Mr. Boot. His life

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1 was much more dysfunctional than Mr. Boot's, as I will
2 explain a bit later. The crime there was one of
3 circumstance and not long-term planning and not part of a
4 gang-affiliated crime spree.

5 The *Miller* court provided numerous factors, as I
6 indicated, to consider in resentencing someone who was
7 previously sentenced as a child or juvenile. The purpose
8 of the Sentencing Reform Act is to make the criminal
9 justice system in Washington accountable to the public by
10 developing a system for the sentencing of felony offenders,
11 which structures but does not eliminate discretionary
12 decisions affecting sentences. So, what I've done, given
13 that, and you will hear me say this again, given that the
14 law around sentencing juveniles is so fluid, I have chosen
15 to apply both the SRA criteria and to incorporate the
16 *Miller* factors and, for the lawyers' benefit, I am
17 incorporating the *Miller* factors under the second prong,
18 which deals with providing punishment which is just.

19 The first prong of the SRA is to ensure that the
20 punishment for a criminal offense is proportionate to the
21 seriousness of the offense and the offender's criminal
22 history. In this case, as described in the trial in 1996
23 and again here in our *Miller* hearing through live
24 witnesses, Mr. Boot's murder of Ms. Reese was horrific,
25 calculated, and cold-blooded. It was, in fact, a

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1 premeditated execution as described by the prosecutor back
2 in 1996 at the time of sentencing.

3 Mr. Boot had a juvenile history of six felonies. He
4 was, by his own acknowledgement, an established gang member
5 in what I understand to be the Rolling 60's Crips. His
6 crimes were escalating and Ms. Reese's murder was part of a
7 crime spree. His degree of responsibility was high.
8 Unlike Jackson, he was the murderer. Unlike Miller, his
9 crime was not spontaneous; it was calculated as part of
10 escalating gang-inspired violence.

11 Number two, second prong of the SRA, promote respect
12 for the law by providing punishment which is just:
13 After considering the analysis of the U.S. Supreme Court in
14 *Miller*, the Washington State legislature expressly retained
15 the discretion for a sentencer to impose a minimum of 25
16 years to a maximum of life without possibility of parole
17 based on consideration of numerous factors. As recent as
18 February of 2017, the Washington State Supreme Court in a
19 case called *State vs. Ramos* approved of the use of the
20 *Miller* factors to decide the constitutionality of
21 sentencing of a 14-year-old to consecutive sentences that
22 totaled 85 years for four murders. Ramos' friend stabbed a
23 disabled father, his wife, beat their 12-year-old son with
24 a baseball bat, and then Ramos killed the couples' six-
25 year-old son with the bat.

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1 Subsequent to *Ramos*, in April of 2017, so just last
2 month, Division II of the Court of Appeals declared life
3 without the possibility of parole for a juvenile is
4 unconstitutional under art. 1, § 14 of our State
5 constitution. The case name is *State v. Bassett*. *Bassett*
6 was 16. He stole a rifle from his father, made a homemade
7 silencer out of a pop can, and shot both his father and
8 mother. His accomplice, McDonald, found the father
9 breathing and shot him. Both mother and father died.
10 McDonald or Bassett, it wasn't known, as reported by the
11 Court of Appeals, then found Bassett's little brother and
12 drowned him. Since *Bassett* is a Court of Appeals case, as
13 I have indicated, I feel bound to follow it as it's a
14 higher court.

15 While normally a trial court can sentence anywhere
16 within the standard range without findings, I'm
17 incorporating *Miller* factors as encouraged by Justice Yu in
18 *State vs. Ramos*. The *Miller* factors that were expanded
19 upon by *Bassett* are many. The first *Miller-Bassett* factor
20 is chronological age. Here, Mr. Boot was closer to being
21 18 and an adult than a juvenile. He was 17 years-and-
22 three hundred-and-fifty days. He was not a child.
23 Technically, he wasn't an adult either. He was two weeks
24 away from that.

25 Vulnerability to negative influence by family and

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SENTENCING

1 peer pressure is the next factor that *Bassett* raises.
2 Mr. Boot had loving and supportive grandparents who had
3 afforded him an opportunity to attend school and a nice
4 home until he decided to commit crimes and engage in gang
5 activity. At the same time, Mr. Boot had a father who was
6 in prison, a mother who had left early and who is described
7 as committed to drugs. Mr. Boot chose to engage in
8 escalating violence to raise his gang status. It was a
9 matter of choice. He chose to move out of his
10 grandparents' home and move in with a girlfriend. I do not
11 find the evidence and circumstances as supporting negative
12 influence by family or gang peer pressure. He chose to be
13 involved with the gang.

14 Mr. Boot reported to his expert that testified here
15 in court that he enjoyed his gang member status and was
16 committed to it. And that is corroborated by the fact that
17 Mr. Boot was sentenced at the age of 19 and then continued
18 to be part of a gang while in prison for roughly another
19 five years.

20 The next factor that is raised in *Bassett* is mental
21 and emotional development. There was no evidence from the
22 1996 trial that Mr. Boot was less developed emotionally
23 than a like person or someone who had turned 18 or who had
24 reached the age of majority. Mr. Boot had chosen to join a
25 gang long before the fateful day for Ms. Reese. He was a

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1 good student until he decided to take up an antisocial
2 lifestyle and he moved out of his grandparents' home by
3 choice and in with a woman when he was 17. He was
4 financing his lifestyle by selling drugs, as described by
5 witnesses in our *Miller* hearing.

6 Next, there is the consideration of home environment
7 and ability to extricate himself from adverse home
8 circumstances. And one thing that you may be thinking is
9 that sounds much like one of the prior factors that I
10 mentioned. And many of those factors overlap with one
11 another, so I feel like I have addressed this with the
12 vulnerability, family and peer influence above.

13 The possibility of rehabilitation: This is a strong
14 factor for Mr. Boot. This is a significant factor in the
15 *Miller* and *Bassett* analyses. In respect to Mr. Boot, the
16 corrections officer, Mr. Wilson, testified that Mr. Boot's
17 prison supervisor told him that, these are my words, not
18 his, that if anyone with a murder background can make it,
19 Mr. Boot can. His expert, Dr. Roesch, opines that Mr. Boot
20 can rehabilitate but needs access to more programs that are
21 only available if he has a sentence with the possibility of
22 parole. And we heard from Mr. Boot that he leads groups
23 that focus on helping other inmates in the penitentiary.

24 The next *Bassett* factor focuses on the homicide and
25 extent of participation. I really addressed this already,

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1 as well. The jury found that Mr. Boot shot Ms. Reese three
2 times in the face and there were aggravating factors. The
3 jury found him to be the shooter, that he did this to cover
4 up the crime, and he was doing this, or I should say, he
5 did this to enhance his status as a gang member. The jury
6 didn't find gang status enhancement, but that was evidence
7 at trial. See *State v. Boot* 89 Wn. App. 780 (1998). And
8 then he went on with his gang status for five more years.

9 The next *Bassett* factor is youth-based inability to
10 work with a lawyer and deal with law enforcement. In other
11 words, is the defendant, or in this case, was Mr. Boot
12 immature, too youthful that he couldn't assist his lawyer.
13 There was no evidence of that at trial, and there was no
14 evidence of that presented during our *Miller* hearing.

15 The next *Bassett* factor is the ability to appreciate
16 wrongfulness. In my estimation, Mr. Boot was essentially
17 an adult, 15 days from being 18. In 15 days, he would have
18 been old enough to vote and enlist in the United States
19 military. He appeared to know the gravity of what he was
20 doing and this understanding on his part is corroborated by
21 the jury expressly finding that Mr. Boot premeditatedly
22 murdered Ms. Reese to cover up his crimes. His knowledge
23 or appreciation of the wrongfulness is further support for
24 Mr. Boot not being a youth or having more of an adult-like
25 basis from which to make decisions and engage in activity.

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1 The next factor is impetuosity, emotion and
2 impulsiveness. Mr. Boot was, again, essentially the age of
3 majority and he chose to plan a carjacking. He had
4 attempted a prior carjacking that was foiled. He kidnapped
5 Ms. Reese. He didn't have to kidnap her. He could have
6 just taken her purse. He robbed her and then executed her
7 to cover up his kidnapping and robbery. It was not as if
8 he was 14 and went along with others to a store and got
9 caught up in what others were doing. It was not as if he
10 had gone to smoke marijuana and drink with an adult where
11 the adult falls asleep and he attempts to opportunistically
12 rob and gets caught.

13 Reckless is the next factor. Mr. Boot was more than
14 reckless. Webster's New Universal Unabridged Dictionary
15 defines "reck" as having concern or care. It defines
16 "reckless" as the quality of not caring about consequences
17 or irresponsibility. Black's Law Dictionary gives a
18 similar definition for "reck" and "reckless." Mr. Boot
19 chose to kill and cover up his crime. Recklessness is not
20 necessarily a characteristic of immaturity. Mr. Boot's
21 expert acknowledged that adult offenders do similar things,
22 and Mr. Boot continued to participate with the Crips up to
23 approximately five years into prison. The jury found him
24 to have murdered Ms. Reese to conceal the commission of
25 kidnapping and robbery beyond a reasonable doubt. Mr.

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1 Boot's crimes against Ms. Reese were the product of intent,
2 not recklessness.

3 Willingness to walk away: Mr. Boot showed no
4 willingness in 1994, December 27, 1994, to walk away.

5 Immaturity: Mr. Boot was essentially an adult.
6 There was no evidence at the time of trial that he was less
7 mature than most people 18 years of age. He consciously
8 chose this lifestyle. He moved in with a woman. He was
9 committed to a gang life of crime, and he stayed on that
10 path for another five years. By estimation, he was 24 or
11 so.

12 Degree of responsibility that Mr. Boot was capable
13 of exercising: He could have chosen to study and develop a
14 trade and be like his grandfather, but he did not. He
15 chose purposefully to follow the life of a gang member of
16 the Crips.

17 Character traits less--fixed as a juvenile:
18 Mr. Boot's character traits remained unlawful up to five
19 years in prison and an age of 24 or so. We don't know
20 whether he can be outside the structure and supervision of
21 a prison without hurting someone or when he will be safe to
22 society. The presentence report notes doubt about actual
23 remorse.

24 The next factor that arose from the *Miller Bassett*
25 analysis is the ability to appreciate risk. Mr. Boot knew

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1 what he was doing and chose to do it. He had enough
2 appreciation for risk that he executed Ms. Reese to attempt
3 to cover up the kidnapping and robbery.

4 The next factor under the Sentencing Reform Act (3)
5 is to be consistent with others committing similar crimes.
6 RCW 9.9A.010 and the sentencing guidelines for Aggravated
7 Murder First Degree are the result of study by experts in
8 sentencing and intended to provide for commensurate
9 sentences. The sentence between a minimum of at least 25
10 years and life with the possibility of parole would be
11 commensurate by definition of those experts. As shown by
12 the foregoing review of *Miller* and *Ramos*, Mr. Boot will be
13 receiving a lighter sentence than he may have otherwise
14 received given my conclusion that I need to follow the
15 precedent of *State vs. Bassett*.

16 The next factor under the Sentencing Reform Act is
17 to protect the public. Mr. Boot committed one of the most
18 serious crimes Spokane has seen. He was on a path of being
19 a gang member who committed crimes to show strength. He
20 was in prison for five or so years before he began to work
21 on rehabilitation. The sentence of life with the
22 possibility of parole will require, by statute, that before
23 he gets released, he will be assessed by the Sentencing
24 Review Board, and the statute provides that public safety
25 is the highest priority of the parole board.

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SENTENCING

1 The next factor under the Sentencing Reform Act is
2 to offer Mr. Boot an opportunity to improve himself.
3 Sentencing Mr. Boot to a sentence with the opportunity for
4 parole will allow Mr. Boot to participate in rehabilitative
5 programs that were not available to him when he was subject
6 to life without the possibility of parole, before *State vs.*
7 *Bassett* was decided. If Mr. Boot fully participates, as
8 his supporters submit that he has in the last 15 or so
9 years, he has an opportunity to improve and be considered
10 for release by the Review Board.

11 The sixth factor under the SRA is to make frugal use
12 of the State's resources. I don't give much analysis to
13 this because this has been a very costly matter and will
14 continue to be so, although if Mr. Boot is released,
15 certainly the expenses would go down.

16 The seventh SRA factor is to reduce the risk of
17 reoffending upon release to the community. This will
18 require Mr. Boot to have been rehabilitated to the point
19 that he can make healthy and publicly safe choices outside
20 the safe structure of the prison system. A sentence
21 without the possibility of parole will enable Mr. Boot to
22 participate in more programs and potentially ready himself
23 to be released without reoffending. No one knows whether
24 he can do this. Mr. Wilson wrote that in his report, and
25 Mr. Boot's expert said essentially the same thing.

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SENTENCING

1 Now, for purposes of the sentence, with all due
2 respect to you, please stand, Mr. Boot.

3 Mr. Boot, I feel constrained by *State vs. Bassett*,
4 and working to account for the myriad of factors of higher
5 courts and the legislature, I cannot sentence you to life
6 without possibility of parole. Given the totality of the
7 many resentencing factors, your premeditated murder of Ms.
8 Reese was not the result of transient youth. I'm committed
9 to following the law. I find you should be sentenced to a
10 minimum term of 50 years, which is 600 months, with credit
11 for time served, both the time served from arrest to the
12 first trial in 1994 and the time you served under your last
13 sentence. You shall pay the standard legal financial
14 obligations, if there are any left after you receive credit
15 for what you have already paid. And unless the State has
16 more points that the court should consider for purposes of
17 this sentencing, you may have a seat, Mr. Boot, while we
18 prepare the paperwork.

19 MR. DRISCOLL: The only other thing I would ask is
20 Mr. Wilson proposed a bunch of conditions upon release and
21 we do have that drafted. I believe neither party objects
22 to the court entering those, as well.

23 THE COURT: And it's my intention to adopt those.
24 Thank you.

25 MR. DRISCOLL: Thank you, Your Honor.

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SENTENCING

1 THE COURT: Mr. Driscoll, could you get a copy of
2 the transcript, and as needed, reduce my decision to
3 findings and conclusions.

4 MR. DRISCOLL: I will, Your Honor. Thank you.

5 MR. REID: Your Honor, I have reviewed the Judgment
6 and Sentence with Mr. Boot and it does reflect the order of
7 the court. May I approach?

8 THE COURT: Yes.

9 MR. REID: And also approach with the Warrant of
10 Commitment.

11 THE COURT: Please hand it to Ms. Matthews. I have
12 signed the Felony Judgment and Sentence. I'm signing the
13 Judgment and Sentence Appendix H regarding community
14 custody. I'm signing the Warrant of Commitment.

15 My regrets for all concerned.

16 (Court concluded.)

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REPORTER'S CERTIFICATE

C E R T I F I C A T E

1
2
3 I, REBECCA J. WEEKS, Official Court Reporter of the
4 Superior Court of the State of Washington, in and for the
5 County of Spokane, sitting in Department Number 3 thereof,
6 hereby certify that the foregoing cause of action came
7 regularly on for hearing before the Honorable Raymond F.
8 Clary, on the 26th day of May, 2017.

9
10 I further certify that the foregoing was transcribed
11 from my stenographic notes; that it is a true, accurate and
12 complete verbatim transcription of said proceedings.

13
14 I further certify that I am in no way related to,
15 employed by, or interested in any of the parties to the
16 foregoing cause of action; nor do I have any financial
17 interest in said cause of action.

18
19 WHEREBY, I hereby affix my hand, dated this 3rd day of
20 July, 2017.

21
22 
23 Rebecca J. Weeks, CCR #2597
24 Official Court Reporter - Dept. 3

25 BootSentencel/bk

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35408-3-III
)	
KEVIN BOOT,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF MAY, 2018, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<p>[X] KEVIN BOOT 748979 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF MAY, 2018.

X _____ 

WASHINGTON APPELLATE PROJECT

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