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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

KEVIN J. BOOT, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**Consolidated with 36526-3-III**

IN RE PERSONAL RESTRAINT OF:

KEVIN J. BOOT

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**BRIEF OF RESPONDENT**

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## I. APPELLANT'S 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 a sentencing court's ability to consider sentences less than 25 years for juveniles aged 16 to 18.
3. The imposition of a 50-year sentence 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).
- 5-16. Findings of Fact 2, 3, 4, 5, 7, 9, 10, 12, 13, 14, 15, and 16 are not supported by substantial evidence and fail to meaningfully consider RCW 10.95.030(3)(b) and *Miller*.
17. The trial court erred in sentencing Mr. Boot to a minimum term of 50 years of incarceration with a maximum term of life.

## II. ISSUES PRESENTED ON DIRECT APPEAL

1. Is a 50-year sentence for a 17-year-old a de facto life sentence; if a 50-year sentence for a 17-year-old is a de facto life sentence, must this Court remand for resentencing under *State v. Bassett*<sup>1</sup> which prohibits life without parole sentences for juveniles under article 1, section 14 of the Washington Constitution?
2. Pursuant to *Houston-Sconiers* and *Gilbert*,<sup>2</sup> must RCW 10.95.030(3) be read to permit a sentencing court the discretion to impose less than the 25-year statutory minimum for aggravated first-degree murder upon a 16 or 17-year-old juvenile defendant sentenced in adult court?

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<sup>1</sup> *State v. Bassett*, 192 Wn.2d 67, 73, 428 P.3d 343 (2018).

<sup>2</sup> *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017); *State v. Gilbert*, 193 Wn.2d 169, 438 P.3d 133 (2019).

3. Has the defendant adequately briefed his categorical bar challenge to RCW 10.95.030(3)'s 25-year minimum sentence?
4. Are the sentencing court's findings of fact supported by substantial evidence?
5. Did the resentencing court presume the defendant to be an adult or does the *Miller* hearing reflect the trial court understood that it was to receive and consider how the hallmark attributes of youth affected the defendant and how they may have contributed to his crime?

### **III. STATEMENT OF THE CASE**

Kevin Boot was convicted of aggravated first-degree murder in 1996 for the brutal slaying of Felicia Reese, a stranger, who he and his younger cousin, Jerry Boot,<sup>3</sup> carjacked, robbed of \$43, and shot three times in the face, before dumping her body and abandoning her car. When Mr. Boot killed Ms. Reese, he was fifteen days shy of his eighteenth birthday. Whether Mr. Boot or Jerry Boot was the instigator of the events culminating in Ms. Reese's death and whether Mr. Boot or Jerry Boot pulled the trigger to shoot Ms. Reese three times in the face were hotly contested issues at trial. When a jury convicted Mr. Boot as charged of aggravated murder, he was sentenced to life in prison without the possibility of release.

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<sup>3</sup> Kevin Boot was born 1/11/1977 and Jerry Boot was born 4/18/1978. VRP 1846. Because they share the same last name, Kevin Boot will be referred to as "Mr. Boot" or "Kevin"; Jerry Boot will be referred to as "Jerry Boot" or "Jerry." No disrespect is intended.

After the United States Supreme Court decided *Miller*, 132 S. Ct. at 2464, our legislature enacted legislation known as “the *Miller*-fix,” ordering that all juveniles who were sentenced to life without the possibility of parole prior to June 1, 2014, return to the sentencing court for a resentencing hearing comporting with the mandate of *Miller*. RCW 10.95.030, .035. Mr. Boot was appointed counsel for a *Miller* hearing; that attorney hired a renowned psychologist to evaluate Mr. Boot in preparation for the resentencing.

After receiving and considering testimony and other evidence presented by both the State and Mr. Boot, the resentencing court imposed a minimum sentence of fifty years and a maximum sentence of life. From his 2017 resentencing hearing, the defendant timely appealed.<sup>4</sup> He also moved the sentencing court to grant a second resentencing hearing, claiming counsel was ineffective. The superior court transferred Mr. Boot’s CrR 7.8 motion to this Court as a personal restraint petition, now consolidated with the defendant’s direct appeal.

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<sup>4</sup> The defendant’s opening brief includes an argument that the matter is properly before this Court as an appeal, rather than as a PRP. Br. at 32-38. This question was settled in *State v. Delbosque*, 195 Wn.2d 106, 456 P.3d 806 (2020). The direct appeal is properly before this Court.

*Substantive facts.*

Many of the substantive facts have been taken from this Court's published opinion in *State v. Boot*, 89 Wn. App. 780, 783–85, 950 P.2d 964 (1998). Where applicable, citations are also made to the resentencing hearing,<sup>5</sup> during which many of the same facts were presented. Facts not presented to the resentencing court are noted as such.

Felicia Reese was last seen alive on December 27, 1994. After attending the Harvest Christian Fellowship Conference, Ms. Reese left around 9:15 p.m. to take her fiancé to work. She planned to pick him up the next morning, but she failed to do so; she also failed to return to the conference. RPR 40. The next day, a walker discovered her body along the Centennial Trail. Ms. Reese was shot in the face three times. There was no blood trail near her body, indicating the murder occurred elsewhere. RPR 28. Near her body, police found Ms. Reese's bloodstained Bible. RPR 29.

Ms. Reese's car was found a short distance from her body. RPR 30. The rear passenger area was soiled with blood and police found a shell casing on the floorboard. RPR 31-32. Ms. Reese's purse had been discarded, as were her keys. RPR 30. The passenger seat was "somewhat forward" and the driver's side seat was "significantly further back than was the passenger

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<sup>5</sup> The verbatim report of proceedings from the resentencing hearing is referred to herein as "RPR."

seat.” RPR 32. Mr. Boot was six inches shorter than Jerry Boot and Ms. Reese was 5’2”. RPR 33.

The day after Ms. Reese’s body was discovered, a deputy spotted a stolen car, and pursued it. Kevin Boot and another man fled. Mr. Boot threw a .380 caliber pistol over a fence while he fled. A ballistics report verified the three bullets removed from Ms. Reese’s skull were fired from that pistol.

Days earlier, on December 25, 1994, Mr. Boot and Jerry Boot were driving around with a relative named Tyler Marsh. They saw two men “flashing gang signs,” causing Mr. Boot and Jerry Boot to exit the car to confront them. Mr. Marsh later told detectives that Mr. Boot claimed to have shot at the individuals.<sup>6</sup> The two victims heard gunshots, but could not identify the shooter. *See also* RPR 36.<sup>7</sup> Also, two nights before the murder, Mr. Boot threatened another individual in the Spokane Valley with a gun.<sup>8</sup>

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<sup>6</sup> The State presumes this Tyler Marsh is the same Tyler Marsh who has supplied a declaration on Mr. Boot’s behalf for his personal restraint petition. The State would note that Tyler Marsh suffered some memory defects at trial, claiming, under oath, that he could not remember if this statement was made by Kevin or Jerry Boot. CP 1745. Detective Grabenstein testified that in interviewing Mr. Marsh on January 17, 1995, three weeks after the murder, Mr. Marsh attributed this comment to Kevin Boot. CP 1774.

<sup>7</sup> At the resentencing hearing, Detective Grabenstien provided an abbreviated account of this event: “On Christmas Day, several witnesses described an incident where he apparently shot at two individuals who they encountered walking along Greene Street...Apparently no one was hit.” RPR 36.

<sup>88</sup> At trial, Charity Picicci testified Mr. Boot held a gun to her head in the days preceding the murder because he wanted her to break up with her boyfriend and date Jerry Boot. CP 1820. Rea Bivens testified that Mr. Boot also put a gun to her

RPR 35. A separate incident also occurred wherein a female jokingly threatened Mr. Boot with a gun, but he took it away from her, and pointed it at another woman's head, telling the others he would shoot her.<sup>9</sup> RPR 38. The others present "called him a baby and said he wouldn't do it." RPR 38.<sup>10</sup>

On December 26, 1994, Kevin and Jerry Boot were at a different female's apartment, and ordered a pizza, planning to rob the delivery person. Kevin Boot had a gun; Jerry Boot had mace. When they returned to the apartment, Mr. Boot stated he shot the pizza man. The delivery person heard no gunshots but was maced. *See also* RPR 36.

On December 27, 1994, the night Ms. Reese died, a Deaconess Hospital security guard noticed two men putting garbage cans in the middle of the road. He shined his spotlight on them and they ran away. The guard saw them again on a sidewalk near a parking lot, where he told them he would call police if he saw them trespassing. The guard later identified Jerry Boot as one of the two men. RPR 37. Mr. Boot admitted he and Jerry were

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head in the bathroom of her house on Christmas Day, two days before the murder. CP 1889.

<sup>9</sup> At the resentencing, defense counsel cross-examined Detective Grabenstein about the victim's denial of the incident at trial and in interviews. RPR 43-44.

<sup>10</sup> At trial, one witness testified that Mr. Boot told the female to get on her knees, pointed the gun to her head, and said, "I will do it execution style." CP 1859. This information was not presented at the resentencing.

looking for a car to steal that night; they wanted to steal a car so that Mr. Boot could drive to see his girlfriend in the Valley. RPR 42. Apparently unsuccessful at the hospital, they went to Riverfront Park to find a car to steal, and then to the Sheraton Hotel where they found Ms. Reese. RPR 38.

After his arrest for possession of a stolen vehicle, Mr. Boot asked to speak to Detective Van Leuven, a gang specialist. RPR 23. Mr. Boot told law enforcement three different stories regarding Ms. Reese's death. RPR 13. After Mr. Boot claimed his only knowledge of the murder was what he heard on television, and that individuals named "Teardrop" and "Aaron" wanted him to take a handgun for them, detectives confronted him with the discovery that the gun he had discarded was the weapon used to kill Ms. Reese. RPR 14, 17. Mr. Boot immediately wanted to know if he "could get some kind of a deal." RPR 17. Mr. Boot then claimed that he was with "Teardrop" and "Aaron" when they kidnapped Ms. Reese and took her to Minnehaha park, and "Aaron" shot her; during these events, Mr. Boot claimed to be in the back seat with Ms. Reese. RPR 18-19. Mr. Boot then changed his story, stating that his friend, Josh Glanville, killed Ms. Reese while Mr. Boot drove the car. RPR 20-21. When confronted with information that he had been seen with Jerry Boot, Mr. Boot claimed that Jerry Boot shot Ms. Reese, while he drove the car. RPR 22.

Jerry Boot's story was generally consistent with Mr. Boot's to the extent that the recited events commenced at the same location, and described the same kidnapping, carjacking and drive to Minnehaha. RPR 33. Jerry Boot, like Mr. Boot, claimed the person sitting in the passenger seat shot Ms. Reese. RPR 34. However, contrary to Mr. Boot's claims before and during trial, at his resentencing, and in his personal restraint petition, numerous individuals testified Mr. Boot admitted to being the shooter. The night of the murder, he saw other friends, and said his adrenaline was pumping because he had killed a girl and she was probably floating in the river.<sup>11</sup> CP 1861. After the murder, he saw Josh Glanville, saying, "What's up cuzz? I just blasted this bitch in the face."<sup>12</sup> CP 1874. Sean Patterson, also a gang member, testified Mr. Boot confessed to killing Ms. Reese and said that afterwards, he returned to his grandparents' house where he ate hamburgers and watched a movie.<sup>13</sup> CP 2075, 2080.

The physical evidence presented at trial (and during the resentencing hearing) also supported the conclusion that Mr. Boot, not Jerry Boot, shot Ms. Reese. Detective Grabenstein believed that Mr. Boot shot Ms. Reese – he possessed the murder weapon after the murder, the car seat positions

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<sup>11</sup> The resentencing court did not hear these specific facts.

<sup>12</sup> The resentencing court did not hear this verbatim statement.

<sup>13</sup> The resentencing court did not hear these facts.

indicated that Mr. Boot was in the passenger seat, Mr. Boot boasted to several individuals that he shot Ms. Reese and Jerry Boot's fingerprints were found on the *driver's* side window of the car.<sup>14</sup> RPR 34-35.

Detective Grabenstein characterized Mr. Boot's behavior as "beyond reckless and intentional," and "he had a plan...a mission...to get himself from downtown Spokane to the Valley...a plan that was adjusted several times as the need arose." RPR 44. However, Detective Grabenstein agreed some of Mr. Boot's actions in the days preceding the murder demonstrated impulsive or impetuous behavior. RPR 44-45.

Detective Jim Hansen testified at the resentencing, expressing that, in his experience, Mr. Boot was not a typical teenager. RPR 24. In support of this belief, he cited Mr. Boot's affiliation with gangs and drug dealers; Detective Hansen believed Mr. Boot was mature for his age. RPR 24. Detective Hansen told the resentencing court that Mr. Boot demonstrated no fear or intimidation when speaking to the police; however, he cried when he admitted that he and his cousin were involved in the murder. RPR 24.

The defendant presented evidence on his own behalf in support of his argument that despite the horrific nature of the murder, he accepted full responsibility and was not irreparably corrupt. In anticipation of the *Miller*

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<sup>14</sup> On the night of the murder, Mr. Boot wore black leather gloves. CP 1861, 1921. The resentencing court did not hear this information.

resentencing, Dr. Ronald Roesch evaluated the defendant and gave the following salient testimony:

- Within adolescence, there is variability in maturity and development. RPR 74. The science is still developing and has not developed such that an individual's maturity level may be predicted. RPR 76. Humans mature their whole lives, but most maturation occurs before age 25. RPR 77. Maturation does not stop simply because a person turns 18 years old. RPR 77. Additionally, some 17-year-olds may be more mature than some 30-year-olds. RPR 115. Nothing would have changed in Mr. Boot's development between the time of the crime and his eighteenth birthday. RPR 119-120.
- Dr. Roesch did not evaluate Mr. Boot as a 17-year-old adolescent. RPR 79. He could not evaluate whether Mr. Boot told the truth or lied during the evaluation. RPR 89. When asked if he knew whether there was evidence of Mr. Boot's maturity, impulsivity, and impaired decision making at the time of Ms. Reese's murder, Dr. Roesch conceded his opinions were only based on the fact that Mr. Boot "was a member of that class" of adolescents. RPR 104. An assessment of the defendant's maturity level at the time of the crime could only be accomplished by making inferences from his known behavior. RPR 115.

- Regarding the information Dr. Roesch *did* have about Mr. Boot, Dr. Roesch concluded that Mr. Boot had a loving, stable environment with his grandparents and was very close to them, and did not offer an opinion that Mr. Boot's lack of contact with his biological parents had any impact on his development. RPR 84-85, 101, 106. Dr. Roesch concluded that intellectual deficits did not play a significant factor in Mr. Boot's life and that he did well in school until junior high school RPR 85. He did not note any abuse that had an impact on Mr. Boot's development. RPR at passim. In 1991 or 1992, Mr. Boot's grandparents had concerns with his mental health, but there was no testimony that those concerns extended to the time of the murder. RPR 90. Dr. Roesch was not provided any evidence of psychological testing that occurred when Mr. Boot was young. RPR 116.
- Dr. Roesch testified Mr. Boot was "enamored" with the gang lifestyle; at the time of the murder, he had been in a gang for four years, and had moved out of his grandparents' house to afford himself more freedom. RPR 107, 117, 125. He had been living on his own for seven months. RPR 121. Regarding the impact of gang participation on an individual, Dr. Roesch spoke largely in generalities. RPR 87.
- Dr. Roesch offered testimony that Mr. Boot used marijuana, alcohol and methamphetamine, but did not testify concretely how it affected Mr.

Boot, either in his development or on the night of the murder. RPR 86, 95, 121. Further, he testified that there was no evidence that Mr. Boot's youthfulness impacted his understanding of his legal rights.<sup>15</sup> RPR 107.

- Dr. Roesch relayed that Mr. Boot had a desire to show people that he could do things that they did not think he would do, such as running across a freeway or jumping off a cliff. RPR 88.
- After being sent to prison, Mr. Boot eventually listened to his grandmother and left the gang lifestyle behind; he did so on his own, prior to the *Miller* decision, indicating his self-improvement was not related to the possibility of future release. RPR 93, 101.
- Dr. Roesch stated he had no "crystal ball" to determine whether Mr. Boot was irreparably corrupt, but opined that he was not. RPR 109, 113. He believed Mr. Boot was a reckless, immature, antisocial youth at the time of the murder. RPR 123. Nevertheless, Dr. Roesch believed that Mr. Boot would still need vocational training and programming prior to being released to assist him in adapting to life outside the prison. RPR 111. The Court asked Dr. Roesch, "do you have a sense when Mr. Boot would be safe to the community?" Dr. Roesch could not give a specific

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<sup>15</sup> Dr. Roesch also conceded that lying to the police is not unique to juvenile offenders. RPR 117.

answer, stating, it “would take some period of time” but not an “extraordinary” period of time. RPR 127-28.

#### **IV. DIRECT APPEAL ARGUMENT**

The defendant claims his resentencing hearing was constitutionally defective for a number of reasons. First, he claims that RCW 10.95.030(3)(a)(ii)’s 25-year mandatory minimum sentence does not comport with *Miller’s* requirement for an individualized analysis, and that it violates article I, section 14 of the Washington Constitution under a categorical bar analysis. Br. at 13-14. Second, he contends that his 50-year minimum sentence is an unconstitutional de facto life sentence. Br. at 16-19. Third, he claims that the resentencing court failed to meaningfully consider the distinctive attributes of youth before imposing sentence. Br. at 19-30. Fourth, Mr. Boot contends that the resentencing court erred by presuming he should be treated like an adult. Br. at 31-32.

##### **A. THE POST-MILLER EVOLUTION OF SENTENCING JUVENILES FOR HOMICIDE OFFENSES.**

Under RCW 10.95.030(3)(a)(ii), offenders who committed aggravated first-degree murder when they were at least 16 years old but less than 18 years old are subject to an indeterminate sentence with a minimum term of no less than 25 years. When setting the minimum term, sentencing courts must comply with *Miller* by accounting for the offender’s diminished

culpability stemming from their youth. RCW 10.95.030(3)(b). Unlike other juvenile offenders, a juvenile sentenced under RCW 10.95.030 for aggravated murder (or under RCW 9.94A.507 applicable to sex offenses) is ineligible to petition the Indeterminate Sentence Review Board for early release after 20 years of incarceration. RCW 9.94A.730(1).

In *Miller v. Alabama*, the United States Supreme Court held that *mandatory* life sentences without the possibility of parole violate the Eighth Amendment's prohibition on cruel and unusual punishment when imposed on an offender who committed their crime before the age of 18. *Miller*, 567 U.S. at 487. The *Miller* Court recognized that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 471. Juvenile offenders are often "less deserving of the most severe punishments" because they "have diminished culpability and greater prospects for reform." *Id.* (quoting *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)). Juveniles are generally less culpable than adults due to their lack of maturity, underdeveloped sense of responsibility, impulsivity, heedless risk taking, and increased vulnerability to negative influences and pressures. *Id.*

In light of this generally diminished culpability of juvenile offenders, *Miller* now requires sentencing courts to consider the "mitigating qualities of youth" before imposing a particular penalty. *Id.* at

476. When evaluating the mitigating qualities of youth, the court must receive and consider

“chronological age, ‘immaturity,’ ‘impetuosity,’ ‘failure to appreciate risks and consequences,’ the surrounding family and home environment, ‘the circumstances of the homicide offense, including the extent of his participation in the conduct’ and any pressures from friends or family affecting him, the inability to deal with police officers and prosecutors, incapacity to assist an attorney in his defense, and the possibility of rehabilitation.”

*State v. Bassett*, 198 Wn. App. 714, 725, 394 P.3d 430 (2017), *aff’d*, 192 Wn.2d 67 (2018) (quoting *Miller*, 567 U.S. at 477).

[W]here a convicted juvenile offender faces a possible life-without-parole sentence, the sentencing court must conduct an individualized hearing and “take into account how children are different,<sup>16</sup> and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 2469. This individualized...hearing “gives effect to *Miller*’s substantive holding that life 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).

*State v. Ramos*, 187 Wn.2d 420, 428–29, 387 P.3d 650 (2017), *as amended* (Feb. 22, 2017) (footnote added). The mandate of *Miller* applies to both literal and de facto life without parole sentences. *Id.* at 437-40. However, unlike in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), in which the United States Supreme Court categorially barred the

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<sup>16</sup> *Miller* “establishes an affirmative requirement that courts fully explore the impact of the defendant’s juvenility on the sentence rendered.” *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572 (2014).

death penalty for juvenile offenders, *Miller* did not categorically bar life without parole for juveniles convicted of murder.

Although *Miller* did not categorically bar life without parole sentences for juvenile homicide offenders, the Washington State Supreme Court did so in *Bassett*, 192 Wn.2d at 73, a case which post-dated Mr. Boot's resentencing.<sup>17</sup> *Bassett*<sup>18</sup> held that RCW 10.95.030(3)(a)(ii) is unconstitutional to the extent that it allows *any* juvenile to be sentenced to life without parole.<sup>19</sup> 192 Wn.2d at 91. Consequently, every judge conducting a *Miller* resentencing in Washington *must* set a minimum term that is less than life.

In determining the appropriate sentence, the sentencing court is not required to make an explicit finding that the offense reflects irreparable

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<sup>17</sup> However, the record of the resentencing is replete with references to the Court of Appeals' decision in *Bassett*, 198 Wn. App. 714, which was ultimately affirmed by the Supreme Court. *See e.g.*, RPR at 176.

<sup>18</sup> When Bassett was 16 years old, he was kicked out of his parents' home; he and his roommate later snuck into the residence, where Bassett shot his parents. His brother was drowned in the bathtub, an act to which the other participant confessed but later blamed on Bassett. Bassett was convicted of aggravated first-degree murder for the three deaths. At his *Miller* resentencing, he requested three 25-year concurrent sentences based on un rebutted mitigation evidence; however, the court imposed three consecutive life without parole sentences. 192 Wn.2d at 73-75.

<sup>19</sup> Pre-*Bassett*, juveniles in Washington could only be sentenced to life without parole if they were convicted of aggravated first-degree murder; if a juvenile were convicted of any other crime, or combination of crimes, he or she would be eligible for release after 20 years, unless he or she committed a disqualifying infraction in the prior year. *Bassett*, 192 Wn.2d at 91 (citing RCW 10.95.030; RCW 9.94A.730(1)).

corruption, nor is the court required to consider mitigating evidence that is otherwise prohibited by Washington law. *See Ramos* 187 Wn.2d at 437;

When making its decision, the court must be mindful that a life-without-parole sentence is constitutionally prohibited for juvenile homicide offenders whose crimes reflect “unfortunate yet transient immaturity” rather than “irreparable corruption.” *Id.* at 2469 (quoting *Roper*, 543 U.S. at 573, 125 S.Ct. 1183). Moreover, due to “children’s diminished culpability and heightened capacity for change ... appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” *Id.* The sentencing court must thoroughly explain its reasoning, specifically considering the differences between juveniles and adults identified by the *Miller* Court and how those differences apply to the case presented. While formal written findings of fact and conclusions or law are not strictly required, they are always preferable to ensure that the relevant considerations have been made and to facilitate appellate review.

*State v. Ramos*, 187 Wn.2d at 444.

When Mr. Boot was resentenced in 2017, *Miller*, *Ramos* and the Court of Appeals’ decision in *Bassett* were the opinions that generally governed the hearing. In 2018, the Supreme Court affirmed *Bassett*, holding that life without parole was categorically barred under Washington’s prohibition on cruel punishment. Since that time, our Supreme Court has further elucidated the requirements of *Miller*-fix resentencing hearings.

In 2019, the Court of Appeals decided *Gilbert*, 193 Wn.2d 169. When Gilbert was 15-years-old, he murdered two men who tried to prevent him from stealing a vehicle, and attempted a third murder; he was originally sentenced to life without parole for one count of aggravated murder plus a

280-month consecutive sentence for first degree murder. *Id.* at 171-72. The defendant was later resentenced pursuant to *Miller*,<sup>20</sup> requesting the court not only adjust his LWOP sentence, but to consider restructuring the sentence for the second count of murder to run it concurrently with the aggravated murder. *Id.* at 172. The resentencing court believed it lacked the authority to adjust anything other than the aggravated murder sentence. *Id.* The Supreme Court reversed based on the sentencing court's belief that it lacked discretion, reiterating the holding in *Houston-Sconiers*, 188 Wn.2d 1: sentencing courts possess the discretion to consider downward sentences for juvenile offenders tried in adult court regardless of any statutory sentencing provision to the contrary; *Houston-Sconiers* "cannot be read as confined to the firearm enhancement statutes as it went so far as to question any statute that acts to limit consideration of the mitigating factors of youth during sentencing." *Gilbert*, 193 Wn.2d at 175, 177. "Nor can [*Houston-Sconiers*] be read as confined to, or excluding, certain types of sentencing hearings as [the Court] held that courts have discretion to impose downward sentences 'regardless of how the juvenile got there.'" *Id.* at 176 (quoting *Houston-Sconiers*, 188 Wn.2d at 9).

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<sup>20</sup> *Gilbert* did not engage in a state constitutional analysis. 193 Wn.2d 169.

In 2020, our Supreme Court decided *Delbosque*, reversing another juvenile resentencing because two of the trial court’s findings of fact were unsupported by substantial evidence. 195 Wn.2d 106. “[A]fter a period of heavy drinking,” Delbosque brutally murdered two people.<sup>21</sup> *Id.* at 111. During his *Miller* resentencing, Delbosque proffered uncontroverted evidence establishing that he was physically and sexually abused as a child, was likely experiencing alcohol-induced psychosis during the crime, had a low propensity for future dangerousness, and likely experienced executive functioning deficits greater than the average 17-year-old because of childhood traumas; such deficits negatively impacted his development and ability to regulate his behavior. *Id.* at 113.

The resentencing court had acknowledged that its 48-year sentence “may be” considered a de facto life sentence; thus, it stated that it had considered the factors which would support a life without parole sentence, and found that Delbosque was “one of those rare cases” where such a sentence was appropriate. *Id.* at 113-14. The resentencing court found: (1) Delbosque “continues to exhibit an attitude toward others that is reflective of the underlying murder where he chooses to advance his own

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<sup>21</sup> Delbosque apparently shot one person and “hack[ed] another to death with a meat cleaver.” 85 Wn. App. 1079, 1997 WL 207898 (1997) (unpublished) (not cited as authority of any kind, but to clarify omitted facts from the court’s recent opinion).

needs over others” and (2) “that the crime was not symptomatic of transient immaturity, but has proven over time to be a reflection of irreparable corruption.” *Id.* at 116.

The Supreme Court reversed the 48-year sentence because the first finding, involving Delbosque’s continued misbehavior, was unsupported by a record that established (1) Delbosque had not had a prison infraction in the six years prior to the *Miller* hearing, (2) the other examples of Delbosque’s predatory behavior dated back 20 years to the time of the original prosecution, and (3) Delbosque had engaged in the rehabilitative opportunities that were available to him in prison. *Id.* at 117. In support of its finding of irreparable corruption, the sentencing court cited the crime itself, Delbosque’s attempt to implicate his girlfriend, and the 2010 prison infraction. *Id.* at 118. The Supreme Court found that the sentencing court “disregarded Delbosque’s mitigation evidence” – evidence that established Delbosque’s early childhood experiences *actually did* impact him, rather than had the mere potential to impact him. *Id.* at 119. The Supreme Court cited these examples as evidence that the resentencing court did not meaningfully consider the mitigating evidence of Delbosque’s youthfulness and likelihood of rehabilitation, and failed to reconcile its determination of irreparable depravity with that mitigation evidence. *Id.* at 120.

Citing the Ninth Circuit, the Supreme Court stated that “[re]sentencing courts ‘must reorient the sentencing analysis to a forward-looking assessment of the defendant’s capacity for change or propensity for incorrigibility, rather than a backward-focused review of the defendant’s criminal history.’” *Id.* at 122 (citing *U.S. v. Briones*, 929 F.3d 1057, 1066 (9<sup>th</sup> Cir. 2019)). “The key question is whether the defendant is capable of change. If subsequent events effectively show that the defendant has changed or is capable of changing, LWOP is not an option.” *Id.*

Currently under consideration by the Supreme Court is the Court of Appeals’ decision in *State v. Gregg*, 9 Wn. App. 2d 569, 444 P.3d 1219, *review granted*, 194 Wn.2d 1002 (2019).<sup>22</sup> Gregg was sentenced to 444 months for first degree murder with a firearm, first-degree burglary with a firearm and first-degree arson, crimes committed when he was 17-years-old. *Id.* at 573. Gregg contended on appeal that the federal and state constitutions require a presumption that a juvenile’s youth is a mitigating factor and the State assumes the burden to prove otherwise beyond a reasonable doubt. *Id.* at 574. The Court of Appeals rejected this argument,

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<sup>22</sup> Also under consideration is *State v. Haag*, No. 51409-5-II, 2019 WL 4273918 (2019), which the Supreme Court accepted review on June 17, 2020, under No. 97766-6 and is currently set for oral argument on October 20, 2020. At issue in *Haag* is whether the resentencing court’s 46-year minimum term amounts to a de facto life sentence and whether the court’s findings support that sentence.

citing *Ramos*, 187 Wn.2d at 436-37. *Gregg*, 9 Wn. App. 2d. at 578 (“*Miller* does not require that the State assume the burden of proving that a standard range sentence should be imposed, rather than placing the burden on the juvenile offender to prove an exceptional sentence is justified”). The Supreme Court heard argument in *Gregg* on February 25, 2020.

**B. A FIFTY-YEAR SENTENCE FOR A SEVENTEEN-YEAR-OLD IS NOT A DE FACTO LIFE SENTENCE.**

Of ultimate importance to the resolution of this case is whether Mr. Boot’s sentence of 50-year minimum sentence is a de facto life sentence. Under *Bassett*, a life sentence is categorically prohibited for juvenile offenders under the Washington State Constitution. Under *Miller* and *Ramos*, a sentencing court must find that a juvenile homicide offender is “irreparably corrupt” prior to imposing a life sentence, whether actual or de facto. Thus, in order to determine whether the trial court comported with the Eighth Amendment and article I, section 14, this Court must determine if the defendant’s 50-year sentence falls within *Bassett*’s prohibition or *Miller*’s limitation.

At Mr. Boot’s resentencing, the defendant suggested to the court that its “starting point” was the 25-year “mandatory minimum” sentence required by RCW 10.95.030. RPR 134. The State agreed that the court could not impose a life sentence under the Court of Appeals’ opinion in *Bassett*,

94 Wn. App. 1017 (1999). RPR 163-64 (“If it’s an uncommon case, and say the *Bassett* opinion doesn’t apply, and the statute, as written, is still good, you can still impose a life without the possibility of parole sentence. If not, then the court can’t do that. The court has to set a different, a minimum term still, but less than what would be life without the possibility of parole”). The State argued that a sentence of 60 to 65 years was still likely within Mr. Boot’s average life expectancy, and would, therefore, not be an unconstitutional de facto life sentence. RPR 165. The resentencing court agreed that it must follow *Bassett*, and that it could not sentence the defendant to a term of years that would exceed his life expectancy, setting the minimum term at 50 years. CP 177. Therefore, unlike in *Delbosque*, there is no evidence in this record that the resentencing court believed the 50-year sentence to be a de facto life sentence; rather, this record reflects the court’s intent to set a less-than-life minimum sentence, especially where the record reflects that the court imposed a significantly reduced sentence from that requested by the State.

Admittedly, under *Bassett*, 192 Wn.2d 67, this Court could swiftly reverse Mr. Boot’s sentence if it were to find, as a matter of law, a 50-year sentence is a de facto life sentence prohibited by article 1, section 14. However, courts have not reached a consensus that a 50-year sentence is a de facto life sentence for juvenile homicide offenders. For example, in

*Delbosque*, the court engaged in an analysis of the factual findings necessary to *support* a life without parole sentence, and appeared to acknowledge that, if proper findings were made, a 48-year sentence (which the trial court believed to be a life sentence), could be constitutionally imposed on a juvenile under *Miller*.<sup>23</sup>

In *State v. Ronquillo*, 190 Wn. App. 765, 361 P.3d 779 (2015), Division One of this Court held a 51.5-year sentence for a 16-year old was a de facto life sentence.<sup>24</sup> Yet, the *Ronquillo* Court acknowledged that “[a] sentence of 51.3 years is *not necessarily a life sentence* for a 16–year–old, but it is a very severe sentence.” *Id.* at 774 (emphasis added); *but see State*

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<sup>23</sup> Or, perhaps, *Delbosque* does not squarely address the applicability of *Bassett* to *Delbosque* because that argument was not adequately raised or briefed. *Delbosque* does not mention whether the 48-year sentence would have been categorically prohibited under article I, section 14 of the Washington State constitution. Instead, it states in passing, “The [resentencing] court’s rationale is inconsistent with *Miller*’s recognition that incorrigibility is inconsistent with youth... This reasoning is consistent with our case law indicating that irreparable corruption should be rare [(citing *Bassett*)]. . . Indeed, *Bassett*’s prohibition on juvenile life without parole sets a high standard for concluding that a juvenile is permanently incorrigible.” 195 Wn.2d at 118 (emphasis added). It is unclear whether *Delbosque* suggests some retreat from the “high standard” set by *Bassett*, whether that standard may be met if the findings that were made are supported by the record, or, if in Washington, as *Bassett* appears to make clear, there are no “rare cases” in which irreparable corruption may be found under article I, section 14.

<sup>24</sup> *Ronquillo* is distinguishable from this case. *Ronquillo* was not convicted of aggravated murder; he was convicted of premeditated first degree murder and two counts of attempted first degree murder, which, because of the multiple offense policy of the SRA ran consecutively to each other. 190 Wn. App. at 770. *Ronquillo* committed a drive-by shooting, killing one individual and wounding another. *State v. Ronquillo*, 89 Wn. App. 1037, 1998 WL 87641 at \*2 (1998) (not cited for any precedential value but because the facts were not recited in *Ronquillo*’s 2015 case).

*v. Gilbert*, 3 Wn. App. 2d 1007, 2018 WL 1611833 at \*23. (Fearing J. dissenting) (“I conclude Gilbert’s minimum forty-five-year sentence, with the first opportunity for release at age sixty to be an impermissible de facto life sentence”) (unpublished).<sup>25</sup> Due to the severity of the 51.5-year sentence, the *Ronquillo* court deemed it a de facto life sentence, citing no actuarial evidence supporting its decision, except for its citations to other state opinions. This Court is not bound to follow *Ronquillo*. *Matter of Arnold*, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018). Further, at least one other court has concluded that reliance on *Ronquillo* is misplaced because it predated *Ramos*, 187 Wn.2d at 434, in which the court ostensibly defined a de facto life sentence as “a total prison term exceeding the average human life-span.” *See State v. Haag*, 2019 WL 4273918 (unpublished). Yet, in *Delbosque*, the Supreme Court repudiated the notion that it defined “de facto life sentence” in *Ramos*, declining to provide a definition. 195 Wn.2d at 122.

Mr. Boot cites decisions from Connecticut, California, New Jersey, Wyoming, Iowa, Oregon, Illinois, and Maryland,<sup>26</sup> in support of his

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<sup>25</sup> Pursuant to GR 14.1 a party may cite to an unpublished opinion filed on or after March 1, 2013. Such opinions have no precedential value, are not binding on any court and may be accorded such persuasive value as the court deems appropriate.

<sup>26</sup> *Casiano v. Comm’r of Correction*, 317 Conn. 52, 77–78, 115 A.3d 1031 (2015); *People v. Contreras*, 4 Cal.5th 349, 411 P.3d 445, 455, 229 Cal. Rptr. 3d 249 (Cal. 2018) (citing *State v. Zuber*, 227 N.J. 422, 152 A.3d 197, 212–13 (2017))

contention that his minimum 50-year sentence is a de facto life sentence. Br. at 18-19, Supp. Br. at 16-17. Yet, a number of other states disagree, and have held that a 50-year sentence is not a de facto life sentence. *See e.g., Commonwealth v. Anderson*, 2019 PA Super 350, 224 A.3d 40, 47 (Pa. Super. Ct. 2019); *Grace v. State*, 285 So.3d 1008, 1009 (Fla. App. 1 Dist., 2019); *State v. Steele*, 915 N.W.2d 560, 567, 300 Neb. 617, 626 (2018) (“While some other states have found that a sentence expressed as a term of years may constitute a de facto life sentence, we have not done so...On the other hand, we have found that sentences that allow for a ‘meaningful and realistic opportunity to obtain release’ are not de facto life sentences”).

Under the trial court’s imposed 50-year minimum term, Mr. Boot will have a meaningful opportunity for release before his 68<sup>th</sup> birthday. National Vital Statistics Reports indicate the average human life span is 78.6 years, and the average African American life span is 75.3 years.<sup>27</sup>

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(minimum 55 and 68-year terms are “the practical 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 aggregate 75-year sentence with parole eligibility after 52.5 years for 16 year old convicted of second degree murder and other offenses); *White v. Premo*, 365 Or. 1, 443 P.3d 597, 604-05 (2019) (54 year sentence for a 16 year old); *Illinois v. Buffer*, 137 N.E.763, 774 (2019) (any sentence over 40 years is de facto life); *Carter v. State*, 461 Md. 295, 192 A.3d 695 (2018), *reconsideration denied* (Oct. 4, 2018) (eligibility for parole after 50 years was a de facto life sentence).

<sup>27</sup> *See* Elizabeth Arias and Jiaquan Xu, National Vital Statistics Reports, United States Life Tables 2017 at 1, 3, available at [https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68\\_07-508.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_07-508.pdf); *see also* Social Security Administration, Actuarial Life Table 2017, available at

Therefore, on average, a person of Mr. Boot's age could enjoy several years of life or more after age 68.

The defendant, while urging this Court to follow *Ronquillo* and other cases, fails to establish that it is unlikely he will survive until his minimum release date, or that there is no meaningful opportunity for release in such time as to permit him to enjoy a period of liberty. This Court should not presume, without more, that a 50-year minimum sentence in these circumstances affords Mr. Boot no reasonable possibility of release or a meaningful life thereafter. *See Anderson*, 224 A.3d at 47. If, however, this Court concludes that a 50-year sentence is a de facto life sentence categorically prohibited under our state constitution and *Bassett*, then the defendant's sentence must be reversed and remanded for resentencing.

**C. RCW 10.95.030(3)(A)(II)'S 25-YEAR MINIMUM SENTENCE FOR AGGRAVATED MURDER IS NO DIFFERENT THAN ANY OTHER STATUTORY MINIMUM SENTENCE FROM WHICH THE SENTENCING COURT MAY DEVIATE DEPENDENT ON YOUTHFUL CULPABILITY.**

Although the legislature has plenary authority over sentencing and may fix legal punishments and provide for minimum and maximum sentence terms, *see e.g., State v. Benn*, 120 Wn.2d 631, 670, 845 P.2d 289 (1993), *Houston-Sconiers* and *Gilbert* are clear. Where an individual is

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<https://www.ssa.gov/oact/STATS/table4c6.html> (indicating average remaining life expectancy of 40-year-old male in 2017 was 38.56 years).

sentenced in adult court for a crime committed when the individual was a juvenile, the sentencing court must have discretion to depart from mandatory sentencing provisions otherwise applicable to adult offenders. As noted in *Gilbert, Houston-Sconiers* “cannot be read as confined to the firearm enhancement statutes as it...question[ed] any statute that acts to limit consideration of the mitigating factors of youth during sentencing;” “[n]or can it be read as confined to, or excluding, certain types of sentencing hearings as [the Court] held that the courts have discretion to impose downward sentences ‘regardless of how the juvenile got there.’” 193 Wn.2d at 175-77 (emphasis in original). Nor can it be read as applicable only to SRA sentences under Title 9, and not sentences under chapter 10.95; it would be illogical to conclude the Constitution applies only to certain statutory provisions, but not to others.

For this reason, RCW 10.95.030 mandatory minimum sentence of 25 years for aggravated murder committed by 16- or 17-year-olds comports with constitutional requirements in *Houston-Sconiers* and *Gilbert*; Washington’s judges have discretion to consider a downward departure from the 25-year mandatory minimum sentence. The statute comports with *Miller* not because the sentencing court has discretion to depart from the 25-year minimum sentence, but because *Miller* applies to only life sentences; a 25-year sentence is not a life sentence.

In this case, the defendant did not request a mitigated sentence less than the 25-year statutory minimum. Despite defense counsel's argument that 25 years "is the starting point," RPR 134, there is no evidence that the sentencing court believed *Houston-Sconiers* (decided three months before his sentencing hearing) did not apply to Mr. Boot's sentencing, or that the court's discretion was hampered by the statutory mandatory minimum. Defense counsel's suggestion that 25 years "was the starting point" is not indicative of an attorney who believed *Houston-Sconiers*' scope to be limited, but rather, is indicative of an attorney who recognized the severity and brutality of the defendant's crime and that, strategically, the defendant would gain more credibility with the court by requesting a low-end sentence, rather than an exceptional sentence downward. The defendant has failed to establish the trial court did not understand it possessed discretion to further depart from the 25-year mandatory minimum sentence – had such a request been made at the resentencing – and so, unlike *Gilbert*, is not entitled to relief on appeal. *See Gilbert*, 193 Wn.2d at 177 ("Because [the sentencing judge] believed he did not have discretion to consider anything other than an adjustment to the aggravated murder sentence, he did not consider whether the mitigating factors of Gilbert's youth might warrant an exceptional sentence").

Citing *Bassett*, the defendant additionally argues that the 25-year minimum sentence set by RCW 10.95.030 is unconstitutionally cruel and unusual under a categorical bar analysis. Br. at 14. Yet, the issue in *Bassett*, whether a maximum term of life for a juvenile convicted of aggravated murder is categorically barred under the Washington State Constitution, differs dramatically from defendant’s instant argument, that the same statute’s 25-year minimum term is also unconstitutional under article I, section 14. The defendant fails to undertake the required categorical bar analysis, which includes demonstrating a national consensus against the sentencing practice at issue and an analysis of the “culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question” and whether “the challenged sentencing practice serves legitimate penological goals.” *See Bassett*, 192 Wn.2d at 85, 87. This Court should not entertain this issue as it is inadequately briefed. *See e.g., State v. Thomas*, 150 Wn.2d 821, 868–69, 83 P.3d 970 (2004), *aff’d*, 166 Wn.2d 380 (2009).

**D. MR. BOOT’S CASE DIFFERS FROM *DELBOSQUE* BECAUSE THE COURT’S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.**

1. Standard of review for juvenile resentencing hearings.

A court’s sentencing decision is reviewed for clear abuse of discretion or misapplication of the law. *Delbosque* 195 Wn.2d at 116. A

trial court abuses its discretion when “its decision ‘is manifestly unreasonable or based upon untenable grounds.’” *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). Further, “[t]he ‘untenable grounds’ basis applies ‘if the factual findings are unsupported by the record.’” *Id.* For a trial court that acts

within bounds set by case law and statute, the grant of discretion is broad: “Affording discretion to a trial court allows the trial court to operate within a ‘range of acceptable choices.’” *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (internal quotation marks omitted) (quoting [*State v.*] *Rohrich*, 149 Wn.2d [647,] 654, 71 P.3d 638 [2003]).

Thus, [an appellate court] give[s] great deference to the trial court’s determination: even if [the appellate court] disagree[s] with the trial court’s ultimate decision, [the appellate court will] not reverse that decision unless it falls outside the range of acceptable choices because it is manifestly unreasonable, rests on facts unsupported by the record, or was reached by applying the wrong legal standard. *See State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

*State v. Curry*, 191 Wn.2d 475, 484, 423 P.3d 179 (2018); *see also Ramos*, 187 Wn.2d at 453 (“Although we cannot say that every reasonable judge would necessarily make the same decisions as the court did here, we cannot reweigh the evidence on review. The court clearly received and considered Ramos’ extensive mitigation evidence, was fully aware of its authority to impose an exceptional sentence below the standard range, and reasonably considered the issues identified in *Miller* when making its decision”).

An appellate court reviews findings of fact for substantial evidence. *Delbosque*, 195 Wn.2d at 116 (citing *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014)). “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” *Id.* (citing *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)).

In *Delbosque*<sup>28</sup> and *Gilbert*, cases post-dating the resentencing hearing in Mr. Boot’s matter, our Supreme Court discussed the discretion that must be used by a resentencing court in considering the proper sentence to impose on a juvenile convicted of one or more murders. Specifically in *Delbosque*, the court acknowledged that predicting future dangerousness is extremely difficult, but, for this reason, resentencing courts must consider the measure of rehabilitation that has occurred since a youth was originally sentenced to life without the possibility of parole. 195 Wn.2d at 121.

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<sup>28</sup> The State would note that post-*Delbosque*, our Supreme Court has remanded at least two matters to the Court of Appeals for reconsideration in light of *Delbosque*. See *State v. Backstrom*, 195 Wn.2d 1018, 464 P.3d 209 (2020) (COA 77134-5) (defendant received minimum 48-year sentence for a murder of a mother and daughter during a robbery of their home when defendant was 17 years old); *State v. Collins*, 195 Wn.2d 1018, 464 P.3d 209 (2020) (COA 51511-3) (sentencing court rejected request for an exceptional mitigated sentence for second degree murder and imposed 260-month sentence).

2. Mr. Boot's resentencing hearing.

In resentencing the defendant, Judge Raymond Clary considered and properly applied not only the *Miller/Bassett* criteria listed above, but also sentenced the defendant with the purposes of the SRA in mind. RCW 9.94A.010; *Houston-Sconiers*, 188 Wn.2d at 35–36 (Madsen, J. concurring in result). Additionally, although the court did not have the benefit of *Delbosque*, the court's findings are supported by substantial evidence.<sup>29</sup> The Court did not make a finding of irreparable corruption, did not intend to impose a life without the possibility of parole sentence, and, in fact, explicitly found that the likelihood of rehabilitation was great. Under these circumstances, it is doubtful that the trial court even needed to make formal

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<sup>29</sup> The defendant does not dispute that the following findings are supported by substantial evidence:

Finding of Fact 6: The possibility of rehabilitation for Mr. Boot is strong. Mr. Boot's prison supervisor informed Jeremy Wilson, a Community Corrections Officer from the Department of Corrections, and 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.

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

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

findings of fact in support of its less-than-life without parole sentence; the Supreme Court has held that a formal finding of irreparable corruption is not necessary to sustain a de facto life without the possibility of parole sentence as long as the record is sufficient for review. *Ramos*, 187 Wn.2d at 450. Regardless, the record supports the court's findings.

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

There was no dispute about the defendant's chronological age at the time he killed Ms. Reese. It was undisputed that, at the time he killed Ms. Reese, he was only two weeks away from legal adulthood at age 18. Dr. Roesch testified that there would not be any developmental changes in the two weeks between the murder and the defendant's eighteenth birthday. The Court could not engage in an evaluation as to how or whether the hallmark effects of youth affected the defendant without acknowledging that the defendant was nearly an adult. This finding of fact was supported by substantial evidence.

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

The court's description of Mr. Boot's grandparents and their loving, supportive environment, was based on substantial evidence – Mr. Boot's own statements. RPR 54 (“The discussion I had with Mr. Boot on the phone, he described that home as supportive, loving, and not a negative environment”); *see also* RPR 49 (Detective Grabenstein's impressions of Mr. Boot's grandparents). Mr. Boot disclosed that “he realized that nobody was at fault for his behavior, nothing influenced his behavior other than his own decisions and choices.” RPR 54. That his father was in prison and his mother was a drug addict were findings also supported by the record. RPR 84. The fact that his parents were not in his life and that his grandparents provided a loving environment supported the finding that Mr. Boot did not suffer negative influences by family. Dr. Roesch offered no opinion that Mr. Boot's lack of contact with his parents had any effect on his development.

The record also supported the conclusion that Mr. Boot voluntarily left his grandparents' home to move in with a girlfriend. RPR 121. Dr. Roesch testified about the effect of peer influences on youth: “If you are hanging around with a bunch of delinquents who are antisocial and getting into trouble with the law, that's going to be a negative peer influence.” RPR 87. Interestingly, Dr. Roesch did not speak with specificity about the effect the gang lifestyle had on Mr. Boot or on his motive to commit the crime, but rather, spoke largely in generalities. RPR at *passim*. Mr. Boot was

enamored with the lifestyle, and joined a gang for access to drugs. However, as discussed below, while there was evidence that Mr. Boot *may* have violently killed Ms. Reese to enhance his status in the gang, there was no evidence presented that he was actually pressured by anyone else to kill Ms. Reese, other than by his own desires to prove others wrong about him. The resentencing court properly considered the evidence and concluded there was no basis upon which it could find that Mr. Boot's conduct was mitigated by peer pressure. This finding was supported by substantial evidence or the lack of evidence to the contrary.

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

Dr. Roesch testified Mr. Boot would not have experienced any discernible changes in his maturity between the time of the murder and his eighteenth birthday; thus, the court's finding that Mr. Boot's emotional and mental development was like that of an eighteen year old was supported by the evidence. The court's finding that Mr. Boot was a good student until he joined a gang was also supported by Mr. Boot's own expert's testimony: "I looked at his school records...He actually did quite well in school up until about middle school, and then things went downhill pretty rapidly. But before that, he was an average student. He was involved in sports programs.

He was active in various roles in school until about seventh grade.” RPR 85-86. The Court’s finding that Mr. Boot “chose” to join a gang was, again, supported by Mr. Boot’s own acknowledgment that “that nobody was at fault for his behavior, nothing influenced his behavior other than his own decisions and choices.” RPR 54.

Unlike Delbosque, who presented evidence that childhood abuse did, *in fact*, affect his development and ability to regulate his behavior, there was no such testimony in this case. This finding was supported by substantial evidence.

*Finding of Fact 5: Mr. Boot’s home environment and ability to extricate himself from adverse home circumstances is the same findings as #3 and 4 above.*

Based upon findings 3 and 4, the court could reasonably find that Mr. Boot voluntarily left a supportive home environment and did not suffer an inability to extricate himself from adverse home-life circumstances.

*Finding of Fact 7: Mr. Boot’s murder of Ms. Reese was horrific, calculated and cold-blooded. It was 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.*

Mr. Boot’s counsel conceded his crime was horrific. RPR 141. The evidence established that Mr. Boot’s kidnapping and execution of Ms. Reese was intentional, and not merely reckless, which would support the conclusion that the crime was not characterized by the hallmarks of youth. There was testimony supporting the conclusion that Mr. Boot may have

acted to enhance his gang status; “one of the things that increases your status as a gang member is whether or not that you have committed violent crimes up to and including homicide. And basically, the more violent you are, the higher your status is within a gang.” RPR 41. The testimony established that the murder was committed to cover up the defendant’s other crimes, RPR 34-35, which was a valid consideration in the analysis of whether a crime was planned or impulsive. *See Ramos*, 187 Wn.2d at 429-30, 452-53. The Court was free to disregard the defendant’s protestations that he did not shoot Ms. Reese and instead rely upon his many statements that he did, in fact, shoot her, as well as the physical evidence in support of that conclusion. This finding of fact was supported by substantial evidence.

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

It was not an abuse of discretion for the court to interpret the facts presented as indicating that Mr. Boot could appreciate the wrongfulness of his actions and that his crime was premeditated. *See CP 71-72*. The Court was presented with evidence that the murder was committed to cover up the defendant’s other crimes. *See CP 72* (direct appeal finding evidence sufficient to prove that the defendant committed the crime to conceal his identity). The defendant attempted to throw away the murder weapon. RPR

12, 14, 16. The defendant tried to “work a deal” with police when it was apparent they knew he was involved in the murder. RPR 17. It was also not error for the court to find that Mr. Boot was more adult-like than child-like based upon the evidence and its other findings of fact, as well as Dr. Roesch’s testimony about the additional responsibilities society gives adolescents at the age of 18. RP 105. This finding of fact was not entered in error.

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

The Court did not err in finding that the defendant attempted to cover up his crime by killing Ms. Reese. It did not err in finding that the crime was not indicative of an impetuous or emotional decision. The defendant and his cousin apparently unsuccessfully attempted to find a car to steal at the hospital before travelling downtown to accomplish their goal. That evidence established that the decision to carjack Ms. Reese was deliberate and the result of some degree of planning and effort. The evidence established the murder was not the result of thrill seeking (as Mr. Boot’s bridge jumping was), but rather, stemmed either from the simple

desire to steal a car and cover up his crime, or from the desire to enhance his status in a gang.

*Finding of Fact 12: Mr. Boot showed no willingness to walk away from the circumstance on December 27, 1994.*

There was no evidence to support a conclusion that the defendant had any willingness to walk away or extricate himself from the circumstances preceding Ms. Reese's murder. Having been unsuccessful in committing a carjacking at the hospital, the defendant and his cousin made the conscious effort to look for a new victim downtown. The trial court did not err in making this finding.

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

The trial court did not err in determining that the defendant's crime was not the result of immaturity. While there was evidence that the defendant did mature over time and ultimately repudiated the gang lifestyle while in prison, that evidence did not necessarily mean that when he was two weeks shy of his eighteenth birthday, his crime was reflective of the hallmark attributes of youth. At two weeks shy of his eighteenth birthday, Mr. Boot was living a very adult life in many respects – he lived with his girlfriend, he left his grandparents' home, and, in his own words, he was responsible for his own choices.

*Finding of Fact 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.*

As above, the defendant's own words were that no one else was responsible for his choices but himself, to include leaving school and leaving the positive influence of his grandparents. Significant testimony was presented during the hearing reflecting that Mr. Boot's actions were the result of a number of unpressured, calculated choices. *See e.g.*, RPR 50, 54. The court did not err in entering this finding.

*Finding of Fact 15: Mr. Boot's character traits remained unlawful up to five years in prison and age twenty four or so. 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.*

It was undisputed that Mr. Boot followed the gang lifestyle until he was approximately 24-years-old and had been in prison for a number of years. This finding *supports* the court's finding that the probability of rehabilitation was strong. However, this finding also indicates that the court simply did not know, based on the evidence presented at the resentencing, the degree of remorse felt by the defendant and when, despite the degree of rehabilitation that had occurred thus far, Mr. Boot could safely reenter society. Dr. Roesch could not provide such a prediction. It was conceded that the defendant had not yet been able to take advantage of some prison programming that could have helped prepare him for reentry into society.

Like most judges, the resentencing court did not have a “crystal ball” to predict the unpredictable, and no evidence established at what point the defendant could be safely released into society. *See* RPR 109. The court did not err in entering this finding.

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

As with the above findings, the sentencing court did not err in finding that Mr. Boot was aware of his actions, risks and consequences. Mr. Boot tried to “work a deal” with officers when it was clear they did not believe his lies. There was sufficient evidence presented at trial, and sustained on appeal, that Mr. Boot murdered Ms. Reese to conceal his identity, which, as in *Ramos*, was indicative of an awareness of consequences, not of impulsivity. The evidence supports this finding.

While the defendant may not agree with the weight that the court gave to the evidence and testimony presented to it, the court nonetheless received and properly analyzed the evidence presented at the resentencing hearing. The Court found that “The possibility of rehabilitation for Mr. Boot is strong. Mr. Boot’s prison supervisor informed Jeremy Wilson, a Community Corrections Officer from the Department of Corrections, and 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.” CP 175. Therefore, unlike the court in *Delbosque*, Mr. Boot’s sentencing court acknowledged the strides made by Mr. Boot and his accomplishments while in prison. The court’s finding that Mr. Boot’s likelihood for rehabilitation was great was clearly a finding that Mr. Boot was not irreparably corrupt. However, perhaps because of the heinousness and callousness of Mr. Boot’s crime, his relative lack of remorse, the fact that he had not yet been afforded necessary reentry programming, or the fact that Mr. Boot’s expert could not opine when he would be safe for release, the court was justifiably loathe to impose a lesser sentence.

As above, *Delbosque* urges courts to refocus their attentions on a defendant’s ability to change in determining permanent incorrigibility. Here, the court did not find Mr. Boot permanently incorrigible, looking both at his past crimes and his past and current rehabilitative efforts. Yet, neither the evidence presented nor the finding that Mr. Boot could be rehabilitated mandated the court find that Mr. Boot was immediately ready for release, or would be ready in the near future. Even Dr. Roesch conceded that Mr. Boot’s release was not appropriate without additional pre-release support and programming.

While this Court may not agree with all of the sentencing court's findings of fact or the assignment of weight given to the facts presented, the record is clear that the court properly considered the hallmarks of youth and their impact on Mr. Boot, finding that the defendant's crime did not clearly reflect only youthful impetuosity or the other hallmark characteristics of youth. That finding is not inconsistent with the court's additional finding that Mr. Boot's likelihood of rehabilitation is strong; rehabilitation is a valid penological goal that does not merely apply to juveniles, but to adults as well. The Court's finding that Mr. Boot and his criminal actions were adult-like when he was two weeks shy of his eighteenth birthday should not be disturbed on appeal, and the court did not abuse its wide discretion in making such a finding.

**E. THE SENTENCING COURT DID NOT PRESUME THAT MR. BOOT SHOULD BE TREATED LIKE AN ADULT.**

In *Delbosque*, our Supreme Court was clear to say that despite some contrary language in *Ramos*,<sup>30</sup> RCW 10.95.030(3) does not allocate a burden of proof to either the State or defendant. 195 Wn.2d at 123-124. Further, in *Delbosque*, the court rejected the State's claim that the Court of

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<sup>30</sup> In *Ramos*, in the context of a sentencing under the Sentencing Reform Act, the court stated a juvenile bears the burden of proving by a preponderance of the evidence that an exceptional sentence below the standard range is justified. However, in *Delbosque*, the court clarified that reasoning does not extend to sentencing hearings pursuant to RCW 10.95. 195 Wn.2d at 123.

Appeals treated age as a per se mitigating factor, but instead merely harkened back to the central principles behind *Graham* and *Miller*, that children are less deserving of the most severe punishments and their traits are less likely to be evidence of irretrievable depravity. *Id.* at 124. Perhaps this question will be more fully answered in the forthcoming Supreme Court decision in *Gregg*, 9 Wn. App. 2d 569; yet, like *Ramos*, that case involved an SRA sentence, rather than, as here, a sentence under RCW 10.95.

Here, although the sentencing court noted that Mr. Boot was only two weeks away from his eighteenth birthday when he killed Ms. Reese, the court did not presume to treat him as though he was an adult at the time of the crime. The court engaged in a full *Miller* resentencing hearing, receiving and considering the defendant's significant mitigation evidence, and analyzing how that evidence bore on Mr. Boot's culpability for the murder. Even if there was a presumption that Mr. Boot should be viewed as a child (at seventeen years, eleven months and two weeks old), the trial court's supported findings that Mr. Boot was more of an adult than a child should not be disturbed on appeal. The court did not presume, ab initio, that the defendant was an adult; rather, the court was persuaded by the evidence presented that Mr. Boot's behavior was adult-like in many respects. The court found that Mr. Boot's actions were planned and intentional, in an effort to conceal his identity, and not attributable to the hallmark attributes

of youth. That finding is one for the finder of fact to be made, and, where supported by the record, as here, should not be disturbed on appeal.

## V. PERSONAL RESTRAINT PETITION ARGUMENT

If this Court affirms the defendant's sentencing in the direct appeal, then it must consider whether the defendant's ineffective assistance of counsel claim has any merit. If this Court reverses the defendant's sentence on direct appeal, this Court need not reach the merits of the personal restraint petition.

### 1. Standard of review for personal restraint petitions.

To obtain relief on a PRP, the petitioner must show that he was actually prejudiced by a violation of his constitutional rights or by a fundamental error of law. *Matter of Cook*, 114 Wn.2d 802, 810, 792 P.2d 506 (1990). Bare, unsupported allegations are insufficient to merit relief. *State v. Coombes*, 191 Wn. App. 241, 255-56, 361 P.3d 270 (2015).

### 2. Standard of review for ineffective assistance of counsel claims.

To demonstrate ineffective assistance of counsel, a petitioner must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);<sup>31</sup> *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a

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<sup>31</sup> The issue in *Strickland* was, similarly, a claim of ineffective assistance of counsel at sentencing.

defendant fails to satisfy either prong, a court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Deficient performance occurs when counsel’s performance falls below an objective standard of reasonableness – “that counsel made errors *so serious that counsel was not functioning as the ‘counsel’* guaranteed by the Sixth Amendment.” *Strickland*, 466 U.S. at 687 (emphasis added). To show prejudice, a petitioner must demonstrate there is a probability that, but for counsel’s deficient performance, “the result of the proceeding would have been different”<sup>32</sup> i.e., that the sentencing court would have been swayed by the “newly proffered” evidence to the point that a lesser sentence would have been imposed.<sup>33</sup> Mr. Boot bears the burden of demonstrating the absence of any strategic reason for the challenged conduct. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Moreover, it is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” *Strickland*, 466 U.S. at 693. Counsel’s errors must be “so serious as to deprive the defendant of a fair [sentencing], a [sentencing]

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<sup>32</sup> *McFarland*, 127 Wn.2d at 335.

<sup>33</sup> An error by counsel, even if unreasonable, does not warrant setting aside the judgment if the error did not affect the judgment. Cf. *U.S. v. Morrison*, 449 U.S. 361, 364-65, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel’s performance must be prejudicial to the defense to constitute ineffective assistance. *Strickland*, 466 U.S. at 691-92.

whose result is reliable.” *Id.* at 687. Failure to make either showing defeats the ineffectiveness claim. Here, Mr. Boot’s claim fails on both prongs.

3. Defendant’s personal restraint petition fails because he has not established that Mr. Reid’s strategy was deficient or that the sentencing court would have sentenced him differently.

In his PRP, defendant claims his resentencing counsel was ineffective because (1) he failed to correct a misstatement in his expert’s report that Mr. Boot was found at trial to be the shooter; (2) he failed to review the trial record, leaving him without avenues by which to impeach the detectives at sentencing and avenues to support mitigation evidence; (3) he failed to fully investigate Mr. Boot’s upbringing; (4) counsel was deficient for failing to raise Mr. Boot’s adverse childhood experiences; (5) counsel failed to discuss how Mr. Boot’s volatile years in prison followed by reform aligned with the maturation trajectory outlined in *Miller*; and (6) counsel was deficient for failing to request a sentence below the statute’s 25-year minimum.

Mr. Boot wants to abandon his previous claim at sentencing, that he was fully responsible for the murder; instead, now seeks to reduce that culpability by attempting to prove the unprovable – that he was not the shooter and was not as responsible as the shooter because of adverse childhood experiences. Mr. Reid’s very valid strategy at the resentencing was to establish that *regardless* of who shot Ms. Reese, Mr. Boot accepted

his equal responsibility and culpability for the murder even though he maintained he was not the shooter. Dr. Roesch, through Mr. Reid's guidance, established, under the applicable *Miller* factors, that there were good and valid reasons for the court to reduce Mr. Boot's sentence; Dr. Roesch established that Mr. Boot was not irreparably corrupt, and that his likelihood of reform was great. Yet, after failing to receive the sentence he desired, Mr. Boot now seeks a different sentencing approach.

The U.S. Supreme Court decision in *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), vindicates Mr. Reid's approach, and reminds reviewing courts that trial counsel need not test every possible item or call every possible expert in order to be effective. Richter was prosecuted for a murder in which two people were shot. *Id.* at 92-93. Leading up to trial, the State had not developed any evidence as to the source of blood pooled in the residence where one victim was shot. *Id.* at 94-95. In opening statement, defense counsel exploited that hole in the State's case by describing a series of events and a theory of self-defense that would allow the jury to reasonably question Richter's guilt. *Id.* at 94. The prosecution reacted by testing evidence not previously tested and by calling unplanned witnesses. *Id.* at 95. Defense counsel responded with cross-examination of these new witnesses, but did not call his own experts. *Id.* at 95-96.

On federal habeas review, the Ninth Circuit Court of Appeals – believing it could see more clearly with hindsight – held that counsel was constitutionally ineffective for failing to develop evidence of self-defense. *Id.* at 97. The U.S. Supreme Court granted certiorari and reversed, *unanimously rebuking* the federal appellate court for its approach to *Strickland* – an approach not unlike the one Mr. Boot suggests this Court follow. The Supreme Court spent no fewer than seven pages of its opinion correcting the circuit court’s application of *Strickland*. *Id.* at 104-11. The Supreme Court focused, not on what it thought defense counsel subjectively believed or should have done as to several strategies, but rather, on what an objectively reasonable attorney might do under the circumstances. *Id.* The Court reaffirmed that counsel has wide latitude to choose strategies, *id.* at 106, that an attorney can avoid distractive or counter-productive strategies in favor of more productive ones, *id.* at 107, that some strategies may pose hidden risks, *id.* at 108-09, and that sometimes an effective strategy entails reserving a theory until later, *id.* at 109.

Mr. Boot’s arguments against Mr. Reid’s resentencing tactics are, like the approach taken by the Ninth Circuit, distorted by hindsight. His arguments ignore context and evidentiary detail in favor of hearsay, conjecture, and second-guessing. He now proposes arguments that could well have damaged his case in front of the resentencing court. An adult

offender who seeks to accept less responsibility in favor of offering excuses for that behavior, runs the risk that the sentencing court will find him to lack remorse or accountability for his actions. Mr. Boot's current attorney proposes that Mr. Reid should have concentrated on his claim that he was not the shooter, a claim that *remains contrary* to much of the evidence – and a position that intuitively rebukes Mr. Boot's acceptance of *full* responsibility, and that requires the proponent to engage in the Sisyphean task of proving *everyone a liar* including all of those individuals who proffered Mr. Boot's confessions or presented tangible physical evidence pointing to Mr. Boot as Ms. Reese's murderer. He also proposes to mitigate his responsibility because while in utero, his mother was sent to the hospital, and thereby deflect the trial court's focus from the murder to the first eighteen months of his life and his in-utero existence. PRP at 15-17. This does little to rebut the defendant's own admissions to Dr. Roesch that his grandparents provided him a loving home and his choice to leave that environment could only be blamed on himself.

Even if some of Mr. Boot's newly-proposed alternative strategies *might* have been pursued, the Constitution does not *demand* that they be pursued. Here, Mr. Reid's sentencing *strategy* was to emphasize the most recent 12 years of Mr. Boot's remarkably infraction-free existence and his steps to self-improvement motivation, to establish that he was a model

inmate,<sup>34</sup> that he was capable of making better decisions than his past may have indicated,<sup>35</sup> that he had disassociated from gang involvement,<sup>36</sup> that he was “capable of making prosocial choices,”<sup>37</sup> and, most importantly, that Mr. Boot was not one of those individuals who was “irreparably corrupt.”<sup>38</sup> Under the subsequently-issued opinion in *Delbosque*, those are the most important factors that are to be considered at sentencing – the necessary “forward-looking assessment of the defendant’s capacity for change or propensity for incorrigibility, rather than a backward-focused review of the defendant’s criminal history.” 195 Wn.2d at 122 (citing *U.S. v. Briones*, 929 F.3d at 1067). Mr. Reid sought to demonstrate Mr. Boot’s rehabilitation by focusing on his life since his incarceration – a life that was marked by his clear repudiation of the gang lifestyle, efforts to act as a mentor, and pains to take advantage of the available prison programming.

Equally, and most importantly, Mr. Reid’s strategy attempted to deemphasize his client’s unsustainable position that he was not the shooter (contradicted by a wealth of physical and testimonial evidence), and

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<sup>34</sup> RPR 110.

<sup>35</sup> RPR 110.

<sup>36</sup> RPR 110.

<sup>37</sup> RPR 113.

<sup>38</sup> RPR 113.

establish that this position was not in diametrical opposition to Mr. Boot's claim that he accepted total responsibility for the murder and that he was a "full participant" in the murder. RPR 89. Mr. Reid artfully accomplished this task. As explicated in *Richter*:

Although courts may not indulge "*post hoc* rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, *Wiggins*, [539 U.S.], at 526-527, 123 S.Ct. 2527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (*per curiam*). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U.S., at 688, 104 S.Ct. 2052.

562 U.S. at 109-10.

In sum, the defendant attempts to vilify Mr. Reid, and have this Court agree that defense counsel was required to adopt a different strategy at sentencing – its new scorched-earth investigative strategy – and assume the new burdens (and potentially, new risks) that this new strategy creates. Mr. Reid's strategy was sound, and aspects of the newly proffered tactics may have some merit, the new tactics fail to solve Mr. Boot's problems or establish that but for those tactics, the court would have imposed a different

sentence. “Facts are stubborn things.”<sup>39</sup> After her daughter was brutally and senselessly murdered, Ms. Reese’s mother had the sad experience of burying her daughter in her unused wedding gown. RPR 63-65.

Unlike the cases where the Supreme Court has found *Strickland* error, this is not a case where counsel so neglected his client that “counsel was not functioning as the ‘counsel.’” *Strickland*, 466 U.S. at 687.<sup>40</sup> Throughout the proceedings, Mr. Reid was conscientious and well-prepared. The ineffective assistance claim is without merit.

Additionally, as above, the use of the newly proffered mitigation information, may have had its own disadvantages. For instance, the polygraph examination results and newspaper article are not “competent, admissible evidence” that may be used in support of a personal restraint petition. The trial transcript notes that during trial, an article was published in the paper indicating “Detectives Now Say Both Cousins Shot Reese.” CP 2160. It also claims that detectives stated that “Kevin Boot shot Reese twice and passed [Jerry Boot] the .380 semiautomatic handgun. Jerry Boot said he immediately fired two more shots, hitting the victim once more in the

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<sup>39</sup> “Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence.” John Adams, 2<sup>nd</sup> President of the United States.

<sup>40</sup> Mr. Boot claims that he could have received as little as a 25-year sentence and that Mr. Reid was ineffective for arguing for a 35-year sentence. The fact that he received a/ 50-year sentence stands in bold opposition to this claim.

face.” *Id.* The newspaper article contains hearsay and should not be considered by this Court as evidence – there is not even an indication in the article which detective made the statements or if he or she was correctly quoted.

Jerry Boot’s lie detector test results do not aid Mr. Boot, also defeating a claim of ineffective assistance. Tactically speaking, defense counsel could legitimately believe the results of Jerry Boot’s polygraph test would work against Mr. Boot. If anything, a stronger argument may be made that Mr. Boot was a corrupting influence<sup>41</sup> on the younger Jerry Boot or, at a minimum, that he goaded Jerry Boot into also shooting Ms. Reese so they would be equally culpable. The lie detector test does nothing to vindicate Mr. Boot. It does nothing to invalidate the other evidence placing the gun in Mr. Boot’s hands, or to undermine his boasts to his friends that he “killed that bitch.” Counsel was not ineffective for not raising this issue during the resentencing.

Next, defendant claims that counsel was ineffective for failing to review the entire trial record, thereby limiting his avenues for impeachment during the resentencing hearing. While defense counsel may have gleaned additional opportunities for impeachment with a more thorough review of

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<sup>41</sup> A letter to the editor from 1995 also indicates Jerry Boot’s mother believed Kevin Boot to be corrupting influence who victimized Jerry Boot.

the record, there is no indication that those avenues for impeachment would have resulted in a lesser sentence. As above, defense counsel's focus was legitimately on Mr. Boot's strides since his incarceration, which, under *Delbosque* is of great importance, rather than what occurred or did not occur 20 years earlier. Further, any inadvertent misstatements of witnesses called to testify in a resentencing hearing regarding a crime committed over two decades earlier were not likely to sway the sentencing court's opinion of Mr. Boot given the heinous nature of the crime. Further, the more inquiry into the historical facts surrounding the crime that defense counsel made, the more counsel risked the State may react and admit additional damaging evidence against Mr. Boot, such as the numerous callous admissions listed above, which were not heard by the trial court. This claim fails because defendant has failed to show prejudice.

Lastly, to address defendant's contention that counsel was defective for failing to request or suggest that the sentencing court could impose a sentence less than the statutory 25-year minimum, the defendant is unable to demonstrate prejudice, i.e., that, had counsel requested less than 25 years, the court would have granted that request. As in *Matter of Meippen*, 193 Wn.2d 310, 316, 440 P.3d 978 (2019), despite the mitigation evidence proffered to and considered by the sentencing court, the court imposed a

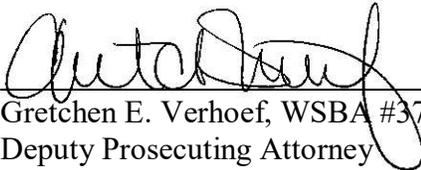
top-end standard range sentence, defeating the defendant's claim of prejudice. This claim also fails.

## VI. CONCLUSION

The State respectfully requests this Court affirm the defendant's sentence and dismiss his personal restraint petition.

Dated this 31 day of July, 2020.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Gretchen E. Verhoef, WSBA #37938  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN BOOT,

Respondent.

In Re Personal Restraint of:

KEVIN BOOT,

Petitioner.

NO. 35408-3-III  
Consol. w/36526-3

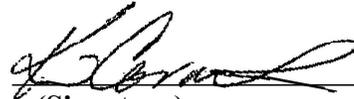
CERTIFICATE OF  
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on July 31, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Marla Zink  
marla@marlazink.com

7/31/2020  
(Date)

Spokane, WA  
(Place)

  
(Signature)

**SPOKANE COUNTY PROSECUTOR**

**July 31, 2020 - 10:20 AM**

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**Appellate Court Case Number:** 35408-3  
**Appellate Court Case Title:** State of Washington v. Kevin Jeremy Boot  
**Superior Court Case Number:** 95-1-00310-0

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