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Supreme Court No. I0II72-5
(COA No. 82396-5-I)

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DUNG HOANG LE,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Dung Le asks this Court to accept review of the Court of Appeal’s decision terminating review in *State v. Le*, No. 82396-5-I.¹ RAP 13.4. The June 13, 2022, opinion and July 13, 2022, order denying the motion for reconsideration are attached.

B. ISSUES PRESENTED FOR REVIEW

1. Dung’s convictions for both first- and second-degree murder violate double jeopardy. Recognizing this violation, the Court of Appeals issued an opinion granting his personal restraint petition and remanding with instructions for the trial court to vacate the second-degree murder conviction and to strike all references to it from the judgment and sentence and the findings of fact and conclusions of law. The trial court removed the words “murder in the second degree” from the

¹ The opinion and order erroneously caption the case as a personal restraint petition. That is incorrect. This matter is a direct appeal from a resentencing proceeding following a remand from the grant of a petition. The notice of appeal, assignment letter, and briefing of both parties in the Court of Appeals reflect the correct case caption.

judgment, but the findings and conclusions supporting the exceptional sentence still refer to and rely on the offending conviction. The judgment and sentence violates Dung's right against double jeopardy, in violation of the state and federal constitutions. U.S. Const. amend. V; Const. art. I, § 9; RAP 13.4(b)(3).

2. The Sentencing Reform Act (SRA) and due process of law require a court to enter findings of fact and conclusions of law when it imposes an exceptional sentence. Here, the trial court permitted the original exceptional sentence to stand but did not make findings of fact and conclusions of law supporting the exceptional sentence. It also failed to identify and remove the findings and conclusions that the Court of Appeals determined cannot be used to justify the exceptional sentence. Dung is entitled to a hearing at which the court makes new findings of fact and conclusions of law and determines whether an exceptional sentence is warranted. The failure to abide these requirements and instead affirming the original exceptional

sentence presents a significant constitutional issue of substantial public interest. RAP 13.4(b)(3)-(4).

3. RAP 2.5(c)(2) permits an appellate court to “review the propriety of an earlier decision of the appellate court in the same case” to reflect evolving law and to best serve the ends of justice. The trial court refused to consider Dung’s hallmark features of youth at the time of the offense because it found itself bound by the mandate limited to striking the second-degree murder conviction. The Court of Appeals denied Dung’s request because it misunderstood its authority and Dung’s argument. Where the law on youth sentencing has evolved since the previous decisions in Dung’s case, substantial public interest favors review so Dung can present evidence to support his constitutionally required resentencing based on the mitigating circumstances of his youth. RAP 13.4(b)(1)-(4).

4. The right to a public trial in an open court, guaranteed by article I, sections 3, 10, and 22, and the Sixth Amendment, requires courts to conduct proceedings on the record in open

court except where the court balances the relevant interests and determines some necessity requires closure. The trial court acknowledged it needed to conduct a *Bone-Club*² analysis before Dung's hearing, indicating it was holding a closed proceeding, but it never balanced the relevant interests or determine a necessity required a closure. The Court of Appeals denied Dung's appeal because it confused the parties' presence in the courtroom with whether the proceedings were open to the public. The opinion affirming Dung's sentence, despite the open courts violation, conflicts with this Court's recognition of Washington's strong right to public and open proceedings and presents a constitutional issue of substantial public interest. RAP 13.4(b)(1), (3)-(4).

C. STATEMENT OF THE CASE

In 1992, the State charged 19-year-old Dung Hoang Le with first-degree murder and first-degree extortion. CP 226-27. It charged the alternatives of premeditated intentional

² *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

aggravated murder and felony murder. CP 226. The jury convicted Dung of the felony murder alternative, as well as extortion. CP 63, 220. It also convicted him of the alternative lesser included offense of second-degree intentional murder. CP 64, 220.

Dung was an immigrant who relocated to the United States as a child after he fled Vietnam with his family. CP 160-62. He struggled to learn English, displayed delayed learning abilities, and suffered from neurological problems. CP 160-62.

The trial court sentenced Dung in 1993, decades before courts understood young people's evolving capacity to appreciate wrongfulness and consequences and before courts recognized the arbitrariness of the artificial distinction between young people under and over 18. CP 220-25; 07/19/1993RP 1-20; see generally *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021). In 1993, Dung's sentencing court did not have the benefit of recent scientific evidence about youth brain development that courts now must consider when

determining the appropriate punishment for young adults. As a result, the 1993 sentencing court did not consider the “hallmark features” of youth under the framework developed by cases over the last ten years, such as a young person’s “immaturity, impetuosity, and failure to appreciate risks and consequences.” *State v. Houston-Sconiers*, 188 Wn.2d 1, 23, 391 P.3d 409 (2017) (quoting *Miller v. Alabama*, 567 U.S. 460, 477, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)).

At Dung’s sentencing hearing, the court found as mitigating circumstances that he had no criminal history and no predisposition to commit a crime. 07/09/1993RP 2; CP 83. The court rejected Dung’s proposed mitigating circumstances of diminished capacity and his lack of sophistication. 07/09/1993RP 2-7; CP 83-85. The court found as aggravating circumstances Dung acted with deliberate cruelty and that the victim was particularly vulnerable. CP 82-83; 07/09/1993RP 7-8. The court relied on findings about the “intentional” nature of

the murder in assessing the aggravating circumstances and the exceptional sentence. CP 82-4; 07/09/1993RP 2-5.

The court entered judgment on both the first-degree felony murder and the alternative second-degree intentional murder convictions. CP 220. The court imposed an exceptional sentence of 840 months that would require then-19-year-old Dung to die in prison. CP 86, 221-22. This 70-year sentence was three times the standard range of 261-347 months. CP 221.

The convictions and sentences were affirmed on direct appeal. CP 210-19. Dung later filed a motion to vacate his judgment and sentence, arguing the court violated the prohibition against double jeopardy when it entered judgment on both the first-degree and second-degree murder convictions. CP 1-43. The Court of Appeals considered the motion as a personal restraint petition. CP 44-87, 191-97. It agreed the entry of judgment on both alternative murder convictions violated Dung's right to be free of double jeopardy. CP 194. It

remanded to the trial court “to vacate the second degree intentional murder conviction and strike any reference to it in Le’s Judgment and Sentence and the FFCL [Findings of Fact and Conclusions of Law].” CP 194.

On remand, the prosecution characterized the purpose of the proceeding as “simply . . . to correct the judgment and sentence and the findings.” 02/11/2021RP 8. Dung argued the court could not let the original exceptional sentence stand because the court based it on findings and conclusions that supported *both* murder convictions, one of which was now vacated due to the constitutional violation. 02/11/2021RP 14-15; CP 235-51. Dung explained the 1993 court based the aggravating factors supporting the exceptional sentence on its findings that he acted intentionally and committed an intentional murder. 02/11/2021RP 14-15. These findings were inconsistent with the remaining conviction for felony murder, which was not intentional. Dung also asked the court to exercise its discretion and resentence him. 02/11/2021RP 10-

15; CP 235-51. Dung included among the reasons the court should resentence him that he was 19 years old at the time of the offense. 02/11/2021RP 10-15; CP 235-51.

The court responded that the hearing was “just to fix the judgment and sentence” and denied Dung’s requests.

02/11/2021RP 16. The court did not enter new or amended findings of fact and conclusions of law. The court did not identify what facts needed to be stricken from the old findings and conclusions. The court did not independently determine if an exceptional sentence was appropriate in light of the vacated conviction. It simply let the previous exceptional sentence stand without determining if findings supported it.

D. ARGUMENT

- 1. The Court of Appeals opinion continues the double jeopardy violation by affirming an exceptional sentence based on findings and conclusions which refer to the offending conviction.**

A jury convicted Dung of felony murder and a lesser included alternative of second-degree intentional murder. CP 63-64, 220. The original sentencing court entered judgment on

both convictions and relied on facts about the “intentional” nature of the offense to find aggravating factors and impose an exceptional sentence on the felony murder count. CP 82-84, 220; 07/09/1993 2-5.

The Court of Appeals later agreed entry of convictions for both felony and intentional murder violated Dung’s right against double jeopardy. CP 194. It remanded for the sentencing court to strike the offending conviction *and* any reference to it in the judgment and sentence and in the findings of fact and conclusions of law supporting the exceptional sentence. CP 194. But the trial court did not do that. Instead, it left undisturbed critical references to the vacated conviction and relied on facts of the vacated conviction to uphold the previously imposed exceptional sentence. CP 207.

Although Dung’s remaining conviction rests on felony murder, not intentional murder, the findings authorizing an exceptional sentence continue to rely on the court’s assessment of Dung’s intent to kill. There is no longer a jury finding

supporting this intent, and it may not serve as the basis for an exceptional sentence. However, the findings still contain reference to the offending conviction. For example:

- “the defendant’s ability to intentionally commit the crimes;” *Compare* CP 83 (original findings), *with* CP 269 (corrected findings).
- “intentional murder” and “intentional perpetration” *Compare* CP 84 (original findings), *with* CP 270 (corrected findings).
- the “jury . . . find[ing] that the defendant acted with intent;” *Compare* CP 84 (original findings), *with* CP 270 (corrected findings).

So too remain the original sentencing court’s oral findings, incorporated into the written findings, relying on the conviction for the intentional offense. CP 85 (Finding VII).

- “The jury found that the defendant acted intentionally.” (07/09/1993RP 2)
- referencing the jury’s “decision on intentional murder” and its finding that “he intended to kill” (07/09/1993RP 2-3)
- “intent to murder” (07/09/1993RP 3)
- “[T]he jury could have acquitted him and walked him right out of here had they believed that he did not have the mental capacity to form the intent to murder.” (07/09/1993RP 3)
- “The defendant stands before me convicted of intentionally killing Mrs. Lui.” (07/09/1993RP 3)

- referencing the “deliberate killing” (07/09/1993RP 3)
- finding the jury determined “the defendant’s ability to intend the act of murder” (07/09/1993RP 4)
- “intentionally perpetrated” (07/09/1993RP 4)
- relying on jury’s finding of “intentional murder” (07/09/1993RP 5)

A judgment and sentence imposing an exceptional sentence is valid only where proper findings of fact and conclusions of law support it. *See State v. Friedlund*, 182 Wn.2d 388, 393, 341 P.3d 280 (2015); Former RCW 9.94A.120(3); RCW 9.94A.535. Here, the findings and conclusions are not proper because the court did not strike all the findings that relied on the conviction that violated double jeopardy. More than that, the court also failed to determine whether the remaining findings still supported the exceptional sentence. To do so, the court must hold a hearing at which it exercises its discretion.

Where a court imposes a sentence outside of the standard range, it must “set forth the reasons for its decision in written findings of facts and conclusions of law.” Former RCW

9.94A.120(3); RCW 9.94A.535. The findings supporting an exceptional sentence are not a mere procedural formality. The findings must be sufficiently specific to allow appellate courts to “review the reasoning underlying discretionary sentencing determinations” to ensure trial courts do not abuse their discretion. *Id.* The findings of fact and the judgment comprise part of the “final record” of the criminal prosecution. RCW 10.64.100.

“[P]roceedings on remand must not be treated as a mere formality or useless act. The exercise of sentencing discretion is an awesome power. It involves far more than reciting some magical words or checking boxes on a form.” *State v. McFarland*, 18 Wn. App. 2d 528, 542, 492 P.3d 829 (2021). The trial court here treated Dung’s proceeding on remand as “a mere formality or useless act” when it merely whited out reference to the offending conviction but did not hear Dung on resentencing or determine what facts in the findings and conclusions relied on that conviction and needed to be

removed. Dung was entitled to a new hearing at which the court imposed a new sentence and entered new findings and conclusions to justify the sentence.

A judgment and sentence imposing an exceptional sentence is valid only where it is supported by proper findings of fact and conclusions of law. Here, the findings and conclusions are not proper because the court failed to strike the findings that relied on the conviction that violated double jeopardy. The court also failed to determine whether the remaining findings still supported the exceptional sentence.

A court must exercise its discretion, review the entire original sentencing proceeding, and determine which of these and any other references to the second-degree murder must be removed from the findings and conclusions. It must actually remove these references that violate Dung's right against double jeopardy. And it must make findings and determine whether the exceptional sentence remains supported.

This Court should grant review.

2. The Court of Appeals misunderstood its discretion to reconsider its earlier decision in light of intervening caselaw and to permit Dung to present mitigating circumstances of his youth.

In 1992, Dung was 19 years old when the crime occurred. CP 226-27. In 1993, the court imposed an 840 month exceptional sentence on Dung, which was three times the standard range. CP 86, 221-22. That 1993 sentencing occurred decades before courts understood young people's evolving capacity to appreciate wrongfulness and consequences and before courts recognized the arbitrariness of the artificial distinction between young people under and over 18. CP 220-25; 07/19/1993RP 1-20; *Monschke*, 197 Wn.2d 305. The 1993 sentencing court did not consider Dung's "hallmark features" of youth under the framework developed by cases over the last ten years. *Houston-Sconiers*, 188 Wn.2d at 23 (quoting *Miller*, 567 U.S. at 477).

Dung sought to have the trial court consider his youth at the time of the offense when the trial court heard the remanded matter. CP 235-51; 02/11/21RP 10-15. The trial court

understood Dung's request and refused to consider his youth or any other factors because it felt constrained by the scope of the Court of Appeals' mandate. 02/11/21RP 7-10, 15-16.

Dung asked the Court of Appeals to exercise its discretion under RAP 2.5(c)(2) and clarify that the trial court should hold a plenary resentencing at which Dung may present evidence of the mitigating circumstances of his youth. Br. of Appellant at 2, 5-6, 28-34. The Court of Appeals' previous opinion, granting Dung's personal restraint petition in part, declined to remand expressly for resentencing based on Dung's youth. CP 192, 197. The trial court here felt constrained by that perceived limitation. 02/11/2021RP 7-10, 15-16. It would not consider Dung's request to address his youth or for a resentencing hearing. 02/11/2021RP 10-15; CP 235-51.

The Court of Appeals rejected Dung's argument because it mistakenly believed he had not argued for resentencing based on youth. To the contrary, the record in Dung's case and this

Court's jurisprudence on emerging youth both support a new sentencing hearing.

First, in the underlying petition, Dung argued the double jeopardy violation entitled him to a full resentencing hearing so that court could consider in the first instance the appropriate sentence without the influence of the offending conviction. CP 47-55. At such a plenary resentencing, the court would have been able to resentence Dung based on all relevant considerations, including youth.

Second, before the remanded proceeding, Dung filed motions with the trial court, urging it to consider his youth at the hearing on remand. CP 235-51. Dung also urged the court to consider his youth when he spoke. 02/11/21RP 10-15. The Court of Appeals' conclusion that Dung did not raise the issue of his youth in the proceedings addressing the underlying petition is incorrect. Slip op. at 5.

Finally, the Court of Appeals ignored RAP 2.5. The Rules of Appellate Procedure provides:

The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

RAP 2.5(c)(2).

To the extent the Court of Appeals previously denied Dung's request for a full resentencing hearing, RAP 2.5(c)(2) authorized it to reevaluate that decision. The evolution of the law and understanding of youth justifies a hearing at which a sentencing court may consider Dung's young age and the hallmark features of youth in the context of the current framework for assessing youth culpability.

“Modern social science, our precedent, and a long history of arbitrary line drawing have all shown that no clear line exists between childhood and adulthood.” *Monschke*, 197 Wn.2d at 306. Just as children “possess lessened culpability, poorer judgment, and greater capacity for change than adults,” *In re Pers. Restraint of Ali*, 196 Wn.2d 220, 225-26, 474 P.3d 507

(2020), due to the developmental state of their brains, so too do young people, even those who are no longer legally children. *Monschke*, 197 Wn.2d at 321-26. This Court now recognizes that these same constitutional protections extend to “youthful defendants older than 18.” *Id.* at 325.

Dung is entitled to the sentencing court’s consideration of those protections. To hold otherwise would be to leave Dung in a worse position than he would have been had the jury convicted him as charged of the higher count of premeditated intentional aggravated murder. Had it so convicted Dung, he would indisputably be entitled to a hearing under *Monschke*. It would be a fundamentally illogical result that Dung would be in a better position had the jury convicted him of the greater charge and the court sentenced him to life without the possibility of parole, but that he would be denied relief because the jury convicted him of a lesser offense but the court still

sentenced him to a de facto life sentence.³ The Court of Appeals nonetheless denied him relief.

Courts retain the discretion to reconsider sentences on remand. *See State v. Oeung*, 17 Wn. App. 2d 1021, 2021 WL 1550310, at *7 (Wash. Ct. App. 2021) (unpub.) (“[T]he trial court has discretion to resentence Oeung on all counts and to consider recent developments in Washington law when resentencing her.”)⁴; *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009); *Troiano v. United States*, 918 F.3d 1082, 1087 (9th Cir. 2019) (district court is free to conduct full resentencing on all counts and is not limited to one count on which sentence was reversed). And RAP 2.5(c)(2) authorized the Court of Appeals to expand the scope of its remand.

³ There can be no question Dung’s 70 year sentence is a de facto life sentence. *State v. Haag*, 198 Wn.2d 309, 317, 495 P.3d 241 (2021).

⁴ Cited pursuant to GR 14.1 as nonbinding authority for such persuasive value as this Court sees fit.

The landscape of youth sentencing as it relates to young adults over the age of 17 has changed since the Court of Appeals issued its prior opinion remanding the case for the court to amend Dung’s judgment and findings. *Monschke*, 197 Wn.2d 305. The Court of Appeals here ignored the changes in the law and misunderstood its discretion to recognize those changes. This Court should grant review.

3. The court violated Dung’s right and the public’s right to public proceedings in an open court.

- a. The right to a public proceeding in open court prohibits courts from holding non-public proceedings unless the court conducts an analysis and finds a need to close the proceeding.

“The open operation of our courts is of utmost public importance.” *Dreiling v. Jain*, 151 Wn.2d 900, 903, 93 P.3d 861 (2004). It is “essential to the courts’ ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.” *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 211,

848 P.2d 1258 (1993). “This openness is a vital part of our constitution and our history” and ensures judges are subject to “the check of public scrutiny.” *Dreiling*, 151 Wn.2d at 903-04. “Proceedings cloaked in secrecy foster mistrust and, potentially, misuse of power.” *Id.* at 908.

The Washington Constitution specifically provides, “Justice in all cases shall be administered openly, and without unnecessary delay.” Const. art. I, § 10. Related constitutional provisions provide for a right to a “public trial.” Const. art. I, § 22; U.S. Const. amend. VI. Together, these constitutional requirements protect Washington’s robust history of open courts and assure fairness in the judicial system. *State v. Love*, 183 Wn.2d 598, 604-05, 354 P.3d 841 (2015). They safeguard not only an accused person’s right to a public proceeding in open court, but also the public’s right to open access to the court system.

A person’s right to a public trial and the public’s right to open access to the court system serve “complimentary and

interdependent functions in assuring the fairness of our judicial system.” *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995); *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948).

To satisfy these constitutional mandates, courts must conduct proceedings on the record in courts open to the public. A court may not conduct secret or closed proceedings “without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order.” *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006).⁵ Thus, a court may close proceedings to the

⁵ The factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a “serious and imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

public only when it balances the relevant factors on the record and determines the factors justify a closure. *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005).

A court violates the right to a public trial where the court holds a closed proceeding without justification. *State v. Smith*, 181 Wn.2d 508, 521, 334 P.3d 1049 (2014). “A closure unaccompanied by a *Bone-Club* analysis on the record will almost never be considered justified.” *Id.* at 520. Even where it engages in the required analysis, a court must also enter specific findings to identify the interests necessitating the closure. *Brightman*, 155 Wn.2d at 515-16; *see Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). The failure to articulate a sufficiently compelling

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting *Eikenberry*, 121 Wn.2d at 210-11).

reason to justify closing a proceeding to the public violates both the public's and the defendant's right to an open and public proceeding. *Easterling*, 157 Wn.2d at 179.

The onus to ensure an open, public proceeding is on the court, which has "the affirmative duty" to determine whether a compelling interest justifies closure before holding a closed proceeding. *Bone-Club*, 128 Wn.2d at 261. Courts "must fulfill our independent obligation to protect the open administration of justice." *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 9, 330 P.3d 168 (2014).

- b. The trial court violated Dung's right and the public's right to a public proceeding in open court when the court failed to ensure public access to the proceeding.

Here, the trial court violated both Dung's right to a public proceeding in an open court and the public's right to access to the courts. The trial court itself acknowledged the proceedings were not open to the public when it recognized it needed to conduct a *Bone-Club* analysis before the hearing began. "I have to make some *Bone-Club* findings." 01/08/21 RP 1.

However, the trial court never considered the necessary factors and never entered any findings justifying the closure at either the original or the continued proceeding. 01/08/21RP 1-6; 02/11/21RP 7-18. The trial court's recognition of the need for a *Bone-Club* analysis demonstrates the nature of the proceeding was not open to the public.

- c. The Court of Appeals disregarded the constitutional violation and this Court's precedent because it confused an open court violation with the right to be present.

The Court of Appeals rejected Dung's argument that the trial court violated Dung's right to a public court proceeding because "the minutes [of the hearing] reflect that the judge and a court clerk were present in the courtroom," while Dung, defense counsel, and the prosecutor were present by telephone. Slip op. at 6. The Court of Appeals confused the right to be present with the right to open and public proceedings.

Dung was present by telephone, and his right to be present was satisfied. But a court may violate a person's right to a public proceeding in an open courtroom when the judge

and parties are present, even when they are physically present in the courtroom. Indeed, that is precisely what occurred in *Bone-Club* itself. 128 Wn.2d at 256-57 (finding violation of public trial right where court conducted hearing in physical courtroom but excused observers and closed courtroom to public). The issue is not who was present where; the issue is whether the hearing was conducted in an open forum accessible to the public.

Here, the trial court's recognition that it needed to conduct a *Bone-Club* analysis demonstrates the proceeding was not open to the public, even though the parties were present telephonically. 01/08/21RP 1. Despite the closure, the court never conducted the *Bone-Club* analysis that it admitted it needed to conduct and never made any findings. It did not find some necessity justified holding a closed proceeding the public could not access. The closure without a *Bone-Club* analysis or a finding that closure was required violated Dung's and the

public's right to a public proceeding in open court. *Smith*, 181 Wn.2d at 520.

The Court of Appeals misanalysed Dung's claim because it confused Dung's and the public's right to an open and public proceeding with Dung's right to be present for the hearing. Its opinion disregards a constitutional violation and this Court's precedent. This Court should accept review.

E. CONCLUSION

For the above reasons, this Court should grant Dung's petition for review.

In compliance with RAP 18.17(b), counsel certifies the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 4,592 words.

DATED this 12th day of August, 2022.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a stylized flourish at the end.

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APPENDIX A

June 13, 2022, Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint
Petition of:

DUNG HOANG LE,

Appellant.

DIVISION ONE

No. 82396-5-I

UNPUBLISHED OPINION

DWYER, J. — In 1993, a jury convicted Dung Hoang Le of both murder in the first degree and the inferior degree offense of murder in the second degree. More than 25 years later, in a personal restraint petition (PRP), Le argued that the trial court's entry of judgment on the inferior degree offense conviction violated his right to be free of double jeopardy. We agreed, and remanded the matter to the trial court to vacate the conviction of murder in the second degree and to strike any reference to it from both Le's judgment and sentence and the trial court's findings of fact and conclusions of law. The findings and conclusions had been entered in support of the sentencing court's imposition of an exceptional sentence.

Le now appeals from the trial court's order vacating the conviction of murder in the second degree. According to Le (1) the trial court failed to comply with our directions on remand, (2) a change in the law entitles him to a

resentencing hearing so that his youth may be considered, and (3) his right to a public trial was violated. Finding no entitlement to relief, we affirm.

I

In 1993, Dung Hoang Le was convicted of the murder of Mayme Lui and the extortion of her family.¹ The jury convicted Le of both first degree felony murder, predicated on the commission of burglary and robbery, and murder in the second degree. Le's standard sentencing range was 261-347 months. The sentencing court imposed an exceptional sentence of 820 months after finding that the victim was particularly vulnerable and that the attack on Lui manifested deliberate cruelty to the victim.

In January 2020, we considered Le's PRP asserting that the inclusion of the alternative conviction violated his right to be free of double jeopardy. See In re Pers. Restraint of Le, No. 78242-8-1, slip op. at 1-3 (Wash. Ct. App. Jan. 21, 2020) (unpublished), <https://www.courts.wa.gov/opinions/pdf/782428.pdf> (Le II). The State conceded the double jeopardy violation and we accepted the State's concession. Le II, No. 78242-8-1, slip op. at 3. However, we rejected Le's argument that the double jeopardy violation required resentencing. We explained that

[h]ere, while the trial court noted in both the Judgment and Sentence and [findings of fact and conclusions of law on imposition of an exceptional sentence (FFCL)] that the jury convicted Le of first degree felony murder and second degree intentional murder, the record clearly indicates that the court would have imposed the same sentence had it not included Le's intentional murder

¹ The underlying facts of Le's 1992 crime appear in our unpublished opinion resolving his direct appeal, State v. Le, noted at 82 Wn. App. 1010, 1996 WL 312492 (Le I).

conviction in the Judgment and Sentence. In the FFCL, the court never discussed the [second degree] intentional murder conviction as a justification for the exceptional sentence. Instead, the FFCL provides that the aggravating factors of particular vulnerability of the victim and deliberate cruelty supported the exceptional sentence. See Le I, 1996 WL 312492, at *2 (“The trial court’s reasons for the imposition of the exceptional sentence were (1) the particular vulnerability of the victim and (2) deliberate cruelty to the victim.”). The majority of the factual findings focus on the facts that demonstrated the particular vulnerability of Lui, and the deliberate cruelty of Le’s crime. These factors alone may justify an exceptional sentence. Because vacating Le’s alternative conviction does not change these underlying facts, the court would have considered them as aggravating factors when imposing an exceptional sentence even if Le’s intentional murder conviction had not been in his Judgment and Sentence.

For these reasons, we decline to remand for resentencing.

Le II, No. 78242-8-1, slip op. at 5-6 (footnotes omitted).

On remand, the trial court ordered that the conviction for murder in the second degree be vacated and any reference to it stricken from Le’s judgment and sentence and the findings of fact and conclusions of law entered to support imposition of the exceptional sentence.

Le appeals.

II

Le first contends that the trial court on remand did not comply with our directions when it vacated the conviction of murder in the second degree and ordered stricken any references to it in either Le’s judgment and sentence or the findings of fact and conclusions of law entered to support imposition of the exceptional sentence. This is so, according to Le, because the court order did

not “decide which findings and conclusions it had to strike or whether the remaining findings will still support the sentence.”² We disagree.

We remanded the matter to the trial court “to vacate the second degree intentional murder conviction and strike any reference to it in Le’s Judgment and Sentence and the FFCL.” Le II, No. 78242-8-1, slip op. at 3.

The trial court ordered

that the conviction for MURDER IN THE SECOND DEGREE ONLY is vacated consistent with the Court of Appeals mandate issued on August 14, 2020. Any reference to the Murder in the second degree conviction shall be stricken from the Judgment and Sentence and the Finding[s] of Fact and Conclusions of Law on Imposition of Exceptional Sentence.

This is entirely consistent with our instructions. Furthermore, Le’s assertion that he had no opportunity to argue as to which findings contained references is not consistent with the record. Le had such an opportunity at the hearing and did not do so. Rather, Le’s counsel stated that he was “signing off on the proposed orders with no changes—as provided by [the prosecutor] and submitting those to the Court.”

We previously denied Le’s request for resentencing. We remanded this cause to the trial court for the limited purpose of vacating a conviction and removing references to it from both Le’s judgment and sentence and the findings of fact and conclusions of law entered to support imposition of the exceptional sentence. The trial court did not err by hewing closely to our instructions.

² Br. of Appellant at 24.

III

Le next requests that we “reevaluate”³ our previous decision denying his request for resentencing so that the trial court may consider his youth at the time of his offense,⁴ following our Supreme Court’s decision in In re Pers. Restraint of Monschke, 197 Wn.2d 305, 482 P.3d 276 (2021). We decline to do so. Despite Le’s contention to the contrary, Le’s youth at the time of the offense was not raised—or even mentioned—in his PRP. Accordingly, any legal significance of Le’s youth in light of intervening case law is not properly before us. See In re Pers. Restraint of Khan, 184 Wn.2d 679, 690 n.4, 363 P.3d 577 (2015).

IV

Finally, Le contends that his right to a public trial was violated. This is so, according to Le, because the telephonic proceeding on remand constituted an improper court closure. As the proceeding took place in open court, we disagree.

The state and federal constitutions guarantee the right to a public trial. Article I, section 22 of the Washington Constitution provides: “In criminal prosecutions the accused shall have the right . . . to have a speedy public trial.” The Sixth Amendment to the United States Constitution states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” The right to a public trial is not absolute, as a courtroom may be closed to the public if the trial court justifies the closure by conducting an on-the-record balancing of several factors enumerated in State v. Bone–Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). A defendant asserting violation of his public trial rights must

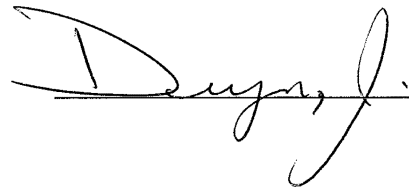
³ Br. of Appellant at 29.

⁴ Le was 19 years old at the time of the offense.

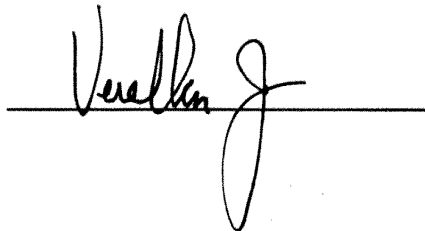
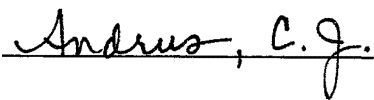
show that a closure occurred. State v. Njonge, 181 Wn.2d 546, 556, 334 P.3d 1068 (2014). We “will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.” State v. Jasper, 174 Wn.2d 96, 124, 271 P.3d 876 (2012) (quoting Barker v. Weeks, 182 Wash. 384, 391, 47 P.2d 1 (1935)).

Le asserts that the “proceedings were not broadcast or otherwise available to the public.”⁵ Although Le, his counsel, and the prosecutor appeared telephonically, the minutes reflect that a judge and a court clerk were present in the courtroom. There is nothing in the record indicating that the courtroom was closed to the public or that there was no broadcast. Furthermore, the resulting order vacating the conviction, signed by Le’s counsel, states that it was “DONE IN OPEN COURT.” Le thus fails to demonstrate that a closure necessitating a Bone-Club analysis occurred.

Affirmed.



WE CONCUR:



⁵ Br. of Appellant at 39.

APPENDIX B

July 13, 2022, Order Denying Reconsideration

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint
Petition of:

DUNG HOANG LE,

Appellant.

DIVISION ONE

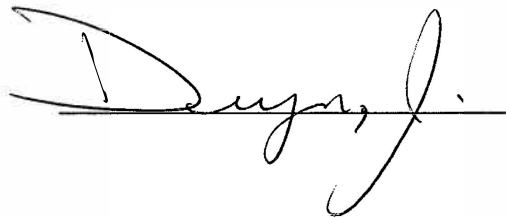
No. 82396-5-I

ORDER DENYING MOTION
FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is hereby denied.

FOR THE COURT:

A handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to be "D. Nguyen, J.".

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82396-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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petitioner

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MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: August 12, 2022

WASHINGTON APPELLATE PROJECT

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