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THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER

V.

CRISTIAN DELBOSQUE, RESPONDENT

MOTION FOR REVIEW

Court of Appeals No. 49792-1-II
Appeal from the Superior Court of Mason County
The Honorable Daniel Goodell
No. 93-1-00256-4

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

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A. IDENTITY OF PETITIONER

The State of Washington, the respondent below, moves this Court pursuant to RAP 13.5A(a)(1) to review the decision of the Court of Appeals to reverse the trial court judgment and sentence pursuant to RAP 16.4.

B. DECISION OF COURT OF APPEALS

The State of Washington requests this court to review the Court of Appeal's December 4, 2018, published opinion in case number 49792-1-II, which reversed the trial court judgment and sentence in Mason County Superior Court case number 93-1-00256-4, which the trial court issued following a hearing to set a minimum term as required by RCW 10.95.035(1). A copy of the opinion is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

1) Did the Court of Appeals err by substituting its own judgment for that of the trial court on contested matters of fact?

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2) Did the Court of Appeals err by misallocating the burden of proof and persuasion, by treating age as a per se mitigating factor, and by finding that the trial court did not properly follow the requirements of RCW 10.95.030 and *Miller v. Alabama*?

D. STATEMENT OF THE CASE

The facts are provided in the State's brief to the Court of Appeals, attached as Appendix B.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1) Court of Appeals erred by substituting its own judgment for that of the trial court on contested matters of fact.

At page 9 of its opinion, the Court of Appeals held that the trial court's finding, that "'Delbosque continues to exhibit an ongoing attitude to others that is reflective of Mr. Delbosque's underlying murder[,]'" was unsupported by substantial evidence in the record. *State v. Delbosque*, No. 49792-1-II (quoting trial court "Memorandum Opinion Re: Finding and Conclusions" at p.2, section 4). But the full context of the trial court's statement is as follows:

Mr. D's chances of becoming rehabilitated and the reflection of transient immaturity. Mr. Delbosque committed an extraordinarily

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brutal and vicious murder of a minor victim. Mr. Delbosque does not suffer from any diagnosable mental illness, but has been diagnosed with alcohol dependence. Mr. Delbosque continues to exhibit an ongoing attitude to others that is reflective of Mr. Delbosque's underlying murder *where he is choosing to advance his own needs, even resorting to violence, over the well-being of others*. This reflects an attitude that a third party's well-being is insignificant and expendable in comparison to his needs. There is no identified program or treatment presented to deal with this negative attribute.

"Memorandum Opinion Re: Finding and Conclusions" at p.2, section 4 (emphasis added). (Appendix C). The Court of Appeals then states that "[t]he superior court noted in its oral ruling that, while in prison, Delbosque received an infraction in 2010 for his alleged involvement in gang activity." *State v. Delbosque*, No. 49792-1-II, at p. 9. The Court of Appeals alleged that "the [trial] court's only example of this attitude was Delbosque's 2010 infraction for attempting to arrange an assault, which occurred six years prior to the evidentiary hearing." *Id.* at 10. The Court of Appeals found that "to whatever extent Delbosque's infraction history does exhibit a pattern related to the murder he committed, that pattern is not continuing or current" and that "[t]herefore, the superior court's finding is not supported by substantial evidence." *Id.*

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The State contends that the Court of Appeals' findings give rise to "an issue of substantial public interest that should be decided by the Supreme Court" pursuant to RAP 13.4(b)(4) and that this Court should also accept review under RAP 13.4(b)(1) because the Court of Appeals' findings are in conflict with the Supreme Court's decision in *State v. Ramos*, 187 Wn.2d 420, 453, 387 P.3d 650 (2017), *as amended* (Feb. 22, 2017), *reconsideration denied* (Feb. 23, 2017), *cert. denied*, 138 S. Ct. 467, 199 L. Ed. 2d 355 (2017) ("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 of Appeals cites no authority to support its finding that the infraction at issue should be weighed slightly because it is six years old, nor does it cite any authority for its proposition that to support the conclusion of the trial court there must be a continuing or current pattern or the weight that a trial court is required to give to evidence, or the lack of evidence, of post-offense behaviors. This absence of authority begs for the Supreme Court's judgment and supports review under RAP 13.4(b)(4).

At page 10 of its opinion, the Court of Appeals overrides the trial court's finding of fact "that Delbosque's crime was reflection of

‘irreparable corruption, permanent incorrigibility, and irretrievable depravity.’” Delbosque at 10 (quoting “Memorandum Opinion Re: Finding and Conclusions” at p.2, section 1).

But Delbosque is not entitled to a presumption that he should receive a reduced sentence, and he bears the burden of proving that his crime was the result of transient immaturity. *State v. Ramos*, 187 Wn.2d 420, 434-37, 387 P.3d 650 (2017). Nor is the trial court required to make an explicit finding that the crime reflects irreparable corruption. *Id.* at 437, 449-50.

The State contends that the totality of the record supports the trial court’s finding. When considering the sufficiency of the evidence in *Ramos*, the Supreme Court stated: “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.” *Id.* at 453. The State contends that the same principle should apply in the instant case. The Court of Appeals’ opinion to the contrary conflicts with *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017), and begs for this Court’s acceptance of review pursuant to RAP 13.4(b)(1) & (4).

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- 2) The Court of Appeals erred by misallocating the burden of proof and persuasion, by treating age as a per se mitigating factor, and by finding that the trial court did not properly follow the requirements of RCW 10.95.030 and *Miller v. Alabama*.

The Court of Appeals held that the trial court failed to comply with the *Miller*-fix statute in this case. *Delbosque* at 10-13. But the sentence in this case was not a life without parole sentence. *Ramos* defined a de facto life sentence as a sentence that exceeds the average human life span. *Ramos* at 434. The trial court followed *Miller* and the *Miller*-fix statute and used its discretion and declined to impose a life sentence, and the Court of Appeals cited no authority to support its contention that *Miller* principles must be applied to *Delbosque*'s 48-year sentence. The Court of Appeals' holding conflicts with *Ramos* and begs for this Court's judgment under RAP 13.4(b)(1) and (4).

Additionally, the Court of Appeals seemed to allocate the burden of proof on the State and seemed to assume that youth is a per se mitigating factor for sentencing. The Court of Appeals decision seems to say that all children, all the time, no matter the conduct and irrespective of the facts of the crime, are entitled to a mitigated sentence. *See, e.g., Delbosque* at 11. This approach makes the *Miller*-fix hearing a pointless

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PO Box 639
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360-427-9670 ext. 417

formality and removes all discretion and fact-finding functions from the trial court. Age is not a per se mitigating factor. *State v. O'Dell*, 183 Wn.2d 680, 695-96, 358 P.3d 359 (2015). The Court of Appeals decision in this case conflicts with these Supreme Court precedents and begs for this Court's judgment to settle these issues under RAP 13.4(b)(1) and (4).

Neither *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), nor RCW 10.95.030 require the sentencing court to presume that a 17 year old defendant's crime is a reflection of transient immaturity. *Ramos*, 187 Wn.2d at 445. Delbosque's evidence, by way of expert witnesses and witnesses who described his troubled background, was not adequate to persuade the trial court that Delbosque deserved a sentence that was less than what the trial court imposed. Reviewing courts do not substitute their judgment for that of the trial court; thus, the reviewing court must affirm the trial court unless no reasonable person could have come to the same conclusion as the trial court. *In re Det. of Duncan*, 167 Wn.2d 398, 406, 219, P.3d 666 (2009). The Court of Appeals decision in Delbosque conflicts with these authorities and begs for this Court's judgment to resolve these conflicts under RAP 13.4(b)(1) and (4).

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F. CONCLUSION

For resolution of the issues raised above, the State urges the Court to accept review of this case.

Respectfully submitted this 3rd day of January, 2019.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

Appendix A

December 12, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CRISTIAN J. DELBOSQUE,

Appellant.

No. 49792-1-II

**ORDER CORRECTING CAPTION
OF PUBLISHED OPINION**

The published opinion in this case was filed on December 4, 2018. Upon the motion of the court to correct the caption of the opinion, it is hereby

ORDERED that the caption of the publish opinion previously filed on December 4, 2018, is hereby changed to:

STATE OF WASHINGTON,

Respondent,

v.

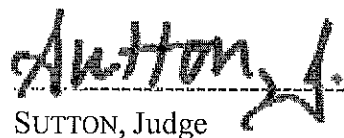
CRISTIAN J. DELBOSQUE,

Appellant.

IT IS SO ORDERED.

FOR THE COURT:

PANEL: Jj. JOHANSON, BJORGEN, SUTTON


SUTTON, Judge

December 11, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CHRISTIAN J. DELBOSQUE,

Appellant.

No. 49792-1-II

**ORDER CHANGING CAPTION
OF PUBLISHED OPINION**

The published opinion in this case was filed on December 12, 20018. Upon the motion of the court to change the caption of the opinion, it is hereby

ORDERED that the caption of the publish opinion previously filed on December 12, 2018, is hereby changed to:

STATE OF WASHINGTON,

Respondent,

v.

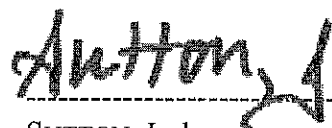
CHRISTIAN J. DELBOSQUE,

Appellant.

IT IS SO ORDERED.

FOR THE COURT:

PANEL: Jj. JOHANSON, BJORGEN, SUTTON



SUTTON, Judge

December 4, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint
Petition of:

No. 49792-1-II

CHRISTIAN DELBOSQUE,

PUBLISHED OPINION

Petitioner.

SUTTON, J. — In 1994, a jury found Cristian Delbosque guilty of aggravated first degree murder committed when he was 17 years old. The superior court imposed a life sentence without the possibility of parole. In 2016, under RCW 10.95.030 (the *Miller*-fix statute)¹ and RCW 10.95.035, the superior court held an evidentiary hearing and entered an order imposing a minimum term of 48 years with a maximum term of life imprisonment.

Delbosque challenges his judgment and sentence, arguing that the superior court's findings of fact are unsupported by substantial evidence and that the superior court failed to adequately consider the diminished culpability of youth as required by the *Miller*-fix statute when setting the

¹ In 2014, the Washington legislature responded to the United States Supreme Court's ruling in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), by enacting the *Miller*-fix statute. See RCW 10.95.030(3)(a). The *Miller*-fix statute requires that a sentencing court take into account the factors identified in *Miller* before sentencing a 16- to 18-year-old offender to life without parole or early release. RCW 10.95.030(3)(a)(ii), (b). The legislature also enacted a statute that requires that juveniles sentenced before 2014 to life without parole or early release be resentenced under the *Miller*-fix statute. RCW 10.95.035(1).

minimum term. We hold that the superior court's findings regarding Delbosque having an attitude towards others reflective of the underlying crime, and of Delbosque's permanent incorrigibility and irretrievable depravity are not supported by substantial evidence. We further hold that the superior court failed to comply with the *Miller-fix* statute when setting Delbosque's minimum term. Thus, Delbosque's restraint is unlawful. Accordingly, we grant his Personal Restraint Petition (PRP), reverse the judgment and sentence, and remand for resentencing.

FACTS

In 1994, Delbosque was convicted of aggravated first degree murder for the murder of a young woman. Delbosque was sentenced to a mandatory sentence of life without parole. Delbosque was 17 years old when he committed the murder.

In June 2016, the superior court conducted an evidentiary hearing to set a minimum term of confinement under the *Miller-fix* statute and RCW 10.95.035(1). During this hearing, the superior court heard extensive testimony from Delbosque's friends and relatives regarding his difficult and troubled childhood. The State presented testimony from the officer who investigated the murder and victim impact testimony.

The State also presented evidence from Robert Schreiber, the unit supervisor of the prison where Delbosque was incarcerated. Schreiber testified that Delbosque was currently classified as medium security and would qualify for minimum security except for the term of his sentence and an immigration detainer. Schreiber testified that between 1995 and 2008, Delbosque had 10 prison infractions, and that Delbosque's last infraction was in 2010. The 2010 infraction asserted that Delbosque used his leadership position in a gang to attempt to arrange an assault on another inmate.

Delbosque presented the testimony of two experts. Dr. Manuel Saint Martin evaluated Delbosque for past and current mental health issues. Dr. Saint Martin diagnosed Delbosque with borderline intellectual functioning and alcohol dependence at the time he committed the crime. Dr. Saint Martin also testified that he believed the murder likely involved “some sort of psychotic episode due to alcohol.” III Verbatim Report of Proceeding (VRP) at 423. In Dr. Saint Martin’s opinion, Delbosque’s dependence on alcohol played a significant role in the murder.

Dr. Sarah Heavin testified specifically regarding whether youth was a factor in Delbosque’s case. Dr. Heavin testified that the major area in which youthfulness affects behavior is executive functioning because of the youth’s underdeveloped frontal lobe. Generally, this results in juveniles being more likely to engage in risk-taking behavior and more susceptible to peer pressure or peer approval. Dr. Heavin opined that Delbosque was even more likely to exhibit these behaviors because of his lower intellectual functioning and traumatic upbringing. Specifically, Dr. Heavin testified that “youthfulness, combined with trauma, made him less likely to monitor his own behavior responsibly, inhibit aggressive behavior.” III VRP at 513. In summary, Dr. Heavin testified,

Well, I’m not suggesting that Mr. Delbosque’s homicide be excused. I’m suggesting that the [c]ourt respectfully consider the effect that his early childhood had on his brain development. It’s my opinion that his relative risk taking was greater than a typically developing youth without those same risk factors, which placed him in the apartment drinking alcohol excessively with a gun. And once essentially this string of crimes that were committed that night started, he had more difficulty than the average teen behaving in a reasonable way.

III VRP at 537-38.

After the hearing, the superior court entered the following findings of fact:

2. **Childhood and Life Experiences.** Mr. Delbosque endured a very difficult childhood up until the time of the murder, including a life with little nurturing, limited nutrition, and much chaos. Many risk factors are associated with the upbringing and development of Mr. Delbosque, including utero exposure to alcohol, his mother's death at an early age, a life of impoverishment, and both sexual and physical abuse as a child.

3. **Degree of Responsibility.** Mr. Delbosque is entirely responsible for the murder. No other person assisted him in the design or implementation of the murder. Alcohol dependence was not a predominate factor in the murder. Anger and a desire to conceal guilt were the predominate factors.

4. **Mr. [Delbosque]'s chances of becoming rehabilitated and the reflection of transient immaturity.** Mr. Delbosque committed an extraordinarily brutal and vicious murder of a minor victim. Mr. Delbosque does not suffer from any diagnosable mental illness, but has been diagnosed with alcohol dependence. Mr. Delbosque continues to exhibit an ongoing attitude to others that is reflective of Mr. Delbosque's underlying murder where he is choosing to advance his needs, even resorting to violence, over the well-being of others. This reflects an attitude that a third party's well-being is insignificant and expendable in comparison to his needs. There is no identified program or treatment presented to deal with this negative attribute.

Clerk's Papers (CP) at 30-31. Based on its findings, the superior court concluded,

The brutal murder that Mr. Delbosque committed in October of 1993 was not symptomatic of transient immaturity, but has proven over time to be a reflection of irreparable corruption, permanent incorrigibility, and irretrievable depravity.

CP at 31.² The superior court set a minimum term of 48 years with a maximum term of life imprisonment.

² Delbosque argues that the superior court mislabeled this finding as a conclusion of law. Br. of Appellant at 17. Findings of fact are determinations of whether the evidence shows that something existed or occurred. *Casterline v. Roberts*, 168 Wn. App. 376, 382, 284 P.3d 743 (2012). We agree. We treat findings of fact, labeled as conclusions of law, as findings of fact when challenged on appeal. *State v. Ross*, 141 Wn.2d 304, 309-10, 4 P.3d 130 (2000). Because the superior court's conclusion of law relates to whether a fact existed, we treat it as a finding of fact.

ANALYSIS

I. PROPER REVIEW OF DELBOSQUE'S CLAIMS

Delbosque filed a direct appeal of the superior court's order imposing the new minimum term. However, the proper method for Delbosque to seek review of the superior court's order is a PRP. *State v. Bassett*, 198 Wn. App. 714, 721, 394 P.3d 430 (2017), *aff'd*, ___ Wn. App. ___, 428 P.3d 343 (October 18, 2018). As a result, we requested supplemental briefing to allow Delbosque to address whether the superior court's order satisfied the requirements for relief from restraint under RAP 16.4. Order Requesting Supplemental Briefing at 2 (April 17, 2018).

In his supplemental brief, Delbosque argues that we should review his direct appeal of the superior court's order imposing the new minimum term of incarceration as a PRP.³ We agree.

RCW 10.95.035 provides for certain juvenile offenders sentenced to life without parole or release before June 1, 2014, to be resentenced consistent with the *Miller*-fix statute. *Bassett*, 198 Wn. App. at 718, n.6. RCW 10.95.035(3) also provides that "[t]he court's order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986." Review of a minimum term decision by the parole board before July 1, 1986, was obtained by filing a PRP. *Bassett*, 198 Wn. App. at 721.

³ Delbosque also argues that RCW 10.95.035(3) is unconstitutional because it violates the guaranteed right to appeal under article I, section 22 of the Washington Constitution. The State declined to respond to Delbosque's argument and instead argues that we should decline to address it because it was raised for the first time in the supplemental briefing and was outside the scope of this court's order for supplemental briefing. Generally, this court will not consider an argument raised for the first time in supplemental briefing. *State v. Krajewski*, 104 Wn. App. 377, 387, 16 P.3d 69 (2001). Accordingly, we do not consider Delbosque's argument that RCW 10.95.035(3) is unconstitutional.

“In order to facilitate review of a minimum term decision on the merits, we may disregard a filing defect and treat a direct appeal as a PRP.” *Bassett*, 198 Wn. App. at 721-22. Although Delbosque filed a direct appeal of the superior court’s order imposing the new minimum term of incarceration, we disregard this procedural defect and review Delbosque’s appeal as a PRP.

II. MINIMUM TERM SENTENCE

Delbosque argues that the superior court’s findings of fact are unsupported by substantial evidence and that the superior court failed to adequately consider the diminished culpability of youth as required by the *Miller*-fix statute when setting the minimum term of his sentence. We hold that (1) the superior court’s findings regarding Delbosque having an attitude towards others reflective of the underlying crime, and of Delbosque’s permanent incorrigibility and irretrievable depravity are not supported by substantial evidence, and (2) the superior court failed to comply with the *Miller*-fix statute when setting the minimum term.

A. LEGAL PRINCIPLES

“To obtain relief under a PRP where no prior opportunity for judicial review was available, a petitioner must show that he is restrained under RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c).” *Bassett*, 198 Wn. App. at 722. A petitioner is restrained under RAP 16.4(b) when he is confined. Under RAP 16.4(c)(2), restraint is unlawful when “[t]he conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington.” Here, it is undisputed that Delbosque is restrained.

We review challenged findings of fact for substantial evidence. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). “Substantial evidence” is “evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.” *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). We may look to the superior court’s oral ruling to interpret its written findings of fact. *State v. B.J.S.*, 140 Wn. App. 91, 99, 169 P.3d 34 (2007). Findings of fact that contain errors are subject to harmless error analysis. *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003).

In 2012, the United States Supreme Court held in *Miller v. Alabama* that it was unconstitutional to impose mandatory life without parole sentences for juvenile homicide offenders. 567 U.S. at 489. The Supreme Court noted that juvenile offenders have diminished culpability and are less deserving of the most severe punishments because they have a lack of maturity and an underdeveloped sense of responsibility, are more vulnerable to outside pressures and negative influences, and their traits are less likely to be evidence of irretrievable depravity. *Miller*, 567 U.S. at 471. The *Miller* Court required that sentencing courts consider the “mitigating qualities of youth,” including an offender’s youth and attendant characteristics, before imposing a particular penalty. 567 U.S. at 476. These attendant circumstances include: chronological age, immaturity, failure to appreciate risks and consequences, the circumstances of the homicide offense, and the possibility of rehabilitation. *Bassett*, 198 Wn. App. at 725.

Before *Miller*, Washington law imposed a mandatory sentence of life without the possibility of release or parole for an offender convicted of aggravated first degree murder, regardless of the offender’s age. *Bassett*, 198 Wn. App. at 726. In response to *Miller*, our legislature enacted the *Miller*-fix statute, which provides:

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

(ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.^[4]

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

RCW 10.95.030.

Our legislature also enacted RCW 10.95.035(1), which states:

A person, who was sentenced prior to June 1, 2014 . . . to a term of life without the possibility of parole for an offense committed prior to their eighteenth birthday, shall be returned to the sentencing court or the sentencing court's successor for sentencing consistent with *[the Miller-fix statute]*.

B. FINDINGS OF FACT

Delbosque argues that the following four findings of fact in the superior court's order are not supported by substantial evidence: (1) alcohol dependence was not a predominant factor in the murder, (2) Delbosque does not suffer from a diagnosable mental illness, (3) Delbosque continues to demonstrate an attitude towards others reflective of the underlying crime, and (4) the murder reflected permanent incorrigibility and irretrievable depravity. The superior court's findings

⁴ Our Supreme Court recently held that this subsection of RCW 10.95.030 is unconstitutional under the Washington Constitution because sentencing juvenile offenders to life without parole or early release constitutes cruel punishment. *State v. Basset*, 428 P.3d 343 (2018).

regarding alcohol dependence and mental illness are supported by substantial evidence, but the remaining findings are not supported by substantial evidence.

1. Alcohol Dependence

The superior court found that “[a]lcohol dependence was not a predominate factor in the murder.” CP at 12. Dr. Saint Martin testified that he believed that alcohol induced psychosis explained much of the seemingly bizarre behavior during and after the murder. However, the superior court, in its oral ruling, weighed that opinion against the evidence at the crime scene and determined that the murder was not the result of alcohol induced psychosis. Therefore, to this extent, the superior court’s finding is supported by substantial evidence.

2. Mental Illness

The superior court also found that Delbosque does not suffer from diagnosable mental illness but that he has been diagnosed with alcohol dependence. This finding is supported by substantial evidence. Dr. Saint Martin did testify that Delbosque had a diagnosis of alcohol dependence and borderline intellectual functions. Dr. Saint Martin testified that Delbosque did not suffer from any personality disorders such as schizophrenia, hallucinations, or sexual deviance. Therefore, this finding, within the context it was made, is supported by substantial evidence.

3. Pattern of Behavior

The superior court also found that “Delbosque continues to exhibit an ongoing attitude to others that is reflective of Mr. Delbosque’s underlying murder.” CP at 12. The superior court noted in its oral ruling that, while in prison, Delbosque received an infraction in 2010 for his alleged involvement in gang activity.

Although the superior court found that Delbosque had an ongoing attitude reflective of the murder, the court's only example of this attitude was Delbosque's 2010 infraction for attempting to arrange an assault, which occurred six years prior to the evidentiary hearing. Therefore, to whatever extent Delbosque's infraction history does exhibit a pattern related to the murder he committed, that pattern is not continuing or current. Therefore, the superior court's finding is not supported by substantial evidence.

4. Irreparable Corruption

The superior court also found that Delbosque's crime was a reflection of "irreparable corruption, permanent incorrigibility, and irretrievable depravity." CP at 12. In its oral ruling, the superior court stated that Delbosque's "predatory view ha[d] extended well into his adult life." IV VRP at 660. The court also noted that the murder "was not symptomatic of transient immaturity, but has proven over time to be a reflection of irreparable corruption, permanent incorrigibility, and irretrievable depravity." IV VRP at 661.

As discussed above, the superior court considered that Delbosque received an infraction in 2010. But his infraction does not support the notion that Delbosque continues to exhibit an attitude reflective of the murder. Likewise, Delbosque's infraction is not evidence of irreparable corruption proven over time. Delbosque had been in prison for approximately 15 years before the 2010 infraction, and the infraction took place 6 years before the evidentiary hearing. Accordingly, the superior court's finding is not supported by substantial evidence.

C. DIMINISHED CULPABILITY OF YOUTH

Delbosque next argues that the superior court erred in setting the minimum term of his sentence because the court failed to properly consider the sentencing criteria in the *Miller*-fix

statute. We agree. While the superior court clearly understood what it was required to consider, its findings demonstrate that it failed to meaningfully consider the evidence within the proper context of the diminished culpability of youth as required by the *Miller*-fix statute. Accordingly, the superior court failed to comply with the requirements of the *Miller*-fix statute in setting Delbosque's minimum term.

Here, the superior court made specific findings regarding Delbosque's age, childhood and life experience, degree of responsibility, and chances of becoming rehabilitated. The superior court did not, however, consider the designated factors "that account for the diminished culpability of youth," as required by the *Miller*-fix statute. RCW 10.95.030(3)(b).

Miller held that children are constitutionally different from adults for purposes of sentencing, explaining that because juveniles have diminished culpability and greater prospects for reform, "they are less deserving of the most severe punishments." 567 U.S. at 471 (*quoting Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)). In making this determination, the Court relied on three gaps between children and adults: children display a lack of maturity and an underdeveloped sense of responsibility, they are more vulnerable to outside pressures and negative influences, and their traits are less likely to be evidence of irretrievable depravity. *Miller*, 567 U.S. at 471.

Miller also determined that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. 567 U.S. at 472. Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. *Miller*, 567 U.S. at 472. Nor can deterrence do the work in this context, because the same

characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. *Miller*, 567 U.S. at 472. Similarly, deciding that a juvenile offender forever will be a danger to society would require making a judgment that the juvenile is incorrigible, but incorrigibility is inconsistent with youth. *Miller*, 567 U.S. at 472-73. For the same reason, rehabilitation cannot justify a sentence of life without parole because it forswears altogether the rehabilitative ideal and reflects an irrevocable judgment about a juvenile offender’s value and place in society, at odds with a child’s capacity for change. *Miller*, 567 U.S. at 473.

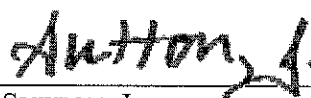
Both the *Miller* holding and Dr. Heavin’s testimony clearly establish that the diminished culpability of youth relates to juveniles underdeveloped executive brain functioning, including increased risk taking, failure to appreciate consequences and responsibility, and susceptibility to outside influences. Dr. Heavin also testified that Delbosque’s childhood and life experiences and degree of responsibility exacerbated the poor executive functioning characteristic of youth. In this case, the superior court did not address how any of the factors it analyzed related to the poor executive functioning or increased risk taking that Dr. Heavin identified as reflective of Delbosque’s diminished culpability.

The superior court also failed to address the greater prospects for reform from a crime committed while Delbosque was a child. This failure is shown by our holdings above that Delbosque’s infraction history does not exhibit a continuing or current pattern of behavior related to the murder he committed. Nor are his infractions evidence of irreparable corruption proven over time. The court’s rationale is also inconsistent with *Miller*’s recognition that incorrigibility is inconsistent with youth. 567 U.S. at 472-73.

In setting Delbosque's minimum term, the superior court failed to comply with the *Miller-fix* statute by failing to specifically consider the "diminished culpability of youth." Because the superior court failed to comply with the *Miller-fix* statute, Delbosque shows that his restraint is unlawful.

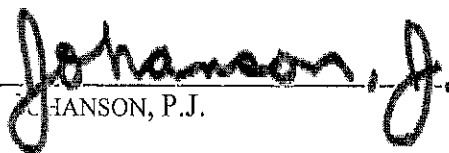
CONCLUSION

We hold that the superior court's findings regarding an attitude towards others reflective of the underlying crime, and of permanent incorrigibility and irretrievable depravity are not supported by substantial evidence. We further hold that the superior court failed to comply with the *Miller-fix* statute when setting the minimum term. Accordingly, Delbosque's restraint is unlawful because the superior court failed to comply with the *Miller-fix* statute in sentencing him. Thus, we grant the PRP, reverse the judgment and sentence, and remand for resentencing.

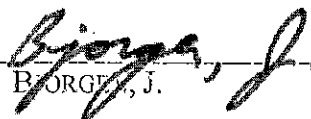


SUTTON, J.

We concur:



JOHANSON, P.J.



GEORGE, J.

Appendix B

No. 49792-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

CRISTIAN DELBOSQUE, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell, Judge

No. 93-1-00256-4

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. This court should dismiss Delbosque's appeal because a direct appeal is not a lawful means of challenging a resentencing under RCW 10.95.035.
2. State's answers to Delbosque's assertions that insufficient evidence supports four partial findings of fact to which he assigns error on appeal.
3. The State contends that the trial court correctly followed the mandates of RCW 10.95.030, RCW 10.95.035, and *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), when resentencing Delbosque.

B. FACTS AND STATEMENT OF THE CASE

There are two sets of exhibits and two sets of verbatim reports in this case because the trial occurred in 1994 but the resentencing now at issue occurred in 2016. There are ten volumes of verbatim reports from the trial, and there are four volumes of verbatim reports from the 2016 resentencing, but rather than have sequential volume numbers, the numbering system begins anew with the resentencing. Numerous exhibits were admitted into evidence at the trial, and some of those exhibits were then specifically discussed at the resentencing, but rather than refer to them by their original exhibit number, new numbers, beginning at 1, were assigned at the resentencing. Therefore, to identify the record, the State

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will refer to the 1994 transcripts by volume number and page, such as RP-I xx, etc., and will refer to the resentencing transcripts as "SRP-I xx" to distinguish them from the trial transcripts. Additionally, the State will refer to the original exhibits by their original exhibit numbers and will distinguish the resentencing exhibits by preceding the exhibit numbers with the abbreviated term "Sent.," such as "Sent. Ex. 1," and so on.

Additionally, because this case involves instances where some witnesses share the same surname, the State will in many or most instances refer to witnesses by their first name rather than by their surnames, but for clarity will refer to the defendant by his surname, Delbosque.

The facts of this case are as follows:

In 1992 or 1993, at the age of 16 or 17, the defendant-appellant, Cristian Delbosque, moved from his home in Mexico to Shelton, Washington. RP-VII 793-99; Sent. Ex. 13. Delbosque worked fulltime at the El Serape, a local restaurant in Shelton. *Id.* He lived with his father and had family members who lived nearby, including two brothers. *Id.*

Filiberto Sandoval was Delbosque's childhood friend. RP-VII 797. They grew up together in the same neighborhood in Mexico. *Id.* Filiberto had a brother, named Santiago Sandoval. *Id.* In 1993, Filiberto

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and Santiago shared an apartment together in Shelton. RP-VII 801. Filiberto worked at a local restaurant called the Oriental Express. RP-III 189-90. Delbosque's brother, Ricardo, worked at the same restaurant. RP-III 191-93. Filiberto had a key to the restaurant, and his job was to let himself in during the night after closing and to clean the restaurant before it reopened the following day. RP-III 190.

Santiago had a 16-year old girlfriend, named Kristina Berg, who was staying in the apartment with him and Filiberto. RP-V 486-87. Sometime prior to October 18, 1993, Santiago took a trip back to Mexico. *Id.* Kristina stayed behind and continued to live in the apartment with Filiberto. *Id.*

Sometime after about 10:30 at night on October 18, 1993, about three months before his 18th birthday, Delbosque went to Filiberto's apartment to visit with him while Kristina was there. RP-VII 801-03, 866-67. Delbosque had a .25 caliber pistol with him. RP-V 519. It appears likely that Delbosque and Filiberto drank some alcohol together. Although the details are sketchy – because Delbosque is the only witness who survived to tell the story – it appears that at some point after midnight (so that it was then October 19, 1993), a fight broke out between Delbosque and Filiberto. *Id.* During this fight, Delbosque pulled out his

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pistol and shot his childhood friend, Filiberto, in the chest. *Id.* The gunshot ruptured a pulmonary vein and caused Filiberto's death within a matter of minutes. RP-VI 719.

Again, because Delbosque is the only survivor, and because he gave various statements about what happened, the exact sequence of the events may be unknowable. But what is known is that Kristina ended up in the bathroom after witnessing Delbosque shoot Filiberto. RP-V 520. It appears that Kristina had locked herself into the bathroom in an effort to escape Delbosque, who then kicked in the door and shot Kristina in the thigh. *Id.*; RP-VI 691-93.

Delbosque's intent was to kill Kristina because she had seen him kill Filiberto, and Delbosque did not want to leave a witness. RP-V 521. But after Delbosque shot Kristina once, the pistol jammed, and he was unable to shoot her again. RP-V 521, 524. It is possible that Kristina had armed herself with a meat cleaver before she locked herself in the bathroom; but it is also possible that Delbosque went and got the meat cleaver when his pistol jammed. RP-V 520-24. But in any event, what is known is that Delbosque struck Kristina with a meat cleaver many, many times, causing her death. RP-V 520-21; RP-VI 686-700, 710; Ex.s 21, 24, 55, 66, 68, 70, 71, 72, 152, 153, 155.

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Before he killed her, Delbosque made Kristina take off her shirt and expose her naked breasts. RP-V 520. At some point he then began to whack her with the meat cleaver. RP-V 520-21. Kristina raised her arms to defend herself from the attack, which caused defensive wounds to her arms and hands. *Id.*; RP-VI 688. Delbosque continued the attack and landed some of the blows onto Kristina's face, causing deep wounds that fractured her facial bones. RP-VI 695-99. Eventually he landed at least two blows to Kristina's throat, which nearly decapitated her. RP-VI 698-700; Ex.s 152, 153, 155. Her head appeared to be hanging and attached to her body by a mere flap of skin, but apparently the spinal cord was unsevered and kept Kristina's dangling head attached to her body. RP-III 278; RP-VI 700; Ex.s 152, 153, 155. An autopsy revealed 68 meat cleaver wounds to Kristina's body. RP-VI 700, 728.

After Delbosque had killed both Filiberto and Kristina, he unclothed them and put Filiberto's body on top of Kristina's body and made it appear that they were possibly engaged in sexual intercourse. RP-V 521-22; Sent. Ex. 2; Ex.s 21, 24. He then put the meat cleaver into Filiberto's hand, piled clothing on top of the bodies, and then placed a hand-written note on top of the clothing. *Id.* Delbosque then took several items from the apartment and went home to go to sleep. RP-V 522-23.

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As he walked home, he abandoned the items he had taken. RP-V 523. But Delbosque kept the pistol, and when he got home he wrapped the pistol in a sock and put it in his closet. RP-IV 337. The pistol was still bloody from the crime scene. *Id.*

Later in the day when the Oriental Express opened, the owner was surprised to find that Filiberto had not reported to work during the night and cleaned the restaurant. RP-III 190-91. Filiberto was a reliable employee who never missed work. *Id.* The owner was concerned about Filiberto; so he asked another employee, Ricardo (who coincidentally happened to be Delbosque's brother), to go to Filiberto's apartment and check on him. RP-III 191. Sometime between noon and 1:30, Ricardo went to the apartment with his wife. RP-III 193-94. He entered the apartment through the bathroom window while his wife waited outside. RP-III 198. Once inside, Ricardo discovered the bodies and told his wife to call the police. RP-III 198-200.

The police arrived and began processing the crime scene. RP-III 201. Delbosque was among a number of curious people who had gathered outside the apartment, and he was one of several people who went voluntarily to the police station to give a statement. RP-IV 313. Delbosque's brother, Aldo, translated his statement into English. RP-IV

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317. The detective who interviewed Delbosque noticed that he had a swollen nose, a scratch on his face, a scratch on his neck, a cut thumb, and a scratch on his left index and middle fingers. RP-IV 313-14.

Delbosque's injuries appeared superficial. *Id.*; Sent. Ex.s 6, 7, 8. In his statement, Delbosque said that when he was walking home from work at about 10:15 the night before the interview, two guys jumped him. RP-IV

320. Delbosque said that the guys said they were looking for Santiago Sandoval. *Id.* And he said that one of them had a gun, and the other had a knife and that as he fought them, the guy with the knife cut his fingers. *Id.*

Delbosque returned to the police station for a second voluntary statement on October 20th. RP-IV 327. On this occasion, a Spanish-speaking officer took the statement. RP-IV 334-35; RP-V 492, 508, 512. In this statement, Delbosque reiterated what he had said in his first statement, except that he became confused about the route he was taking or where he was at when the two strangers allegedly attacked him. RP-V 512.

On October 21, the police executed a search warrant at Delbosque's residence and found the gun. RP-V 513. The police arrested Delbosque, told him he was under arrest for murder, and took him to the police station. RP-V 513-15. The police advised Delbosque of his rights,

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and Delbosque waived his rights. RP-V 514-15. Police then showed him the gun. RP-V 515. When shown the gun, Delbosque admitted that the gun was his, and he said "I did it and I'll tell you everything that you want to know." RP-V 515.

Delbosque then told Officer Delacruz that he had been drinking with Filiberto and Kristina and that they had drank a bottle of rum and some beer. RP-V 518. He said that he got into an argument with Filiberto about some money that Filiberto owed him. RP-V 518-19. This argument led to a fight, during which Delbosque ended up on the ground with Filiberto kicking him. RP-V 519. Delbosque said that he then pulled his gun and shot Filiberto in the chest. *Id.*

Delbosque said that Kristina locked herself in the bathroom. RP-V 520. When Filiberto stopped moving, Delbosque went to the bathroom and knocked, but Kristina would not answer the door. RP-V 520. Delbosque said that he then kicked in the door and shot Kristina, who then fell back on the toilet. RP-V 520. He said that he then told her to take off her shirt, and when asked why, he said "Because I wanted to put them together like that." RP-V 520.

Delbosque said that Kristina came after him with a meat cleaver and that they started to fight over the meat cleaver. RP-V 520-21.

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Delbosque demonstrated for officers how Kristina defended herself by raising her arms to block the blows from the meat cleaver. RP-V 521. Delbosque said that he had to kill Kristina because she saw him kill Filiberto. RP-V 521. Delbosque said, "I held the meat cleaver with both hands and press down twice on her neck." RP-V 521. Delbosque said, "Yeah, I get very angry, and I don't know what I do when I get very angry." RP-V 521.

At the completion of the investigation, the State charged Delbosque with one count of aggravated murder in the first degree for the murder of Kristina Berg and with one count of murder in the second degree for the murder of Filiberto Sandoval. CP 476-80.

In addition to the evidence described above, the evidence at trial showed that Kristina suffered 29 superficial cuts on her upper chest and shoulder area. RP-VI 686. She had a hatchet type wound on the front of her upper chest, slightly above her breast. RP-VI 686-87. She suffered a total of 17 defensive wounds to her arms and hands. RP-VI 688. In addition to superficial wounds to her face, she also suffered several deep wounds to her face, including four deep, chopping type wounds to her face. RP-VI 695-98. The largest of the chop-type wounds was to her neck. RP-VI 698-99. The hacking blows to Kristina's neck or throat

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almost severed her head. RP-III 278; RP-VI 698-700. Altogether Kristina suffered 68 wounds from the meat cleaver while she was still alive. RP-VI 700, 728; RP-VII 29. Although the gunshot wound contributed minimally, the hacking was the direct cause of Kristina's death. RP-VI 691-93, 710.

Delbosque testified at trial, and contrary to his pretrial statements to police, Delbosque testified that his girlfriend, Heather Santos, had committed both murders and that he had lied to police to protect her. RP-VII 803, 821-24. Delbosque testified that Santos had sent letters to him while he was in jail awaiting trial. RP-VII 835. Delbosque testified that the letters were strange because, he testified, "[i]n some letters, she'd say that she wasn't there, and then in other letters she would say that she was." RP-VII 869-70. During her testimony, Heather Santos testified that some of the letters had been altered. RP-VIII 936-50. On rebuttal, a document examiner called by the State also testified that the letters had been altered. RP-VIII 972-89.

Delbosque testified that Heather Santos was already at Filiberto's apartment when he arrived. RP-VII 803. He said that after he arrived at the apartment, he fell asleep, but later awoke to the sound of a gunshot. RP-VII 808. He testified that when he awoke he saw Heather Santos

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holding a gun, arguing with Kristina, and that Filiberto was holding his stomach and staggering. RP-VII 809-10. Delbosque testified that Heather Santos hit him in the face with the gun, knocking him to the ground and causing him to become disoriented. RP-VII 812. He said that Kristina went into the bathroom, that he could hear Heather Santos kicking at the bathroom door, and that he then heard a gunshot in the bathroom. RP-VII 814-15. He said that he then received a blow to the head, which knocked him unconscious. RP-VII 815. He testified that when he came to again, he discovered the murders. RP-VII 815-22. A doctor examined Delbosque for injuries when he was arrested the day after the murders, and Delbosque did not have any injury that would corroborate his testimony that he was hit in the face and head and knocked out. RP-VIII 960-61.

After receiving the evidence, the jury returned verdicts finding Delbosque guilty of aggravated murder in the first degree, for the murder of Kristina, and guilty of murder in the second degree, for the murder of Filiberto. RP-IX 1119-20. Sentencing occurred on October 10, 1994. CP 469-75. For the murder of Kristina, the trial court imposed a sentence of life without the possibility of parole, which was the only sentence available to the court because Delbosque was 17 years old when he committed the murder. CP 473. For the murder of Filiberto, the trial

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court imposed a sentence of 205 months in prison. RP 473. In 2005, Delbosque's conviction for the murder of Filiberto was vacated pursuant to *In re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), and *In re Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004). See, *Personal Restraint Petition of Cristian Delbosque*, No. 33052-1-II.

In June of 2016, Delbosque returned to the trial court for resentencing pursuant to *Miller v. Alabama*, 132 S.Ct. 2455, 183 L. Ed. 2d 407 (2012), and RCW 10.95.030 and .035. SRP-I 2. Following a full and fair hearing, the trial court entered findings and conclusions and amended Delbosque's sentence of life without the possibility of parole to a minimum sentence of 48 years with the possibility of parole after 48 years. SRP-I 1 through SRP-IV 675; CP 26-29, 30-31.

Further facts are provided in the argument sections below, as needed to develop the State's arguments.

C. ARGUMENT

1. This court should dismiss Delbosque's appeal because a direct appeal is not a lawful means of challenging a resentencing under RCW 10.95.035.

RCW 10.95.035(3) provides that a sentencing "court's order setting a minimum term is subject to review to the same extent as a

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minimum term decision by the parole board before July 1, 1986.” The only lawful means of obtaining review of a parole board decision prior to July 1, 1986, was to file a personal restraint petition. *State v. Bassett*, 198 Wn. App. 714, 434-35 (citing *In re Pers. Restraint of Rolston*, 46 Wn. App. 622, 623, 732 P.2d 166 (1987)).

Accordingly, the State contends that Delbosque’s appeal should be dismissed because it is unlawful under RCW 10.95.035(3).

2. State’s answers to Delbosque’s assertions that insufficient evidence supports four partial findings of fact to which he assigns error on appeal.

Here, Delbosque assigns error to four specific subparts of the trial court’s findings of fact. Specifically, Delbosque challenges the sufficiency of the evidence to support each one of these four subparts of the trial court’s findings of fact. The State will address the facts of each of these four subparts separately. The following analysis, however, is applicable to each of the challenges to the sufficiency of the evidence.

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622

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P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), *abrogated on other grounds by Crawford v. Washington*. 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The reviewing court need only find that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). The reviewing court defers to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). *State v. Randecker*, 79 Wn.2d 512, 517–18, 487 P.2d 1295 (1971).

- i) Trial court's finding that alcohol dependence was not a *predominate* factor in the murder.

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Delbosque contends that the trial court erred when, in its finding of fact number 3, it found that "Alcohol dependence was not a predominate factor in the murder." Br. of Appellant at 13-15; CP 31. To support his contention, Delbosque argues that the State did not present any evidence to contradict the opinions of his expert witnesses, and he contends that "[t]he state had employed an expert who obviously could have addressed this issue but the state chose not to call that witness." Br. of Appellant at 15.

However, there is nothing in our record that would indicate what the State's expert could have "obviously" (Br. of Appellant at 15) testified about, except that the witness had opinions about "irredeemability or irreparability," which has nothing to do with alcohol dependence. SRP-II 379. Also, Delbosque over weighs his own expert's opinion.

Delbosque's expert, Dr. Saint Martin, blamed the murders on an alcohol-induced psychosis. SRP-III 426. But he also admitted that someone with an alcohol-induced psychosis can engage in intentional, goal-directed activity, and he described several aspects of the murder that were intentional. SRP-III 430. He said that alcohol-induced psychosis is more of an explanation than a defense. SRP-III 431. And he admitted that his diagnosis of alcohol-induced psychosis was based on an obsolete

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version of the DSM, which was DSM-IV, rather than the now current version, which is DSM-V. SRP-III 442-43. And he admitted that he did not diagnose delusions or hallucinations, which the DSM-V requires before making a diagnosis of alcohol-induced psychosis. SRP-III 443; Sent. Ex. 31. In summary, he admitted that it was really no more than a guess as to whether alcohol may have caused Delbosque to commit these crimes. SRP-III 448.

Still more, on the topic of alcohol effects on impulse control, Dr. Saint Martin conceded that committing an intentional, premeditated homicide indicates something more than mere impulse control limitation. SRP-III 458. When confronted with the brutality of the murder of Kristina, Dr. Saint Martin conceded that the repeated blows with the meat cleaver, despite Kristina's suffering, went beyond mere impulse control. RP-III 461.

In summary, Dr. Saint Martin conceded that he didn't have all the facts and that he really didn't know what caused Delbosque to commit murder. RP-III 462-65. And he admitted that his opinions were really just an educated guess. RP-III 462. Dr. Saint Martin explained that:

Well, that's --- we can't understand his state-of-mind, and you know, we don't have all the facts. So it's the best --- it's the best guess from my prior experience with cases and what we

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have in this case.

RP-III 462.

Delbosque's second expert, Dr. Heavin, conceded that to have a valid diagnosis of substance induced psychotic disorder, hallucinations or delusions must be present as diagnostic criteria. SRP-III 546. Dr. Heavin explained that Dr. Saint Martin said that he can't exclude alcohol psychosis as a reason for excessive violence, and that's not necessarily the same thing as diagnosing it. SRP-III 544-45.

The trial court judge did not say that alcohol was not a factor in the crime; what he said is that it was not a "predominate" factor. CP 31.

ii) Trial court's finding that Delbosque does not suffer from any diagnosable mental illness.

Delbosque assigns error to the trial court's finding of fact number 4, wherein the trial court found that, other than alcohol dependence, Delbosque "does not suffer from any diagnosable mental illness." Br. of Appellant at 15; CP 31. Delbosque contends that he has been diagnosed with "Borderline Intellectual Functioning" and that the trial court's finding is, therefore, erroneous. Br. of Appellant at 15-16. However, Delbosque

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has not provided any citation to evidence to support a finding that Borderline Intellectual Functioning is a mental illness.

The record shows that Delbosque's IQ at the time of murders was approximately 76 or 77, and that at that IQ a person is functional. SRP-II 398. Dr. Saint Martin opined that Delbosque has borderline intellectual functioning, but he did not describe this as a mental illness, nor did he opine that this contributed to the crime. SRP-III 423. Instead, Dr. Saint Martin testified that borderline intellectual functioning, and mental retardation, are not linked to dangerousness. SRP-III 437. He said that there is no correlation between borderline intellectual functioning and sexual abuse or homicide. SRP-III 457-58.

Dr. Heavin testified that Delbosque does not meet the criteria for a mental health problem. SRP-III 490. She also testified that there is no correlation between IQ and the crime of murder. SRP-III 529. In her own assessments, Dr. Heavin found that Delbosque has no mental health problem at this time. SRP-III 530.

On these facts, the trial court did not err by finding that Delbosque does not suffer from any diagnosable mental illness.

iii) Trial court's finding that Delbosque continues to exhibit an attitude that places his needs above those

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of others.

Here, Delbosque contends that the trial court made an erroneous finding, which Delbosque quotes as follows:

“Christian [sic] Delbosque continues to engage in violent acts demonstrating an ongoing attitude reflective of the underlying crime in which he chooses his desires over the well-being of others.”

Br. of Appellant at 16. However, Delbosque does not provide a citation to the language that he quotes, and a review of the record has not led to any source for Delbosque’s quotation – thus, the State must assume that this quotation was erroneously phrased.

However, the trial court’s written finding to which Delbosque assigns error was phrased as follows:

Mr. Delbosque continues to exhibit an ongoing attitude to others that is reflective of Mr. Delbosque’s underlying murder where he is choosing to advance his needs, even resorting to violence, over the well-being of others. This reflects an attitude that a third party’s well-being is insignificant and expendable in comparison to his needs.

CP 31 (Finding of Fact No. 4); Br. of Appellant at 14. The State contends that the trial court’s parenthetical reference to “resorting to violence,” which is offset by commas in the court’s actual language, puts much less emphasis on an inference of continuing violence and the nature of the

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violence than what appears in Delbosque's uncited, and probably erroneous, quotation.

Delbosque contends that "[t]his finding by the court was based upon the fact that in the past 24 years the defendant has been involved in three one-on-on[e] fist fights with another inmates." Br. of Appellant at 16. But again, Delbosque provides no citation to support the contention.

Delbosque's prison record showed numerous infractions, many of which were not violent. SRP-I 98-121. In addition to the three infractions for fighting, Delbosque received two separate infractions, on August 24, 1997, and April 5, 2004, for possession of dangerous weapons. SRP-I 99-101; Sent. Ex 16. On November 3, 2000, he was cited for possessing another inmate's property. *Id.*; Sent. Ex 16. On November 25, 2002, he was involved in extortion and blackmail of other inmates. *Id.*; Sent. Ex 16. In June of 2010 he was cited for using his gang leadership position to initiate assaults by other inmates against other inmates. SRP-I 101-03; Sent. Ex 16.

When giving its oral ruling, the trial court explained that at the time of trial, Delbosque blamed his girlfriend, Heather Santos, for the murders. SRP-IV 641, 647, 652, 656. The court noted that besides falsely testifying that Heather Santos committed these murders, Delbosque also

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altered letters to fabricate false evidence implicating Santos. SRP-IV 656-57. It was in addition to these observations that the trial court also noted Delbosque's prison record. SRP-IV 657-59. It was in this light that the trial court judge observed that Delbosque brutally murdered Kristina in order to cover up his crime of shooting Filiberto, causing his death. SRP-IV 660. Thus it was in the context of the totality of the court's considerations that the trial court provided the language in its written finding of fact number 4 to which Delbosque assigns error. The State contends that in light of the context of the entire record, the two sentences to which Delbosque assigns error are not erroneous.

iv) The trial court's finding that the murder of Kristina is a reflection of "irreparable corruption, permanent incorrigibility, and irretrievable depravity" rather than "transient immaturity."

Here, Delbosque treats the trial court's conclusion of law number 1 as a finding of fact and assigns error to it based on a challenge to the sufficiency of the evidence. Br. of Appellant at 13-15, 17. The trial court's language to which Delbosque assigns error reads as follows:

The brutal murder that Mr. Delbosque committed in October of 1993 was not symptomatic of transient immaturity, but has proven over time to be a reflection of irreparable corruption, permanent incorrigibility, and irretrievable depravity.

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CP 31 (Conclusion of Law No. 1).

To support his contention that the trial court erred, Delbosque asserts his act of committing “double homicide” in this case was “for no apparent reason other than transient immaturity and impulsivity of youth.” Br. of Appellant at 17. But Delbosque is not entitled to a presumption that he should receive a reduced sentence, and he bears the burden of proving that his crime was the result of transient immaturity. *State v. Ramos*, 187 Wn.2d 420, 434-37, 387 P.3d 650 (2017). Nor is the court required to make an explicit finding that the crime reflects irreparable corruption. *Id.* at 437, 449-50.

The State contends that the totality of the record supports the trial court’s finding. When considering the sufficiency of the evidence in *Ramos*, the Supreme Court stated: “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.” *Id.* at 453. The State contends that the same principle should apply in the instant case.

3. The State contends that the trial court correctly followed the mandates of RCW 10.95.030, RCW 10.95.035, and *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), when resentencing Delbosque.

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Miller holds that *mandatory* life without parole sentences for offenders who were younger than 18 when they committed the crime of conviction is unconstitutional under the Eighth Amendment to the US Constitution. *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). *Miller* holds that discretionary life without parole sentences in such cases are not necessarily unconstitutional, but that every juvenile offender must have the benefit of a sentencing hearing and that the sentencing court must have the discretion to provide for the possibility of parole.

Additionally, RCW 10.95.030 requires that:

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

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

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RCW 10.95.030(3)(a)(ii) and .030(b). Also, the sections of RCW

10.95.035 that are relevant to Delbosque's claims provide as follows:

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

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

In the instant case, Delbosque received the hearing that RCW 10.95.030, RCW 10.95.035, and *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), require. SRP Vol.s I-IV. Delbosque was not prevented from entering evidence in the hearing. *Id.* He presented the testimony of family members and two experts. *Id.* His grievance now is that he did not carry the burden of proof, and the trial court did not weigh the evidence to his advantage. But the record shows that the trial court correctly weighed the evidence and applied RCW 10.95.030 and the *Miller* factors. SRP-IV 640-66; CP 30-31

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To support his contention that the trial court failed to follow these criteria, Delbosque recites his view of the evidence and does so in a light favorable to his claim that the trial court erred. Br. of Appellant at 22-30. But by doing so, Delbosque is in effect asking the reviewing court to reweigh the evidence. But, as the State argues in response to Delbosque's sufficiency of the evidence argument in part 2, above, Delbosque bears the burden of proof, and the reviewing court does not reweigh the evidence on review. *State v. Ramos*, 187 Wn.2d 420, 434-37, 453, 387 P.3d 650 (2017).

Neither *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), nor RCW 10.95.030 require the sentencing court to presume that a 17 year old defendant's crime is a reflection of transient immaturity. *Ramos*, 187 Wn.2d at 445. Delbosque's evidence, by way of expert witnesses and witnesses who described his troubled background, was not adequate to persuade the trial court that Delbosque deserved a sentence that was less than what the trial court imposed. Reviewing courts do not substitute their judgment for that of the trial court; thus, the reviewing court must affirm the trial court unless no reasonable person could have come to the same conclusion as the trial court. *In re Det. of Duncan*, 167 Wn.2d 398, 406, 219, P.3d 666 (2009).

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Here, the record shows that the trial court fully considered all the evidence that Delbosque presented. The trial court acknowledged that it was required to...

take into account mitigating factors that account for the diminished culpability of youth, as provided in the *Miller* case, including but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's changes of becoming rehabilitated, as well other factors provided by the *Miller* case.

SRP-IV 643. The court went on to further elaborate its duty to consider "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* In fact, the court gave a detailed recitation of its duties under RCW 10.95.030 and *Miller*.

SRP-IV 643-44. The trial court then summarized the evidence that was under consideration, which included the defendant's age, his work history, his work ethic, his maturity, his childhood and life experiences, the testimony of his expert witnesses, his degree of responsibility, his use of alcohol, and the facts of the crime. SRP-IV 644-48. The trial court's oral findings are well reasoned, and they support the trial court's sentencing decision. SRP-IV 640-66.

Delbosque asserts that "the state had employed its own expert witness to evaluate the defendant." Br. of Appellant at 25-26. But there is

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no citation to the record to support this assertion. Instead, careful review of the record reveals only two possible citations, SRP-II 364 and 379-80. In one instance, in regards to scheduling, the State surmised and informed the court as follows: "But we're going to want to -- we're going to file a motion and want to have Mr. Del Bosque examined by our own expert." SRP-II 364. But there is no indication in the record that that ever occurred. Then, at a later hearing Delbosque's defense counsel informed the court that the prosecution had "consulted with" an expert witness, but that the expert hadn't actually examined Delbosque. SRP-IV 379-80. Both parties informed the court of the contingent possibility of calling the witness, either as Delbosque's witness or as a rebuttal witness for the State, but ultimately neither party called this witness to testify. *Id.*

"The law recognizes that psychiatric medicine is an imprecise science and is subject to differing opinions as to what constitutes mental illness." *Matter of Det. of Belcher*, 189 Wn.2d 280, 292, 399 P.3d 1179 (2017) (citation omitted). There is no citation to record to support a contention that borderline intellectual functioning is a mental illness. To the contrary, Dr. Saint Martin ruled out mental illnesses. SRP-III 422. He found that Delbosque's IQ is 76 or 77, and he diagnosed borderline intellectual functioning, but he did not characterize these findings as a

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mental illness. SRP-II 398; SRP-III 423. Although he did not characterize an IQ of 76 or 77 as mental retardation, he denied that mental retardation or borderline intellectual functioning are linked to dangerousness, and he said there was no correlation between such diagnoses and sexual abuse or homicide. SRP-III 437, 457-58. Dr. Heavin also found that Delbosque does not meet the criteria for a mental health problem and that there is no correlation between IQ and murder. SRP-III 490, 529-30. Dr. Heavin explained that IQ and maturity, and particularly the transient immaturity of youth, are not the same thing and that there is no correlation between these concepts. SRP-III 534-37. In summary, therefore, whether Delbosque suffers from a mental illness is a non-issue, except possibly as a mitigating fact, to the extent that the absence of a mental illness might lead to an expectation that there is no mental illness that might affect his future behavior.

The sentencing court was required to consider Delbosque's capacity for rehabilitation. *State v. Ramos*, 287 Wn.2d 420, 449, 387 P.3d 650 (2017). Review of the record shows that the trial court did exactly what it was required to do. SRP-IV 640-66. The trial court considered Delbosque's age, maturity, and level of responsibility as it existed when he committed murders. SRP-IV 644-45. The court carefully considered

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Delbosque's childhood and life experiences. SRP-IV 645. The court acknowledged the disadvantages that Delbosque faced as child, and the court acknowledged that there was evidence offered that suggested that these circumstances *may* have affected Delbosque's brain development and social development. SRP-IV 645.

The trial court acknowledged that Dr. Saint Martin was "unable to rule out that Delbosque suffered from alcohol induced psychosis at the time of the murders." SRP-IV 646. And the court acknowledged that Dr. Heavin opined that the combination of alcohol and possession of a gun "were symptomatic of transient immaturity that created the circumstances that caused the murders." SRP-IV 646. However, while transient immaturity may explain why Delbosque drank alcohol at age 17 and may explain why he possessed a gun, and while it may explain why he shot Filiberto during a fight, it doesn't necessarily follow that it explains why he hacked Kristina 68 times with a meat cleaver, despite her cries and her suffering, and nearly severed her head merely because she saw him shoot Filiberto. Also, the court carefully considered the possibility that Delbosque committed the murders while in an alcohol-induced psychosis, but in the end the court did not find that the explanation was sufficiently credible. SRP-IV 646-55.

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The court then considered whether Delbosque was solely responsible for the murder of Kristina (as opposed to being induced by others to commit the crime). SRP-IV 655. The court then considered the chances that Delbosque can be rehabilitated and whether his crime is reflective of transient immaturity. *Id.* The court acknowledged that the sentence of “life without parole is justified in only the rarest of circumstances.” *Id.* The court considered “the actual crime, as well as the life and actions of Mr. Del Bosque after he committed the crime.” *Id.*; SRP-IV 656-61.

In summary, the trial court found that any evidence of rehabilitation and transient immaturity was insufficient to overcome the other evidence, and *State v. Ramos*, 287 Wn.2d 420, 449, 387 P.3d 650 (2017), gives the resentencing court great discretion to draw these conclusions. Thus, under *Ramos* the trial court did not abuse its discretion when sentencing Delbosque to sentence of 48 years with the possibility of parole at age 65, an age that is younger than most people his age may retire on social security.

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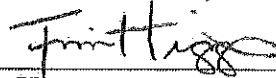
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D. CONCLUSION

The State asks that this Court dismiss Delbosque's appeal because direct appeal in this case is unlawful under RCW 10.95.035(3). Or, in the alternative in the event that this court treats Delbosque's unlawful appeal as a personal restraint petition, as in *State v. Bassett*, 198 Wn. App. 714, 394 P.3d 430 (2017), then the State asks that this Court sustain the trial court's sentence in this case and dismiss Delbosque's petition because his restraint is not unlawful.

DATED: November 8, 2017.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

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Appendix C

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Ginger Brooks, Clerk of the
Superior Court of Mason Co. Wash.

SUPERIOR COURT OF WASHINGTON
FOR MASON COUNTY

STATE OF WASHINGTON

Plaintiff

vs.

CRISTIAN DELBOSQUE,

Defendant.

NO. 93-1-00256-4

MEMORANDUM OPINION
RE: FINDINGS AND
CONCLUSIONS

The court makes the following findings based upon a preponderance of evidence:


1. **Mr. Delbosque's Age.** Mr. Delbosque was 17 years 3 months and 12 days at the time of the murder which most likely occurred during the early hours of October 19, 1993. At the time he was not in school, was working more than 40 hours a week and was known to his employer as a good employee. This juvenile work ethic alone does not indicate a level of maturity, but does separate him from other less responsible juveniles.
2. **Childhood and Life Experiences.** Mr. Delbosque endured a very difficult childhood up until the time of the murder, including a life with little nurturing, limited nutrition, and much chaos. Many risk factors are associated with the upbringing and development of Mr. Delbosque, including utero exposure to alcohol, his mother's death at an early age, a life of impoverishment, and both sexual and physical abuse as a child.

3. Degree of Responsibility. Mr. Delbosque is entirely responsible for the murder. No other person assisted him in the design or implementation of the murder. Alcohol dependence was not a predominate factor in the murder. Anger and a desire to conceal guilt were the predominate factors.
4. Mr. D's chances of becoming rehabilitated and the reflection of transient immaturity. Mr. Delbosque committed an extraordinarily brutal and vicious murder of a minor victim. Mr. Delbosque does not suffer from any diagnosable mental illness, but has been diagnosed with alcohol dependence. Mr. Delbosque continues to exhibit an ongoing attitude to others that is reflective of Mr. Delbosque's underlying murder where he is choosing to advance his needs, even resorting to violence, over the well-being of others. This reflects an attitude that a third party's well-being is insignificant and expendable in comparison to his needs. There is no identified program or treatment presented to deal with this negative attribute.
5. Reduction of Risk. The loss of power and influence that Mr. Delbosque may experience as a result of advanced aging after an extended period of confinement may reduce the risk to society relative to Mr. Delbosque's release.

The court provides the following conclusions:

1. The brutal murder that Mr. Delbosque committed in October of 1993 was not symptomatic of transient immaturity, but has proven over time to be a reflection of irreparable corruption, permanent incorrigibility, and irretrievable depravity.
2. An indeterminate sentence setting a minimum of 48 years will allow an Indeterminate Sentence Review Board the ability to consider whether the loss of power and influence that Mr. Delbosque may experience as a result of advanced aging after an extended period of confinement may make him suitable for release.

DATED this 23 day of November, 2016.



JUDGE DANIEL GOODELL
MASON COUNTY SUPERIOR COURT

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Filing Motion for Discretionary Review of Court of Appeals

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