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Supreme Court No. 96709-1
Court of Appeals No. 49792-1-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

CRISTIAN DELBOSQUE,

Respondent.

BRIEF OF PETITIONER – STATE OF WASHINGTON

In Response to Brief of Amici Curiae
Fred T. Korematsu Center for Law and Equality,
American Civil Liberties Union of Washington,
Washington Association of Criminal Defense Lawyers, and
Washington Defender Association

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TABLE OF CONTENTS

Page

I. STATEMENT OF THE ISSUES1

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

 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*?

II. STATEMENT OF FACTS RELEVANT TO ISSUES1

III. ARGUMENT.....1

 I. RCW 10.95.030 does not specify a burden or standard of proof when conducting a *Miller*-fix setting of a minimum term. Here, the trial court allowed both parties to offer evidence and then considered all the evidence, regardless from whom it originated, and then carefully set an appropriate minimum term.....1

 a. The trial court very carefully considered the totality of the evidence, weighed it, and applied it to each of the *Miller* factors, including but not limited to rehabilitation, and the trial court then judiciously applied its discretion to set an appropriate minimum term.....2

 b. The trial court’s decision to order a minimum term of 48 years in this case was a carefully considered and appropriate exercise of the trial court’s

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

discretion, which did, and does, provide Delbosque with a meaningful opportunity for release.....	7
i) There is no statutory or constitutional requirement that sentencing courts must presume a minimum sentence of 25 years for 16 or 17-year old juveniles who commit aggravated first degree murder.....	7
ii) Rehabilitation or the prospect of rehabilitation is not the only factor that a sentencing court must consider when imposing the minimum term for aggravated first degree murder.....	10
c. There is no statutory or constitutional requirement that a court setting a minimum term for aggravated first degree murder must find that the defendant is incorrigible before setting a minimum term greater than 25 years, and there is no scientific or legal presumption that youthfulness is a per se reason to limit the minimum term to a mere 25 years.....	12
II. The court of appeals erred by substituting its judgment for that of the trial court when it overturned the trial court's proper exercise of its sentencing discretion.....	16
IV. <u>CONCLUSION</u>	20

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

TABLE OF AUTHORITIES

State Cases

State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018).....3, 14, 18

State v. Furman, 122 Wn.2d 440, 858 P.2d 1092 (1993).....2

State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017).....6

State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015).....*passim*

State v. Ramos, 187 Wn.2d 420, 435, 387 P.3d 650 (2017).....16

United States Supreme Court Cases

Graham v. Florida,
560 U.S. 48, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010).....4, 10, 11

Miller v. Alabama,
567 U.S. 460, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012).....*passim*

Montgomery v. Louisiana,
136 S. Ct. 718, 193 L.Ed.2d 599 (2016).....9

Roper v. Simmons,
543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).....9, 14

Federal Cases

United States v. Briones, No. 16-10150,
2019 U.S. App. LEXIS 20293 (9th Cir. July 9, 2019).....8

Statutes

RCW 10.95.030..... *passim*

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

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II. STATEMENT OF FACTS RELEVANT TO ISSUE

The facts are set forth in other briefs already submitted to the Court, so to avoid redundancy the State respectfully refers the Court to the State's original briefs for a summary of facts.

III. ARGUMENT

I. RCW 10.95.030 does not specify a burden or standard of proof when conducting a *Miller*-fix setting of a minimum term. Here, the trial court allowed both parties to offer evidence and then considered all the evidence, regardless from whom it originated, and then carefully set an appropriate minimum term.

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

- a. The trial court very carefully considered the totality of the evidence, weighed it, and applied it to each of the *Miller* factors, including but not limited to rehabilitation, and the trial court then judiciously applied its discretion to set an appropriate minimum term.

Amici curiae contend that children are constitutionally different from adults and that children must be treated differently for sentencing purposes. Delbosque has been treated differently from an adult in this case, and he has received a comparatively lenient sentence because he was nine months short of his eighteenth birthday when he murdered Kristina Berg by hacking her 68 times with a meat cleaver, causing her death – a murder that Delbosque committed because Kristina Berg was a witness to Delbosque’s earlier murder of Filiberto Sandoval. RP-V 519-21; RP-VI 686-700, 710, 719; Ex.s 21, 24, 55, 66, 68, 70-72, 152-53, 155.

When Delbosque committed this murder in 1993, RCW 10.95.030 mandated one of two possible penalties, life without the possibility of parole or the death penalty. However, the death penalty provision was inapplicable to Delbosque because he was a juvenile. *See, e.g., State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993).

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

After the United States Supreme Court declared in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012), that *mandatory* life without parole sentences are unconstitutional for juveniles and our state legislature enacted the *Miller*-fix statute, Delbosque was resentenced in 2016 under RCW 10.95.030(3). Although our State Supreme Court has since declared in *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018), that *all* life without the possibility of parole sentences are unconstitutional for juveniles, at the time of Delbosque's resentencing in 2016, RCW 10.95.030 and *Miller v. Alabama* allowed for *discretionary* life without parole sentencing for juveniles such as Delbosque who were convicted of aggravated first degree murder.

Thus, in 2016 the trial court had the authority to sentence Delbosque to a sentence of life without the possibility of parole. But the court received and considered evidence about Delbosque's youthfulness and his subsequent behaviors and circumstances, and then, based on Delbosque's youthfulness at the time of the murder, the court allowed for the possibility of parole after Delbosque serves a minimum term of 48 years. SRP 640-76.

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

These facts show that Delbosque has been treated differently because of his youthfulness at the time of the murder. Unlike an adult offender, Delbosque did not risk a death penalty. And unlike an adult who would face a *mandatory* life without parole sentence, Delbosque's sentencing court had the *discretion* to allow for the possibility of parole. But, based on considerations of youthfulness, Delbosque in fact has the possibility of parole (after serving a sentence of 48 years) – a possibility that would have been unavailable but for the attributes of youthfulness. *Id.*

The *Miller* Court held that sentencing courts must have discretion to allow for the possibility of parole when sentencing juveniles because “the distinctive attributes of youth *diminish* the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” *Miller* at 472 (emphasis added). The *Miller* Court also wrote that “the case for retribution is not as strong with a minor as with an adult.” *Id.* (quoting *Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011, 2028, 176 L.Ed.2d 825, 843 (2010)).

But a diminution is not equivalent to a total elimination, and to say that the justification is *not as strong as* does not mean that the justification

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

is not strong or that it is non-existent. And so, a diminution of the penological justifications for a harsh sentence – such as a sentence of life imprisonment against 14-year old juveniles (where the sentencing judge was *denied* the discretion to allow for the possibility of parole) – should not be the basis for concluding that a sentence of 48 years with the possibility of parole against a 17-year old (where the judge had discretion to impose a sentence of 25 years to life) is too harsh of a sentence.

Miller does not hold that youthfulness must always mitigate against every juvenile crime, no matter the facts, no matter the severity, and no matter the relevancy of the “hallmark features”¹ of youth to the circumstances of the crime. The State contends that there is a difference between a 14-year old who foolishly participates in a robbery as compared to a 17-year old who hacks a victim to death with a meat cleaver to cover up another murder. Still more, there are differences in individuals, and it may be possible that some will be more deserving of leniency than others.

Thus arises the brilliance of *Miller*, that judges must have discretion to consider the possibility of parole when sentencing juveniles,

¹ *Miller*, 567 U.S. at 477.

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

and thus arises the wisdom of the evolving standards of our state jurisprudence, that sentencing courts must take into account the potentially mitigating attributes of youth when sentencing juveniles in all cases. *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017); *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). But these cases should not be interpreted as requiring a presumption of mitigation in all cases where the perpetrator of a particularly violent murder is merely youthful or is youthful and has a life story that is unfamiliar to many observers.

In *O'Dell*, this Court recognized that there are “studies that establish a clear connection between youth and decreased moral culpability for criminal conduct.” *O'Dell* at 695. But the State contends that there is an important circumstantial distinction that should be recognized between moral culpabilities from one crime as compared to another and that a decreased culpability – irrespective of how great or how slight the decrease in a particular case – should not automatically mean that the defendant is undeserving of substantial punishment. This Court seemed to recognize the spectrum of possibilities when it used the word “may” and wrote that “in light of what we know today about adolescents' cognitive and emotional development, we conclude that youth may, in

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

fact, relate to a defendant's crime[.]” *Id.* at 695-96 (internal quotations, brackets, and citations omitted). Thus, the Court adhered to its precedent and declared that “[i]t remains true that age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence.” *O’Dell* at 695. The State requests that the Court adhere to its precedents in the instant case.

- b. The trial court’s decision to order a minimum term of 48 years in this case was a carefully considered and appropriate exercise of the trial court’s discretion, which did, and does, provide Delbosque with a meaningful opportunity for release.
 - i) There is no statutory or constitutional requirement that sentencing courts must presume a minimum sentence of 25 years for 16 or 17-year old juveniles who commit aggravated first degree murder.

The State contends that a minimum sentence of 48 years is not disproportionately harsh for Delbosque, who murdered an innocent victim, Kristina Berg, by hacking her 68 times with a meat cleaver because she was a witness to Delbosque’s earlier murder of Filiberto Sandoval. RP-V 519-21; RP-VI 686-700, 710, 719; Ex.s 21, 24, 55, 66, 68, 70-72, 152-53, 155.

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

Amici curiae cite a federal 9th Circuit Court of Appeals case, *United States v. Brinoes*, No. 16-10150, 2019 U.S. App. LEXIS 20293 (9th Cir. July 9, 2019), as persuasive authority for their proposition that the presumptive minimum sentence for 16 and 17-year old defendants who commit aggravated first degree murder should be 25 years. Br. of Amici at 8-11. However, *Brinoes* is a federal case wherein the defendant received a post-*Miller* sentence of life without the possibility of parole. *Brinoes* at 5-6. But unlike *Brinoes*, the instant case is not a federal case, and Delbosque did not receive a life without parole sentence. Still more, the United States Supreme Court authorities relied on by *Brinoes* speak well for themselves, and so, the *Brinoes* court's interpretation of these authorities is not particularly useful in the instant case. However, one observation of the *Brinoes* court is of particular interest as applied to the instant case, where the *Brinoes* court acknowledged that "the severity of a defendant's crime is indisputably an important consideration in any sentencing decision." *Id.* at 18.

Brinoes states that "when courts consider *Miller's* central inquiry, they must reorient the sentencing analysis to a forward-looking assessment of the defendant's capacity for change or propensity for incorrigibility,

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

rather than a backward-focused review of the defendant's criminal history.” *Id.* at 19. The most recent precedent to which Brinoes cites to support this statement is *Montgomery v. Louisiana*, 136 S. Ct. 718, 726, 193 L.Ed.2d 599, 610 (2016). *Id.* at 18. But *Montgomery*, unlike the instant case, was reviewing the imposition of a mandatory life without parole sentence, rather than a discretionary sentence for a term of years, as in the instant case. *Montgomery* at 726. Thus, in this context, the Court declared, as follows:

“By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence,” mandatory life without parole “poses too great a risk of disproportionate punishment.” *Id.*, at ____, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407, 424. *Miller* required that sentencing courts consider a child’s “diminished culpability and heightened capacity for change” before condemning him or her to die in prison. *Ibid.* Although *Miller* did not foreclose a sentencer’s ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect “irreparable corruption.” *Ibid.* (quoting *Roper v. Simmons*, 543 U.S. 551, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)).

Montgomery v. Louisiana, 136 S. Ct. 718, 726, 193 L.Ed.2d 599, 610-11 (2016) (quoting *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 2469, 183 L.Ed.2d 407, 424 (2012)).

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

But in the instant case, Delbosque did not receive a life without parole sentence, and the trial court did consider the attributes of youth, and in particular, Delbosque's youth, before deciding on the appropriate sentence. SRP IV 640-75.

- ii) Rehabilitation or the prospect of rehabilitation is not the only factor that a sentencing court must consider when imposing the minimum term for aggravated first degree murder.

Amici curiae cite *Graham v. Florida*, 560 U.S. 48, 75, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010), to support their contention that "the reason that this Court and the Supreme Court held that juveniles should be sentenced differently is because they can be rehabilitated and become productive, contributing members of society." Br. of Amici at 13. This contention presupposes that the only justification for punishment for crime is the lack of supposed rehabilitation. But there is no clear definition of what constitutes "rehabilitation" in the context of aggravated first degree murder. If one commits aggravated first degree murder and immediately rehabilitates – whatever rehabilitation means in the context of aggravated

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

first degree murder – is he or she thereby underserving of any punishment at all?

The *Graham* decision was concerned with *nonhomicide* offenders, and in this context the Court reasoned that “penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders.” *Graham* at 74. Thus, it was in the context of nonhomicide offenses that the Court proclaimed as follows: “The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.” *Id.* at 75. Distinct from *Graham*, the instant case is not a *nonhomicide* case – instead, it is a case of aggravated first degree murder, and unlike the defendant in *Graham*, Delbosque did not receive a sentence of life without the possibility of parole – instead, despite the severity of his crime, Delbosque is eligible for parole after 48 years. SRP-IV 640-75.

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

- c. There is no statutory or constitutional requirement that a court setting a minimum term for aggravated first degree murder must find that the defendant is incorrigible before setting a minimum term greater than 25 years, and there is no scientific or legal presumption that youthfulness is a per se reason to limit the minimum term to a mere 25 years.

Amici curiae cite *Miller v. Alabama*, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012), to support their contention that “[t]he defense need only prove an individual’s biological age to show that he possesses the ‘hallmark features’ of youth.” Br. of Amici at 13. Although it is intuitively reasonable to guess that, to some degree, some accurate predictions can generally, but imperfectly, be based on chronological age, the citation to authority, nevertheless, does not support amici curiae’s stronger contention. But more importantly, the State contends that neither such seemingly accurate predictions nor the mere hallmark features of youth necessarily weigh against a minimum term of 48 years in the instant case.

In *O’Dell*, this Court recognized that the juvenile brain generally is not fully developed until after age 20. *State v. O’Dell*, 183 Wn.2d 680, 691-92, 358 P.3d 359. In *O’Dell*, this Court recognized that “specific individuals” with undeveloped brains are influenced by “impulsivity, poor

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

judgment, and susceptibility to outside influences.” *Id.* at 691. But importantly, rather than impose a presumption applicable to all cases in all degrees, the Court recognized and respected that “[t]he trial court is in the best position to consider those factors.” *Id.* at 691.

Amici curiae propose that “[t]he State must prove that the juvenile does not have the hallmarks of youth by clear and convincing evidence.” Br. of Amici at 13. First, the State responds again that mere possession of common attributes of youth should not be regarded as per se sufficient to excuse a crime as serious as aggravated first degree murder – and particularly not on the facts of the instant case.

The State contends that the mere attributes of youth may be sufficient to presumptively mitigate against youthful crimes, such as joy riding, drug and alcohol offenses, petty malicious mischief, and what have you, but it should not automatically follow that every juvenile who commits aggravated first degree murder should presumptively receive a mitigated sentence because of poor impulse control, poor judgment, peer influences, or a failure to consider consequences. To the extent that such considerations are meaningful in the context of aggravated first degree murder committed by juveniles, they have been accounted for to some

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

degree already by the elimination of the death penalty by *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005), the elimination of mandatory life without possibility of parole sentences by *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012), and the elimination of discretionary life without possibility of parole sentences by *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018).

RCW 10.95.030 does not allocate or define the burden of proof applicable at a *Miller*-fix hearing, nor does it set forth a presumed or standard range for defendants who were age-16 or 17 when they committed the crime of aggravated first degree murder. Instead, the statute requires that such defendants “shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years.” RCW 10.95.030(3)(a)(ii). Because subsection (3)(a)(i) requires a minimum term of exactly 25 years for defendants who are aged 15 and younger, the use of the phrase “no less than” in subsection (3)(a)(ii) appears to give the sentencing judge discretion to impose a greater sentence.

To decide upon the minimum term, subsection (3)(b) directs the trial court to “take into account mitigating factors that account for the

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

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." Notably, the statute does not direct the trial court to weigh any factor above any others, nor does it direct the trial court to presume that all juveniles are capable of rehabilitation, which is but one of several named factors and is but one of many possible factors for the court's consideration.

Most of these factors are uniquely within the ability of the defendant to present to the court. For example, the defendant is in a uniquely better position to know his or her own childhood and life experiences or how those experiences may have contributed to the crime of aggravated first degree murder. The sentencing court will normally be possessed of information about the crime itself, the brutality of it, the nature and degree of the defendant's involvement, and the details of the planning and the motive, if any, among other things, as well as observations about the defendant himself or herself. So, in the absence of

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

other information, the court should nonetheless have sufficient information to decide upon a minimum term.

But if either party wishes to move the court's minimum term decision from its starting place – a point that is within the court's discretion somewhere between 25 years and de facto life, then that party should bear the burden of production. In *State v. Ramos*, this Court wrote (in the context of the Sentencing Reform Act), that the defendant bears the burden of proof by a preponderance of the evidence when seeking a mitigated sentence below the standard range. 187 Wn.2d 420, 435, 387 P.3d 650 (2017). The State contends that the same standard should apply in the instant case. In effect, with this standard both sides will have an incentive to present relevant evidence and to prove it by a preponderance, thus presenting the court with all available facts necessary to an informed decision.

- II. The court of appeals erred by substituting its judgment for that of the trial court when it overturned the trial court's proper exercise of its sentencing discretion.

Amici curiae argue that, because the trial court set the minimum term at 48 years rather than 25 years, and because it did so even though

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

Delbosque presented the testimony of an expert, the trial court necessarily did not follow the requirements of the *Miller*-fix statute. Br. of Amici at 16-17. Amici curiae reason that “[t]he ‘*Miller* holding’ and a doctor’s testimony about Mr. Delbosque’s brain was sufficient to establish that Mr. Delbosque had the hallmarks of youth.” *Id.* at 16. However, although amici curiae do not offer a citation or otherwise clarify which of Delbosque’s two expert witnesses they are referring to, neither of Delbosque’s witnesses testified specifically about Delbosque’s brain. SRP-II 388-400; SRP-III 401-474; SRP-III 474-550.

Additionally, there was no testimony that generic hallmarks of youth are necessarily sufficient to minimize the severity of Delbosque’s acts of hacking Kristina Berg with a meat cleaver 68 times, causing her death. *Id.* The contrary argument requires the fact-finder to presume, without proof, that Delbosque’s brain was sufficiently undeveloped to excuse this murder and to accordingly justify a minimum sentence. The record shows that the fact-finder – the trial court judge – appropriately considered the evidence, weighed it according to his discretion, and set the minimum term at 48 years. SRP-IV 640-75.

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

Amici curiae argue that “[t]he State did not present clear and convincing evidence to show that Mr. Delbosque did not have those biological characteristics or that, despite those characteristics, Mr. Delbosque is incapable of being rehabilitated within a 25-year sentence after his offense.” Br. of Amici at 16-17. But the trial court judge was not restricted to only the evidence offered by the State. The trial court judge had all the evidence before him, to include the evidence presented by Delbosque. SRP-IV 640-75. The trial court judge decided upon the minimum term in this case before *State v. Bassett*² ruled that juvenile life without parole sentences are unconstitutional. The trial court judge considered the evidence, weighed it, and consistent with the *Miller*³ proclamation that appropriate juvenile life without parole sentences will be uncommon, set the minimum term at 48 years. SRP-IV 640-75.

Amici curiae focus heavily on the illusive concept of rehabilitation and urge that the State should bear a burden of proof by the clear and

² 192 Wn.2d 67, 428 P.3d 343 (2018)

³ 567 U.S. 460, 479, 132 S. Ct. 2455, 2469, 183 L.Ed.2d 407, 424 (2012)

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

convincing evidence standard. Br. of Amici at 16-17. However, as argued previously, RCW 10.95.030(3) does not set forth a standard of proof, and rehabilitation is but one factor for the sentencing court's consideration. The trial court judge very carefully considered rehabilitation when deciding upon the minimum term. SRP-VI 655-63.

The record shows that Delbosque's prison infractions extend beyond the one infraction mentioned by amici curiae. SRP-IV 657-58; SRP-I 96-173. Delbosque's prison infraction history was but one part of the proof and but one part of the trial court's consideration. SRP-IV 640-75. The trial court judge gave very careful consideration to the totality of the evidence and very carefully weighed the *Miller* factors. SRP-IV 640-75. The trial court appropriately exercised its discretion and imposed a fair minimum term of 48 years. The trial court judge was in the best position to consider and weigh the evidence, and his decision should be respected. *See, e.g., State v. O'Dell*, 183 Wn.2d 680, 691, 358 P.3d 359 (“[t]he trial court is in the best position to consider [the *Miller*] factors”).

Brief of Petitioner
State of Washington
In Response to Amici Curiae
Case No. 96709-1

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

IV. CONCLUSION

RCW 10.95.030 does not specify which party bears the burden of production, nor does it specify the burden of proof. In the instant case the trial court allowed both the State and the defendant liberal opportunity to present meaningful evidence in support of the trial court's minimum term sentencing decision. Most of this evidence was presented by Delbosque, because as the defendant he was in a uniquely better position to present information about himself in support of the court's minimum term decision. Because both parties had an incentive to present facts useful to the court's decision, the court was fully informed when it decided upon the minimum term of 48 years. This decision was a very well-reasoned decision that was fully supported by the facts. This Court should respect the trial court's reasonable exercise of its discretion and should sustain the trial court judge's minimum term decision of 48 years.

DATED: August 27, 2019.

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Brief of Petitioner
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In Response to Amici Curiae
Case No. 96709-1

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