

No. 96709-1

NO. 49792-1-II

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

STATE OF WASHINGTON,

Respondent,

vs.

CRISTIAN JOB HERNANDEZ DELBOSQUE,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it entered findings of fact unsupported by substantial evidence when resentencing a juvenile convicted of homicide who was originally sentenced to life without the possibility of release.

2. The trial court erred when it resentenced the defendant without adequately weighing and applying the criteria required under RCW 10.95.035, RCW 10.95.030 and the decision in *Miller v. Alabama*.

Issues Pertaining to Assignment of Error

1. When resentencing a juvenile convicted of homicide who was originally sentenced to life without the possibility of release, does a trial court err if it enters findings of fact under RCW 10.95.030 that are unsupported by substantial evidence?

2. Does a the trial court err if it resentences a defendant who was originally given life without the possibility of release for a crime committed as a juvenile without adequately weighing and applying the criteria required under RCW 10.95.035, RCW 10.95.030 and the decision in *Miller v. Alabama*?

STATEMENT OF THE CASE

Factual History

The defendant Christian DelBosque was born in 1977, the tenth of ten children in an impoverished family who resided in Saltillo, Mexico, a manufacturing city about two hours by bus from Monterrey, Mexico. RP 211-214, 232-233. His mother abused alcohol during her pregnancy with the defendant, and gave birth to him at six months of gestation. RP 333-334, 584; Exhibit 25, p. 5. The defendant weighed four pounds at birth and suffered from congenital strabismus, an abnormal alignment of his eyes. RP 415-416. Although he underwent surgery for this condition at six or seven-years-old, he still had noticeably crossed eyes and still suffered from blurred vision, orbital pain and eye inflammation. RP 415-416.

The defendant's family was very poor and he and his younger siblings suffered from malnutrition during their childhood years. RP 271-272. Their home did not have electricity, running water, or toilets. RP 231-233, 266-269. Although their house initially had dirt floors, the family was eventually able to put in a concrete floor. RP 266. The defendant's mother was gone from the family home for extended periods of time working in Monterey and the defendant's father was occasionally physically abusive to him and his siblings. RP 235-237, 490-491.

At age six or seven, the defendant's mother died of leukemia, after which the defendant, his closest sibling in age Lilly, and his next youngest brother Eluid, were sent to live with their maternal aunt and cousins in Monterey. RP 215-216, 279. The defendant later found out that he and his two youngest siblings probably had a different father than their other seven brothers and sisters, which might have precipitated their father sending them to live with their aunt in Monterrey. RP 327-328. In any event, the defendant's aunt in Monterrey worked as a "psychic" and apparently operated a brothel. RP 280-281, 577-578. The defendant and his sister did attend school during this period of time although they had a strained relationship with their aunt. RP 283-284. During this period of time both the defendant and his sister Lily were physically and sexually abused. RP 346, 407-409, 490-491. After about three or four years the defendant and his two siblings moved back to Saltillo and lived for a period of time with one of their elder sisters by the name of Dulce, who suffered from schizophrenia. RP RO 329; Exhibit 25, p. 5.

Eventually, the defendant and his sister and brother moved back into their family home. RP 346. By this time the defendant was in his early teens. *Id.* Around this time he quit school, started to work, and began abusing alcohol. RP 285-286. One of the friends with whom he spent time

and with whom he worked was Filiberto Sandoval. RP 243, 247, 250, 295-296. At 16-years of age the defendant moved from Saltillo to Shelton, Washington to live with an older brother who was able to help get him a job washing dishes in a restaurant. RP 294-296. Although the defendant was a good worker, he continued to abuse alcohol. RP 256-260, 301. During this time his friend Filiberto Sandoval also moved to Shelton, where he lived with his 16-year-old girlfriend Kristina Berg in an apartment. RP 26, 249.

Sometime in the late evening of October 16, 1993, or the early morning of October 17th the defendant went to Filiberto and Kristina's apartment, where both he and Filiberto drank alcohol. RP 15-17. Apparently the two of them argued while drinking, and at some point the defendant took a .25 caliber pistol and shot Filiberto in the chest, killing him. RP 25, 35, 42. The defendant then took a knife and killed Kristina by slashing halfway across her throat. RP 25, 35, 42, 179. The defendant then repeatedly inflicted post-mortem slash wounds across Kristina's body. RP 179, 424-425, 435. He also inflicted a number of post-mortem cuts to Filiberto's body. *Id.* At some point after both Filiberto and Kristina were dead the defendant removed a portion of their clothing and posed them in a crude attempt to make the scene look like a murder/suicide. RP 179, 405, 456.

Procedural History

By information filed November 24, 1993, and amended September 2, 1994, the Mason County Prosecutor charged the defendant Cristian Job Hernandez Delbosque with one count of aggravated first degree murder for killing Kristina Berg and one count of Second Degree Felony Murder for killing his friend Filiberto Sandoval while committing the crime of Second Degree Assault. CP 477-480, 476. The case was eventually tried to a jury, who convicted the defendant on both charges, after which the court imposed a sentence of life without the possibility of release on the aggravated first degree murder conviction. CP 469-475. Although the defendant's convictions were later affirmed on direct review, the Court of Appeals subsequently granted the defendant's second Personal Restraint Petition and vacated the conviction for killing Filiberto Sandoval based upon the decision in *In re Andress*, 147 Wn.2d 602 (2002), that second degree assault could not be the underlying felony for a felony-murder charge. CP 444-448.

Following the decision of the United States Supreme Court in *Miller v. Alabama*, 576 U.S. —, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and the Washington Legislature's passage of RCW 10.95.035 and amendment to RCW 10.95.030 (commonly referred to as the Miller fix), the defendant

again appeared before the Mason County Superior Court for resentencing. RP 1-684. During the hearing on resentencing the state called three witnesses: Shelton Police Lieutenant Kenneth Dobie, Mason County Juvenile Court Deputy Administrator Michael Dunn, and Corrections officer Robert Schreiber, who worked at the Stafford Creek Correction Center. RP 15, 60, 170. Lieutenant Dobie testified to his review of the crime scene in 1993. RP 15-56. Mr. Dunn testified concerning his preparation of the 1993 Juvenile Court decline report following his interview with the defendant. RP 60-92.

Officer Schreiber testified concerning the defendant's disciplinary and work history while in prison. RF 96-170. Although he did outline three incidents over the past 24 years in which the defendant was involved with another inmate in a one-on-one fist fight, he did say that in these instances the defendant did not use a weapon and was compliant when ordered by prison staff to stop. RP 101, 126-127. These incidents were not reported for criminal prosecution. RP 155. According to Officer Schreiber, the defendant has had no infractions over the past 18 months, and but for the fact that he is serving a sentence of life without release, he would be classified as minimum security, even though there is an immigration detainer against him. RP 138-144, 169. Officer Schreiber also testified to

the following, which was taken from the most recent report filed by the defendant's current DOC counselor at Stafford Creek. RP 157-158.

Inmate Del Bosque is serving an SRA sentence with an ERD of LWOP. He has a deportation detainer to Mexico currently imposed. He currently scores minimum custody. Due to the nature of his crime, he continues to score at close. Del Bosque is not a veteran and is working on two needs areas. He is consistently upgrading his English capabilities and education. And he has program for food service for over 14 months. This is a pleasant and cooperative individual in the living unit and programming areas.

RP 157-158.

Finally, although the state had apparently employed an expert to evaluate the defendant regarding the RCW 10.95.030 criteria, the state did not call this witness. RP 379.

Following the presentation of the state's case, the defense called seven witnesses, including the defendant's brothers Ricardo Delbosque and Aldo Delbosque, and the defendant's sisters Lydalia "Lily" Delbosque and Elia Delbosque and Aldo Lopez, the defendant's employer in 1993. RP 210, 256, 261, 322, 562. All of these witnesses testified to the facts included in the preceding factual history. *See Factual History, supra*. The defendant also called two experts who performed forensic evaluations of the defendant and reviewed all of the records from the trial and from prison. RP 388, 474.

The first expert the defense called was Dr. Manuel Saint Martin, a forensic psychiatrist and attorney licensed in both California and New York, among other states. RP 388-391. The second expert was Dr. Sarah M. Heavin, a licensed clinical psychologist who teaches at the University of Puget Sound and who has specific expertise in how psychological trauma as a child influences that child's later life. RP 474-475. She also has a post-doctorate fellowship at the University of Washington focusing on juvenile forensic psychology. RP 476. Both Dr. Martin and Dr. Heavin have testified in the area of juvenile forensic psychiatry and juvenile forensic psychology in hundreds of court cases. RP 390-391, 483.

According to Dr. Martin, the defendant has a 76 or 77 IQ, which puts him in the lowest 6% for intellectual function. RP 397-398. Although he can read and write, he functions at about a 6th grade level. RP 398-399. While the defendant can hold down a job and live independently, his IQ limits what he can do. *Id.* Dr. Martin's diagnosis of the defendant is "Borderline Intellectual Functioning with alcohol dependence." RP 423. Given his testing of the defendant and his review of the records of this case, in his opinion the defendant's infliction of post-mortem cutting wounds on the two victims were symptomatic of a psychotic episode due to alcohol use. RP 423-427. They were not wounds made trying to kill someone. *Id.*

Rather they were wounds basically inflicted out of rage and disorganized thinking, all of which are indicators of alcohol induced psychosis. *Id.*

While the defendant's alcohol abuse would be a risk factor if he were released from prison and began to drink again, his mental retardation and borderline intellectual functioning are not linked to dangerousness. RP 437. In addition, the defendant does not suffer from any severe personality disorders such as anti-social personality disorder. RP 403-408. Neither does the defendant exhibit any signs of schizophrenia, hallucinations or sexual deviancy. RP 402-408.

Dr. Martin went on to testify that he is familiar with the decision of the United States Supreme Court in *Miller v. Alabama*, and the requirement that the trial court address the question whether or not the defendant is "irreparable." RP 441-442. In his opinion, the defendant is not irreparable. *Id.* Were he so Dr. Martin would have expected to see his violent behavior continually repeated in prison, which you don't see in his prison record. RP 410-412. Although that record does indicate that the defendant has been in a few one on one fights in prison, none involved weapons. *Id.* In addition, the trauma that the defendant suffered as a child certainly could be addressed with proper treatment. RP 441-442. In Dr. Martin's opinion, the defendant could at any point be released safely into the community.

Id.

In her testimony Dr. Heavin explained that Adolescents have different executive functioning, meaning that they engage in more risk taking, are more susceptible to peer pressure and peer approval. RP 488. In her opinion, the defendant's actions in dropping out of school and working did not quicken the development of the frontal lobe of the brain; rather, the current literature suggest that it actually slows it, as does alcohol abuse. RP 488-489. Based upon her testing of the defendant, as well as the facts of the defendant's premature birth, his low birth weight, his mother's actions abusing alcohol while pregnant, the defendant's low IQ, it is her opinion that when the defendant committed the offense he suffered from poor decision making, and poor executive functioning associated with his developmental immaturity. RP 493-518. In addition, the fact that the defendant is now sober and has matured indicates that he had improved executive function and improved brain development. RP 518-520.

Following the presentation of evidence at the sentencing hearing and argument by counsel, the court took the case under advisement. RP 604-636, 637-666. The court later declared its decision to impose a minimum term of 48 years. RP 604-636, 637-666. The trial court later entered the following findings and conclusions in support of the sentence

it imposed:

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 [in] 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[elbosque]'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 expandable 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.

CP 11-12.

Following imposition of the 48 year minimum mandatory sentence the defendant filed timely notice of appeal. CP 5-17.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT UNSUPPORTED BY SUBSTANTIAL EVIDENCE WHEN RESENTENCING A JUVENILE CONVICTED OF HOMICIDE WHO WAS ORIGINALLY SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF RELEASE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In the case at bar, appellant assigns error to the underlined portions of Findings of Fact 3 and 4 and the underlying portion of Conclusion No. 1 (to the extent it constitutes a finding of fact):

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[elbosque]'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 expandable in comparison to his needs.** There is no identified program or treatment presented to deal with this negative attribute.

. . .

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.**

CP 11-12 (emphasis added).

The aforementioned portions of the findings to which Appellant assigns error can be separated into the following individual finding: (1) that alcohol dependence was not a predominate factor in the murder; (2) that Christian Delbosque does not suffer from any diagnosable mental illness; (3) that Christian 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; and (4) that the

defendant's 1993 offense was a reflection of "permanent incorrigibility, and irretrievable depravity" as opposed to "transient immaturity." As the following explains, substantial evidence does not support these findings of fact.

In this case the trial court found that "alcohol dependence was not a predominate factor in the murder." This finding was directly contrary to the evidence presented by both of the defendant's experts. It was also contrary to the evidence of the remaining defense witnesses who testified concerning the defendant's continued abuse of alcohol from his early teens to the time of the crime. In addition, while the court might have been free to ignore all of this evidence, the state presented no evidence to the contrary of this issue. The state had employed an expert who obviously could have addressed this issue but the state chose not to call that witness. Neither did any of the state's three witnesses present any evidence from which the trial court could support this finding. Thus, substantial evidence does not support this finding by the court.

In this case the trial court also found that the defendant "does not suffer from any diagnosable mental illness, but has been diagnosed with alcohol dependence." The first half of this finding is directly contrary to the evidence of Dr. Martin who diagnosed the defendant with "Borderline

Intellectual Functioning with alcohol dependance.” RP 423. No state’s witness, expert or otherwise, disputed this diagnosis. While it might be argued that borderline intellectual functioning is not a “mental illness,” it certainly does affect a juvenile’s capacity to understand and appreciate the effects of his actions as compared to the capacity of an adult. To this extent the court’s finding is not supported by substantial evidence.

In this case the trial court also made a finding that “Christian 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.” This finding by the court was based upon the fact that in the past 24 years the defendant has been involved in three one-on-one fist fights with another inmates. None of these fights involved weapons and there is no evidence to support the conclusion that the defendant even instigated these fights. In addition, it was alleged that the defendant solicited an inmate to assault another inmate in prison, an allegation that the defendant denied. Finally, at one point a razor blade was found in a cell the defendant shared with another inmate. Both the defendant and his cell mate denied knowledge of the item.

In this case the trial court took three one-on-one fist fights and two allegations of prison infractions the defendant denied and which were

unproven and has placed them in the same class as a double murder involving post-mortem mutilation of the bodies. Whether or not three one-on-one fist fights in 24 years of prison, none of which were referred for prosecution, constitute “violent offenses” is questionable at best. However, what it does not constitute is evidence of “an ongoing attitude reflective of the underlying crime” of a double homicide 24 years in the past. Thus, substantial evidence does not support this finding of fact.

Finally, in this case the trial court held that the defendant’s 1993 offense was a reflection of “permanent incorrigibility, and irretrievable depravity” as opposed to “transient immaturity.” As was mentioned with the previous finding, the defendant’s three one-on-one fist fights in over 24 years in prison are not indicative or even remotely related to a double homicide committed by a 17-year-old for no apparent reason other than transient immaturity and the impulsivity of youth. It is not evidence to support a factual finding of “permanent incorrigibility” or “irretrievable depravity.” Thus, this finding is not supported by substantial evidence.

II. THE TRIAL COURT ERRED WHEN IT RESENTENCED THE DEFENDANT WITHOUT ADEQUATELY WEIGHING AND APPLYING THE CRITERIA REQUIRED UNDER RCW 10.95.035, RCW 10.95.030 AND THE DECISION IN *MILLER v. ALABAMA*.

In *Miller v. Alabama*, 576 U.S. —, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the United States Supreme Court recognized that in most cases juvenile offenders prosecuted in adult court for homicide offenses have both a reduced culpability as well as greater prospects for change than do adult offenders. The court held:

Roper and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform... 'they are less deserving of the most severe punishments.

Miller v. Alabama, 132 S. Ct. at 2464 (quoting *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L.Ed. 2d 825 (2010) and citing *Roper v. Simmons*, 543 U. S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)).

The reasoning behind the court's conclusion that juvenile offenders are less culpable and have greater capacity for reform than do adults lies in the court's recognition that the vast majority of juveniles lack maturity, have an underdeveloped sense of responsibility, have greater vulnerability to negative outside influences, including peer pressure, and that these traits have a less fixed nature than these traits in a mature adult. *State v. Ronquillo*, 190 Wn.App. 765, 772, 361 P.3d 779, 783 (2015).

In recognition of this fundamental difference between juvenile and adult offenders, the court in *Miller* held that mandatory life-without-release sentences for juveniles convicted in adult court of homicide offenses violate the Eighth Amendment prohibition against cruel and unusual punishment. *Miller v. Alabama*, 132 S. Ct. at 2464 (citing United States Constitution, Eighth Amendment).

Thus, “while not every juvenile homicide offender is automatically entitled to an exceptional sentence below the standard range,” every juvenile offender facing a sentence of life without release or effective life without release is “automatically entitled to a *Miller* hearing.” *State v. Ramos*, 187 Wn.2d 420, 434, 387 P.3d 650, 658 (2017), *as amended* (Feb. 22, 2017), *reconsideration denied* (Feb. 23, 2017). In *Ramos* the Washington Supreme Court set the parameters of a *Miller* hearing as follows:

At the *Miller* hearing, the court must meaningfully consider how juveniles are different from adults, how those differences apply to the facts of the case, and whether those facts present the uncommon situation where a life-without-parole sentence for a juvenile homicide offender is constitutionally permissible. If the juvenile proves by a preponderance of the evidence that his or her crimes reflect transient immaturity, substantial and compelling reasons would necessarily justify an exceptional sentence below the standard range because a standard range sentence would be unconstitutional.

State v. Ramos, 187 Wn.2d at 434–35.

In response to the Supreme Court's decision in *Miller*, the Washington Legislature adopted RCW 10.95.035 and modified RCW 10.95.030. This legislative action is commonly referred to as the *Miller* fix. These two statutes provide both a procedural framework and substantive criteria for resentencing all offenders currently serving sentences of life or effective life without release for homicides committed while a juvenile.

The mandate for resentencing is found in RCW 10.95.035(1), which states:

(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.

RCW 10.35.035.

While this statute mandates the resentencing for offenders such as the defendant who were given a "term of life without the possibility of parole for an offense committed prior to their eighteenth birthday," it does not set out the criteria the court is supposed to consider when imposing a new sentence. Rather, these criteria, which are non-exclusive, are found in RCW 10.35.030(3)(b), which states:

(3)(a)(i) Any person convicted of the crime of aggravated first

degree murder for an offense committed prior to the person's sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.

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

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

RCW 10.35.030(3)(a)&(b).

Subsection (3)(b) of this statute sets out the following four non-exclusive, mandatory criteria the trial court must consider when resentencing a defendant who received life without release for aggravated first degree murder committed when the defendant was 16 or 17-years old: (1) the defendant's age, (2) the defendant's "childhood and life experience," (3) the defendant's "degree of responsibility the youth was capable of exercising" and (4) the defendant's "chances of becoming rehabilitated." Although not explicitly stated in the statute, under the

Miller decision the purpose in using these criteria is to determine whether or not the defendant at the time of the event had “diminished culpability and greater prospects for reform” than an average adult and are thus “less deserving of the most severe punishments.” *See Miller, supra.*

In the case at bar the trial court answered this first question by noting that at the time of the event the defendant was “17 years 3 months and 12 days at the time of the murder.” Superficially, this rendition of both months as well as days appears to militate towards imposing a much higher minimum sentence given the fact that the defendant was 9 months from turning 18-years-old. However, any such argument fails to recognize that under RCW 10.35.030(3)(a)(ii) the criteria set out in section (3)(b) only have application for defendants who were “at least sixteen years old but less than eighteen years old” at the time the crime was committed. Thus, in the universe of those resentenced under RCW 10.35.030(b), the defendant stood chronologically at approximately the 63rd percentile. That is to say, he was 63% up the age scale from 16 to 18-years-old.

The second criteria instructs the trial court to consider the defendant’s “childhood and life experience.” Once again, the purpose of considering “childhood and life experience” is to determine the defendant’s level of culpability and to determine the defendant’s “prospects for reform”

compared to an adult with a fully developed brain. In the case at bar the trial court implicitly found that the defendant's "childhood and life experience" strongly militated towards much less culpability than a fully developed adult. This implicit finding flows from the following factual finding the court entered:

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 [in] 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.

CP 11.

As was stated by both of Mr. Delbosque's experts, *in utero* exposure to alcohol, premature birth, limited nurturing, limited nutrition, a chaotic family life, continued impoverishment, physical abuse and sexual abuse, all of which the defendant experienced during his life, are all factors that significantly inhibit intellectual and emotional maturation in young adults. *See* Testimony of Dr. St. Martin, 394-418; *See also*, Testimony of Dr. Heavin, 483-508. Thus, this criteria strongly militates towards the conclusion that the defendant's level of understanding, control and culpability were significantly below that of an adult.

The third criteria from RCW 10.95.035(3)(b) mandates that the trial

court determine the “degree of responsibility the youth was capable of exercising.” As previously stated, the purpose of this evaluation is to determine the “degree of responsibility” the defendant was “capable of exercising” when compared to an adult with complete intellectual and emotional brain maturation. A careful look at the findings entered on this issue indicates that the trial court fundamentally misunderstood precisely what both the statute and the decision in *Miller* require, and in so misunderstanding did not address this criteria in any meaningful way. The following explains this error.

In this case the trial court entered the following finding of fact on the issue of responsibility:

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.

CP 12.

As a statement of fact, the first, second and fourth sentences in this finding were accurate. There was no question about who committed the murder, there was no question that he committed the murder alone, and there was little question that anger and a desire to conceal guilt were “predominate,” although probably not the exclusive, factors in the

commission of the crime. However, under the decision in *Miller* and under the third criteria as recognized by the legislature in the “Miller fix” statute, the question is not whether the defendant committed the crime alone or out of anger or out of a desire to avoid responsibility. Rather, the purpose of this criteria is to determine the “degree of responsibility” the defendant was “capable of exercising” when compared to an adult with complete intellectual and emotional brain maturation. In this case the trial court did not even attempt to address this question.

While the trial court did not address the third criteria in any meaningful manner, the defendant’s two experts did. According to Dr. Martin, the defendant’s degree of responsibility in comparison to an adult was significantly decreased. He based this opinion upon a number of factors, including the facts that (1) the defendant’s IQ of 76 or 77 places him in the lowest 6% for intellectual function, (2) that while he can read and write, at best the defendant functions at about a 6th grade level, (3) that while the defendant can hold down a job and live independently, his IQ limits what he can do and (4) the defendant’s testing indicates that he has a “Borderline Intellectual Functioning with alcohol dependence.” RP 423.

In this case the state did not introduce any witness, report or evaluation to counter this evidence. The fact that the state had employed

its own expert witness to evaluate the defendant on this critical issue and then did not call that witness strongly indicates that the findings of the state's expert supported Dr. Martin's conclusion. In any event, there is no evidence in the record to support a conclusion that the defendant's degree of responsibility was anything above that of an immature teen. Thus, in this case the trial court's finding No. 3 does not support the imposition of a minimum sentence of 48 years in prison, which itself approaches an effective life sentence.

The fourth criteria from RCW 10.95.035(3)(b) mandates that the trial court determine "the youth's chances of becoming rehabilitated." As previously stated, the purpose of this evaluation is to determine "the youth's chances of becoming rehabilitated." The trial court's findings on this issue are found in Finding of Fact No. 4 and Conclusion of Law No. 1, which state as follows:

4. Mr. D[elbosque]'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.

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.

CP 12.

The trial court's first statement that the "Mr. Delbosque committed an extraordinarily brutal and vicious murder of a minor victim" is correct as a statement of fact. However, it does not address the question of the defendant's capacity for rehabilitation compared to that of a person who was an adult at the time of the commission of the crime. Similarly, the court's second sentence also does not address the capacity for rehabilitation compared to an adult committing the offense. This second sentence states: "Mr. Delbosque does not suffer from any diagnosable mental illness, but has been diagnosed with alcohol dependence." Initially, it should be recognized that the findings is incorrect. Dr. Martin diagnosed the defendant with "Borderline Intellectual Functioning with alcohol dependance." RP 423. No state's witness, expert or otherwise, disputed this diagnosis. However, to a large question the defendant's diagnosis with a "mental illness" or lack of diagnosis of a "mental illness," as the trial court

found does not address the issue of rehabilitative capacity. Indeed, it fails to recognize and evaluate what *Miller* requires, which is a determination whether or not the defendant's capacity for rehabilitation is greater than that of an adult given a juvenile's normal transient immaturity.

In addressing the issue of rehabilitative capacity, the court goes on to find that the defendant:

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 expandable in comparison to his needs.

CP 12.

The error in this finding is twofold. First, as mentioned in the first argument, it is unsupported by the record before the trial court. While it is true that the defendant has had three one-on-one fist fights with other inmates over the past 24 years, and he was accused of soliciting an inmate to assault another inmate, these facts have no correlation with a double murder in which the defendant shot a friend, cut the throat of his friend's girlfriend, and then mutilated the bodies with a knife. As the DOC witness testified, each of these "fights" occurred in a one-on-one confrontation with another inmate, there was no evidence supporting a claim that the defendant started the fights, the fights did not include the use or attempted

use of weapons, and the defendant immediately stopped his conduct when ordered by DOC staff. This conduct is not reflective of a continuation of “an ongoing attitude to others that is reflective of Mr. Delbosque’s underlying murder” as the court claims.

The testimony and reports of the defendant’s experts also support this argument. For example, in his testimony Dr. Martin gave his opinion that the defendant’s infliction of post-mortem cutting wounds on the two victims were symptomatic of a psychotic episode due to alcohol use and that they were not wounds made trying to kill someone. Rather, in his opinion, they were wounds basically inflicted out of rage and disorganized thinking, all of which are indicators of alcohol induced psychosis. This evidence was not an indication that the defendant did not have a capacity for rehabilitation. Dr. Martin went on to testify that in his opinion, the defendant is not irreparable. Were he so Dr. Martin would have expected to see his violent behavior continually repeated in prison, which Dr. Martin did not see in his prison record. Dr. Martin did not see the defendant’s three one-on-one fist fights in over 24 years of incarceration indicative of a continuation of the conduct that constituted the crime here at issue.

Similarly, in her testimony Dr. Heavin gave her opinion that, based her testing of the defendant, as well as the facts of the defendant’s

premature birth, his low birth weight, his mother's actions abusing alcohol while pregnant, the defendant's low IQ, when the defendant committed the offense he suffered from poor decision making, and poor executive functioning associated with his developmental immaturity. She found this poor decision making and poor executive functioning as transient immaturity.

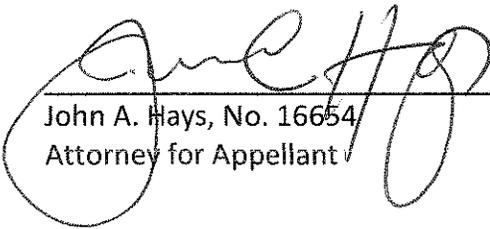
Both Dr. Martin as well as Dr. Heavin's findings were directly contrary to the courts belief that the defendant suffered from "permanent incorrigibility and irretrievable depravity." In addition, as was already noted, the state in this case did not call an expert to refute Dr. Martin and Dr. Heavin's conclusions on the issue of rehabilitative capacity and transient immaturity at the time of the event. Thus, in the case, the trial court erred in its finding that the evidence presented at the sentencing hearing supported a conclusion that (1) the defendant's acts were the result of transient immaturity, and (2) that the defendant did not have the capacity for rehabilitation in excess of an adult who had committed the offenses. As a result, this court should vacate the sentence imposed in this case and remand for a new sentencing hearing.

CONCLUSION

Trial court erred when it entered findings unsupported by substantial evidence. In addition, the trial court erred when it failed to correctly apply the criteria required for review under *Miller v. Alabama* and RCW 10.35.030. As a result, this court should vacate the defendant's sentence and remand for a new sentencing hearing.

DATED this 27th day of July, 2017.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

RCW 10.95.035

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

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

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

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

RCW 10.95.030

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

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

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

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

(c) "Significantly subaverage general intellectual functioning" means

intelligence quotient seventy or below.

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

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

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

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

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

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

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

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

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

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

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

(i) An offender released or discharged under this section may be returned to the institution at the discretion of the board if the offender is found to have violated a condition of community custody. The offender is entitled to a hearing pursuant to RCW 9.95.435. The board shall set a new minimum term of incarceration not to exceed five years.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

CRISTIAN DEL BOSQUE,
Appellant.

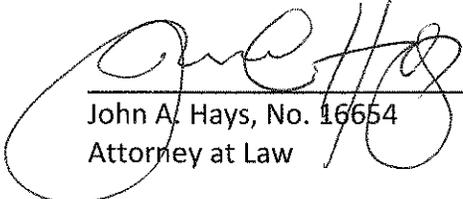
NO. 49792-1-II

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OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this Dated this 27th day of July, 2017, at Longview, WA.



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