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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

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S SUPPLEMENTAL BRIEF

1. Delbosque's challenge of the trial court's order setting a minimum term is reviewable as a personal restraint petition, but despite the reviewability of the order, Delbosque has not shown that his restraint under the order is unlawful, as defined by RAP 16.4(c), and his petition, therefore, should fail.
2. Delbosque's briefing opining that RCW 10.95.030 and *State v. Bassett*, 198 Wn. App. 714, 394 P.3d 430 (2017), *review granted*, 189 Wn.2d 1008, 402 P.3d 827 (2017), violate Wash. Const. art. 1, § 22, is in excess of and beyond the scope of this Court's order requesting supplemental briefing and also constitutes a new issue which is raised for the first time in supplemental briefing; therefore, this Court should decline review of this issue.

B. STATEMENT OF THE CASE

"The court requires supplemental briefing regarding whether the assignments of error Delbosque has raised in his opening brief satisfy the requirements for relief from unlawful restraint under RAP 16.4(c)." Order Requesting Supplemental Briefing at 2.

C. ARGUMENT

1. Delbosque's challenge of the trial court's order setting a minimum term is reviewable as a personal restraint petition, but despite the reviewability of the order, Delbosque has not shown that his restraint under the order is unlawful, as defined by RAP 16.4(c), and his petition, therefore, should fail.

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The trial court entered the judgment and sentence in this case on October 10, 1994. CP 469-75. The times allowed for seeking an appeal or filing a personal restraint petition have expired. RAP 5.2; RCW 10.73.090. Delbosque is currently under restraint, as defined in RAP 16.4(b), because of this order.

On November 23, 2016, in response to RCW 10.95.030 and .035, the trial court entered an order that amended the original judgment and sentence by reducing the minimum term from life imprisonment to a minimum term of 48 years. CP 26-29. Hence, the amended order removed a level of restraint from Delbosque rather than to further restrain him. However, because RCW 10.95.030(3)(a)(ii) authorized and required the trial court judge to impose a minimum term of up to life imprisonment but no less than 25 years, the State contends that to the extent that Delbosque's minimum term is greater than 25 years, Delbosque is under restraint as defined by RAP 16.4(b) because of the amended order.

RCW 10.95.035(3) mandates 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." Prior to July 1, 1986, filing a personal restraint petition was the procedure for obtaining review of parole board's decision setting a minimum term. *In re Personal*

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Restraint of Rolston, 46 Wn. App. 622, 623, 732 P.2d 166 (1987).

Accordingly, Delbosque has had no opportunity for review prior to the instant personal restraint petition.

“When a person seeks relief by personal restraint petition and has not had a prior opportunity for judicial review of the grievance, the petitioner must establish, in order to prevail on the merits of his claim, ‘that he is restrained under RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c).’” *In re Blackburn*, 168 Wn.2d 881, 883–84, 232 P.3d 1091 (2010) (quoting *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 299, 88 P.3d 390 (2004); see also, *State v. Bassett*, 198 Wn. App. 714, 718, 394 P.3d 430 (2017), review granted, 189 Wn.2d 1008, 402 P.3d 827 (2017). In the instant case, the State does not dispute that Delbosque’s petition is reviewable as a personal restraint petition, but the State contends that Delbosque’s petition should be denied because he cannot show that his restraint is unlawful under RAP 16.4(c).

Delbosque contends that his restraint is unlawful under subsections (2), (5), and (7) of RAP 16.4(c). Supp. Br. of Appellant at 2-5. In his initial brief to this Court, Delbosque specified the following two assignments of error:

1. The trial court erred when it entered findings of fact unsupported

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by substantial evidence when resentencing a juvenile convicted of homicide who was originally sentenced to life without the possibility of parole.

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*.

Br. of Appellant at 1.

In his supplemental brief to this Court, Delbosque avers that “the trial court’s failure to adequately weigh and apply the criteria required under... *Miller v. Alabama*¹... violates Mr. Delbosque’s right to be free from cruel and usual punishment under the Eighth Amendment.” Supp.

Br. of Appellant at 3. Based on this averment, Delbosque contends that “[t]his is a constitutional violation for which relief is available under RAP 16.4(c)(2).” *Id.*

The actual holding of *Miller*, however, was that a *mandatory* life without parole sentence imposed against a juvenile offender violates the 8th Amendment. *Miller* at 479. The Court preserved the discretion of trial courts to impose *discretionary* life without parole sentences against juveniles, but limited the trial court’s discretion in such cases as follows:

¹ 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)

“Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Miller* at 480. The trial court in the instant case did not sentence Delbosque to life without parole; thus, the holding of *Miller* is not offended in the instant case.

However, Delbosque also avers that subsections (5) and (7) of RAP 16.4 are satisfied in the instant case. Supp. Br. of Appellant at 3. Subsections (5) and (7) of RAP 16.4 refer vaguely to “other grounds” without much qualifying elaboration. Irrespective of the limited holding of *Miller*, RCW 10.95.030(3)(b) imposes the following statutory duty on the trial court:

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.

Id. Delbosque contends that the trial court failed to obey its statutory duty when imposing the minimum term in this case and that the alleged failure by the trial court provides a basis for relief under RAP 16.4(c)(5) and (7).

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Supp. Br. of Appellant at 3-4. However, as argued in detail in the State's initial brief, the trial court very carefully followed the mandate of RCW 10.95.030(3)(b) when setting the minimum term in this case, and the mere fact that the trial court did not weigh the facts to Delbosque's advantage – or that the trial court did not see the facts in the light that Delbosque favored – does not mean that the trial court judge failed to follow the mandates of RCW 10.95.030 and .035. Therefore, although Delbosque's claim is reviewable by this Court, Delbosque nevertheless fails to satisfy the requirement for relief from personal restraint under RAP 16.4.

2. Delbosque's briefing opining that RCW 10.95.030 and *State v. Bassett*, 198 Wn. App. 714, 394 P.3d 430 (2017), *review granted*, 189 Wn.2d 1008, 402 P.3d 827 (2017), violate Wash. Const. art. 1, § 22, is in excess of and beyond the scope of this Court's order requesting supplemental briefing and also constitutes a new issue which is raised for the first time in supplemental briefing; therefore, this Court should decline review of this issue.

In his supplemental brief, Delbosque advances for the first time a new claim that RCW 10.95.030 and *State v. Bassett*, 198 Wn. App. 714, 394 P.3d 430 (2017), *review granted*, 189 Wn.2d 1008, 402 P.3d 827 (2017), unconstitutionally deny his right to appeal under Wash. Const. art. 1, § 22, right to appeal. A reviewing "court will generally not address arguments raised for the first time in a supplemental brief." *Cummings v.*

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Lewis County, 156 Wn.2d 844, 851, 133 P.3d 458 (2006). When requiring supplemental briefs in this case, this Court limited its requirement to the issue addressed in part one of the State's brief, above. The State contends that this Court should decline to review Delbosque's new claim, which he is now raising for the first time in a supplemental brief, and which was not addressed in this Court's order requiring supplemental briefing.

D. CONCLUSION

The State contends that Delbosque's claim is reviewable as a personal restraint petition but that he nevertheless on the facts of this case has not, and cannot, establish that his restraint is unlawful as defined by RAP 16.4(c) and that this Court, therefore, should deny Delbosque's petition.

DATED: May 22, 2018.

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