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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Personal Restraint Petition of:

ADAM BETANCOURT,

Petitioner.

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**SUPPLEMENTAL BRIEF OF THE ISRB ADDRESSING *STATE V.  
DELBOSQUE***

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## I. INTRODUCTION

The Court directed the parties file supplemental briefs to address *State v. Delbosque*, --- Wn.2d ----, 456 P.3d 806 (2020). *Delbosque* does not apply here. *Delbosque* reviewed a trial court's resentencing of a juvenile offender pursuant to *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Betancourt's petition challenges a discretionary releasability determination by an expert executive agency under RCW 9.94A.730. That statute already presupposes that children are constitutionally different under *Miller* and allows certain juvenile offenders to petition for early release after serving at least 20 years of their sentence. *Delbosque*, therefore, addressed a very different challenge than that at issue here.

But if it were applied *arguendo*, *Delbosque* would support affirming the Indeterminate Sentence Review Board's (ISRB or Board) decision. In making its releasability determination, the Board considered whether Betancourt posed a risk of future criminal behavior, and its decision is supported by substantial evidence. The Board acknowledged that Betancourt had progressed toward releasability. But, in the Board's expert opinion, other evidence outweighed this progress, demonstrating that Betancourt failed to adequately address the prime criminogenic factor in his life, his drug addiction. This is entirely consistent with *Delbosque*.

## II. ARGUMENT

### A. *Delbosque* Does Not Apply to the Board's Exercise of Discretion Under RCW 9.94A.730

*Delbosque* does not apply to this personal restraint petition. *Delbosque* addressed a superior court's discretion and predictions of future dangerousness involved at the resentencing of juvenile offenders, while Betancourt's petition challenges the Board's decision on whether he may be released early from prison to community custody or otherwise.

In *Delbosque*, this Court reviewed a resentencing court's decision to impose a minimum term of 48 years on a juvenile offender pursuant to the state's "Miller fix" legislation, RCW 10.95.030 and RCW 10.95.035. *Delbosque*, 456 P.3d at 810-11. One of the issues before the Court was whether the superior court's findings of fact supporting its discretionary resentencing decision were based on "substantial evidence." *Id.* at 812. The superior court's findings at issue concerned the core of the Eighth-Amendment inquiry under *Miller*—whether *Delbosque*'s crimes of conviction reflected "transient immaturity" requiring a more lenient sentence or whether they reflected "irretrievable depravity" permitting a harsher sentence. *Id.* at 812-14. This Court concluded that the superior court abused its discretion because it did not adequately consider mitigation evidence and because its finding of permanent incorrigibility was not

supported by substantial evidence. *Id.* at 814. Thus, the sentencing court under *Miller* and *Delbosque* must determine whether a particular juvenile offender has a “greater prospect for reform” allowing for eventual rehabilitation over many years or even decades. *See Miller*, 567 U.S. at 471.

By contrast, at issue here is the Board’s discretionary releasability determination under RCW 9.94A.730. This statute allows certain juvenile offenders to petition for early release after serving at least 20 years of their sentence. RCW 9.94A.730 does not determine an offender’s sentence, but rather how part of that sentence is served since individuals released under RCW 9.94A.730 may continue to serve their sentences in community custody under conditions imposed by the Board.

RCW 9.94A.730 presupposes that juvenile offenders have “greater prospect for reform.” Accordingly, it presumes a petitioner is releasable under conditions after at least 20 years in prison. But the statute requires the Board to determine in its discretion whether a juvenile’s generally-presumed “greater prospect for reform” has sufficiently materialized in a particular adult to find him or her releasable in the very near future without endangering public safety. Betancourt’s petition puts at issue whether the Board abused its discretion by acting “without consideration of or in disregard of the facts.” *In re Pers. Restraint of Dyer*, 157 Wn.2d 358, 363, 139 P.3d 320 (2006).

Moreover, *Delbosque* contemplates that the superior court does not have any inherent expertise in resentencing juvenile offenders and that it, therefore, must typically rely on expert witnesses. *Delbosque*, 456 P.3d at 815. By contrast, this Court has consistently recognized the Board's experience and inherent expertise in making the discretionary releasability decisions at issue here. *In re Ayers*, 105 Wn.2d 161, 165, 713 P.2d 88 (1986); *Matter of Sinka*, 92 Wn.2d 555, 564-65, 599 P.2d 1275 (1979).

Reviewing courts, therefore, “approach such decisions with substantial deference” because “courts are *not* a super [ISRB] and . . . will not substitute their discretion for that of the [ISRB].” *In re Dyer*, 175 Wn.2d 186, 196, 283 P.3d 1103 (2012). Importantly, this Court has held that “substantial judicial deference” is generally “appropriate when an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency's expertise.” *Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997). Releasability decisions concerning juvenile offenders are such determinations, and RCW 9.94A.730 has committed them to the Board's expertise and discretion. *See Ayers*, 105 Wn.2d at 165.

In sum, *Delbosque* is not applicable to the Board's decisions under RCW 9.94A.730 because *Delbosque* addressed a resentencing court's exercise of its discretion under *Miller*. Betancourt does not challenge his

sentence. Rather, he challenges the Board's exercise of its discretion in the context of releasability determinations beyond the scope of *Miller*.

**B. The Board's 2018 Decision Is Consistent With *Delbosque***

While *Delbosque* does not apply to this petition, the Board's finding Betancourt not releasable is consistent with *Delbosque* because the Board's finding is supported by substantial evidence.

The Board found Betancourt not releasable because he used drugs throughout the majority of his incarceration and introduced drugs into the facility in 2009 to sell them there. ISRB Response, at 6. The conduct underlying these two reasons could have resulted in new criminal convictions after Betancourt's eighteenth birthday. These convictions would have made him ineligible for early release under RCW 9.94A.730(1). Several of his 32 serious prison infractions were directly related to his then-untreated drug addiction. *Id.*

Chiefly, the Board found Betancourt not releasable because he had not participated in recommended sober support groups. *Id.* The Board observed that sober group participation had been recommended after Betancourt completed substance abuse treatment in 2016. But while the Board recognized that Betancourt had engaged in a significant amount of programming, Betancourt told the Board he had not found the time to prepare for release by participating in sober groups between completing

treatment in 2016 and the Board hearing in 2018. ISRB Response, Ex. 3, at 4-5. Dr. Wentworth's psychological evaluation identified participation in sober groups as helpful for the social reintegration of a recovering drug addict such as Betancourt who has never lived as an adult outside the closely regulated world of a prison or dealt with the stresses that come with this drastic change. *Id.*, Ex. 4, at 14.

Even after both the Board and Dr. Wentworth repeated the 2016 recommendation that he engage in such sober groups, there is no evidence that Betancourt has done so in the almost two years since his Board hearing. This persistent refusal sets him apart from Delbosque who "demonstrated a desire" to participate in relevant programming but was prevented from doing so due to his mandatory life sentence. *Delbosque*, 456 P.3d at 813.

Betancourt's persistent refusal may also indicate a lack of insight into the power of an incurable, chronic condition—his drug addiction. Although his addiction currently appears to be in remission, it must be constantly treated and managed by measures designed to support treatment such as sober groups. See National Institute on Drug Abuse, *Drugs, Brains, and Behavior: The Science of Addiction—Treatment and Recovery*, <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/treatment-recovery> (accessed Mar. 25, 2020). Betancourt's persistent refusal may also suggest his lack of insight into the well-

recognized link between drug addiction and crime. Dr. Wentworth's report highlighted this link. ISRB Response, at 7-8. This link may have already played a role in Betancourt's crimes due to his drug use and gang membership already as a teenager and due to the fact that he and his associates had planned and committed the murders to which he pled guilty as a means to rob the elderly victims. *See id.* at 4; *id.* Ex. 3, at 3.

Thus, the Board adequately considered evidence of Betancourt's rehabilitation, despite Betancourt's contention to the contrary. *See* Pet.'s Suppl. Brief, at 2. That evidence necessarily includes rehabilitative deficiencies regarding a critical criminogenic factor—Betancourt's drug addiction—that has played a substantial role in his life both before and during his incarceration and that has, possibly, played a key role in his crimes. In the Board's expert opinion that must give public safety considerations the highest priority, *see* RCW 9.94A.730(3), this key fact outweighed the many courses Betancourt finished while in prison. These courses may well offer him promising vocational opportunities after release. But they do not address the prime criminogenic factor in his life, namely, his chronic drug addiction.

Moreover, unlike the sentencing court in *Delbosque*—and contrary to Betancourt's contention—the Board did not rely on his crimes as reasons to find him non-releasable. *See Delbosque*, 456 P.3d at 813; Pet.'s Suppl.

Brief, at 2. The fact that the Board included in its decision a description of his crimes of conviction is supported by the risk assessment best practices set forth in Dr. Wentworth's report. ISRB Response, Ex. 4, at 11.

Finally, Betancourt is also incorrect in claiming that the Board "discarded, without explanation," the risk assessment conducted by the Department of Corrections. *See* Pet.'s Suppl. Brief, at 2. The Board acknowledged the favorable results of the risk assessment conducted by Dr. Wentworth. ISRB Response, Ex. 3, at 6. But the Board also considered the relevant evidence discussed above. Based on its own expertise and statutory charge, the Board deemed the latter to be entitled to greater weight than tests administered during a couple hours on a single day. Additionally, the Board effectively endorsed Dr. Wentworth's recommendation. She did not recommend outright release but a gradual decrease in custody levels. *See also In re Pers. Restraint of Pugh*, 7 Wn. App. 2d 412, 419-20, 433 P.3d 872 (2019) (endorsing further programming and services, not immediate release, for offenders deemed to be in need of decreased custody levels).

As a result, the Board's decision finding Betancourt not releasable in 2018 does not constitute an abuse of the Board's discretion. It is also supported by substantive evidence under *Delbosque*. Therefore, Betancourt's personal restraint petition should be denied.

**C. If Betancourt’s Petition Were Granted, *Delbosque* Favors Remanding It to the Board to Conduct a New Hearing**

If the Court were to grant Betancourt’s petition, *Delbosque* favors a remand to the Board for a new hearing. The Court is certainly authorized by RAP 16.15(b) to direct the release of a petitioner. But remand to the Board is the proper course of action in Betancourt’s case not only because *Delbosque* resulted in a remand. Chiefly, it is appropriate because releasability is a discretionary decision by the Board in its exercise of expertise and statutory authority. *See* RCW 9.94A.730. A remand honors this Court’s long-standing precedent and judicial deference to expert agencies, discussed above. *See, e.g., Dyer*, 157 Wn.2d at 369 (“While a review of the evidence and testimony presented at the parolability hearing suggests Dyer met his burden to have conditions of release on parole established, *we cannot make this decision in the first instance*. We instead remand to the ISRB . . . .” (emphasis added)).

Betancourt unpersuasively claims remand for resentencing in *Delbosque* was proper only because “the law changed (or was further defined) after the sentence” imposed on *Delbosque* in 2016. Pet.’s Suppl. Brief, at 2-3. To be sure, *Delbosque* recognized resentencing was appropriate there to give the superior court “the benefit of recent, relevant precedent” decided after the 2016 resentencing. *Delbosque*, 456 P.3d at 814

(citing *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017), and *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018)). But the alternative to remand the Court was addressing was affirming the sentence, not changing it in the first instance on appeal. Additionally, Betancourt fails to mention that Board hearings specifically conducted under RCW 9.94A.730 have not yet generated a substantial number of precedential decisions since the statute was adopted in 2014. The only relevant decisions—*Pugh* and *Matter of Brashear*, 6 Wn. App. 2d 279, 430 P.3d 710 (2018)—were filed after the Board found Betancourt not releasable. Thus, Betancourt’s argument cannot overcome the conditional rationale for remand set forth above.

### III. CONCLUSION

For the reasons set forth above, the Court should dismiss Betancourt’s petition. Alternatively, the Court should remand the case to the Board.

RESPECTFULLY SUBMITTED this 8th day of April 2020.

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**CERTIFICATE OF SERVICE**

I certify that on the date below I electronically filed the foregoing SUPPLEMENTAL BRIEF OF THE ISRB ADDRESSING *STATE V. DELBOSQUE* with the Clerk of the Court using the electronic filing system which will serve the following electronic filing participant:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 8th day of April 2020, at Olympia, Washington.

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