NO. 56163-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JERMOHNN ELIJAH NATHANIEL GORE,

Appellant.

BRIEF OF APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY
THE HONORABLE STEPHANIE A. AREND, JUDGE

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I. INTRODUCTION

When Jermohnn Gore was 16 years old, he and several friends shot at a convenience store, killing one person. Mr. Gore was initially sentenced to 82 years' incarceration. This Court affirmed his convictions but remanded with instructions to conduct a hearing pursuant to *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

At resentencing, the judge quoted the appropriate legal standard but disregarded it as applied to Mr. Gore. The judge struggled to consider Mr. Gore a child at the time of his crimes, equated him to his 23-year-old co-defendant, and speculated that 16-year-olds are similar to persons in their twenties.

Additionally, Mr. Gore received ineffective assistance of counsel. Counsel was unprepared, did not obtain the file from Mr. Gore's prior attorney, knew almost nothing about the underlying facts of this case, and did little to prepare mitigation evidence on Mr. Gore's behalf. This Court should reverse and remand for a new *Miller* hearing.

II. STATEMENT OF THE ISSUES

1. Did the resentencing court clearly misapply the law at a *Miller* hearing when it refused to consider a 16-year-old a child and instead equated him to his 23-year-old co-defendant?

2. Did defense counsel provide ineffective assistance, prejudicing Mr. Gore, when he was unprepared for resentencing, did not obtain any expert witnesses, and presented little mitigation evidence?

III. ASSIGNMENTS OF ERROR

Mr. Gore assigns error to the term of his confinement, as ordered in the judgment and sentence entered on August 19, 2021. CP 51-52.

Mr. Gore also assigns error to the resentencing court's denial of his motion to vacate. RP at 65.

Additionally, Mr. Gore assigns error to the following portions of the Findings of Fact and Conclusions of Law for Exceptional Sentence Below Standard Range entered on August 26, 2021:

1. The resentencing court erred by concluding that Mr. Gore's acts did not evidence transient immaturity. CP 68.
2. The court erred in its conclusions about the maturity of 16-year-olds. CP 69.
3. The court erred by minimizing the impact of Mr. Gore's family circumstances and childhood. CP 69.
4. The court erred by concluding that no substantial and compelling reasons justified an exceptional sentence outside and below the standard range. CP 69.
5. The court erred by equating Mr. Gore with his 23-year-old co-defendant. CP 69; RP at 39-40, 41.
6. The court erred by concluding that 16-year-olds more closely resemble adults in their twenties than 14-year-olds. CP 69; RP at 42-43.

IV. STATEMENT OF THE CASE

On May 1, 2015, when he was 16 years old, Jermohnn Gore participated in a drive-by shooting that left one person

dead. CP 63-64. Mr. Gore and fellow gang members acted in retaliation for a shooting committed by a rival gang. CP 63.

Mr. Gore and his friends shot at a convenience store where they believed the rival gang hung out. CP 63. They did not injure any rival gang members. *Id*. Instead, they shot and killed Brandon Morris. CP 64. Mr. Morris was not affiliated with either gang; he and some friends were walking through an alley near the store at the time of the shooting. *Id*. A bullet also struck the backpack of one of Mr. Morris's companions. *Id*. Mr. Gore was one of two shooters. CP 63. The other shooter, Alexander Kitt, was 23 at the time. *Id*.

The state charged Mr. Gore with one count of first degree murder by extreme indifference; one count of second degree felony murder; four counts of first degree assault; one count of unlawful possession of a firearm in the first degree; and one count of intimidating a witness. CP 64-65. Counts one through six all carried firearm enhancements. *Id*.

The final count arose from Mr. Gore's actions after he was arrested. CP 64. While in juvenile detention, Mr. Gore sent a note to a witness saying, "Please don't snitch. Take your statement back or were [sic] gonna kill your family." *Id*.

The jury convicted Mr. Gore as charged.[1] CP 65. On October 12, 2016, Mr. Gore was sentenced to 984 months (82 years) incarceration—a de facto life sentence. *Id*. His adult co-defendant, Mr. Kitt, was sentenced to 1,010 months (about 84 years) incarceration. RP at 14. Mr. Gore raised his youthfulness as a factor at sentencing but did not specifically request a downward departure on that basis. *Kitt*, 9 Wn. App. 2d 235 at ¶76 (unpublished portion). Mr. Gore appealed.

On June 18, 2019, this Court affirmed Mr. Gore's convictions, but remanded for a *Miller* hearing to consider his

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[1] Initially, the sentencing court dismissed Mr. Gore's second degree murder conviction without prejudice. However, this conviction was dismissed with prejudice in August 2021, as a result of this Court's decision in *State v. Kitt*, 9 Wn. App. 2d 235, 442 P.3d 1280 (2019).

youth. *Kitt*, 9 Wn. App. 2d at 238. Over two years later, on August 19, 2021, the trial court held a resentencing hearing. RP at 4. Tragically, Mr. Gore's trial attorney, Robert Quillian, passed away in 2020. RP at 4, 64. In March 2020, his new attorney, Stephen Johnson, filed a notice of appearance and demand for discovery. App. at 1-2.

At the resentencing hearing on August 19, 2021, Mr. Johnson stated that he "never received the file" for Mr. Gore's case and had "no idea" about the underlying facts:

> Mr. Bob Quillian was the original attorney on this matter. I did not handle the trial. I never received the file in this case from Mr. Quillian's estate and – or from the Department of Assigned Counsel. So I have really no idea about what the facts are in this case, other than that there was a jury trial and whatever was presented in the probable cause statement.

RP at 4-5. Despite this, Mr. Johnson stated that he was "prepared to proceed." RP at 5.

Mr. Johnson was not prepared. He did not read the entirety of the Court of Appeals decision prior to the resentencing

hearing. RP at 44 ("I read most of it, Your Honor."). He did not prepare a mitigation package or obtain a mitigation specialist. RP at 55. He did not arrange a psychological evaluation of Mr. Gore. *Id*. He did not call any expert witnesses and presented no evidence about juvenile brain development. *Id*. Mr. Johnson stated that these witnesses were unavailable due to COVID, but he did not request a continuance on this basis. *Id*. He did not present any evidence from the Department of Corrections (DOC) about Mr. Gore's good behavior in prison. CP 68. According to Mr. Johnson, "[Mr. Gore's] case in my office fell through the cracks." RP at 55.

At the resentencing hearing, the state "expressed frustration" at recent changes in juvenile sentencing. CP 65. According to the court's findings:

> The State expressed frustration with the concept of "transient immaturity" and detailed

> many of the facts and procedural history of the *Houston-Sconiers*[2] case.
>
> The State discussed that Houston-Sconiers, whose sentence was reduced in 2018 based on the "transient immaturity" concept, had recently pled guilty to crimes that resulted in a 20+ year sentence to avoid a third-strike sentence of life without parole.

CP 65.

The prosecutor argued that Mr. Houston-Sconiers and others tangentially involved with the case were all "heavily involved" in felonies and questioned whether Mr. Gore "is going to be different than all the others in this situation":

> Houston-Sconiers right now just accepted a 20 year sentence to avoid his third strike.
>
> …
>
> So that's who we're dealing with. The other individuals involved in that case all heavily involved in felony – violent felony crimes. Every one of them.
>
> So how do you predict and say that Mr. Gore, Jermohnn Gore is going to be different than all the others in this situation?

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

RP 10-11. The prosecutor argued that the judge who gave Mr. Houston-Sconiers a lenient sentence "took a big chance" that "didn't work out", and Mr. Gore's case was "the exact same":

> Houston-Sconiers' judge, Judge Hickman, took a big chance. That didn't work out. And it's the same exact, uh – it's – it's very similar, I should say, the circumstances, Mr. Houston-Sconiers and Jermohnn Gore.

RP at 12. The state recommended an exceptional downward sentence of 420 months, or 35 years, with no possibility of earned early release for 25 of those years. RP at 15-16.

Two days before the resentencing hearing, defense counsel filed a four-page sentencing brief, along with five letters of support from persons attesting to Mr. Gore's character. CP 31-39. In both the brief and at the hearing, counsel argued that an appropriate sentence would incarcerate Mr. Gore until he is 30 years old. CP 33; RP at 24. He argued that Mr. Gore's abusive and dysfunctional childhood should weigh in favor of a more lenient sentence. CP 32-33; RP at 25-26.

The superior court found that no "substantial and compelling reasons" justified an exceptional sentence below the standard range. CP 69. Despite this, the court adopted the state's proposed 35-year sentence. CP 49, 53, 69. The court quoted the Court of Appeals decision in this case and went through the factors applicable at a *Miller* hearing individually. RP at 34-36.

First, the court found that Mr. Gore's actions "did not evidence transient immaturity but rather were the result of deliberation and intent with full knowledge of the long-term consequences of his acts." CP 68; *see also* RP at 41. The court noted that Mr. Gore's threats against a witness after his arrest showed that his actions were thought out. RP at 36-37. The court also noted that during trial, observers in the gallery were recording testimony and threatening witnesses' families. RP at 37. The judge seemed to blame Mr. Gore for the conduct of these observers. *Id*.

Second, the sentencing judge acknowledged that Mr. Gore's "family and home environment" were detrimental to his

"maturation and development." RP at 38. However, the court concluded that his "family circumstance and troubled childhood do not excuse or explain his acts of violence and murder" because "[m]any people have traumatic childhoods and a very small number of them commit crimes such as occurred in this case." CP 69.

Third, the court recognized the negative peer pressure resulting from Mr. Gore's "involvement in the Hilltop Crips gang" but did not feel that this justified his actions. RP at 38. Mr. Gore committed these crimes alongside an adult in his twenties, fellow gang member Mr. Kitt. The court repeatedly equated the two. RP at 39-40. According to the court, Mr. Kitt "was 23 years, five months and sixteen days old at the time of the shooting" but "otherwise, there is [no] factual difference between him and Mr. Gore." *Id*. The court concluded that "Mr. Kitt and Mr. Gore, for all practical purposes, are – are in exactly the same spot." RP at 41.

Fourth, the court considered whether Mr. Gore "might be successfully rehabilitated." RP at 40. The court pointed out that this "was not Mr. Gore's first conviction" and he "had previously been convicted of a serious offense." *Id*. The court also noted that although Mr. Gore "indicated he has been a model prisoner since being incarcerated . . . no documentation was presented in support of this claim". CP 68.

While making these determinations, the court had difficulty acknowledging that Mr. Gore was a child when he committed these crimes:

> And quite honestly, it's difficult for me to – to use the word "child" – that's the word out of the *Houston-Sconiers* case – when considering Mr. Gore or any of his co- Defendants.

RP at 40. The court noted that Mr. Gore, at age 16, had a long criminal history, which weighed against his chances of rehabilitation. *Id*.

According to the court, 16-year-old Mr. Gore was entirely different from the 14-year-old defendant in *Miller*. RP at 42.

The court speculated that there is a "huge difference" between age 14 and 16, and a 16-year-old more closely resembles a person in his twenties:

> And I – you know, part of what is disturbing to me and – is, in this line of cases, is, um, that we don't hold people personally responsible. Miller, at fourteen years of age – you talk about differences in age and maturation. I think there's a huge difference between a fourteen-year-old and a sixteen-year-old, quite frankly. I think the maturity level when you're a young person goes up exponentially every year, or potentially does, in a normal maturing person. Very different than, say, a 21 to a 23-year-old. I don't think you mature as much as you get older in a one or two year timespan. But I think you do a lot in, um, from fourteen to sixteen. And by sixteen, Mr. Gore knew and understood that by shooting at a group of people, uh, they could certainly be injured or die. He understood that consequence.

RP at 42-43. The court also emphasized the need for justice for the victim, Mr. Morris. RP at 43.

On August 26, 2021, the court held a hearing to enter written findings pertaining to the exceptional sentence. CP 53. Mr. Gore filed a motion to vacate his sentence based on ineffective assistance of counsel. RP at 56-57. The state

opposed this motion, pointing out that resentencing was pending for about two years. RP at 57.

The prosecutor also argued that expert testimony was unnecessary at a *Miller* hearing given recent case law:

> The courts have said that juveniles' brains aren't developed. So I don't think we need an expert to say that. That's been stated by the courts. That's the whole rationale behind all of these cases coming back.

RP at 58. Juvenile immaturity, according to the state, is not "some sort of novel thing that needs anything beyond a – a common sense analysis." RP at 59-60.

The resentencing court denied Mr. Gore's motion to vacate. RP at 65. The court entered findings of fact and conclusions of law to support its 35-year sentence. CP 62-69. Mr. Gore appeals. CP 76-91.

V. ARGUMENT

"[C]hildren are different" from adults for sentencing purposes. *Houston-Sconiers*, 188 Wn.2d at 18 (quoting *Miller*, 567 U.S. at 481). Here, the resentencing court misapplied the

standard for a *Miller* hearing. Additionally, Mr. Gore received ineffective assistance of counsel. His appointed attorney was unprepared and failed to present minimally adequate mitigation evidence, prejudicing Mr. Gore. This Court should reverse and remand for another resentencing hearing.

A. The Resentencing Court Clearly Misapplied the Law by Refusing to Acknowledge the Differences Between Children and Adults.

The resentencing judge in this case recited the legal standard applicable to juvenile offenders, then disregarded it as applied to Mr. Gore. The court refused to consider Mr. Gore a child at the time of his offenses, stated that he was as culpable as his 23-year-old co-defendant, and speculated that a 16-year-old is more similar to an adult than to a 14-year-old. The court referenced *Miller* but failed to conduct a meaningful *Miller* hearing, requiring reversal.

The United States Supreme Court and the Washington Supreme Court have both concluded that "children are less criminally culpable than adults." *State v. Bassett*, 192 Wn.2d 67,

87, 428 P.3d 343 (2018). Psychological studies "establish a clear connection between youth and decreased moral culpability for criminal conduct." *State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015). "As compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 569-70, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)).

Penological goals of retribution, deterrence, incapacitation, and rehabilitation are also impacted by a child's youth. The "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, *even when they commit terrible crimes*." *State v. Ramos*, 187 Wn.2d 420, 438, 387 P.3d 650 (2017) (emphasis in original) (quoting *Miller*, 567 U.S. at 472).

The case for retribution is weakened for children because "'[t]he heart of the retribution rationale' relates to an offender's blameworthiness" and children have diminished culpability. *Miller*, 567 U.S. at 472 (alteration in original) (quoting *Graham*, 560 U.S. at 71-74). "Nor can deterrence do the work in this context, because 'the same characteristics that render juveniles less culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." *Id*. (quoting *Graham*, 560 U.S. at 72). The penological goal of incapacitation contradicts a child's ability to change. *Graham*, 560 U.S. at 74. Children are more capable of rehabilitation because they have "diminished culpability and heightened capacity for change." *Ramos*, 187 Wn.2d at 444 (quoting *Miller*, 567 U.S. at 479).

This appeal arises out of a series of cases addressing juvenile sentencing. Since 2005, the United States Supreme Court has extended Eighth Amendment protections for juvenile defendants. *See Roper*, 543 U.S. 551 (holding that executing a

juvenile is categorically unconstitutional); *Graham*, 560 U.S. 48, (barring life without parole sentences for juveniles convicted of nonhomicide offenses); *Miller*, 567 U.S. 460 (prohibiting mandatory life without parole sentences for all juveniles). Washington has followed suit. *See Houston-Sconiers*, 188 Wn.2d 1 (courts sentencing juveniles must have discretion to impose any sentence below the standard range); *Bassett*, 192 Wn.2d 67 (life without parole sentences for juveniles are categorically unconstitutional).

Miller requires that "a life-without-parole sentence cannot be imposed on a juvenile homicide offender whose crimes reflect transient immaturity." *Ramos*, 187 Wn.2d at 436. A *Miller* hearing "is not an ordinary sentencing proceeding." *Id*. at 443. At a *Miller* hearing, both "the court and counsel have an affirmative duty to ensure that proper consideration is given to the juvenile's 'chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate

risks and consequences.'" *Id*. (quoting *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572 (2014)).

At a *Miller* hearing, "courts 'must *meaningfully* consider how juveniles are different from adults[and] how those differences apply to the facts of the case.'" *State v. Delbosque*, 195 Wn.2d 106, 121, 456 P.3d 806 (2020) (emphasis in original) (quoting *Ramos*, 187 Wn.2d at 434-35). A resentencing court "must do far more than simply recite the differences between juveniles and adults and make conclusory statements that the offender has not shown an exceptional downward sentence is justified." *Ramos*, 187 Wn.2d at 443. The court must "receive and consider relevant mitigation evidence bearing on the circumstances of the offense and the culpability of the offender, including both expert and lay testimony as appropriate." *Id*. "The sentencing court must thoroughly explain its reasoning, specifically considering the differences between juveniles and adults identified by the *Miller* Court and how those differences apply to the case presented." *Id*. at 444.

Additionally, the "resentencing courts must consider the measure of rehabilitation that has occurred since a youth was originally sentenced to life without parole." *Delbosque*, 195 Wn.2d at 121. The key question is whether the juvenile "is capable of change." *Id*. at 122 (quoting *United States v. Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019)).

The Washington Supreme Court recently considered the applicable legal standard at *Miller* hearings in *State v. Haag*, 198 Wn.2d 309, 495 P.3d 241 (2021). At age 17, Timothy Haag murdered his 7-year-old neighbor. 198 Wn.2d at 313. He was sentenced to mandatory life without parole. *Id*. In 2018, he was resentenced after a *Miller* hearing to 46 years to life. *Id*.

The Washington Supreme Court reversed this de facto life sentence and remanded. *Id*. The Court found that the resentencing court's focus "was clearly backward looking, disregarding the forward-looking focus required by our statutes and our case law." *Id*. at 323. At a *Miller* hearing, "retributive factors must count for less than mitigating factors." *Id*. at 325.

The resentencing court clearly misapplied Washington law, "amounting to reversible error." *Id*.

The resentencing court also failed to properly consider Mr. Haag's youth. "Even when the resentencing court considered youth, it primarily focused on the youth of the victim, Rachel Dillard, and not on Haag's youth at the time of the offense." *Id*. at 323. By contrast, "the resentencing court's discussion of Haag's youth was cursory at best" and was "encapsulated by the court's comment that 'according to case law Mr. Haag's youthfulness does reduce his culpability.'" *Id*. at 324. Based on this, the Court concluded that "Haag's youth was not *meaningfully* considered as we require—only Rachel Dillard's was." *Id*. (emphasis in original).

Here, like in *Haag*, the resentencing court minimized Mr. Gore's youth, failing to meaningfully consider this critical factor. The court barely acknowledged that Mr. Gore was a child at the time of his actions, stating: "quite honestly, it's difficult for me to – to use the word 'child' . . . when considering Mr. Gore". RP

at 40. She repeatedly equated Mr. Gore with his 23-year-old co-defendant, stating that "Mr. Kitt and Mr. Gore, for all practical purposes, are – are in exactly the same spot." RP at 41, *see also* RP at 39-40. The judge also speculated that there was a "huge difference" between a 14-year-old and a 16-year-old, but little difference between a 16-year-old and a person in his twenties. RP at 42-43.

As explained below, defense counsel in this case performed deficiently by failing to adequately present mitigation evidence. However, one mitigating factor was squarely before the court despite counsel's failings: Mr. Gore's age at the time of his offenses. The court was required to "*meaningfully* consider how juveniles are different from adults". *Delbosque*, 195 Wn.2d at 121. Merely reiterating the legal standard, and then refusing to consider a 16-year-old a child, was insufficient. This Court should reverse because the resentencing court clearly misapplied the law applicable to *Miller* hearings and abused its discretion. *See Haag*, 198 Wn.2d at 325.

B. Mr. Gore Received Ineffective Assistance of Counsel.

This Court should also reverse and remand because Mr. Gore received ineffective assistance of counsel. His attorney, Mr. Johnson, was unprepared for resentencing, barely presented evidence, and failed to object to improper argument by the prosecutor. This prejudiced Mr. Gore because it meant that the resentencing court had essentially no evidence about rehabilitation. Mr. Gore likely received a lengthier sentence due to counsel's failings.

Both the Sixth Amendment to the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Sentencing is a critical stage of a criminal proceeding, at which a defendant is constitutionally entitled to

effective counsel. *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

Counsel is ineffective when his or her performance falls below an objective standard of reasonableness and the defendant thereby suffers prejudice. *Strickland*, 466 U.S. at 687-88. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. *See, e.g.*, *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). Here, both prongs of the legal standard are met.

1. Counsel performed deficiently.

Mr. Gore's attorney at the resentencing hearing performed deficiently. This inquiry focuses on whether counsel's assistance was reasonable considering all of the circumstances. *Strickland*, 466 U.S. at 689-90. To provide constitutionally adequate assistance, "counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client." *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (emphasis in

original) (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir.1994)).

The duty to provide effective assistance also includes the duty to conduct research. *See, e.g.*, *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 102, 351 P.3d 138 (2015) (counsel has a duty to advise on immigration consequences for a noncitizen defendant). "Failing to conduct research falls below an objective standard of reasonableness where the matter is at the heart of the case." *State v. Estes*, 188 Wn.2d 450, 460, 395 P.3d 1045 (2017) (citing *State v. Kyllo*, 166 Wn.2d 856, 868, 215 P.3d 177 (2009)).

Here, Mr. Gore's attorney performed deficiently in three ways. First, he failed to adequately investigate or prepare for this resentencing hearing. Mr. Johnson was appointed in March 2020, nearly a year and a half before the resentencing hearing in August 2021. App. at 1-2. Two days before this hearing, he filed a four-page sentencing brief, along with five letters from persons vouching for Mr. Gore's character. CP 31-39.

Mr. Johnson freely admitted that Mr. Gore's case "fell through the cracks" at his office. RP at 55. He stated that he "never received the file" for Mr. Gore's case and had "no idea about what the facts are in this case". RP at 4-5. He admitted that he did not read the entirety of the Court of Appeals decision remanding for resentencing. RP at 44 ("I read most of it, Your Honor."). This level of preparation fails to meet the basic standard expected of a reasonable attorney.

Second, Mr. Johnson presented little mitigation evidence to support Mr. Gore's argument for a lower sentence. It does appear that Mr. Johnson spoke with Mr. Gore and his family, and he argued that Mr. Gore's upbringing weighs in favor of leniency. CP 32-33. However, Mr. Johnson did not prepare a mitigation package, obtain a mitigation specialist, arrange for any kind of evaluation of Mr. Gore, call any expert witnesses, or present any evidence about juvenile brain development. RP at 55. He did not present any evidence from DOC about Mr. Gore's conduct in prison. CP 68.

Compare this to the defense attorneys in two similar cases, *Bassett* and *Haag*. In both of these cases, counsel presented extensive mitigation evidence at *Miller* resentencing hearings, including evidence from expert witnesses and from DOC.

Brian Bassett was convicted of three counts of aggravated first-degree murder for killing his parents and brother. 192 Wn.2d at 73. At sentencing, the judge commented that he was "a walking advertisement" for the death penalty. *Id*. Years later, Mr. Bassett was resentenced in light of the Supreme Court's decision in *Miller*. His attorney "submitted over 100 pages of mitigation documentation, including evidence that [Mr. Bassett] had been rehabilitated since his days as a teenager." *Id*. at 75. This evidence included testimony from an expert witness and "significant evidence" about his changes in prison:

> A pediatric psychologist who treated Bassett prior to the murders shed light on Bassett's childhood and life experience. He testified that Bassett had suffered from an adjustment disorder, struggling to cope effectively with the stressors of homelessness and his strained relationship with his parents. The psychologist testified that during a

> family counseling session, Bassett attempted to reconcile with his parents, expressing a desire to come back home, but his parents rejected the idea. Bassett addressed the court and stated that at the time of the crimes he was unable to "comprehend the totality" and "see the long-term consequences of [his] actions." Verbatim Report of Proceedings (VRP) at 79. He said that when he was taken to jail on suspicion of murdering his parents, his first thoughts were "how much trouble [he] was going to be in when [his] parents learned that [he] was there in jail." VRP at 79-80.
>
> Bassett also submitted significant evidence demonstrating how he has matured emotionally and behaviorally. He successfully completed courses examining stress and family violence in order to, as his brief states, "better understand his crimes." Br. of Resp't at 3 n.6. He has not had any prison violations since 2003, and the Department of Corrections classified him as a moderate-to-low security risk. He earned his GED (general equivalency diploma) and a full tuition scholarship for college, and was on the Edmonds Community College honor roll. Many letters from Bassett's supporters stated that he serves as a mentor to other men in prison. He married Joanne Pfeifer in 2010 after premarital counseling.

Id. The judge rejected this evidence and imposed the same sentence of three terms of life without parole. *Id*. On appeal, the Washington Supreme Court reversed, holding that life sentences

without parole are categorically unconstitutional for juveniles. *Id*. at 73.

Similarly, the defense attorney in *Haag* proffered extensive evidence at his client's 2018 resentencing hearing. 198 Wn.2d at 314-15. Counsel presented testimony from two expert witnesses, Dr. Marty Beyer and Dr. Ronald Roesch. *Id*. at 314. These experts "wrote detailed analyses and testified on Haag's behalf", opining that he was unlikely to reoffend:

> Both of Haag's expert witnesses independently administered the SAVRY test (Structured Assessment of Violence Risk in Youth test) to analyze whether, at the time of the crime, Haag would likely have reoffended. CP at 76, 90. Both concluded that Haag would have been at a low risk of reoffending at the time of the offense. *Id.* at 77, 92.
>
> One of the experts, Dr. Roesch, performed further tests: the Personality Assessment Inventory (PAI), a self-reported test used to analyze "adult personality and psychopathology," and the HCR-20 (Historical Clinical Risk Management-20), which assessed Haag's current risk of reoffending. *Id.* at 89, 92. According to Dr. Roesch, "the PAI does not indicate any serious mental health issues that would demand treatment." *Id.* at 90. Similarly, the HCR-20 showed that Haag "is currently considered a low risk for reoffending." *Id.* at 93.

Id. Mr. Haag's attorney also presented evidence that he had only one DOC infraction, in 1997, and obtained a high school diploma while incarcerated. *Id*.

Third, defense counsel in this case failed to object to improper argument by the prosecutor. At resentencing, the prosecutor spoke at length about Mr. Houston-Sconiers, the defendant in a different Pierce County case. RP at 7-12. The prosecutor argued that Mr. Houston-Sconiers received a lenient sentence and "just accepted a 20 year sentence to avoid his third strike." RP at 10. He argued that the judge who imposed this lenient sentence "took a big chance" that "didn't work out", and Mr. Gore's case was "the exact same". RP at 12. The prosecutor argued against rehabilitation: "So how do you predict and say that Mr. Gore, Jermohnn Gore is going to be different than all the others in this situation?" RP at 11.

This amounted to an argument of guilt by association. Mr. Houston-Sconiers received a more lenient sentence. According to the state, he then went on to commit additional crimes, as did

other gang members. The prosecutor argued that Mr. Gore was "the exact same" and was not "going to be different" than these other defendants, heavily implying that Mr. Gore would also commit additional crimes if released.

Although the rules of evidence do not apply to sentencing hearings, evidence at sentencing "must still meet due process requirements." *State v. Strauss*, 119 Wn.2d 401, 418, 832 P.2d 78 (1992), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). Arguing that Mr. Gore was not rehabilitated because other gang members committed more crimes amounted to an improper argument that burdened Mr. Gore's right to a fair proceeding. *Cf. United States v. Wolfswinkel*, 44 F.3d 782, 787 (9th Cir.1995) (prosecution can commit misconduct by arguing guilt by association). Competent counsel would have objected. At the very least, counsel should have contradicted this argument by presenting evidence about rehabilitation, as the attorneys did in *Bassett* and *Haag*.

Mr. Gore's attorney provided nowhere near the level of representation as the attorneys in *Bassett* and *Haag*. Mr. Johnson knew basically nothing about the facts of this case, did little to research or investigate mitigating circumstances, did not read the Court of Appeals decision that led to this resentencing hearing, did not have the case file from the prior attorney, and presented almost no evidence on his client's behalf. This falls well below the "minimum" requirement to "conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client." *Brett*, 142 Wn.2d at 873. Counsel performed deficiently.

2. Counsel's deficient performance prejudiced Mr. Gore.

Counsel's failings also prejudiced Mr. Gore. Prejudice occurs if, but for counsel's deficient performance, there is a reasonable probability that the defendant's sentence would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

At the presentation hearing, the state argued that expert witnesses were unnecessary because "[t]he courts have said that juveniles' brains aren't developed" and juvenile immaturity is a matter of "common sense analysis." RP at 58, 59-60. This argument ignores the value of individualized expert assessment. In both *Bassett* and *Haag*, defense counsel presented evidence from experts who worked directly with those defendants and opined about them as individuals. *Bassett*, 192 Wn.2d at 75; *Haag*, 198 Wn.2d at 314. Mr. Gore had no similar opportunity.

Additionally, even generic expert testimony about juveniles would have been helpful in this case. The resentencing judge had difficulty viewing teenagers as children and equated a 16-year-old with a person in his twenties. RP at 40, 41, 42-43. This directly contradicts case law clearly establishing that children are less culpable for criminal behavior than adults. *See, e.g.*, *Bassett*, 192 Wn.2d at 87.

Expert testimony would also be useful to evaluate whether Mr. Gore is capable of rehabilitation. *Miller* hearings "must be

forward looking, not backward looking." *Haag*, 198 Wn.2d at 322. Despite this, defense counsel presented no evidence about Mr. Gore's likelihood to reoffend, such as evaluations by psychologists or evidence about his conduct in prison.

Instead, the only evidence about rehabilitation came from the state, when the prosecutor made his "guilt by association" argument. As explained above, the prosecutor argued that Mr. Houston-Sconiers and other gang members reoffended, so "how do you predict and say that Mr. Gore, Jermohnn Gore is going to be different than all the others in this situation?" RP at 10-11.

This evidence from the state went unrebutted. Mr. Johnson did not object or present any evidence about juvenile rehabilitation. As a result, the resentencing court showed a lack of understanding about juvenile brain development, had difficulty viewing a 16-year-old as a child, and heard no evidence about Mr. Gore's prospects for rehabilitation. Without this critical mitigation evidence, the court adopted the state's recommended sentence wholesale, prejudicing Mr. Gore.

VI. CONCLUSION

Children are different. They are less criminally culpable than their adult peers, and these differences must be considered by sentencing judges. The judge in this case erred and abused her discretion by refusing to properly consider Mr. Gore's youth. Mr. Gore also received ineffective assistance of counsel when his attorney was unprepared and freely admitted that this case "fell through the cracks" at his office. This Court should remand for a new *Miller* hearing.

Pursuant to RAP 18.17, this document is proportionately spaced using Times New Roman 14-point font and contains 5800 words, excluding the caption, tables, signature blocks, appendix, and certificate of service (word count by Microsoft Word).

RESPECTFULLY SUBMITTED on January 6, 2022.

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