IN THE SUPREME COURT, STATE OF WYOMING

CHRISTOPHER ROBERT HICKS, Appellant (Defendant), v. THE STATE OF WYOMING, Appellee (Plaintiff).	S-24-0323

APPELLANT'S BRIEF

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STATEMENT OF JURISDICTION

This appeal arises from an Order Denying Defense Motion to Correct Illegal Sentences entered December 5, 2024, from the District Court for the Sixth Judicial District, Campbell County. The order left no other outstanding issues regarding Mr. Hicks's sentences; therefore, it is a final and appealable order. *See Mitchell v. State*, 2018 WY 110 ¶¶ 20–21, 426 P.3d 830, 836 (Wyo. 2018). Mr. Hicks filed this appeal on December 6, 2024. Notice of Appeal, TR. at 1213–23. Further, jurisdiction in this matter is vested in this Court under article 5, section 2 of the Wyoming Constitution.

STATEMENT OF ISSUES

I. Whether article I, section 14 provides greater *Miller* protections to late adolescents such as Mr. Hicks than does the Eighth Amendment.

II. Whether the district court erred when it deferred its independent discretion as to the constitutionality of Mr. Hicks's sentences to the legislature.

III. Whether the district court erred when it held Mr. Hicks's claims were barred by *Nicodemus v. State*.

IV. Whether the district court erred when it did not extend *Miller* protections to Mr. Hicks and find the relevant statutes unconstitutional under article 1, section 14.

V. Whether the district court erred by failing to find that Mr. Hicks's mandatory LWOP sentences were separately unconstitutional under article 1, section 15.

VI. Whether the district court erred when it failed to find that Mr. Hicks's mandatory LWOP sentences violated Wyoming's equality and equal protection provisions.

VII. Whether the district court erred when it failed to find that Mr. Hicks's LWOP sentences were also unconstitutional under the Eighth Amendment.

VIII. Whether the district court erred when it applied an "unconstitutional beyond a reasonable doubt" standard to its constitutionality determination of the relevant statutes.

IX. Whether the district court erred when it failed to find that even if late adolescents generally should not receive a *Miller* hearing, Mr. Hicks should as his youthfulness was not considered at his 2006 sentencing hearings.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION

In 2006, Mr. Hicks was convicted of: Conspiracy to Commit Murder in the First Degree of Jeremy Forquer, in violation of Wyo. Stats. Ann. §§ 6-2-101(a) and (b), and 6-10-202(a); Murder in the First Degree of B.C. in violation of Wyo. Stat. Ann. § 6-2-101(a) and (b); and Conspiracy to Commit Murder in the First Degree of B.C., in violation of Wyo. Stats. Ann. §§ 6-2-101(a) and (b), and 6-1-303(a). *See* Verdicts, TR. at 791–94.

Thereafter, Mr. Hicks had two separate sentencing hearings in 2006. First, following his convictions for B.C.'s murder, a penalty phase ensued where ultimately the jury

sentenced Mr. Hicks to life without the possibility of parole (LWOP) for both counts. *See* Sentencing Tr. Vol. 19–21, 9/6–9/7/2006.[1] At his 10/20/2006 sentencing hearing, the Court imposed those sentences consecutively to one another as well as to another LWOP sentence for Mr. Hicks's conspiracy to commit Mr. Forquer's first-degree murder. *See* Sentencing Tr., 10/20/2006. Mr. Hicks's sentencing package includes three consecutive LWOP sentences. He filed a Motion to Correct Illegal Sentences in the district court on July 23, 2024, and an appeal upon its dismissal by the district court. *See* Motion to Correct Illegal Sentences, TR. at 1173; *see also* Order Denying Defense Motion to Correct Illegal Sentences, TR. at 1204–12; Notice of Appeal, TR. at 1213–23.

II. STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED ON APPEAL

A. THE OFFENSES

At trial, it was alleged that Mr. Hicks participated in two separate murders as part of a conspiracy orchestrated by adult co-defendant Kent Proffit, Sr. (approximately 40 years old at the time). *See Hicks v.* State, 2008 WY 83, ¶ 3, 187 P.3d 877, 879 (Wyo. 2008); *see also Proffit v. State*, 2008 WY 114, ¶¶ 3–4, 193 P.3d 228, 231–32 (Wyo. 2008); *Proffit v. State*, 2008 WY 102, ¶ 3, 191 P.3d 963, 965 (Wyo. 2008). The murders occurred in the fall of 2005. *Hicks*, 2008 WY 83, ¶¶ 4–10. Mr. Hicks had been kicked out of his home by his father in Arizona at that time. Dr. Wachtel Report, Motion to Correct Illegal Sentences, Confidential File (Exhibit C), at 4, ¶¶ e–f, TR. at 1173. Mr. Hicks had once lived

[1] The State sought the death penalty for this conviction.

in the Gillette area and returned there after he was estranged from his family. *Id.* at 3, ¶¶, a, e–f. Mr. Hicks and two other youths—one of Mr. Hicks's co-defendants Jacob Martinez (age 18) and one of the victims Jeremy Forquer (age 18)—were living with Proffit, Sr., in a trailer. *Hicks*, 2008 WY 83, ¶ 3. Another co-defendant Michael Seiser (age 15) would visit the trailer frequently. *Id.*

At some point, Mr. Hicks and Mr. Martinez believed they were in trouble due to a plan to transport and sell marijuana in Gillette that "went bad." *Hicks*, 2008 WY 83, ¶ 4. Proffit, Sr. "led Mr. Hicks and Mr. Martinez to believe that he had resolved their problems, and he informed [them] that they 'owed him favors.'" *Id.* At that time, Proffit, Sr., was awaiting trial on charges of sexual assault against his 16-year-old stepson B.C. *Id.* at ¶ 5. Proffit, Sr., told Mr. Hicks and Mr. Martinez that one of the favors they owed him was to kill B.C. *Id.* In addition, Proffit, Sr., continued with his manipulation of the youths by telling Mr. Hicks and Mr. Martinez that Jeremy Forquer, the other victim, was "working for the cops." *Id.* at ¶ 6. Proffit, Sr., told the youths that "Mr. Forquer could tell [police] of their discussions about killing B.C., and that if they did not get 'rid of' Mr. Forquer, he might also inform the authorities of their involvement with illegal drugs." *Id.* Psychologist Dr. Max Wachtel who conducted a psychological and *Miller* evaluation of Mr. Hicks in support of his Motion to Correct Illegal Sentences noted that this level of manipulation exhibited by Proffit, Sr., would have had an extreme impact on a 19-year-old as vulnerable as Mr. Hicks was at the time. *See* Dr. Wachtel Report, Motion to Correct

Illegal Sentences, Confidential File (Exhibit C), at 19, ¶ n, TR. at 1173; *see also* Andrea Titus Mitigation Memorandum, Motion to Correct Illegal Sentences, Confidential File (Exhibit D), at 13–14 (further detailing Proffit, Sr.'s manipulation and abuse of Mr. Hicks).

Proffit, Sr., organized a plan to have the youths—including Seiser—kill Mr. Forquer and B.C. *Hicks*, 2008 WY 83, ¶ 6, 187 P.3d at 879. According to this Court's 2008 opinion, it is alleged that Mr. Hicks pretended to playfully put Mr. Forquer in a chokehold but then attempted to strangle him rendering Mr. Forquer unconscious.[2] Ultimately, Proffit, Sr., ordered Mr. Martinez to tighten a rope around Mr. Forquer's neck until he was dead. *Id.* at ¶ 7. The State did not seek the death penalty for Mr. Forquer's murder. Notably, Mr. Hicks was acquitted of first-degree murder of Mr. Forquer by the jury but found guilty of conspiracy to commit this murder in the first degree. *See* Sentencing Tr. 9/6, Vol. 19–9/7/2006, Vol. 20–21 and 10/20/2006; *see also* Verdicts, TR. at 791–94.

As to the murder of B.C., Proffit, Sr., threatened all the youths that he would have them killed if they did not kill B.C. *Hicks*, 2008 WY 83, ¶ 9, 187 P.3d at 880. Once again, Proffit, Sr., organized a plan for the youths to kill B.C. One early morning, the youths went to B.C.'s home. *Id.* According to the 2008 opinion, Mr. Seiser stayed in the car while Mr. Hicks and Mr. Martinez approached B.C.'s house. *Id.* at ¶ 10. "Mr. Hicks helped Mr. Martinez open the door, and then Mr. Hicks returned to the car while Mr. Martinez went

[2] Mr. Hicks did not testify at trial.

inside and shot B.C." *Id.* Mr. Hicks was convicted of aiding and abetting (accessory before the fact) and conspiracy for the first-degree murder of B.C. *See* Sentencing Tr. 9/6, Vol. 19–9/7/2006, Vols. 20–21 and 10/20/2006.

B. THE 2006 SENTENCING HEARINGS

First, following Mr. Hicks's convictions for B.C.'s murder, a penalty phase ensued where ultimately the jury sentenced Mr. Hicks to LWOP for both counts. *See* Sentencing Tr. Vol. 19–21, 9/6–9/7/2006. Thereafter, at his 10/20/2006 sentencing hearing, the Court imposed those sentences consecutively to one each other as well as to another LWOP sentence for Mr. Hicks's conspiracy to commit Mr. Forquer's first-degree murder. *See* Sentencing Tr., 10/20/2006.

Mitigation Specialist Andrea Titus details the lack of mitigation evidence provided to both the jury and judge by Mr. Hicks's 2006 legal team. *See* Andrea Titus Mitigation Memorandum, Motion to Correct Illegal Sentences, Confidential File (Exhibit D), at 2–5, TR. at 1173. In addition, former Mitigation Specialist Ann Matthews, who was hired to provide support to the attorneys did not testify. She also notes in her affidavit that the neuroscience detailed in Dr. Karagh Brummond's affidavit was unknown at the time and had it been known, she would have encouraged the attorneys to provide this information at sentencing for mitigation purposes. Ann Matthews Affidavit, Motion to Correct Illegal Sentences, (Exhibit F), TR. at 1173. In addition, second-chair attorney John Fahle provides the same testimony as Ms. Matthews to this point. John Fahle Affidavit,

Motion to Correct Illegal Sentences, (Exhibit G), TR. at 1173. No evidence of Mr. Hicks's youthfulness was presented at sentencing. *See* Sentencing Tr. Vols. 19–20, 9/6–9/7/2006; Sentencing Tr., 10/20/2006; *see also* Andrea Titus Mitigation Memorandum, Motion to Correct Illegal Sentences, Confidential File (Exhibit D), at 2–5, TR. at 1173. All three of Mr. Hicks's LWOP sentences were run consecutively to one another. *See* Sentencing Tr., 10/20/2006.

C. THE 2024 MOTION TO CORRECT ILLEGAL SENTENCES

On July 23, 2024, Mr. Hicks filed a Motion to Correct Illegal Sentences, challenging his mandatory LWOP sentences as unconstitutional; he challenged three statutory provisions—Wyo. Stat. Ann. § 6-2-101(b) (2004) (the first-degree murder penal provision), Wyo. Stat. Ann. § 6-1-201(b)(iii) (1983) (accessory before the fact provision that requires the same penalties and punishment for the principal apply), and Wyo. Stat. Ann. § 6-10-301(c) (parole provision)— as unconstitutional in authorizing his mandatory LWOP sentences in violation of both the state and federal constitutions. *See* Motion to Correct Illegal Sentence, TR. at 1173. Multiple expert witness affidavits were filed. *See id.*

The State filed a response that focused solely on procedural grounds, without contesting any of the facts established by the defense witness affidavits. State's Response to Defense Motion to Correct Illegal Sentences, TR. at 1185–94. The district court decided to rule based on the pleadings alone without an evidentiary hearing. *See*

Order Denying, at 1, n. 1, TR. at 1204–12. The district court denied the motion, and Mr. Hicks filed this appeal. *See id.*; *see also* Notice of Appeal, TR. at 1213–23.

ARGUMENT

I. STANDARD OF REVIEW

Whether a sentence is illegal is a question of law this Court reviews *de novo*. *Nicodemus v. State*, 2017 WY 34, ¶ 9, 392 P.3d 408, 411 (Wyo. 2017) (citing *Barela v. State*, 2016 WY 68, ¶ 6, 375 P.3d 783, 786 (Wyo. 2016)). In addition, this Court also determines the constitutionality of a statute under a *de novo* standard of review. *Hardison v. State*, 2022 WY 45, ¶ 5, 507 P.3d 36, 39 (Wyo. 2022) (quoting *Vaughn v. State*, 2017 WY 29, ¶ 7, 391 P.3d 1086, 1091 (Wyo. 2017)).

II. AS THE FINAL ARBITER OF STATE CONSTITUTIONAL CLAIMS, THIS COURT SHOULD FIND THAT WYOMING'S ARTICLE 1, SECTION 14, CONSTRUED ALONGSIDE SECTIONS 15 AND 16, PROVIDES GREATER *MILLER* PROTECTIONS TO LATE ADOLESCENTS SUCH AS MR. HICKS THAN DOES THE EIGHTH AMENDMENT

This Court is the final arbiter on the constitutionality of challenged statutes under the Wyoming Constitution. The Court has repeatedly reminded practitioners that it stands ready to independently and separately interpret the Wyoming Constitution from the federal one. *See e.g., Bear Cloud v. State (Bear Cloud III)*, 2014 WY 113, ¶ 14, 334 P.3d 132, 137 (Wyo. 2014) (quoting *Saldana v. State*, 846 P.2d 604, 621 (Wyo. 1993) (Macy, J., specially concurring)); *Sheesley v. State*, 2019 WY 32, ¶ 14, 437 P.3d 830 (Wyo. 2019) (quoting William J. Brennan, Jr., *State Constitutions and the Protections of Individual*

Rights, 90 HARV. L. REV. 489, 491 (1977)); *Joseph v. State*, 2023 WY 58, ¶ 18, 530 P.3d 1071, 1075 n. 2 (Wyo. 2023). All that is required to preserve a state constitutional claim for review at this Court is presentation of a sound, analytical approach at the district court. *See Joseph*, 2023 WY, ¶ 18, 530 P.3d at 1075 (quoting *Sheesley*, 2019 WY, ¶ 15, 437 P.3d at 837)). Mr. Hicks preserved his state constitutional claims for this Court.

A. THE DISTRICT COURT ERRED WHEN IT DEFERRED ITS INDEPENDENT DISCRETION AS TO THE CONSTITUTIONALITY OF MR. HICKS'S SENTENCES TO THE LEGISLATURE; NONETHELESS, FINAL INTERPRETATION OF THE WYOMING CONSTITUTION RESIDES WITH THIS COURT

The determination of the constitutionality of the relevant statutes as applied to Mr. Hicks lies with this Court. This is not a job for the legislature. Courts interpret the constitution and decide whether statutes or other government conduct violates the constitution. Furthermore, in Wyoming, the framers expressly stated their distrust in the legislature and desire that a strong independent supreme court be the primary "guardian of individual rights." Robert B. Keiter and Tim Newcomb, THE WYOMING STATE CONSTITUTION 11–13, 19, n. 66 (2011). The framers' confidence in the judiciary and simultaneous distrust of the legislature illustrates an intention and strong preference for this Court to rule on issues directly impacting the individual rights of Wyoming citizens. The district court erred when it deferred its independent discretion to determine the constitutionality of statutes to the legislature.

B. THE *SALDANA* FACTORS WEIGH IN FAVOR OF ARTICLE 1, SECTION 14 PROVIDING GREATER PROTECTIONS THAN THE EIGHTH AMENDMENT TO LATE ADOLESCENTS SUCH AS MR. HICKS[3]

The *Saldana* factors have been this Court's primary lens through which it has analyzed whether the Wyoming Constitution provides greater protections than the federal constitution. *See Saldana*, 846 P.2d at 621–24 (Justice Golden's concurrence laid out six non-exhaustive criteria borrowed from the Washington State Supreme Court.); *see also State v. Gunwall*, 106 Wash.2d 54, 58, 720 P.2d 808, 811 (1986); *see e.g., Sheesley*, 2019 WY, ¶ 15, 437 P.3d at 837. This Court has stated: "We have said numerous times that, in construing the state constitution, this Court follows the same rules that govern construction of a statute, and that our fundamental purpose is to ascertain the intent of the framers." *Cathcart v. Meyer*, 2004 WY 49, ¶ 39, 88 P.3d 1050, 1065 (Wyo. 2004) (other citations omitted). It is not required that all the *Saldana* factors be examined, but, here, each weigh in favor of article 1, section 14 providing greater protections than the Eighth Amendment. *See Joseph*, 2023 WY, ¶ 19.

i. Saldana Factors (1) and (2): the Textual Language and the Differences in the Texts

This Court knows the textual language of article 1, section 14 uses an "or" instead of the Eighth Amendment's "and" in its "cruel or unusual" punishment clause. WYO. CONST. art. 1, § 14 ("[N]or shall cruel or unusual punishment be inflicted."). This was intentional

[3] *See also* Motion to Correct Illegal Sentences, TR. at 1173.

on the part of the framers; the records from the *Journal and Debates* kept at the constitutional convention demonstrate the framers were thinking of "cruel" as separate and distinct from "unusual."[4] In *Johnson v. State*, this Court recognized that the use of the disjunctive meant that it should analyze "cruel" separately from "unusual." 2003 WY 9, 61 P.3d 1234, 1249 (Wyo. 2003). Meanwhile, the Eighth Amendment requires that a punishment be both cruel and unusual. *See* U.S. CONST. AMEND. VIII; *see also Harmelin v. Michigan*, 501 U.S. 957 (1991) (only cruel and unusual punishments are captured).

Next, the differences in the text of the Wyoming Constitution and the federal constitution are substantial. As Professor Keiter noted, "The Wyoming Constitution's Declaration of Rights, in contrast to the ten federal Bill of Rights amendments, contains thirty-nine separate provisions that enumerate an array of individual rights, several of which are without counterpart in the U.S. Constitution." Keiter, at 45. Notably, while other state constitutions were referred to during the constitutional convention, the federal constitution was only referenced twice. *Id.* at 8.

[4] At the constitutional convention, Delegate Baxter explained that "unusual" referred to something "unheard of, some punishment the law does not contemplate." Article 1, section 14, Journal and Debates of the Constitutional Convention of the State of Wyoming, September 2–30, 1889.

Further, the Wyoming Constitution has two other punishment-related provisions that do not appear in the federal constitution. Article 1, section 15 reads: "The penal code shall be framed on the humane principles of reformation and prevention." There is no commentary in the *Journal and Debates* on this particular provision. While the *Nicodemus* court has interpreted this section as not limiting sentencing justifications to only reformation and prevention, it is noteworthy that of the four primary justifications for sentencing, these are the only two our framers put into the Wyoming Constitution. *See Nicodemus*, 2017 WY, ¶¶ 34, 37; *see also Mendoza v. State*, 2016 WY 31, ¶ 18, 368 P.3d 886, 893 (Wyo. 2016) (rehabilitation, deterrence, incapacitation, and punishment are the primary justifications for sentencing).

Another punishment-related provision, article 1, section 16 reads: "No person arrested and confined in jail shall be treated with unnecessary rigor. The erection of safe and comfortable prisons, and the inspection of prisons, and the humane treatment of prisoners shall be provided for." Unfortunately, there is no commentary in the *Journal and Debates* on this provision either. However, in construing article 1, sections 14, 15, and 16 along with sections 2 and 3, one of the first versions of this Court recognized that the state "constitution expressly adopts the humanitarian theory" in dealing with criminal offenders and, "thus[,] it may be seen that the modern prison system, at every stage of its evolution, revolves around one central thought,—the possibility of reformation; that reformation of the prisoner is its one animating purpose; that the

hope of reformation is the motive to which it owes its origin." *State v. Bd. of Commissioners of Laramie County*, 8 Wyo. 104, 55 P. 451 (1898). Yes, this is a non-criminal case, but it is noteworthy that two of the supreme court justices on the bench at this time were conventional delegates. *See Nicodemus*, 2017 WY, ¶ 35.

ii. Sadana Factor (3): Constitutional History

Professor Keiter has noted that our delegates were significantly impacted by other western territories, including North Dakota, South Dakota, Montana, Washington, and Idaho, at the time of constitutional drafting. Keiter, at 3. The delegates held copies of these territories' constitutions for reference during the convention, and Colorado's constitution was referenced more than twenty times. *Id.* However, they also "added several expansive individual rights protections." *Id.* at 17–18. Professor Keiter advances that the prevailing view of the delegates was that the Declaration of Rights should be liberally construed as evidenced by the vast number of provisions focused on protecting individual rights. *Id.* at 18. In addition, the broad language defining many of these individual rights further corroborates that the delegates desired liberal construction. *Id.*

As previously mentioned, the framers also quite actively sought to limit legislative power. For example, the Wyoming Constitution included thirty-seven separate prohibitions against local and specialized laws. *Id.* at 11. Professor Keiter notes that "because the delegates mistrusted the legislative process, they preferred to rely on specific constitutional provisions to constrain future state legislatures." *Id.* at 19. To ward

off legislative corruption, the framers created an independent judiciary as the "guardian of individual rights" against both the legislative and executive branches. *Id.* at 11–13.

iii. Saldana Factor (4): Preexisting State Law

In *Gunwall*, the Washington Supreme Court further explained this factor: "Previously established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional rights. State law may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims." *Gunwall*, 720 P.2d at 812.

Remarkably, Wyoming was very progressive in the areas of education and civil rights during its time as a territory. *See* Keiter, at 6. In 1873, the Wyoming territorial legislature established an education system that resulted in more than 97% of youth over the age of ten in the territory being able to read by the constitutional convention in 1889. *Id.* The territorial legislature also swiftly established a state university. *Id.* And it was the first legislative body in the country to grant women the right to vote. *Id.* This focus on late adolescents (who we generally associated with universities) and civil rights for women demonstrates a unique commitment to autonomy and equality in Wyoming.

iv. Saldana Factor (5): Structural Differences

The *Gunwall* court defined the structural differences between state constitutions and the federal one by emphasizing their different purposes—the purpose of state constitutions is to limit federal sovereignty. *Gunwall*, 720 P.2d at 812. As a result, explicit

adoption of individual rights in state constitutions should be viewed as guaranteeing those rights rather than implementing restrictions on them. *See id.*

In addition to Wyoming's Declaration of Rights boasting thirty-nine separate provisions containing a host of individual rights (versus the ten Bill of Rights), the framers also adopted article 1, section 36, which states: "The enumeration in this constitution, of certain rights shall not be construed to deny, impair, or disparage others retained by the people." Structurally, our constitution greatly prioritizes individual rights.

v. Saldana Factor (6): Matters of Particular State or Local Concern

This factor focuses on whether the relevant issue is one of local character or, instead, an issue where there is a need for uniformity across the country. *Gunwall*, 720 P.2d at 813. The *Gunwall* court noted that if it is of local character, it is better served by state constitutional analysis. *Id.*

Significantly, the Supreme Court has indicated that within the Eighth Amendment context, more specifically the *Miller* context, states retain substantial power. In *Jones v. Mississippi*, the Court, citing Judge Sutton of the Sixth Circuit (who is an authoritative jurist and scholar in state constitutionalism), explained that states could implement a host of reforms in the *Miller* context, recognizing that some states had already done so. 593 U.S. 98, 120 (2021) (citing Judge Jeffrey S. Sutton, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018)).

Indeed, Wyoming has been a leader within the *Miller* context in terms of paving its own way in uncharted territory. For example, in *Bear Cloud II* and *Sen I*, this Court held that a sentencing court must apply the *Miller* factors in deciding whether a juvenile offender is "permanently incorrigible." *Bear Cloud v. State (Bear Cloud II)*, 2013 WY 18, ¶¶ 42, 44–45, 294 P.3d 36, 47 (Wyo. 2013); *Sen v. State (Sen I)*, 2013 WY 47, ¶ 51, 301 P.3d 106, 127 (Wyo. 2013). In *Bear Cloud III*, this Court held that sentences for closely related aggregate counts for juvenile offenders could not exceed 45 years in length or prohibit parole eligibility until the offender is 61 years of age, which would render such sentences "de facto life" sentences. *Bear Cloud III*, 2014 WY 113, 334 P.3d 132. This "45/61 standard" was the most protective in the nation. *See id*, ¶¶ 34–35, n. 10. In addition, in 2018, this Court decided the presumptions, burdens, and standards of proof applicable to *Miller* hearings in Wyoming. *See generally Davis v. State (Davis I)*, 2018 WY 40, ¶¶ 41–50, 415 P.3d 666 (Wyo. 2018). This Court has set a great deal of precedent in the *Miller* context, demonstrating *Miller*'s import here.

C. This Court is Not Restricted to Only Applying the *Saldana* Factors in Determining that Article 1, Section 14 Provides Greater Protections to Late Adolescents Such as Mr. Hicks Than the Eighth Amendment

This Court can and should look beyond the *Saldana* factors to decide whether article 1, section 14 provides greater *Miller* protections than the Eighth Amendment. First, our country's history enlightens that state constitutions were instrumental to the crafting of the federal constitution and its Bill of Rights. In addition, Wyoming has notoriety for

rejecting federal government overreach, supporting that we should honor and apply our own state constitution first and foremost. Finally, long ago, this Court recognized that our state constitution is a living and breathing document.

i. State constitutions were intended to be independently interpreted

State constitutions led to the crafting of the federal constitution, not the other way around. "The era between the Declaration of Independence in 1776 and the U.S Constitutional Convention in 1787—was *the* seminal era of constitution writing. The most inspired constitution writing in this country, perhaps at any time, perhaps anywhere, occurred before 1787, and it occurred in the States." Sutton, at 11 (emphasis in original). Thus, during our nation's founding era, practitioners would seek relief from the state constitution if the local government violated an individual's liberty or property rights. *See id.* at 11–12.

Judge Sutton observed that after the period of incorporation—the Fourteenth Amendment was interpreted as having incorporated the Bill of Rights to the states—the federal constitution was improperly elevated to the primary font for individual rights. *See id.* at 13–14. Judge Sutton remarks that many of the primary individual rights, including the right to be free from cruel and/or unusual punishment, "originated in state constitutions and were authored by a set of not inconsequential political leaders in the States, such as John Adams, Benjamin Franklin, Robert Livingston, James Madison, and George Mason." *Id.* at 8.

In makes no sense to interpret Wyoming's Constitution in "lockstep" with the federal constitution. This Court has the authority to interpret the Wyoming Constitution however it wishes without imitation of federal interpretations of, for example, the Eighth Amendment. *See id.* at 16. In 2023, this Court underscored the primacy of state constitutional analysis. "We have emphasized that '[w]hen a party raises a state constitutional claim and provides proper argument on appeal and in the trial court below, the state constitutional analysis takes primacy—that is, the claim is first analyzed under the Wyoming Constitution." *Joseph*, 2023 WY, ¶ 18, 530 P.2d at 1075 n. 2 (quoting *Levenson v. State*, 2022 WY 51, ¶ 18, 508 P.3d 229, 235 (Wyo. 2022) (other citations omitted)). The Court stressed, "We again emphasize the primacy of the state constitutional analysis and the need for it to be conducted separately from any federal analysis, even where the state and federal provisions may appear to require a similar analysis." *Id.* (internal citation omitted).

This Court is not a "lockstepping" court, and it should interpret article 1, section 14 as providing greater *Miller* protections to late adolescents such as Mr. Hicks.

ii. Historically and traditionally, Wyoming has rejected federal government interference

Wyoming and its people have long been suspicious of federal government overreach. Professor Keiter highlights, "Like other western territories, Wyoming's move toward statehood reflected widespread popular dissatisfaction with federal administration of the territory." Keiter, at 6. During the constitutional convention, "[t]he local populace

attributed many of their problems to insensitive and ill-informed territorial officials who were appointed from Washington for political reasons." *Id.* Nine years after the constitutional convention, M.C. Brown, one of Wyoming's delegates, observed: "The territorial form of government established by Congress, while inadequately serving the purposes for which it was intended, had become a distasteful institution to our people, and there was a strong sentiment among them, amounting almost to a determination, to escape from the tutelage of the General Government and to establish a government of their own." Hon. M.C. Brown, Constitution Making, An Address, Winter of 1898.[5]

Wyoming's notoriety for rejecting federal overreach persists today. *See e.g.*, https:/wyofile.com/no-special-session-gordon-says-wyoming-well-equipped-to-fight-feds-on-coal/ (Wyoming challenging federal government's intent to stop new federal coal leases in Powder River Basin); https://lummis.senate.gov/press-releases/lummis-hageman-barrasso-introduce-bill-to-protect-wyoming-ranchers-from-overzealous-biden-mandate/ (Wyoming senators' proposed bill rejecting Biden Administration's mandate of electronic identification tags for bison and cattle); https://content.govdelivery.com/accounts/WYGOV/bulletins/39ae837 (Wyoming joins twenty other states to fight against federal overreach related to Second Amendment); https://www.wyomingnews.com/

[5] The hyperlink where the Court may access this item is provided in the Defense Motion to Correct Illegal Sentences, at 32, TR. at 1173.

news/local_news/gov-gordon-criticizes-nepa-rule-changes-citing-federal-overreach/article_d10cfe76-6a02-11ee-be05-2f6df5761d87.html (Governor Gordon objects to Biden Administration's proposed revisions to National Environmental Policy Act).

Wyoming values state sovereignty, and this further supports that this Court should find that article 1, section 14 provides greater protections than the Eighth Amendment.

iii. Long ago, this Court determined the state constitution is a living and breathing document

Professor Keiter has emphasized that "[t]he Wyoming Supreme Court has also endorsed the proposition that the constitution is an evolutionary document that must accommodate social and economic change." Keiter, at 32.

> In 1933, Justice Fred Blume, who sat on the court for forty-two years and authored many of its seminal constitutional decisions, wrote that "the Constitution is, in a sense, a living thing, designed to meet the needs of progressive society, amid all the detail changes to which such society is subject." In *County Court Judges Ass'n v. Sidi*, 752 P.2d 960 (Wyo. 1988), the Wyoming Supreme Court state: the "constitution is not lifeless, but it is a flexible, living document intended to accommodate new conditions and circumstances in a changing society."

Id.

Cruel and (or) unusual punishment hinges on very similar words (to a "living and breathing constitution"), i.e., the "evolving standards of decency" because our values and morals in this context necessarily changes over time. *See e.g., Roper v. Simmons*, 534 U.S. 551, 568–79 (2005); *Graham v. Florida*, 560 U.S. 48, 62–64 (2010); *Jones*, 595 U.S. at 120–21. Indeed, since *Roper*, our understanding of both juveniles and late adolescents has changed dramatically; steadily, our case law, policies, and practices across the country

attempt to keep pace. *See generally* Dr. Brummond Affidavit, Motion to Correct Illegal Sentences (Exhibit A), TR. at 1173. Further, where we draw the line of the "age of majority" socially and psychologically has also substantially changed over time. *See generally* Dr. Kayla Burd Affidavit, Motion to Correct Illegal Sentences (Exhibit B), TR. at 1173.

Because the Wyoming Constitution is a living and breathing document, it aligns with the cruel and (or) unusual punishment clause's "evolving standards of decency," and further supports that article 1, section 14 provides greater protections in this context.

iv. When construed together, article 1, sections 14, 15, and 16 support extending greater Miller protections to late adolescents

Courts are to interpret the state constitution by using the familiar principles of statutory interpretation. *See Cathcart*, 2004 WY ¶ 39, 88 P.3d at 1065. When interpreting statutes or the constitution, the primary consideration is the legislators' or framers' intent. *See id.*; *see also State ex rel. Motor Vehicle Div. v. Holtz*, 674 P.2d 732, 736 (Wyo. 1983). "[A]ll statutes relating to the same subject or having the same general purpose must be considered and construed in harmony." *Holtz*, 674 P.2d at 735. Article 1, sections 14, 15, and 16 all speak to the punishment and treatment of the accused or convicted.

These three provisions have been previously interpreted as underscoring the reformative and rehabilitative nature of Wyoming's criminal justice system; reformation of the "prisoner" has been referred to as the one animating purpose of Wyoming's prison system. *See Bd. of Commissioners*, 8 Wyo. at 138–39. This makes sense when you look at

the language of each of these sections. Article 1, section 14 forbids cruel or unusual punishment. Subjecting a person to either punishment does not get us closer to their reformation. Article 1, section 15 mandates that our penal system be founded on "the humane principles of reformation and prevention." And, finally, section 16 prohibits mistreating people in jails and prisons; treating them inhumanely would not serve to reform them. This Court does not need the *Saldana* factors to find that article 1, section 14 provides greater protections than does the Eighth Amendment.[6]

III. THE DISTRICT COURT ERRED WHEN IT HELD MR. HICKS'S CLAIMS WERE BARRED BY *NICODEMUS V. STATE* BECAUSE UNLIKE MR. NICODEMUS, MR. HICKS MET HIS BURDEN OF ESTABLISHING THE RELEVANT STATUTES WERE UNCONSTITUTIONAL

No scientific evidence, substantial scientific evidence. That sentence sums up the critical difference between Mr. Nicodemus's and Mr. Hicks's claims that the district court failed to recognize. One look at the appellant's brief or this Court's opinion in *Nicodemus* demonstrates this point. *See generally* Brief of Appellant, Kenneth Dale Nicodemus v. State of Wyoming, No. S-16-0186, Wyoming Supreme Court; *see also Nicodemus*, 2017 WY 34, 392 P.3d 408. There was no scientific evidence advanced by Mr. Nicodemus nor

[6] *See* Nathan Yanchek, *Independent Interpretation of the Wyoming Constitution's Declaration of Rights: A More Open and Traditional Approach to Asserting Rights*, 20 Wyo. L. Rev. 395 (2020) (arguing for an approach akin to statutory interpretation).

considered by this Court seven years ago when *Nicodemus* was decided.[7] Until now, this Court has never had a full and complete evidentiary record or opportunity to consider whether mandatory LWOP sentences for late adolescents such as Mr. Hicks violate article 1, section 14.

Here, Mr. Hicks offered four different expert affidavits, including one from neuroscientist Dr. Karagh Brummond detailing the similarities between the late adolescent and juvenile brain, and another from psychologist Dr. Kayla Burd outlining the evolution of our social understanding of the "age of majority." Both experts cited numerous other experts and sources in their affidavits. Notably, at least 53 of Dr. Brummond's sources were dated 2017 and beyond, and at least 29 of Dr. Burd's sources were similarly dated. *See* Dr. Brummond Affidavit, Motion to Correct Illegal Sentences (Exhibit A), at 35–43, TR. at 1173; *see also* Dr. Burd Affidavit, Motion to Correct Illegal Sentences (Exhibit B), at ¶¶ 1–60, TR. at 1173. Significantly, none of the affidavits submitted by Mr. Hicks were rebutted by the State.

Despite this substantial, unrebutted scientific testimony offered by Mr. Hicks, the district court baldly concluded that Mr. Hicks did not meet "his heavy burden" without any further explanation as to how Mr. Hicks failed to do so. *See* Order Denying Defense Motion to Correct Illegal Sentences, at 7, TR. at 1204-12.

[7] *See also* Defense Motion to Correct Illegal Sentences, at 103–04, TR. at 1173.

Further, the district court failed to recognize that another difference between Mr. Nicodemus's and Mr. Hicks's claims is that Mr. Hicks argued his LWOP sentences violated Wyoming's equality and equal protection provisions, while Mr. Nicodemus did not. *See infra*, at Section IX. Mr. Hicks's stand-alone article 1, section 15 claim was also substantively distinguishable from Mr. Nicodemus's article 1, section 14 claim. *See infra*, at Section VIII. Finally, the district court failed to acknowledge that, unlike Mr. Nicodemus, Mr. Hicks, based on science and the evolving standards of decency articulated how his mandatory LWOP sentences were "cruel or unusual." *See infra*, at Section IV.

IV. THE DISTRICT COURT ERRED WHEN IT DID NOT EXTEND *MILLER* PROTECTIONS TO MR. HICKS AND FIND THE RELEVANT STATUTES UNCONSTITUTIONAL UNDER ARTICLE 1, SECTION 14 BECAUSE MANDATORY LWOP SENTENCES FOR LATE ADOLESCENTS ARE "CRUEL OR UNUSUAL"

This Court can and should do what the district court believed it could not do: extend *Miller* protections to late adolescents and find the relevant statutes are unconstitutional as applied to Mr. Hicks under Wyoming's article 1, section 14. This is because the uncontroverted testimony demonstrated that modern-day neuroscience has established that late adolescents have the same characteristics as juveniles that led to the recognition in *Roper/Graham/Miller* (as well as *Bear Cloud II, III*, and *Davis I*) that "children are different" and far less culpable than adults. In addition, our social understanding of the "age of majority" has substantially changed since *Roper*. These

evolved understandings reveal that the *Roper* bright line of 18 years of age is arbitrary and unconstitutional under our state constitution.

A. Juveniles and Late Adolescents are "Constitutionally Different" From Adults for the Same Reasons

The *Roper/Graham/Miller* trilogy as well as this Court's *Miller* precedent has embraced three common differences between juveniles and adults: (1) that juveniles have "[a] lack of maturity and an underdeveloped sense of responsibility" that "often result[s] in impetuous and ill-considered actions and decisions;" (2) that juveniles "are more vulnerable or susceptible to negative influence and outside pressures, including peer pressure;" and (3) "the character of a juvenile is not as well formed as that of an adult;" it is "more transitory, less fixed." *Roper*, 543 U.S. at 569–70. As the first court to lay out these differences, *Roper* relied on and cited scientific data that predated 2005 to draw its line between juveniles and adults at age 18. *See id.* Thereafter, *Graham* and *Miller* relied on the same *Roper* scientific data as did *Bear Cloud II* and *III* as well as *Davis I*. *See Graham*, 560 U.S. at 89; *Miller v. Alabama*, 567 U.S. 460, 471–72 (2012); *Bear Cloud II*, 2013 WY, ¶¶ 21–22; *Bear Cloud III*, 2014 WY, ¶ 19; *Davis I*, 2018 WY, ¶ 36.

Today, we have a more informed and evolved understanding of the differences between juveniles and adults; furthermore, our scientific and social understanding has evolved over the past two decades such that we now know that late adolescents share the same neuroscientific differences from adults that juveniles do. *See generally* Dr.

Brummond Affidavit, Motion to Correct Illegal Sentences (Exhibit A), TR. at 1173. Further, in 2004, the *Roper* court drew its bright line between juveniles and adults because it believed it had to do so somewhere and age 18 was "the point where society draws the line for many purposes between childhood and adulthood." *See Roper*, 543 U.S. at 574. But years after *Roper* now, the point where society draws the line between childhood and adulthood is far more nebulous. *See generally* Dr. Burd Affidavit, Motion to Correct Illegal Sentences (Exhibit B), TR. at 1173.

B. Dr. Brummond's Undisputed Affidavit Establishes that Late Adolescent Brains Share the Same (*Roper*) Characteristics as Juvenile Brains, Making Late Adolescents "Constitutionally Different" From Adults Too

Neuroscientist and University of Wyoming professor Dr. Karagh Brummond filed an affidavit that was considered by the district court. *See* Dr. Brummond Affidavit, Motion to Correct Illegal Sentences (Exhibit A), TR. at 1173. Of course, Dr. Brummond is not alone in what she has testified to; she cites to over 150 sources in her affidavit. *See id.* at 35–43. There is little-to-no-disagreement about neurodevelopment of the late adolescent brain. *See e.g.*, *Commonwealth v. Mattis*, 493 Mass. 216, 224–29, 224 N.E.3d 410, 420–24 (Mass. 2024). The State did not offer any evidence to the contrary.

Dr. Brummond testifies that "[t]he brains of late adolescents 18-21 years of age contain similar neurodevelopmental capabilities to the brains of juveniles 13-17 years of age compared to adults." Dr. Brummond Affidavit, at 2 (Exhibit A). Critically, Dr. Brummond cites to updated neuroscientific understanding since the *Roper/Graham/Miller* trilogy that

"supports that those 18-21 years of age, classified as late adolescents, are in fact more neurodevelopmentally similar to juveniles 13-17 years of age than to those classified as adults." *Id.* at 3. New, advanced studies have helped to evolve scientific understanding of the late adolescent brain. "Over the past decade, and importantly since *Miller* in 2012, there has been a significant movement to perform [ ] research studies in smaller categories of individuals, which has been instrumental in highlighting the similarities and differences between juveniles, late adolescents, and adult brains." *Id.*

Dr. Brummond describes that as our brains mature a refinement process, referred to as synaptic pruning, occurs decreasing the number of cell bodies in the brain. "Synaptic pruning allows the brain to destroy unused or underused synapses (communication points between neurons) to refine the rate and energy expenditure of the brain keeping the connections that are critical for development and losing those that are less important." *Id.* at 4. The last part of the brain to undergo synaptic pruning is the prefrontal cortex, which is responsible for "planning, decision-making, impulse control, working memory, and executive functioning—all behaviors that are lacking or impaired in many juveniles and late adolescents." *Id.* Dr. Brummond points to multiple studies dated after *Miller* to demonstrate synaptic pruning lasts until the ages of 25-30. *Id.*

In addition to the number of cell bodies of neurons, "the axons of brain cells are also an indicator of neurodevelopment." *Id.* at 5. Dr. Brummond notes, "Many axons of neuros in the brain are wrapped in a fatty sheath called myelin [ ]. When axons are myelinated,

they form white matter tracts [sic] in the brain and are mainly responsible for connecting and relaying information between the different regions of the brain." *Id.* Dr. Brummond reports that "Diffusion Tensor Imaging studies, which can image white matter tracks in the brain, have demonstrated that myelination of certain brain regions, especially the prefrontal cortex, continues well beyond the juvenile time period and into late adolescence." *Id.* at 5–6. Dr. Brummond also cites to studies that demonstrate "the important maturation of the connections from the frontal lobe required for development in the human brain for increased self-control and cognitive capacity, which is undeveloped in late adolescents similar to that observed in juveniles." *Id.* at 6.

Significantly, Dr. Brummond describes how the study of functional neurodevelopment is a very recent advancement, thanks to evolving technology. "Functional neuroscience determines how the different regions of the brain communicate with one another in response to particular changes in the environment." *Id.* at 7. Dr. Brummond cites to studies using new technology that demonstrate "late adolescents between the ages of 18-21 years of age are still in the period of 'transient immaturity' as supported by not only structural data [ ], but also in functional studies." *Id.* at 8.

Due to an overwhelming amount of neuroscientific studies that indicate late adolescents are neurodevelopmentally similar to juveniles as compared to adults, it is unsurprising that late adolescents share the *Roper* characteristics with juveniles. *See id.* at 9.

i. Roper characteristic one: "[a] lack of maturity and an underdeveloped sense of responsibility" that "often result[s] in impetuous and ill-considered actions and decisions"

Late adolescents, as the *Roper/Graham/Miller* trilogy recognizes for juveniles, also possess "[a] lack of maturity and an undeveloped sense of responsibility" that "often result[s] in impetuous and ill-considered actions and decisions." Dr. Brummond states, "Neuroscience research of late adolescent brain development supports the observed behaviors of issues in self-control, immaturity, risk-taking, and reward seeking." *Id.* at 2, 10. Dr. Brummond cites to "[d]ata from over 5,000 individuals ranging from 10–30 years of age across 11 different countries [that] demonstrates [ ] there is a clear mismatch between 'sensation seeking' and 'self-regulatory' behaviors in the late adolescent brain." *Id.* at 10. Significantly, "[s]elf-regulatory behaviors [ ] do not begin to stabilize until early adulthood between 23–26 years of age, which reflects the structural and functional maturation of the prefrontal cortex." *Id.*

In addition to a lack of self-control, like juveniles, late adolescents are poor future planners and decision-makers. "Late adolescents are again similar to what is observed in juveniles in their tendencies to plan for the short-term, focus on immediate gains [avoid delaying], delay gratifications, and [fail to] weigh future consequences. These behaviors are not similar to what is observed in most adults who plan for the long-term, can delay gratification and weigh future consequences of a decision." *Id.*

Further, Dr. Brummond concludes, "Heightened emotional situations can increase risk-taking behaviors in late adolescents." *Id.* at 2, 12. She notes that "the emotional circuits of the brain (commonly termed the limbic system) develop and mature, through myelination and synaptic pruning, at a much faster rate and earlier in development than the prefrontal circuits." *Id.* at 13. Dr. Brummond adds that "[t]his difference in maturation timing of the brain creates vulnerabilities for late adolescent behaviors, especially in emotionally charged situations." *Id.* Much like juveniles, "late adolescents are reliant on their more mature emotional circuits to drive their adaptive behaviors in a time of decision-making." *Id.* This can create a system imbalance where "the emotional, limbic regions of the brain are near maturation, but the prefrontal circuits that control some of those emotional processes are not yet mature…." *Id.* As a result, "late adolescents in emotionally charged situations perform significantly worse on decision-making tasks." *Id.*

Interestingly, one substantial study analyzed cognitive capacity (i.e., "verbal fluency, digit span, and resistance of memory interference") versus psychosocial ability where juveniles (aged 10–17 years) were compared to late adolescents (aged 18–25 years) and adults (aged 26–30 years). *Id.* at 15 (quotation marks omitted). "The results were staggering with cognitive abilities reaching near adult levels between 16–17 years old but psychosocial abilities not reaching adult levels until nearly 25 years of age." *Id.* These findings have been replicated through numerous studies. *Id.*

Dr. Brummond concludes, "Since the prefrontal cortex is not yet developed and has not yet expanded functional control to the emotional circuits required for decreased impulse control and self-regulation, when juveniles and late adolescents are in emotionally charged situations, their neural circuits and psychosocial skills are ill adapted to undergo problem-solving skills necessary for better decision-making." *Id.* Further, in "hot cognition" situations (i.e., instances where juveniles and late adolescents are required to use decision-making skills during an emotionally charged situation), it is demonstrated that "adolescents are more susceptible to issues of self-control when charged with emotional stimuli and this is especially the case for late adolescents as susceptibility continues into the mid-twenties." *Id.* at 16; *see also id.* at 20 ("behavioral studies of juveniles and late adolescents indicate that in psychosocial environments involving peers and stress, these groups of individuals are more likely to make risky, impulsive decisions compared to adults").

ii. Roper characteristic two: "are more vulnerable or susceptible to negative influence and outside pressures, including peer pressure"

Late adolescents, like juveniles, "are more vulnerable or susceptible to negative influence and outside pressures, including peer pressure." Dr. Brummond testifies, "Late adolescents have increased susceptibility to peer and social influences similar to juveniles." *Id.* at *2*, 17. She notes, "The offset in neurodevelopment of the prefrontal cortex and emotional circuits prime the brain of late adolescents to be more responsive to peer and social influences." *Id.* at 2, 18. Dr. Brummond observes, "Much of the

susceptibility of late adolescents and juveniles to peer influence comes back to the common neurodevelopmental timelines shared by these groups in primary brain regions. The presence of peers further enhances the activity of the emotional circuits of the brain, especially those involved in reward processing." *Id.* at 18.

iii. Roper characteristic three: "character [ ] is not as well formed as that of an adult," but, rather, "more transitory, less fixed"

The character of late adolescents, as the *Roper/Graham/Miller* trilogy noted about juveniles, "is not as well formed as that of an adult," but, rather, "more transitory, less fixed." Late adolescents, like juveniles, have both the social and neural capacity to change in character. Dr. Brummond highlights the capacity for late adolescents to develop skills and "neural control" so that they are less influenced by emotion and peer pressure. *See id.* at 2, 20. She notes, "As late adolescents continue to undergo neurodevelopmental progress, decision-making and executive control circuits of the prefrontal cortex will continue to develop and strengthen white matter pathways to emotional regions of the brain." *Id.* at 20. Dr. Brummond adds "providing juveniles and late adolescents with the support and resources to take on positive risks may help to thwart circumstances of negative peer pressures and risk-taking." *Id.* at 21.

Dr. Brummond concludes, "Neural plasticity increases amenability of rehabilitation and reform for late adolescents." *Id.* at 2, 27. She notes, "The reason why 'practice makes perfect' is due to the ability of the brain to undergo plasticity." *Id.* at 27. Plasticity is

described as "the ability for the neurons within the brain tissue to change and modify in response to the experiences encountered in the environment." *Id.* Dr. Brummond observes, "Because of this ongoing plasticity in the brain, childhood and adolescent experiences do not predict the fate of these individuals later in life. Instead, because of the ongoing plasticity occurring in the brain throughout juvenile and late adolescence these individuals are in fact more influenced by the opportunities for rehabilitation, intervention, and reform." *Id.* at 27–28. She continues, "Not only do behaviors that define 'transient immaturity' and hot cognitive events decrease as the brain matures but studies have also demonstrated that most juvenile and late adolescent offenders will not continue to offend as adults." *Id.* at 28; *see also id.* at 30–31.

C. Dr. Burd's Undisputed Affidavit and Other Unchallenged Sources Demonstrate That Society's Ideas About the "Age of Majority" Have Evolved Since *Roper*, Rendering the Line Drawn at 18 Arbitrary and Unconstitutional

The concept of adulthood is fluid. *See* Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 Tul. L. Rev. 55 (2016). For a very long time, the age of majority was rooted in the English common law tradition, which recognized that age as 21 for centuries. *Id.* at 64. This remained the decided age of majority for almost an additional two hundred years after our nation's founding. *See id.* In 1942, Congress lowered the drafting and recruiting age from 21 to 18 to meet wartime demands. *Id*. Thereafter, the age of majority and the age to vote remained at 21 for an additional twenty-nine years. *Id.* In 1971, the Twenty-Sixth Amendment was passed, lowering the voting age to 18. *Id.* at 65. This shift influenced a

sea-wave change to a new age of majority nationwide, replacing the centuries-old, recognized age of 21 with 18. *Id*.[8]

As psychologist and University of Wyoming professor Dr. Kayla Burd testified, adult roles for individuals in their teens and early twenties have shifted such that marriage and parenthood are being delayed to later in life as compared to 20 years ago. *See* Dr. Burd Affidavit (Exhibit B), at ¶¶ 18–21. Further, independence from parental support is becoming much longer than it was 20 to 30 years ago. According to a January 2024 Pew Research Center study, "just 16% of emerging adults aged 18 to 24 are entirely financially independent from their parents." *Id.* at ¶ 11.

Across the nation, in a variety of contexts, there persists an innate understanding that late adolescents, even up to the mid-twenties, are particularly suspended in development somewhere between adolescence and adulthood.[9] A vast number of reputable national

[8] *See also* Defense Motion to Correct Illegal Sentences, at 48–52, TR. at 1173 (other sources, including Wyoming laws, demonstrating the "age of majority" shifts over time and contexts).

[9] Recently, the Supreme Court reminded us that the rule from *Miller* was not categorical in nature. *See Jones*, 593 U.S. at 107 (quoting *Miller*, 567 U.S. at 483). Thus, this Court need not assess whether a national consensus exists in considering Mr. Hicks's request to apply *Miller* protections to him, a late adolescent. *See e.g., In re Monschke*, 197 Wash.3d

organizations, including the American Psychological Association, the National Academy of Sciences, the Center for Law, Brain & Behavior at Massachusetts General Hospital, the American Academy of Pediatrics, and the Institute of Medicine confirm this to be true. Dr. Burd Affidavit, Motion to Correct Illegal Sentences (Exhibit B), at ¶ 62, TR. at 1173. Late adolescents are necessarily afforded some responsibility upon reaching the so-called "age of majority," but more and more states and entities are recognizing the lessened culpability and increased capacity for reform they share with juveniles. Legislation, such as "Second Look" laws and expansions of youthful offender definitions, evolving caselaw and judicial initiatives, national organizations and programs all reflect the observable trend toward understanding the experiences and needs of late adolescents.[10]

Furthermore, several other states' highest courts have found that the "evolving standards of decency" necessitate treating late adolescents like juveniles in the cruel and/or unusual punishment context. State courts have generally fallen into two camps

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305, 326–27 (2021) (quoting *Miller*, 567 U.S. at 483) (emphasis in original). Nevertheless, modern-day national trends do demonstrate increased protections for late adolescents in the criminal legal system, including in the *Miller* context.

[10] *See also* Defense Motion to Correct Illegal Sentences, at 54–66, TR. at 1173 (detailing "Raise the Age" efforts, sentencing and other programs, and specialized courts and correctional units focused on late adolescents).

when applying *Miller* protections to late adolescents—they have either extended *Miller* to this group such that they have the right to a *Miller* individualized sentencing hearing like juveniles or they have categorically barred mandatory LWOP sentences for late adolescents. Washington and Michigan represent the first camp—Washington has extended *Miller* protections to youthful offenders up to the age of 21 and Michigan has done so for those up to the age of 18.[11] This is the camp Mr. Hicks's claims are in. In the other camp, Massachusetts has categorically held that no youthful offender up to the age of 21 may be subjected to an LWOP sentence.[12]

Next, a minority number of states still allow sentencing schemes with mandatory LWOP sentences for first-degree murder convictions. Today, Wyoming is one of those jurisdictions. *See* Wyo. Stat. Ann. § 6-2-101(b); *cf. Mattis*, 493 Mass. at 233, n. 25 (erroneously listing Wyoming as one of 22 states that does *not* mandate LWOP sentences for first-degree murder convictions) (emphasis added). When Wyoming is properly counted as a state that *does* mandate such a sentence, 21 states, at the time *Mattis* was

[11] *See generally Monschke*, 197 Wash.2d 305; *People v. Parks*, 510 Mich. 225, 987 N.W.2d 161 (2022).

[12] *See generally Mattis*, 493 Mass. at 224–29, 224 N.E.3d at 420–24.

being considered, did not mandate LWOP sentences. *See Mattis*, 493 Mass. at 233–34.[13] Today, of the remaining 29 states, only 12 (now that the *Mattis* court barred mandatory LWOP for late adolescents up to age 21), including Wyoming, mandate LWOP sentences for first-degree murder convictions. *See id.*; *see also* Wyo. Stat. Ann. § 6-2-101(b). However, two of those states, Hawaii and Iowa, according to the *Mattis* court provide some discretion to not impose LWOP in their statutory schemes. *See id.*, n. 27. Thus, since *Mattis* was decided, Wyoming is now one of ten states that requires all individuals, including late adolescents such as Mr. Hicks, to be sentenced to LWOP for first-degree murder convictions. *See id.* at 234; *see also* Wyo. Stat. Ann. § 6-2-101(b).

D. Holding the Line for *Miller* Protections Between 17- and 18-Years-Old and Allowing Mandatory LWOP Sentences for Late Adolescents Such As Mr. Hicks is "Cruel" Punishment Under Article 1, Section 14

The Wyoming Constitution's language, text, structure, history, living and breathing nature, and attendant case law relevant to *Miller* all support our state constitution can do what the federal courts have not done—extend *Miller* to late adolescents. Although the *Roper* court set a bright-line rule of when an offender is protected as a juvenile versus an adult between 17- and 18-years-old, that line has been demonstrated as outdated and

[13] *See* also Defense Motion to Correct Illegal Sentences, at 70–72, TR. at 1173 (explaining how the *Mattis* court erred in including Wyoming as a state without mandatory LWOP sentences for first-degree murder).

arbitrary. This Court does not have to hold that line. Other courts have decided not to; in fact, in *Jones* the Supreme Court told states they were free to do what they wanted in the *Miller* context. *See e.g., Parks*, 510 Mich. at 247; *Monschke*, 197 Wash.2d at 307 (internal citation omitted); *see also Mattis*, 493 Mass. at 244–47 (Kafker, J., concurring) (recognizing the Massachusetts legislature treated late adolescents differently depending on context).

Based on late adolescents sharing with juveniles the three *Roper* characteristics that make youth different than adults, including data and understanding based on neuro- and social science, today's social trends in protecting late adolescents, the ever-flexible "age of majority" being dependent on the context, and that none of the legitimate penological purposes for sentencing justify LWOP sentences for late adolescents, this Court should hold that Mr. Hicks's mandatory LWOP sentences are "cruel" under article I, section 14 of the Wyoming Constitution.

In application of article I, section 14, this Court must look at "cruel" disjunctively from "unusual." *See Johnson*, 2003 WY 9, ¶ 35, 61 P.3d at 1249. Thus, even if it is not unusual to sentence late adolescents such as Mr. Hicks to mandatory LWOP sentences that does not matter. Such a sentence is still cruel and, therefore, unconstitutional under article I, section 14. Both state and federal precedents have analyzed "cruel" as being disproportionate with the culpability of the offender—punishment must be "graduated and proportioned" to the offender and the offense. *See Bear Cloud III*, ¶ 25 (quoting *Miller*, 567 U.S. at 469) (quoting *Roper*, 543 U.S. at 560). "'Proportionality' is a concept that also

evolves, with the 'evolving standards of decency that mark the progress of a maturing society.'" *Bear Cloud III*, 2014 WY 113, at ¶ 25 (quoting *Miller*, 567 U.S. at 469) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

Here, it has been demonstrated that Mr. Hicks's culpability (that of a late adolescent at the time of his crimes) is lessened in the same ways Evan Miller's and Kuntrell Jackson's culpability were lessened in *Miller*. Late adolescents share the instructive three *Roper* characteristics (established almost exclusively by neuroscience) with juveniles that have been at the core of the *Roper/Graham/Miller* trilogy and Wyoming's application thereof. *Roper* was decided in 2005 and relied on science dated only up to 2004; we have learned a great deal in the last two decades. Our neurodevelopment and social science understanding has changed. The Wyoming Constitution is a living and breathing document and is easily adaptable to changes in science like this. *See County Court Judges Ass'n v. Sidi*, 752 P.2d 960 (Wyo. 1988).

In addition, this Court has taken special care to ensure that juveniles (unless found to be "permanently incorrigible") are allowed some life following their prison terms. For example, this Court set the most protective standard of its time when it held that sentences for closely related aggregate counts for juvenile offenders that exceed 45 years (or prevent parole eligibility until 61 years of age) are "de facto life" sentences that violate *Miller*. *See Bear Cloud III*, 2014 WY 113, at ¶¶ 34–35, n. 10. In *Bear Cloud III*, the Court expressed concern about geriatric release being no meaningful opportunity for release. In

citing to the Iowa Supreme Court's reasoning for its decision to extend *Miller* protections to aggregate counts, the *Bear Cloud III* court observed, "The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*, 560 U.S. at 74, 130 S.Ct. at 2030, 176 L.Ed.2d at 845–46." *Id.* at ¶ 34 (quoting *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013)).

The reasons the *Bear Cloud III* court cared about Mr. Bear Cloud and his opportunity for meaningful parole are the same as those for Mr. Hicks. He and Mr. Bear Cloud share the same *Roper* characteristics amply discussed and analyzed throughout this brief. Further, although Mr. Hicks was convicted of serious, irrevocable offenses—conspiracy to commit murder in the first degree against both victims and aiding and abetting (i.e., accessory after the fact) in the murder of one victim— the Supreme Court has noted that LWOP is "the second most severe penalty permitted by law" and "shares some characteristics with death sentences that are shared by no other sentences." *Graham*, 560 U.S. at 69 (quoting *Harmelin*, 501 U.S. at 1001). Indeed, Mr. Hicks's mandatory LWOP sentences have altered his life with a forfeiture that is irrevocable. *See Graham*, 560 U.S. at 69. His sentences "deprive[ ] [him] of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence." *Id.* (internal citation omitted).

In addition, Mr. Hicks was not convicted as the principal actor in either murder. As recognized by this Court, important to the *Miller* court in Kuntrell Jackson's case was that he was not the principal actor and that this "should be considered 'before depriving a 14-year-old of any prospect of release from prison." *Bear Cloud III*, 2014 WY 113, at ¶ 28 (quoting *Miller*, 567 U.S. at 477–78) ("[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.") (quoting *Graham*, 560 U.S. at 69)).

Next, Mr. Hicks's mandatory LWOP sentences are "cruel" because under article I, section 14 (read in conjunction with article I, sections 15 and 16), its structure and that of the Wyoming Constitution's entire Declaration of Rights demonstrates broader protections than available under the Eighth Amendment. We not only have a provision that reads "cruel or unusual punishment," but we have two more provisions that the federal constitution (and most state constitutions) does not have, and we have thirty-nine enumerated individual rights in our Declaration of Rights. Our framers valued a criminal legal system that operated with dignity and integrity. Without any substantive discussion in the *Journal and Debates*, they passed section 15, requiring the penal code to honor the "humane principles of reformation and prevention." WYO. CONST. ART. I, sec. 15. Again, with no substantive discussion, essentially as a matter of course, our framers passed section 16, requiring humane treatment of Wyoming's prisoners and safe and comfortable prisons. *See* WYO. CONST. ART. I, sec. 16. These sections exist for reasons and they cannot

be ignored. *See Cathcart*, 2004 WY 49, ¶¶ 39–40 (all portions of the constitution must be read *in pari materia* and no part should be rendered superfluous).

Significantly, although Mr. Hicks is not requesting a categorical rule, i.e., that late adolescents are barred from receiving LWOP sentences, it is still instructive as to whether his sentence is "cruel" that modern-day social trends demonstrate increasing protections for late adolescents in the criminal legal system. Whether it is a pretrial or post-conviction process, parole or sentencing review, or state supreme courts providing more protections under their constitutions, the trend in providing greater protections to late adolescents is undeniable. *See generally* Dr. Burd Affidavit, Motion to Correct Illegal Sentences (Exhibit B), TR. at 1173.

Next, even though society still draws the "age of majority" at 18 in some contexts, such as voting, age 18 as the "age of majority" when the young person has been charged with a crime is an entirely different context that must be accounted for. It is cruel to not do so. Yes, many juveniles and late adolescents are capable of operating as adults in "cold cognition," non-emotionally charged situations, such as voting and serving on a jury. However, in "hot cognition" situations, juveniles and late adolescents perform terribly and far off from adults. They are unreasonable risk-takers and impetuous. They are immature and lack adequate decision-making skills. And they have very poor self-control. *See* Dr. Brummond Affidavit, Motion to Correct Illegal Sentences (Exhibit A), at 16, TR. at 1173.

Thankfully, this changes for most juveniles and late adolescents over time, such that they are far more capable of reformation and rehabilitation than adults. *See id.*

Finally, mandatory LWOP sentences are "cruel" for late adolescents because none of the legitimate penological justifications are being served by such sentences, including Wyoming's animating purpose of reformation. *See Graham*, 560 U.S. at 71 ("the case for retribution is not as strong with a minor as with an adult" because "the heart of the retribution rationale" is blameworthiness); *see also Miller*, 567 U.S. at 472–73 (as to incapacitation, "[d]eciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible – but incorrigibility is inconsistent with youth"); *see also* Dr. Brummond Affidavit (Exhibit A), at 22–24 (as to deterrence, "the tendency for negative risk . . . decreases as the prefrontal cortical brain regions mature through development"); *see also* Defense Motion to Correct Illegal Sentences, at 72–81, TR. at 1173 (further discussing how none of the penological justifications are served by mandatory LWOP sentences for late adolescents).

Significantly, "[a] sentence of life imprisonment without parole [ ] cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society." *Graham*, 560 U.S. at 74. Much like juvenile offenders, late adolescents have "limited moral culpability" and a high capacity for reformation; to honor the rehabilitative ideal of sentencing and Wyoming's

central sentencing purpose of reformation, Wyoming courts must be permitted discretion to consider the youthfulness of late adolescents before imposing a LWOP sentence.

E. Holding the Line for *Miller* Protections Between 17- and 18-Years-Old and Sentencing a Late Adolescent, Such as Mr. Hicks, to Mandatory LWOP is "Unusual" Punishment Under Article 1, Section 14

Mr. Hicks's mandatory LWOP sentences are "unusual" in both the literal and substantive sense. Data collected by the defense supports there are a minimal number of late adolescents serving LWOP or life as a matter of law in the Wyoming Department of Corrections' current system. *See* Wyoming Department of Corrections Daily Count Sheet, July 9, 2024, Motion to Correct Illegal Sentences (Exhibit H), TR. at 1173. Further, LWOP or life as a matter of law sentences are substantively unusual in that they represent "unusually excessive punishment."

First, Mr. Hicks's legal team received data from the Wyoming Department of Corrections outlining how many individuals received an LWOP or life as a matter of law sentence up to through the age of 21 that were in DOC's system. *See id.* Note that this data only reflects the ages of inmates at the time of their sentencing hearings, not offenses. *Id.* In addition, it includes inmates aged 14 through 21 at the time of their sentencing hearings even though Mr. Hicks requests this Court extend *Miller* protections only up to, not through, 21 years of age. Thus, the data is imperfect, but, quite frankly, it overestimates the number of individuals for our purposes, which, thus, makes it a very liberal estimate. There are approximately 2,376 inmates in Wyoming DOC facilities. *See*

id. Out of those 2,376, approximately 47 are still serving or have served LWOP or life as a matter of law prison terms in a Wyoming DOC prison or other sanctioned facility.[14] *See* Lifers Age at Sentence – All from WCIS – Round Two (Exhibit I). This means that, quite liberally, 1.98% of the current inmate population (aged through 21 years-old) is or has been subjected to a LWOP or life as a matter of law sentence. Recall that the quantity 47 also includes those who have already been paroled under *Miller* or commuted or termed for some other reason (such as death) and are no longer part of the current inmate population. While the statistics cannot be perfect based on the data provided, it does give us some sense of just how unusual a LWOP or life as a matter of law sentence is for those aged 14 to 21 years of age in Wyoming's current DOC system.

Next, Michigan's constitution has the same "cruel or unusual punishment" clause as does Wyoming's. *See* MICH. CONST. 1963, ART. I, § 16. The Michigan Supreme Court has held that this clause prohibits "unusually excessive imprisonment." *People v. Lorentzen*, 387 Mich. 167, 170, n. 1, 172, 194 N.W.2d 827 (1972). The *Lorentzen* court noted that such concept "is informed by 'evolving standards of decency' that mark the progress of a maturing society." *Id.* at 179. As the Michigan Supreme Court observed in *Parks*, "[t]he definition of this standard is 'progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Parks*,

[14] These individuals are marked with blue highlight (as inputted by DOC personnel).

510 Mich. at 241, 987 N.W.2d at 169 (quoting *Lorentzen*, 387 Mich. at 178). As mentioned above, today's neurodevelopmental and social science supports the *Roper* characteristics apply to late adolescents just as much as juveniles, there are social trends showing increased protections for late adolescents in the criminal legal system, and we have an enlightened understanding that the "age of majority" is necessarily flexible based on the situation. These all support that mandatory LWOP sentences for late adolescents have become "unusually excessive imprisonment," and, thus, "unusual" and unconstitutional under article I, section 14 of the Wyoming Constitution.

V. THE DISTRICT COURT ERRED BY FAILING TO FIND THAT MR. HICKS'S MANDATORY LWOP SENTENCES WERE SEPARATELY UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 15

Mr. Hicks's mandatory LWOP sentences are also separately unconstitutional under article I, section 15, which dictates that "[t]he penal code shall be framed on the humane principles of reformation and prevention." Significantly, article I, section 15 provides broader protections than the federal constitution in this instance as there is no federal counterpart to it. The same analysis of the *Saldana* and other factors that pointed to article I, section 14 granting more protections to Mr. Hicks also apply in this instance.

That reformation is a constitutionalized and critical justification for sentencing in Wyoming has been substantially briefed herein. However, in *Oakley v. State*, this Court noted it had previously observed that article I, section 15 speaks to the penal code, not sentencing. 715 P.2d 1374, 1379 (Wyo. 1986) (quoting *Jahnke v. State*, 692 P.2d 911, 930

(Wyo. 1984)). Neither the *Oakley* nor the *Jahnke* court further expanded on this interpretation. However, Professor Keiter has written: "This interpretation effectively means that this section can be used only to challenge statutory sentencing provisions and not an actual sentence, at least so long as the sentence is within the statutory limits." Keiter, at 86.

Here, Mr. Hicks challenges his actual sentences as unconstitutional, but he does so by challenging three statutory provisions—Wyo. Stat. Ann. § 6-2-101(b) (2004) (the first-degree murder penal provision), Wyo. Stat. Ann. § 6-1-201(b)(iii) (1983) (accessory before the fact provision that requires the same penalties and punishment for the principal apply), and Wyo. Stat. Ann. § 6-10-301(c) (parole provision preventing Mr. Hicks's parole)—as unconstitutional in authorizing his mandatory LWOP sentences. Mr. Hicks is challenging statutory sentencing provisions; specifically, Wyo. Stats. Ann. § 6-2-101(b) (2004) and § 6-1-201(b)(iii) (1983) are statutory sentencing provisions, such that article I, section 15 can and should provide relief for Mr. Hicks.

VI. THE DISTRICT COURT ERRED WHEN IT FAILED TO FIND THAT MR. HICKS'S MANDATORY LWOP SENTENCES VIOLATED WYOMING'S EQUALITY AND EQUAL PROTECTION PROVISIONS

As a late adolescent convicted of first-degree murder (via conspiracy and accessory theories), Mr. Hicks is being treated differently than a similarly situated juvenile. Multiple juvenile offenders with similar or even principal-based convictions have been paroled, thankfully, under Wyoming's application of *Miller*. *See e.g., State v. Mares*, 2014

WY 126, 335 P.3d 487 (Wyo. 2014). At the core of their releases to parole and of *Miller* and Wyoming's application thereof are the three *Roper* characteristics of youth. As has been demonstrated by the evidence submitted with this brief (and was filed with the district court motion), late adolescents share those same characteristics.

However, late adolescents must be sentenced to LWOP (or life as a matter of law) for first-degree murder convictions whereas juveniles now enjoy a meaningful opportunity for release via parole after 25 years of their sentences having been served. *See* Wyo. Stat. Ann. § 6-2-101(b); *see also* Wyo. Stat. Ann. § 6-10-301(c). Because there is no substantial difference between juvenile and late adolescent culpability based on their shared *Roper* characteristics and the line drawn by *Roper* between them has been demonstrated as arbitrary, Mr. Hicks's mandatory LWOP sentences violate Wyoming's equality provisions under Wyoming's heightened basic scrutiny, including article I, sections 2 and 3, especially when read in conjunction with article I, section 36.

Wyoming's "Equality of all" provision reads: "In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal." WYO. CONST. ART. 1, § 2. As we, once again, consider the *Saldana* factors, this provision provides greater equal protection rights to individuals in Wyoming than does the Fourteenth Amendment's equal protection clause. Its language differs substantially from the Fourteenth Amendment's, including even "the pursuit of happiness." As has already been mentioned, the text and structure of the Wyoming Constitution also differ

substantially from that of the federal constitution, supporting further that our provision provides greater equal protection rights to Mr. Hicks than its federal counterpart does.

Significantly, the Wyoming Constitution also "requires that laws affecting rights and privileges shall be without distinction of race, color, sex, or *any circumstance or condition whatsoever other than individual incompetency." See* WYO. CONST. ART. 1, § 3 (emphasis added). In construing both articles I, section 2 and 3, this Court stated: "Applying the rule of construction used in *Longfellow v. State,* 803 P.2d 848, 851 (Wyo.1990) and *Gezzi v. State,* 780 P.2d 972, 974 (Wyo.1989), Wyo. Const. art. 1, § 36 is construed to make the rights noted in Article 1 illustrative rather than exhaustive." *Johnson v. State Hearing Examiner's Office*, 838 P.2d 158, 165 (Wyo. 1992) (internal citation omitted).

As Professor Keiter notes, "Citing the state constitution's manifold equal protection provisions, the [Wyoming Supreme Court] has interpreted the state constitution's equal protection clause to mandate a more rigorous degree of judicial scrutiny than the deferential rational basis review that generally applies under the Fourteenth Amendment's Equal Protection Clause." Keiter, at 31. Professor Keiter also writes, "In addition, the Wyoming Supreme Court has regularly invoked the constitutional principles of equality and uniformity to protect individuals and other entities against governmental power." *Id.* at 36. Further, "[u]nlike the US Constitution, this provision recognizes the 'pursuit of happiness' as an inherent right, but to merit judicial protection such right may

be limited to liberty interests recognized at common law as essential to the orderly pursuit of happiness." Keiter, at 48.

Significantly, the Honorable M.C. Brown, a constitutional delegate, in an 1898 address regarding the making of the Wyoming Constitution made several salient comments (supporting the constitutional history *Saldana* factor) about the importance of equality in Wyoming. *See* Constitution Making, An Address, Winter of 1898, Hon. M.C. Brown, 104–05.[15] Further, this Court has noted the significance of "equality" in our constitution: "Equality, which was forthrightly proclaimed in the Declaration of Independence, but left out of the original United States Constitution under the pressure of the slavery question, is emphatically, if not repeatedly, set forth in the Wyoming Constitution." *Johnson*, 838 P.2d R 164 (quoting Michael J. Horan, *The Wyoming Constitution: A Centennial Assessment,* XXVI Land & Water L. Rev. 13, 21 (1991) (footnote omitted)); *see also* WYO. CONST. ART. 1, §§ 2 and 3; ART. 3, § 27).

Recognizing this, the *Johnson* court stated the following: "Considering the state constitution's particular call for equal protection, the call to recognize basic rights, and notion that these particular protections are merely illustrative, the Wyoming Constitution is construed to protect people against legal discrimination more robustly than does the federal constitution." *Johnson*, 838 P.2d at 165.

[15] *See* Motion to Correct Illegal Sentences, at 98, TR. at 1173 for website address.

Relying on Justice Stevens' approach, the *Johnson* court created a more heightened basic standard of scrutiny for equal protection than the federal rational basis test, setting out four factors. This Court asks: (1) what class is harmed by the legislation and whether that group has suffered a "tradition of disfavor" by state laws; (2) what is the public purpose served by the relevant law; (3) what is the characteristic of the disfavored class justifying disparate treatment; and (4) "how are the characteristics used to distinguish people for such disparate treatment relevant to the [proposed public] purpose" the law is intended to serve? *See id.* at 165 (internal citations omitted) (quoting Note, *Justice Stevens' Equal Protection Jurisprudence,* 100 Harv. L. Rev. 1146, 1155 (1987)).

In *Johnson*, the appellants, who were under the age of 19, had their licenses suspended because of their convictions for possession or consumption of alcohol, non-driving offenses. They brought several challenges, including an equal protection claim under the Wyoming Constitution. Following its newly minted four-factor test, the *Johnson* court first considered the harms or burdens on the appellants by the law and whether the appellants were a part of a group that had been subject to a tradition of disfavor. The *Johnson* court weighed this factor to the appellants' favor. "Unlike those between the ages of nineteen and twenty-one years, this group not only lost their driver's licenses but were faced with payment of substantially higher premiums for substantially reduced insurance coverage. As well, those under eighteen are 'politically

powerless' since they are deprived of the right to vote and thus unable to make legislators directly accountable for such disparate treatment." *Id.* at 166.

Here, Mr. Hicks is part of a group—late adolescents (aged 18 up to 21) convicted of first-degree murder—that suffers a substantial burden under mandatory LWOP or life as a matter of law sentences and has been subject to a tradition of disfavor in our courts since *Roper*, decided almost two decades ago. Juveniles convicted of first-degree murder have been recognized as constitutionally different and have enjoyed meaningful opportunity for parole in Wyoming since our legislation embracing *Miller* became effective—July 1, 2013. *See Davis v. State (Davis II)*, 2020 WY 122, ¶ 12, 472 P.3d 1030, 1034 (Wyo. 2020) (finding *Miller* became effective in Wyoming on this date). Late adolescents and juveniles are constitutionally different for the same reasons. However, late adolescents have been disfavored based on the arbitrary line drawn and followed since *Roper*.

Next, in *Johnson*, the Court asked what government purpose was being served by the law challenged. There, the State proclaimed it was to prevent drunk driving by youth. *Johnson*, 838 P.2d at 165 Here, the purposes of sentencing late adolescents to mandatory LWOP or life as a matter of law sentences for first-degree murder are the sentencing justifications—retribution, deterrence/prevention, incapacitation, and rehabilitation. None of those interests are being served by Mr. Hicks's mandatory LWOP sentences. *See supra* Section IV. D.

The *Johnson* court's third factor asks: "what is the characteristic of the group that justifies the disparate treatment as compared to those between nineteen and twenty-one years of age or compared to those who are older than twenty-one years of age?" The State argued that differentiating those under the age of 19 from 19 to 21-year-olds was justified because of the lack of independence for those under the age of 19, i.e., that they are subject to rules made by adults. The Court strongly rejected this argument as conjecture. *See id.* at 167 (citing *Nehring v. Russell*, 582 P.2d 67, 77 (Wyo. 1978)).

Here, it has been demonstrated that the line drawn by *Roper* between 17- and 18-year-olds is no better than conjecture. It is arbitrary. Late adolescents share the same youthful characteristics with juveniles that have served as the backbone of the *Roper/Graham/Miller* trilogy and its application in Wyoming. The line rests on unfounded assumptions about not only brain science, but also the "age of majority" and social psychology. All these assumptions have been demonstrated as incorrect through the expert affidavits filed in this matter.

Finally, the *Johnson* court analyzed the fourth factor. "How are the characteristics used to distinguish people for such disparate treatment relevant to the purpose that the challenged laws purportedly intend to serve?" *Id.* The Court found that there was no evidence of relevance in suspending the driving privileges of those under the age of 19 but not those 19 to 21 years of age to improving highway safety or preventing the use or possession of alcohol. *Id.*

Here, the reasons that juveniles were found to be "constitutionally different" in *Roper*, then *Graham*, then *Miller*, and then Wyoming's cases applying that trilogy, are the same for late adolescents. Furthermore, late adolescents do not threaten the State's interests in retribution, deterrence/prevention, incapacitation, and rehabilitation any more than juveniles. These purposes are not served by Mr. Hicks's mandatory LWOP sentences.

VII. THE DISTRICT COURT ERRED WHEN IT FAILED TO FIND THAT MR. HICKS'S LWOP SENTENCES WERE ALSO UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT

After the extensive state constitutional claims, it may seem like a mere afterthought to raise this federal claim; however, because all the reasons already discussed also point to Eighth Amendment protection for Mr. Hicks, it is not a stretch to raise the federal provision. Here too, that the *Roper* characteristics are shared between juveniles and late adolescents, the social trends show there are increasing protections for late adolescents in the criminal legal system, the "age of majority" is a necessarily flexible concept based on the situation, and none of the sentencing justifications are being served by LWOP sentences for late adolescents, Mr. Hicks's mandatory LWOP sentences are cruel and unusual under the Eighth Amendment.[16]

[16] *See also* Defense Motion to Correct Illegal Sentences, at 93–95, TR. at 1173.

VIII. THE DISTRICT COURT ERRED WHEN IT APPLIED AN "UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT" STANDARD TO ITS CONSTITUTIONALITY DETERMINATION OF THE RELEVANT STATUTES

A. THIS COURT SHOULD ABANDON THE "UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT" STANDARD WHEN DETERMINING THE CONSTITUTIONALITY OF STATUTES

The district court erred when it applied the amorphous "unconstitutional beyond a reasonable doubt" standard when determining Mr. Hicks's as-applied challenges to the relevant statutes. This is a strange burden to apply to the constitutionality of statutes as this is the burden of proof required in a criminal trial. *See In re Winship*, 397 U.S. 358, 361 (1970). This Court has moved away from this circumstantially nebulous standard when the right at issue is fundamental in nature. *See Reiter v. State*, 2001 WY 116, ¶ 7, 36 P.3d 586, 589 (Wyo. 2001); *see also Hardison*, 2022 WY 45, ¶¶ 9—10. The application of this standard in analyzing the constitutionality of statutes has also been criticized by scholars. *See e.g.,* Hugh Spitzer, *Reasoning v. Rhetoric: The Strange Case of "Unconstitutional Beyond a Reasonable Doubt*," 74 RUTGERS L. REV. 1429 (2022); *see also* Charles L. Black, Jr., *The People and the Court: Judicial Review in a Democracy* 193–209 (1960); Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 533—38 (2012).

This "unconstitutional beyond a reasonable doubt" standard's application to the constitutionality of statutes first appeared in one Pennsylvania case 214 years ago. Spitzer, *Reasoning v. Rhetoric* at 1431 (citing *Commonwealth ex rel. O'Hara v. Smith*, 4 Binn. 117, 123 (Pa. 1811) ("an act of the legislature is not to be declared void, unless the

violation of the constitution is so manifest as to leave no room for reasonable doubt")). The concept ascended following publication of an article in the Harvard Law Review in 1893 by Professor James Bradley Thayer. *See id.* (citing James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893)). Although Thayer was influential to the Supreme Court justices of his time, the Court only cited to his "unconstitutional beyond a reasonable doubt" standard eleven times post publication of his article, and primarily in dissenting opinions. *See id.* at n. 7. Professor Spitzer emphasizes, "The single post-Thayer Supreme Court majority opinion expressing the 'unconstitutional beyond a reasonable doubt' statement was issued more than six decades ago." Spitzer, at 1432 (citing *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 90–91 (1958)).

Nevertheless, some state courts, including this Court, have applied the standard at random, often intertwining it with other principles. *See id.* at 1432–33 (internal citation omitted). Professor Spitzer summarizes state court use of the standard as follows: (1) its use seems random; (2) very few courts have actually meaningfully engaged with the standard; and (3) where the standard has been cited, 83% of cases reviewed from 2000 to 2020 were decisions upholding the constitutionality of the statutes, and over three-fifths of those were in civil, not criminal cases. *See id.* at 1433.

This standard is entirely unhelpful to courts and should be eliminated because "[q]uoting an evidentiary standard of proof and posturing it as a rule of decision can

mislead both lawyers and the public, or, still worse, appear disingenuous and reduce respect for the judiciary." *Id.* As the final arbiter of interpreting the state constitution, this Court "can just as well emphasize the burden on challengers and the concept that [it] invalidate[s] a law only if it is clearly, plainly, or manifestly unconstitutional" as courts regularly do. *See* Spitzer, *Reasoning v. Rhetoric* at 1459 (citing Christoper R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. TEX. L. REV. 169, 176–78 (2015)).

B. EVEN IF THIS COURT DOES NOT FULLY ABANDON THE "UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT" STANDARD, IT SHOULD NOT BE APPLIED HERE

The district court erred when it decided not to apply the *Reiter* standard. As this Court stated in *Reiter*, the "unconstitutional beyond a reasonable doubt" standard "does not apply where a citizen's fundamental constitutional right, such as free speech, is involved." The Court continued, "The strong presumptions in favor of constitutionality are inverted, the burden then is on the governmental entity to justify the validity of the [statute], and this Court has a duty to declare legislative enactments invalid if they transgress that constitutional provision." *Reiter*, 2001 WY 116, ¶ 7, 36 P.3d at 589 (internal citations and quotations omitted).

Here, the district court commented that counsel did not cite to any authority that the prohibition against cruel and (or) unusual punishment was a fundamental right. Most of the Bill of Rights, however, have been formally recognized as fundamental rights; the Eighth Amendment among them. *See Timbs v. Indiana*, 586 U.S. 146, 150 (2019). Since

1962, the Eighth Amendment's prohibition on cruel and unusual punishment has been recognized as incorporated and applicable to the states through the Fourteenth Amendment due to its fundamental nature. *See Robinson v. California*, 370 U.S. 660, 667 (1962). Because the right is fundamental, the State, having presented no evidence to challenge the defense expert witnesses, failed to meet its burden. *See Reiter*, 2001 WY, ¶ 7, 36 P.3d at 589.

C. No Matter How the Court Squares It, Mr. Hicks Has Met the Burden

While the Court should abandon the Thayer standard or find that a fundamental right is implicated and apply the *Reiter* standard, no matter how the Court squares it, Mr. Hicks has met the burden. Specifically, Mr. Hicks has offered considerable, unrebutted evidence in the form of lengthy affidavits that late adolescents share the same *Roper* characteristics as juveniles. If not this record, it is hard to imagine one that would satisfy the burden.

IX. THE DISTRICT COURT ERRED WHEN IT FAILED TO FIND THAT EVEN IF LATE ADOLESCENTS GENERALLY SHOULD NOT RECEIVE A *MILLER* HEARING, MR. HICKS SHOULD AS HIS YOUTHFULNESS WAS NOT CONSIDERED AT HIS 2006 SENTENCING HEARINGS[17]

At his 2006 sentencings hearings where the jury and the judge imposed LWOP sentences, Mr. Hicks's youthfulness was not considered. As argued throughout this brief, youthfulness as a mitigating factor for late adolescents at sentencing is the same as for

[17] *See also* Motion to Correct Illegal Sentences, at 107–18, TR. 1173 (detailing Dr. Wachtel's *Miller* evaluation of Mr. Hicks).

juveniles. Former mitigation specialist Ann Matthews noted in her affidavit, had the neuroscience and case law permitting the presentation of evidence of youthfulness for late adolescents been available, she would have urged attorney Mr. Carter to use it. *See* Ann Matthews Affidavit, Motion to Correct Illegal Sentences, (Exhibit F), TR. at 1173. Now that science and the law has changed over the past 18 years since Mr. Hicks's sentencing, experts were able to evaluate Mr. Hicks and provide the mitigating information to the district court (and now this Court) that the 2006 jury and sentencing court never had access to. *See* Dr. Wachtel Affidavit, Motion to Correct Illegal Sentences, Confidential File (Exhibit C), at 19, ¶ n, TR. at 1173; *see also* Andrea Titus Mitigation Memorandum, Motion to Correct Illegal Sentences, Confidential File (Exhibit D).

As previously noted, the Supreme Court and this Court have both unequivocally recognized that juvenile offenders are worthy of heightened constitutional protection at sentencing. "A child's character is not as well formed as an adult's, his traits are less fixed, and his actions are less likely to be evidence of irretrievable depravity." *Miller v.* 567 U.S. at 471. Unless it has been proven beyond a reasonable doubt that the juvenile offender is beyond rehabilitation, our justice system has recognized that such offenders are less culpable than a similarly situated adult. *Davis I*, 2018 WY 40, at ¶ 50.

This Court has adopted seven factors from *Miller* that must be considered when determining the role of the offender's youthfulness in the crimes he committed, his ability for rehabilitation, and the sentence he should receive. *See Bear Cloud II*, 2013 WY

18 at ¶ 42. Upon application of these factors and consideration of both Mr. Hicks's background as well as his prison record (related to rehabilitation) there is only one logical conclusion in this case – Mr. Hicks is not the rare, incorrigible youth, and he is certainly not that youth beyond a reasonable doubt. This is wholly supported by the affidavits and reports of all the defense experts. Applying the *Miller* factors directly to Mr. Hicks demonstrates that his youthfulness was an important mitigating factor that was not considered at his 2006 sentencing. Even if this Court does not find that generally all late adolescents should receive a *Miller* hearing, it should find that one is required for Mr. Hicks.

CONCLUSION

WHEREFORE, Mr. Hicks respectfully requests this Court reverse the district court's denial of Mr. Hicks's motion to correct his illegal sentences and remand his case for an individualized *Miller* (sentencing) hearing.

Respectfully submitted this 31st day of January, 2025.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 31, 2025, a true and correct copy of the foregoing was served electronically via the Wyoming Supreme Court C-Track Electronic Filing System, addressed as follows:

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The undersigned also certifies that all required privacy redactions have been made and, with the exception of any required redactions, this document is an exact copy of the written document filed with the Clerk. Furthermore, this document has been scanned for viruses and is free of viruses.

s/Devon Petersen