96772-5

No. 96773-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:

DWAYNE EARL BARTHOLOMEW,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

TIMOTHY K. FORD, WSBA #5986
MacDONALD HOAGUE & BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604

ATTORNEY FOR PETITIONER

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Petitioner Dwayne Bartholomew submits this Supplemental Brief[1] pursuant to the Court's Order of January 24, 2020.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents two issues: Whether the constitutional prohibition of mandatory sentences of life imprisonment without possibility of parole for youthful offenders convicted of murder extends to defendants who were 20 years old at the time of their crime; and whether the petitioner's invocation of that prohibition is timely under the statutes and rules governing personal restraint petitions.

The prohibition on mandatory life without parole sentencing should not be limited to offenders who were 17 years of age or younger; it should at least extend to youthful offenders who were under the age of 21. The scientific evidence undergirding this Court's juvenile life without parole cases suggests that the prohibition should extend least to age 25. But it is unnecessary to decide whether it reaches that far in this case, because Dwayne Bartholomew was much less than 25 years old at the time of this crime. He was 20 years old—younger than the historic age of majority in this country, and younger than the age at which our state's current laws extend the full rights and responsibilities of adulthood.

[1] Petitioner assumes that the Petition and Reply Brief filed on his behalf in the Court of Appeals have been circulated to the Justices, and so he will not repeat all the arguments and submissions made there.

If the Court holds that the mandatory sentence imposed on Petitioner Bartholomew was unconstitutional, no time bar should apply here, for several reasons. RCW 10.73.100(2) and (5) say a personal restraint petition which claims that "[t]he statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct" or that "[t]he sentence imposed was in excess of the court's jurisdiction" can be filed at any time. Moreover, the law and facts on which this petition relies were not reasonably available at any earlier date. RCW 10.73.100(6).

For these reasons, Petitioner's sentence of life in prison without possibility of parole should be vacated and the case remanded to the Pierce County Superior Court for resentencing.

FACTS AND PROCEDURAL HISTORY

The evidence at trial,[2] viewed in the light most favorable to the Stateare set forth in this Court's previous decisions in this case. *See State v. Bartholomew,* 98 Wn.2d 173, 177-181, 654 P.2d 1170 (1982)

[2] Although many of the facts described in this Court's previous opinions are uncontested, their description should not be considered comprehensive or conclusive, for several reasons. The law in force at the time of trial did not permit consideration of mitigating factors with respect to the alternative life sentence. *Cf. Coleman v. McCormick*, 874 F.2d 1280, 1286-87 (9th Cir. 1989). The State's case was largely based on the testimony of Rodney Bartholomew and Tracy Dormandy, which later-disclosed evidence showed to be questionable. *See Bartholomew (II)*, 101 Wn.2d at 1089. And defense counsel at trial by the late Murray Anderson, who was notoriously ineffective as a capital defense lawyer. *See Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432, 1435-1439 (9th Cir. 1995).

(*Bartholomew* I); *State v. Bartholomew,* 101 Wn.2d 631, 645, 683 P.2d 1079 (1984) (*Bartholomew* II). Consistent with and in addition to those descriptions, the petition here alleged, and the State has not disputed, the following basic facts about Petitioner Dwayne Bartholomew, who was barely 20 years old at the time of his crime. Petition ¶1.

> Petitioner's crime had all the earmarks of a depressed, impulsive youth. The homicide victim was killed by a single gunshot to the head, fired in the course of the robbery of a Tacoma Laundromat.
>
> Petitioner's younger brother Rodney was present before or during the crime and told their mutual cousin Bryce Bartholomew about it. Bryce Bartholomew contacted the police. Dwayne was arrested and questioned at the Puyallup City Jail. Dwayne told the arresting officers that, with Rodney's help, he had robbed the laundromat and had shot Turner accidentally. Dwayne's .22 caliber pistol was found lying in pieces on a table at his cousin's trailer where Dwayne had been staying.
>
> On August 6, 1981, Dwayne was arraigned on the charge of first degree murder and pled not guilty. At arraignment, he asked if he could "request the death penalty," and said that would be his request.
>
> Dwayne was depressed and had a history of suicidal ideation and mental problems. He had been discharged from the army after being referred to mental health psychiatric facilities on more than one occasion.
>
> Dwayne testified at his trial and his testimony was consistent with his earlier statements to police: that he robbed the laundromat with Rodney's help, that he had given Rodney some of the money and some marijuana for his help, and that the gun had gone off accidentally as he held it in his left hand and opened the cash drawer with his right hand.
>
> The jury was given a general instruction that it could convict if it found that the defendant committed the murder
>
> > While in the course of, in the furtherance of, or in immediate flight from the commission of the crime of Robbery in the First Degree, or ... to conceal the

> commission of the aforesaid crime of Robbery in the First Degree, or to protect or conceal the identity of the defendant at the person who committed the aforesaid crime of Robbery in the First Degree. .

Petition, ¶¶4-9. Dwayne was convicted of aggravated murder and sentenced to death. *Id.* at ¶ 11.

The death sentence was reversed on appeal because the statute on which it was based was unconstitutional and the prosecution had concealed the results of a polygraph showing Rodney Bartholomew was deceptive in his descriptions of the offense. *Bartholomew* (II), 101 Wn.2d at 644, 646. On remand, the jury found that the State had not met its burden to prove the absence of mitigating circumstances, which resulted in an automatic, mandatory sentence of life imprisonment without possibility of parole. See Petition ¶12; RCW 10.95.030(1), 10.95.080.

The case then proceeded to federal court. A federal habeas corpus petition alleging, *inter alia*, that the nondisclosure of the polygraphs was a *Brady* violation and trial counsel was ineffective, was ultimately denied. *See Wood v. Bartholomew*, 516 U.S. 1, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995) (reversing grant of habeas relief under *Brady* on the grounds that impeaching polygraph evidence was inadmissible at the conviction stage); *Bartholomew v. Wood*, 96 F.3d 1451 (9th Cir. 1996) (unpublished) (denying relief on ineffectiveness of counsel, while acknowledging that "it

was unreasonable and unprofessional conduct for trial counsel to fail to make any specific discovery requests").

This Personal Restraint Petition is Petitioner's first.[3] It was filed on August 8, 2018—just before the one year anniversary of the Court of Appeals' decision in *Matter of Light-Roth*, 200 Wn. App. 149, 401 P.3d 459 (2017), and just after this Court reversed that decision on a ground that is not material to this case, *Matter of Light-Roth* , 191 Wn.2d 328, 422 P.3d 444 (2018). The petition was transferred to this Court by order of January 22, 2019 and consolidated for argument with *In re Monschke,* which raises much the same constitutional issue.

ARGUMENT

I. MANDATORY SENTENCES OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE CANNOT CONSTITUTIONALLY BE IMPOSED ON OFFENDERS WHO WERE LESS THAN 21 YEARS OLD AT THE TIME OF THE OFFENSE.

a. The Court of Appeals' conclusion in *In re Light-Roth*—that the principles requiring consideration of a defendant's youth in mitigation of sentence are not limited to persons under 18 years old—is correct.

It is now well settled that defendants who are convicted of murders committed when they were less than 18 years old cannot constitutionally

[3] Petitioner filed a *pro se* Motion to Modify his sentence in light of *Light-Roth* in October, 2017, in the Pierce County Superior Court. The Motion was transferred to the Court of Appeals and there was dismissed for failure to pay a filing fee, without any decision on its merits. See Petition ¶8.

be subject to mandatory sentences of life imprisonment without parole. Even "the most egregious facts presented by a particular case cannot automatically negate" a juvenile 's right to an individualized sentencing. *State v. Ramos*, 187 Wn.2d 420, 438, 387 P.3d 650, 660 (2017). This is because juveniles "are less criminally culpable than adults, and the characteristics of youth do not support the penological goals of a life without parole sentence." *State v. Bassett*, 192 Wn.2d 67, 90, 428 P.3d 343 (2018).

These constitutional decisions are premised on "[t]hree general differences between juveniles…and adults" first recognized by the U.S. Supreme Court in cases involving capital punishment. *Roper v. Simmons*, 543 U.S. 551, 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

First, juveniles make impulsive and poorly considered judgments. Juveniles' immaturity "means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Roper*, 543 U.S. at 570. Second. their vulnerability and lesser control over their environment "mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences." *Id.* Third, juveniles mature and often change. "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."

Id.; *accord, Bassett*, 192 Wn.2d at 87 (juveniles lack maturity and have an underdeveloped sense of responsibility; are more vulnerable or susceptible to negative influences and pressures, including peer pressure; and their characters are not as well formed).

The same things are true of late adolescents, as this Court has already recognized: In *State v. O'Dell,* a case involving an 18 year old, this Court referenced "the studies underlying *Miller*, *Roper*, and *Graham*...that establish a clear connection between youth and decreased moral culpability for criminal conduct." *O'Dell*, 183 Wn.2d at 695 (citing the findings that children's "transient rashness, proclivity for risk, and inability to assess consequences" lessen their culpability).

> These studies reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure. As amici Washington Defender Association et al. put it, "[u]ntil full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond." *Br. of Amici Curiae in Supp. of Appellant* at 9–10.

Id., 183 Wn.2d at 692–93. "It is precisely these differences that might justify a trial court's finding that youth diminished a defendant's culpability, and there was no way for our legislature to consider these differences when it made the SRA sentencing ranges applicable to all offenders over 18 years of age." *Id.* at 693. *See also Matter of Light-*

Roth, 191 Wn.2d at 337 (2018) ("*O'Dell* broadened our understanding of youth as it relates to culpability.").

Although *O'Dell* and *Light-Roth* involved the justification for departures from presumptive sentencing ranges, the principles they rested on apply with even greater force to statutes imposing life without parole as a mandatory or non-discretionary minimum sentence.

The scientific evidence these cases credited demonstrates that there is no material difference between late adolescent offenders and 17-year-old offenders. See Petition ¶ at 3, and cases and authorities there cited; Petitioner's Reply Brief, pg. 14. In 2010, for example, a study tracking the brain development of 5,000 children found that their brains were not fully mature until age 25. Dosenbach, et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCIENCE 1358, 138–59 (2010). The following year, diffusion tensor imaging (DTI) showed white matter maturation continues beyond adolescence, particularly in the frontal lobe. Beaulieu & Lebel, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 27 J. NEUROSCIENCE 31 (2011). *See also, e.g.*, Hedman, et al., *Human Brain Changes Across the Life Span: A Review of 56 Longitudinal Magnetic Research Imaging Studies*, 33 HUM. BRAIN MAPPING 1987 (2012) (finding "a wave of growth" in human brains "between ~ 18 and 35 years of age").

There is now widespread agreement that the development of the prefrontal cortex, which plays a key role in "higher-order cognitive functions" like "planning ahead, weighing risks and rewards, and making complicated decisions" is not complete until the early twenties. See Monahan, et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUSTICE 557, 582 (2015).

Because their brains are still developing, late adolescents share with juveniles a lack of maturity and an underdeveloped sense of responsibility as manifested in impetuous and ill-considered actions and decisions. *See* Alexandra Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMPLE L. REV. 769 (2016) (finding that persons under 21 show diminished cognitive capacity, similar to that of adolescents, under conditions of emotional arousal); Laurence Steinberg et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, DEVELOPMENTAL SCIENCE (2017); Scott, et al., *Young Adulthood as a Transitional Legal Category*, 85 FORDHAM L. REV. 641, 642 (2016) ("Over the past decade, developmental psychologists and neuroscientists have found that biological and psychological development continues into the early twenties, well beyond the age of majority.").

The same conclusion can be drawn for the susceptibility of late adolescents to outside influences and peer pressure. Research confirms common experiences that the presence of peers "primes" adolescents more than adults to favor the short-term benefits of a risky choice. Albert, D., Chein, J., and Steinberg, L.; *The Teenage Brain: Peer Influences on Adolescent Decision Making,* CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE, 114-20 (2013).

The third characteristic of youth this Court's decisions have relied on—that a juvenile's personality traits are not as fixed—is also equally applicable to emerging adults. Significant changes in personality traits occur from childhood through the mid- to late-20s. Steinberg, L, and Schwartz, R. *Developmental Psychology Goes to Court* from YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (Grisso & Schwartz, Ed. 2000) at 9, 27 ("[M]ost identity development takes place during the late teens and early twenties.")

Although younger offenders are generally less culpable for these reasons, a life without parole sentence imposed on them is much harsher. The sentence is "especially harsh" for any offender under 21 for, just like 17 year olds, they will "on average serve more years and a greater percentage of [their] li[ves] in prison than an adult offender." *Graham v. Florida*, 560 U.S. 48, 70, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). The

punishment means "denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the child], he will remain in prison for the rest of his days.' " *Id*. (quoting *Naovarath v. State*, 105 Nev. 525, 526, 779 P.2d 944 (1989)).

For all these reasons, the Court's insight in *O'Dell* is correct: there is no sound, logical reason to restrict the constitutional prohibitions on mandatory life without parole sentencing to persons under 18 years old.

b. Life imprisonment without parole is qualitatively more severe punishment than any other authorized by Washington law.

Mandatory life imprisonment without parole is a uniquely harsh punishment.

> Life without parole is a drastic sentence. Even though the death penalty is "unique in its severity and irrevocability," the Supreme Court has recognized that life without parole is similar to the death penalty in important respects. [see *Graham v. Florida*, 130 S. Ct. at 2027 (asserting that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences")] A sentence of life without parole "alters the offender's life by a forfeiture that is irrevocable" because it "deprives the convict of the most basic liberties without giving hope of restoration." [*Id*.] Although a prisoner can potentially obtain relief through executive clemency, such a remote possibility does not overcome the severity of this sentence.
>
> The Nevada Supreme Court illustrated the exceptional nature of life without parole in declaring:

> All but the deadliest and most unsalvageable of prisoners have the right to appear before the board of parole to try and show that they have behaved well in prison confines and that their moral and spiritual betterment merits consideration of some adjustment of their sentences. Denial of this vital opportunity means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the prisoner], he will remain in prison for the rest of his days.
>
> [*Naovarath v. State*, 779 P.2d 944, 944 n.1 (Nev. 1989)]. The Ninth Circuit recently echoed these sentiments, noting that a life without parole sentence "condemn[s] [the prisoner] to die in a living tomb, there to linger out what may be a long life . . . without any of its alleviation or rewards--debarred from all pleasant sights and sounds, and cut off from all earthly hope." [*Norris v. Morgan*, 622 F.3d 1276, 1291 (9th Cir. 2010)].

Christopher J. Walsh, *Out of the Strike Zone,* 61 AM. U. L. REV. 165, 204 (2011). A *mandatory* life without parole sentence is harsher still, condemning defendants to die in prison without regard to any individual characteristics they may have or any mitigating circumstances their case may present. It is a qualitatively different and harsher punishment than any other allowed by this State's law.

c. That mandatory life without parole sentences are unconstitutionally harsh when imposed on persons under 21 flows from this Court's precedents.

This Court has previously concluded that Washington's prohibition of cruel punishment in article I, section 14 provides a heightened protection against disproportionate and arbitrary sentences. *Bassett*, 192

Wn.2d 67. *See also State v. Gregory*, 1, 24, 427 P.3d 621 (2018) 24 (article I, section 14 is more protective against arbitrariness and discrimination in capital sentencing); *State v. Fain*, 94 Wn.2d 387, 402, 617 P.2d 720 (1980) (article I, section 14 is more protective in the context of sentencing habitual offenders); *Bartholomew* (II), 101 Wn.2d 639 (article I section 14 is more protective with respect to the prohibition of arbitrariness in capital sentencing).

Petitioner's claim here is not that offenders under 21 can never be sentenced to life imprisonment without parole, but that such an extreme punishment cannot be made mandatory and imposed without any regard for the mitigating effects of their youth. Because of that, neither the proportionality analysis of *Fain* nor the categorical bar analysis applied by the majority in *Bassett* necessarily control here.

The existing consensus of states is not controlling when a court is considering the application of the individualization requirement. Instead, the application of the individualization requirement "flows straightforwardly from … precedents: specifically, the principle of *Roper*, *Graham*, and [the Supreme Court's] individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments. When both of those circumstances have obtained in the past, [the Court has] not scrutinized or relied in the same way on legislative

enactments." *Miller*, 567 U.S. at 483 (citing *Sumner v. Shuman,* 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987); *accord*, *Bartholomew (II),* 101 Wn.2d 639-42 (invalidating parts of the 1981 death penalty statute under Article I, § 14 without relying on comparisons to the laws of other states).

Even if the *Fain* criteria applied, the cruelty of imposing this extreme punishment without regard to the mitigating factors arising from the fact the offender was under the age of 21—is apparent.

> The *Fain* proportionality test considers (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. *Fain*, 94 Wash.2d at 397, 617 P.2d 720.

Bassett, 192 Wn.2d at 83. The offense here was a single victim robbery murder, committed with a single gunshot by a 20 year old man with no significant criminal history. It is an offense that is most commonly prosecuted, in Washington and elsewhere, as first degree felony murder, carrying a statutory minimum sentence of 20 years in prison.[4] *See* RCW

[4] The Brief regarding appellate proportionality review filed in Petitioner's case identified dozens of other cases of single victim robbery murders, none of which had resulted in death sentences (and few of which had resulted in life without parole). A copy of the relevant pages from that appellate brief are attached as Exhibit D. Although Petitioner does not have access to comparable data for later years, the fact that Washington has experienced nearly 8000 murders and non-negligent manslaughters since then (see FBI Uniform Crime Reporting Statistics https://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm, [reporting 7201 murders in Washington from 1981 to 2014]), it is apparent that, at a reference hearing, complete data would show several hundred more, at least.

9.94A.540. In this case the offense was elevated to the crime of aggravated first degree murder by the most evanescent of inferred criminal elements—premeditation and intention to conceal a crime, see Petition ¶ 10—elements which were established through the now-suspect testimony of Rodney Bartholomew and Tracy Dormady, see *Bartholomew* (I), 98 Wn.2d at 177-78, 208; *Bartholomew* (II), 101 Wn.2d at 646.

The only conceivable purpose of the portions of RCW 10.95 which mandate life without parole for all offenders convicted of aggravated murder is incapacitation. There is no evidence or reason to believe that a mandatory sentence of life without parole deters more effectively, or provides better retribution, than a discretionary one—or than a mandatory life sentence with the possibility of parole. But statutes which mandate lifetime incapacitation of persons who have not even reached their 21st birthday, no less than those which contain similar mandates applicable to juveniles under 18, "'make[] an irrevocable judgment about that person[]' that is at odds with what we know about children's capacity for change.'" *Bassett*, 192 Wn.2d at 89 (quoting *Graham*, 560 U.S. at 74). As noted above, the same science that shows "that children have "'diminished culpability and heightened capacity for change'" (*id.*, quoting *Miller*, 567 U.S. at 479), shows that those characteristics do not disappear at age 18, but persist into the twenties.

Considering the punishment that can be imposed in comparable cases within this jurisdiction, the contrast is even more stark: After *Bassett*, *no* person 17 years old or younger can *ever* be sentenced to life imprisonment without parole—no matter how serious their offense, no matter how bad their criminal record, and no matter how weak their claim of mitigating circumstances may be. But in this case, a sentence of life imprisonment without parole was made *mandatory* and imposed without regard to *any* amount of mitigation, on a defendant who was barely two years older than that—years away from full psychological maturity, below the traditional age of majority in this State, and too young even to be granted the full autonomy of a mature adult by Washington law. *See, e.g.* RCW 66.44.270(2)(a) and (b); RCW 69.50.4013.

The protections against cruel punishment in our constitution cannot turn so dramatically on so thin and arbitrary a difference. Where advances in scientific knowledge and understanding of human behavior make it clear that a particular form of punishment is excessive in a particular type of case, that knowledge must be applied rationally, not arbitrarily. Thus, in *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 108 L.Ed.2d 1007 (2014), the Supreme Court held that the scientific advances that informed its decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), prohibiting the imposition of the death penalty on

persons with developmental disabilities, could not support a statute that defined such disabilities with an arbitrary score of 70 on an IQ test. *Hall*, 572 U.S. at 721-22. Similarly, it makes no sense under the science that led this Court to hold that life without parole sentences can *never* be imposed on juveniles under 18 in *any* case, to allow such sentences to be mandated in *every* case involving defendants who are just a year or two older.

The science this Court has accepted makes clear that there is no bright line dividing juvenile brains from adult brains at age 18 for determining culpability. The requirement that a sentencer follow a process—considering mitigation—before imposing such an extreme and irreversible penalty on a late adolescent flows directly from two sets of precedents: those requiring individualized sentencing where severe and irrevocable punishments are involved, and those that hold such punishments may never be appropriate for youthful defendants under 18.

> "If the heart of a criminal justice system is the criminal code, its conscience resides in the power of the jury to acquit against the evidence and the power of the sentencing judge to look beyond the definition of the offense in fashioning an appropriate sanction for a particular defendant." Junker, *Guidelines Sentencing*, 25 U.C. Davis L. Rev at 739. Proportionality, equality, and justice demand that judicial discretion be preserved to impose exceptional sentences….."

State v. Brown, 139 Wn.2d 20, 32–33, 983 P.2d 608 (1999) (dissenting opinion of Justice Madsen), *overruled by State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). This Court should apply this precedent

"straightforwardly," *Miller*, 567 U.S. at 483, and hold late adolescents under 21, like juveniles, present an exceptional case in which a non-discretionary life without parole sentences are unconstitutionally cruel.

II. PETITIONER'S SENTENCE SHOULD BE VACATED ON THAT GROUND.

Two exceptions to the time bar of RCW 10.73.100 make this petition timely.

First, most simply, RCW 10.73.100 (2) and (5) provide that a personal restraint petition is never untimely when it claims that the "statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct" or that "[t]he sentence imposed was in excess of the court's jurisdiction." Consistent with these statutes, in light of its conclusion that the death penalty provisions of RCW 10.95.030(2) were unconstitutional as applied, this Court granted relief to several defendants who had otherwise-untimely personal restraint petitions challenging death sentences pending before the Court. *See State v. Gregory*, 192 Wn.2d at 642; *see, e.g.*, Order of 11/29/18, *In re Gentry*. No. 92315-9. Petitioner's claim is that RCW 10.95.030(1) is unconstitutional as applied to youthful offenders, and judges have no jurisdiction to impose sentences the constitution does not permit. The nature of that claim exempts it from the statutory time bar.

The second reason this petition is not untimely is that it was filed within a year of a material change in the law that should be applied retroactively. RCW 10.73.100 (6) provides:

> There has been a significant change in the law, whether substantive or procedural, which is material to the … sentence … and … a court … determines that sufficient reasons exist to require retroactive application of the changed legal standard.

"Materiality" does not require a holding on "all fours." "Material" means "'[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential...." *State v. Osman,* 168 Wn.2d 632, 642, 229 P.3d 729 (2010) (quoting BLACK'S LAW DICTIONARY 1066 (9th Ed. 2009)); see *In re Gentry*, 179 Wn.2d 614, 625, 316 P.3d 1020 (2014) (holding *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011) was "material" to *Gentry's* case, although it did not require relief).

The Court of Appeals decision in *Light Roth* held for the first time that the principles under which this Court had placed constitutional limits on the sentencing of youthful offenders apply to defendants over 17. This Court reversed that decision on grounds that did not undermine that statement of the law. Clearly, the Court of Appeals' holding, if correct, could "affect … decision making" regarding the constitutionality of Dwayne Bartholomew's mandatory life without parole sentence. So he filed this petition rather than wait for another decision which more clearly established how those principles applied to it. Since the purposes of time

limits on postconviction relief are to promote finality and insure that constitutional issues regarding criminal convictions and sentences are timely raised, surely that was the correct decision.

That leaves the question of retroactivity, which, as the Court in *Gentry* pointed out, is not the same as materiality.[5] In this case, the answer to that question should be easy. For one thing, it is not at all clear as a matter of common sense that the relief sought by this petition is "retroactive" in any real sense: if successful, it could only result in modification of a sentence that has not yet been fully imposed, relief in the form of the possibility of parole in the future. *Cf. State v. Gregory, et al*, 192 Wn.2d at 642 (applying decision holding death penalty statutes unconstitutional to all cases in which the sentence had not been executed.).

But even under the analysis of *Teague v. Lane*—which was fashioned in the context of a very different type of claim in a federal, not state, system—the rule Petitioner is seeking would be retroactive because it "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." *State v. Carney*, 178 Wn. App. 349,

[5] RCW 10.73.100(6) applies where a court "determines" that a change of law is retroactive. Its use of the present tense avoids the conundrum in current federal habeas law, which requires that the retroactivity decision must have already been made before a petition can be granted—so petitions can become untimely while they are still premature. *See Tyler v. Cain*, 533 U.S. 656, 677, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (Breyer, J., dissenting).

360, 314 P.3d 736 (2013) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Moreover, as explained above, the science adopted and relied on in *O'Dell* and *Light Roth* provides no basis to differentiate between defendants who were under 18 and those under 21. Because of that, the result Petitioner seeks is less of a new rule than an application of the principles established in *Miller* and its progeny in this Court. *Cf. Smith v. Sharp*, 935 F.3d 1064, 1084 (10th Cir. 2019) (holding that *Hall v. Florida* did not announce a new rule but merely an application of *Atkins*). Like determinations of intellectual disability, there is no bright line dividing juvenile brains from adult brains at age eighteen with respect to determining culpability. While 18 may be the age of majority for certain societal events, adulthood is not achieved at age 18, neurodevelopmentally speaking. When courts have recognized that "children are different," those courts have expressly relied on neurodevelopment. As a result, extending the differentness rule to late adolescents is just that—an application, rather than a new rule.

Finally, the rule at issue here is substantive and, therefore, presumptively retroactive. This Court has previously held that this is a "substantive rule[] of law: "'that a sentencing rule permissible for adults may not be so for children.'" *Houston-Sconiers*, 188 Wn.2d at 19 n.4

(quoting *Miller*), 567 U.S. at 481); *see Ramos,* 187 Wn.2d at 441 ("*Miller* announces a substantive rule, not a procedural one."). *See also Matter of Meippen,* 193 Wn.2d 310, 326, 440 P.3d 978, 986 (2019) (Wiggins, J. dissenting). The rule sought here is substantive for the same reasons.

Thus, this petition is timely because mandatory life imprisonment without possibility of parole is unconstitutional as applied to the late adolescent class and that is a material and retroactive change in the law.

CONCLUSION

Based on the above, this Court should grant the petition and remand the case to Pierce County Superior Court for resentencing. In the alternative, if the State disputes that adolescents share the mitigating qualities that make juveniles constitutionally different in this regard, this Court should remand for a reference hearing on that issue.

DATED this 2nd day of March, 2020.

Timothy K. Ford, WSBA #5986
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 2nd day of March, 2020, I electronically filed the foregoing with the Clerk of Court using the Washington State Appellate Courts' Portal.

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EXHIBIT D

NO. 48346-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Appellee,

v.

DWAYNE EARL BARTHOLOMEW,

Defendant/Appellant.

ON APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY
WILLIAM L. BROWN, Jr., JUDGE

APPELLANT'S OPENING BRIEF AND BRIEF ON SENTENCE REVIEW

Timothy K. Ford
2200 Smith Tower
Seattle, Washington
(206) 622-5942

Douglas W. Tufts
945 Market Street #334
Tacoma, Washington
(206) 593 4787
Attorneys for Appellant

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ARGUMENT ON SENTENCE REVIEW

V. THE SENTENCE OF DEATH SHOULD BE REDUCED AS EXCESSIVE, ON THE EVIDENCE IN THIS CASE AND COMPARED TO SENTENCES IMPOSED IN SIMILAR CASES.

RCW 10.95.100 requires this Court to review all sentences of death imposed in this state, to determine

> (a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.94.060(4); and
>
> (b) Whether the sentence of death is excessive of disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant .... and
>
> (c) Whether the sentence of death was brought about by passion of prejudice.

RCW 10.95.130(2). If this Court reaches those questions in this case, it should reduce this sentence pursuant to its power vested by RCW 10.95.140(1), for two reasons: the evidence did not justify the jury's finding "beyond a reasonable doubt ... there are not sufficient mitigating circumstances to merit leniency," and this death sentence is excessive and disproportionate to the penalty imposed in similar cases. RCW 10.95.130(2)(a), (b).

A. The Evidence In This Case Did Not Justify A Finding, Beyond A Reasonable Doubt, There Were Not Sufficient Mitigating Circumstances To Merit Leniency.

The task assigned to this Court by RCW 10.95.140(1)(a) is an extraordinarily difficult one. It must answer a question which involves few facts and no law, only values: whether the evidence was "sufficient" to "justify" a finding beyond a reasonable doubt there were not "sufficient" mitigating circumstances to "merit leniency." See RCW 10.95.060(4), RCW 10.95.130(2)(a). In essence, this statute makes this Court the ultimate sentencing authority in capital cases in this state--and requires it to make the final decision of what "mitigating circumstances" are "sufficient" to "merit leniency", and what quantum of evidence will "justify" a finding that mitigation is absent "beyond a reasonable doubt."[41]

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[41] Clearly the question of whether the evidence "justified" a death verdict is not simply a question of fact. Had the legislature intended to limit this Court's review to the more traditional question of whether the evidence "supported" the verdict, see, e.g., State v. Green, supra, 94 Wn.2d at 221, it would have said so. Presumably because the amount of mitigation "sufficient ... to merit leniency" involves so much more than a question of fact, it did not.

A few general principles are available to assist this Court in performing this unprecedented review function. Because "the penalty of death is qualitatively different from a sentence of imprisonment, however long," "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, supra, 428 U.S. at 305.

> It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice and emotion.

Gardner v. Florida, supra 430 U.S. at 358. "'This whole country has travelled far from the period in which the death sentence was an automatic and commonplace result of convictions ....'" Id. at 430 U.S. 356-7, quoting Williams v. New York, 334 U.S. 241, 247-8, 93 L.Ed. 1337, 69 S.Ct. 1079 (1949). And no crime, however heinous, can justify a death sentence without regard to "mitigating factors presented by the circumstances of the particular crime or by the individual offender." Roberts v. Louisiana, 428 U.S. 325, 333-4, 49 L.Ed.2d 974, 96 S.Ct. 3001 (1976).

In this case, the existence of at least four recognized mitigating circumstances was undisputed. Though little was brought out about his background at trial, the testimony showed Dwayne Bartholomew came from a broken home and a deprived background (RP 450-54); that constitutionally must be considered in mitigation. Eddings v. Oklahoma, 50 U.S.L.W. 4161 (January 19, 1982). He was twenty years old at the time of this offense (RP 450); clearly that "age ... calls for leniency." See RCW 10.95.070(7). At the time of the crime he had been ingesting alcohol, marijuana, and apparently other drugs (RP 458-64); though that did provide him any legal excuse, it is plainly a mitigating factor. See Gardner v. Florida, supra, 430 U.S. at 369 (dissenting opinion of Justice Marshall); cf. RCW 10.95.070(2), (6). When arrested, he cooperated fully with police (RP 23-24); that, too, is mitigating. Eddings v. Oklahoma, supra, 50 U.S.L.W. at 4163n.6.

In addition, there was at least some evidence of three other mitigating factors. Dwayne's observed bizarre behavior a month before this crime (RP 561-2), his request for the death penalty at arraignment (VRP 6), his observed depression when first psychiatrically interviewed and past history of mental health treatment (CP 177), and the later

diagnosis of a profound "characterologiocal disorder" (CP 578) all certainly suggested an impairment of his ability "to conform his ... conduct to the requirements of law." See RCW 10.95.020(6). The psychiatric testimony at trial hardly foreclosed all doubt on that issue--at least in light of the later-revealed fact he never took the MMPI test originally prescribed (CP 65), and his past psychiatric evaluations were not reviewed (CP 23-4).

Similarly, Dwayne had a proven history of prior criminal activity consisting of one misdemeanor conviction and one felony charge. Ex. 31, 32. Even if the jury believed he committed the two uncharged robberies attributed to him--and certainly there was reason to doubt that--there was no evidence he had ever before injured anyone. Surely a reasonable person could doubt such a criminal record was "significant" enough to justify taking a young man's life. RCW 10.95.070(1). And anyone aware of the facts regarding recidivism and the prediction of violence--about which this jury was badly misinformed[42] --would have to harbor a doubt that this young man would be a "danger to others" (RCW 10.95.070(8)), locked up in prison for life.

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[42] See, e.g., People v. Murtishaw, supra, 631 P.2d at 466-8; State v. Frampton, supra, 95 Wn.2d 516-7 (Utter, J., dissenting). Appellant asked for a hearing on this issue below. See note 14, above.

None of this excuses the terrible, senseless crime Dwayne Bartholomew committted. But it was enough to give anyone ample reason to doubt that this young man deserved nothing other than death.

Appellant respectfully submits the jury's contrary verdict--which it rendered without hearing all the relevant evidence, and with little guidance from the court--was not justified, and should be reduced.

B. The Sentence Of Death In This Case Is Excessive And Disproportionate To The Penalty Imposed In Similar Cases.

This Court's review functions under RCW 10.95.130(2)(b) are more concrete. It must "compar[e] each death sentence with the sentences imposed on similarly situated defendants to insure that the sentence of death in a particular case is not disproportionate," and there is a "'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" Gregg v. Georgia, supra, 428 U.S. at 198.

RCW 10.95.130(2)(b) attempts to restrictively define for this Court what it is to consider "similar cases," limiting it to certain published appellate reporters. That restriction is plainly invalid,

because it involves "a legal conclusion, a result which follows from examination and consideration of circumstances in a particular case and interpretation and application of legal principles to those facts," which only a court can make. Tacoma v. O'Brien, 85 Wn.2d 266, 272, 534 P.2d 114 (1975). Its effect is to skew the sample of "similar cases" this Court looks at, and to make the death penalty look much less rare and a given death sentence less "disproportionate" than it really is.[43]

But in this case, the sentence is so disproportionate to those received by most similarly situated defendants that it is even apparent from a review limited to reported cases. The sentence of death in this case was imposed for a single-victim robbery murder. The published reports in cases from this state, from 1965 to the decision in Furman v. Georgia, reveal twenty-three cases in which the defendant was convicted of first degree murder for a robbery- or theft-related killing of a single victim.

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[43] All cases in which a death penalty is imposed result in reported decisions by this Court. Cases in which the defendant receives a sentence other than death are reported only if the defendant pled not guilty, chose to appeal, and raised an appellate issue substantial to warrant review by this Court or a published decision of the Court of Appeals. See RCW 2.06.040.

Eighteen of those defendants received life sentences from the juries that convicted them.[44] Five received death sentences.[45] In three of the cases in which the death penalty was imposed, the killing was part of a crime spree--involving other robberies, assaults, or murders--which distinguished them from other cases.[46] Only two of the cases in which the death penalty was imposed appear, from the facts revealed by the appellate decision, to have

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[44] State v. Drew, 70 Wn.2d 793 (1967); State v. Nelson, 72 Wn.2d 269 (1967); State v. Wood and Butler, 78 Wn.2d 362 (1970); State v. Golladay, 78 Wn.2d 127 (1970); State v. White, 4 Wn.App. 668 (1971); State v. Mayner, 4 Wn.App. 549 (1971); State v. Ruud, 6 Wn.App. 57 (1971); State v. Temple, 5 Wn.App. 1 (1971); State v. Finnegan, 6 Wn.App. 612 (1972); State v. Fuller, 7 Wn.App. 369 (1972); State v. Maine, 82 Wn.2d 157 (1973); State v. Craig, 82 Wn.2d 777 (1973); State v. Davis, 82 Wn.2d 790 (1973); State v. Peele, 10 Wn.App. 58 (1973); State v. Corbunne, 10 Wn.App. 298 (1973); State v. Carothers, 84 Wn.2d 256 (1974); Jansen v. Morris, 87 Wn.2d 258 (1976).

[45] State v. Tyler, 77 Wn.2d 726 (1970); State v. Todd, 78 Wn.2d 362 (1970); State v. Cerny, 78 Wn.2d 845 (1971); State v. Music, 79 Wn.2d 699 (1971); State v. Braun, 82 Wn.2d 157 (1973). Four additional defendants received death sentences for robbery murders involving multiple victims: State v. Aiken and Wheat, 72 Wn.2d 306 (1967); State v. Smith and Riggins, 74Wn.2d 744 (1968).

[46] State v. Tyler, supra; State v. Music, supra; State v. Braun, supra.

been truly "similar" to this one--and to the eighteen contemporary reported cases in which the defendant's life was spared. State v. Todd, supra; State v. Cerny, supra. That shows nothing more than how "rarely" and "freakishly" the death sentence was imposed for this type of crime in the years before Furman v. Georgia.[47]

Since the death penalty was reenacted by Initiative 316 in July, 1976, this pattern has held. The reported cases reveal at least sixteen defendants convicted of robbery- or theft-related first degree murders committed after that date and before Martin,

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[47] The data compiled pursuant to this Court's order of December 4, 1979, in State v. Norman, No. 45811, further supports this. They show that, between January 1, 1970 (the date of the first cases compiled) and the date of Furman, another 17 defendants were convicted of theft- or robbery-related murders received prison sentences on guilty pleas or after convictions at trial. See, State v. Parrish, Pierce Co. #39687 (DSHS #127342); State v. Hendricks and Middleton, King Co. #56227; State v. Zimmerman and Herman, Spokane Co. #20055 (DSHS #050005, 641614); State v. Hurley, King Co. #58615 (DSHS #627827); State v. Chambers, King Co. #57002 (DSHS #227274); State v. White, Pierce Co. #40733 (DSHS #127691); State v. Weldon, King Co. #58544 (DSHS #127773); State v. Yeager, King Co. #58429 (DSHS #691035); State v. Boespflug, King Co. #59204 (DSHS #116098); State v. Stubblefield, King Co. #57689 (DSHS #127783); State v. Allen, Spokane Co. #25989 (DSHS #630406); State v. Harvey, King Co. #55588 (DSHS #127510); State v. Stephenson, Kitsap Co. #56062 (DSHS #127516); State v. Craig and Davis, Spokane #20556 (DSHS # 628144, 690731).

none of whom even faced a death sentencing hearing.[48] The only reported robbery-murder case murder case in which the death penalty has even been considered by a jury resulted in a life sentence. State v. Duhaime, 29 Wn.App. 842 (1981).[49]

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[48] State v. Frederick, 20 Wn.App. 175 (1978); State v. Forrester, 21 Wn.App. 855 (1978); State v. Reed, 25 Wn.App. 46 (1979); State v. Williams, 96 Wn.2d 215 (1981); State v. Peyton, Mathis, Harmon, Johnson, Moore, Monds, Cartwright, and Mathis, 29 Wn.App. 701, (1981) State v. Gladstone, 29 Wn.App. 426 (1981); State v. Wixon, 30 Wn.App. 63 (1981); State v. Dudrey, 30 Wn.App. 447 (1981); State v. Aronson, 31 Wn.App. 352 (1982).

[49] The information compiled in Norman bolsters this, showing another 35 defendants convicted of theft- or robbery-related murders committed after July, 1976, who received prison sentences. State v. Reed, Okanagon Co. #6283 (DSHS #257085); State v. Schuler, King #75850 (DSHS #250075); State v. Barriault, Grays Harbor Co. #67921 (DSHS #253659); State v. Nelson, Mason #C-500 (DSHS #127966); State v. Victorio, Yakima Co. #20389 (DSHS #260465); State v. Littleton & Rampola, Pierce Co. # 50301 (DSHS ## 626857, 630656); State v. Miller, Kitsap Co. #C-2945 (DSHS #631242); State v. Smith, Kitsap Co. #C-2947 (DSHS #660032); State v. Mattison & Gibson, King Co. #80395 (DSHS ## 690930, 256444); State v. Conrad, Pierce Co. #51073 (DSHS #255440); State v. Paridiso, Pierce Co. #51730 (DSHS #257168); State v. Bius, King #82405 (DSHS #258672); State v. Keys, Snohomish Co. #78-1-00380-1 (DSHS #262224); State v. Cohorn, Yakima Co. #77-1-00776-4 (DSHS #258965); State v. Morgan & Chapin, King #83633 (DSHS ## 628635, 258791); State v. Holden, King Co. #83840 (DSHS #629172); State v. Justice, Pierce Co. #52432 (DSHS #260861); State v. Brooks & Whitfield, King Co. #84744 (DSHS ##259045, 259801); State v. Webster King Co. #85891 (DSHS #263263); State v. Carson, Spokane Co. #79-1-00040-1 (DSHS #254057); State v. Duckworth & Glanville, Thurston Co. #C-6216 (DSHS #261175); State v. Ferris, King Co. #87432 (DSHS #263304); State v. Wixon & Brown, King Co. # 88476 (DSHS ## 630919, 264237); State v. Sutton, Snohomish Co. #79-1-0087-1 (DSHS #261996); State v. Daley, Spokane Co. #79-1-00074-5 (DSHS #264830); State v. Lakey, Thurston #79-1-00082-9 (DSHS #255710); State v. Brown, Kitsap #79-1-00181-1 (DSHS #265367); State v. Kuneki et al.(3 defs) Yakima Co. #79-1-00739 (DSHS ## 258080, 267714, 267429).

In the six years robbery has been an aggravating factor which makes murder capital in this state, only one person has been sentenced to death for a robbery-murder: Dwayne Bartholomew. Even before the new death penalty laws were enacted, it was clear that "juries generally do not impose the death sentence in [this] ... kind of murder case ...." Gregg v. Georgia, supra, 428 U.S. at 206. Prosecutors, reflecting "the likelihood that a jury would impose the death penalty if it convicts," id. at 225, have seldom even sought it in such cases. And in none of the few where they have has it been imposed.

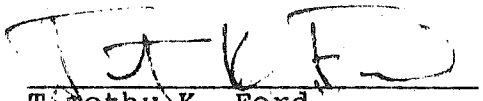
There is no principled way to distinguish this case from many similar cases in which defendants who have committed similar crimes have had their lives spared. For that reason, if no other, this sentence should be reduced.

CONCLUSION

Dwayne Bartholomew's conviction of aggravated first degree murder, and sentence of death, should be reversed.

DATED: May 3, 1982

Respectfully submitted,



Timothy K. Ford
Attorney for Appellant

MACDONALD HOAGUE & BAYLESS

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