IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

No. 96772-5

In re the Personal Restraint Petition of:	)	
	)	
KURTIS MONSCHKE,	)	NO. 52286-1-II
	)	
Petitioner.	)	REPLY TO STATE'S RESPONSE
	)	TO PERSONAL RESTRAINT PETITION

A. ARGUMENT IN REPLY

The essence of Kurtis Monschke's argument for relief is that he is serving a mandatory sentence of life without parole for a crime committed when he was nineteen years old, at a time when sentencing courts had no discretion to consider youth as mitigation. Since that time, there has been a dramatic shift in the law of youthful sentencing, even for those over the age of eighteen. Courts in Washington now recognize that the differences between young defendants and adults do not end on the nineteenth birthday. This dramatic change in the law should apply to Monschke because he has never had an opportunity to have his youth considered as justifying a sentence below life without parole or to make such an argument in the sentencing or appellate courts.

Monschke's record of growth and achievement since his sentencing demonstrates that he should have received consideration of his youth at sentencing.

1. The sentencing court had no discretion to consider Monschke's youth at the time of his sentencing in 2004; the court had to impose a sentence of life without parole.

Kurtis Monschke's argument begins with the premise that, at the time he was sentenced in 2004, for a crime committed when he was nineteen years old, the sentencing court had no discretion to impose a sentence of other than life without the possibility of parole.[1] The State, in its Response to Personal Restraint Petition, concedes this and argues for approximately half of its Response that, in fact, the penalty for aggravated murder for a defendant over the bright-line age of eighteen remains a mandatory sentence of life without parole or death and that the SRA's exceptional sentencing provisions don't apply to those defendants. Response, 10- 19 (e.g. at 12, "Prior to 2014, there had never been an indication that the sentencing scheme which applies to non-aggravated murder cases, the SRA, applied to the aggravated murder statute").

2. The law on youth as a mitigating factor for juveniles has changed dramatically since Monschke's sentencing.

Since Monschke's sentencing, the law on youth as a mitigating factor has changed for those who are juveniles at the time of their crimes. In Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the United States Supreme Court held that the law of juvenile sentencing has changed so dramatically in recent years that a mandatory sentence of life without the possibility of parole for a juvenile, without the sentencing judge having any opportunity to consider ways in which children differ from adults, violates the Eighth Amendment's prohibition against cruel and unusual punishment. Those ways, identified by the Supreme Court, include: (1) "'a lack of maturity and an underdeveloped sense of responsibility' leading to recklessness, impulsivity and heedless risk-taking," (2) a greater vulnerability "to negative influences and outside pressures," and (3) character and traits which are less well-

[1] The state did not seek the death penalty.

formed and less likely to constitute "irretrievable depravity." Miller, 132 S. Ct. at 2464 (quoting Roper v. Simmons, 543 U.S. 551, 569–579, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)). Because of the now-known differences between youth and adults, in State v. Bassett, ___ Wn.2d ___, 428 P.2d 343 (2018), the Washington Supreme Court held that life without parole for juveniles is categorically unconstitutional under the state constitution Article 1, section 14.

The State concedes this as well. Response at 8-9.

3. The important differences between youth and adults can apply to those who are over eighteen and can constitute sufficient justification for an exceptional sentence below the standard range.

The law on the important differences between youth and adults, for sentencing, has changed for young defendants who are young, but no longer juveniles, as well as juveniles. In State v. O'Dell, 183 Wn.2d 680, 683, 358 P.3d 359 (2018), the Washington Supreme Court held that a sentencing court must be allowed to consider youth as a mitigating factor when imposing a sentence on a person even where the person was over eighteen at the time the crime was committed. The Court held that the ways in which juveniles differ from adults persist even after the juvenile turns eighteen.

> When our court made that sweeping conclusion (that it was absurd to think youth could mitigate culpability), it did not have the benefit of the studies underlying Miller, Roper, and Graham—studies that establish a clear connection between youth and decreased moral culpability for criminal conduct. And as the United States Supreme Court recognized in Roper, this connection may persist well past an individual's 18th birthday: "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18 [just as] some under 18 have already attained a level of maturity some adults will never reach." 543 U.S. at 574.

O'Dell, at 698 (footnotes omitted).

The State acknowledges that O'Dell so held. Response at 6 ("Youth alone could . . . amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range . . . for an offender like O'Dell, who committed his offense just a few days after

he turned [19]" citing O'Dell, at 695-696.

4. Under the rationale of the Supreme Court in Light-Roth, O'Dell should apply retroactively to Monschke if not to Light-Roth himself.

In the Court of Appeals decision in In re the Matter of Light-Roth, 200 Wn. App. 149, 401 P.3d 459 (2017), the court held that the youth of the appellant, who was nineteen at the time of the crime, although not a "per se mitigating factor" had to be considered along with a request for a sentence below the standard range and that the request for this relief was not time-barred because O'Dell, which so held, represented a significant change in the law sufficient to establish an exception to RCW 10.73.100(6). Light-Roth, 200 Wn. App. at 151.

On review, Matter of Light-Roth, 191 Wn.2d 328, 336, 422 P.3d 444 (2018), the Supreme Court held that O'Dell did not apply retroactively because it did not constitute a significant change in the law under RCW 10.73.100(6). The test to determine retroactivity utilized by the Supreme Court in Light-Roth was whether the defendant "could have argued this issue before publication of the decision." Light-Roth, at 336. Because youth could, in non-aggravated murder cases, be considered in sentencing prior to O'Dell under RCW 9.94A.535(1)(e), the Court reasoned that O'Dell did not represent a significant change in the law. Id.

Under this test used by the Supreme Court in Light-Roth, however, O'Dell represented a significant change in the law for those petitioners such as Monschke who could not argue that his youth justified a sentence of less than life without parole at his sentencing because (1) he was not a juvenile at the time his crime was committed and (2) his life without parole sentence was mandatory.

O'Dell clearly extended Miller beyond eighteen -- the issue was "Whether a defendant's youth can justify an exceptional sentence below the standard range when the defendant was over

18 when the crime was committed." O'Dell at 689. And the O'Dell Court just as held that it could. Id. at 696. The constitutional principles announced in the Court of Appeals Light-Roth decision still stand as new law, material to this petition, despite reversal on other grounds. See, e.g., State v. Hart, 195 Wn. App. 449, 462-463, 381 P.3d 142 (2016) (citing State v. Arredondo, 190 Wn. App. 512, 537-538, 360 P.3d 920 (2015).

O'Dell should apply retroactively; it represents a significant change in the law for Monschke who never had any chance to argue his youth as mitigation at sentencing even though youth mitigated against his moral culpability at the time of his crime, which was committed when he was nineteen,

5. A bright-line cutoff at nineteen is unconstitutional; any youthful defendant who can demonstrate that brain development and age limited their culpability should have the opportunity to seek a mitigated sentence of less that life without parole.

As set out in Monschke's PRP at 8-9, consistently with O'Dell, mandatory life without parole is unconstitutional for those over eighteen at the time of the crime who are able to demonstrate that their brain development and age limited their culpability for the crime; a bright-line cutoff of age eighteen does not satisfy the constitutional requirements of the Eighth and Fourteenth Amendments or Article 1, section 14 of the Washington Constitution for reasons analogous to the principles set out in cases considering intellectual disability in capital cases. Where a person sentenced to death makes a colorable claim of intellectual disability, he or she is entitled to an evidentiary hearing on the issue. Brumfield v. Cain, 135 S. Ct. 2269, 2273, 192 L. Ed. 2d 356 (2015). A similar rule should apply to those who can make a colorable claim that characteristics of his or her youth at the time of the crime lessened culpability.

B. RESTATEMENT OF THE FACTS

A. The State's factual presentation is inaccurately selective and unjustifiably inflammatory.

The State's presentation of facts in its Response is inaccurately selective -- it relies primarily on the few damaging portions of testimony by Monschke's codefendants who testified against him in exchange for reduced sentences. For example, the State ignores the physical evidence which established that clothes taken from co-defendants Pillatos, Frye and Butters had Townsend's blood spattered on them, while the boots Monschke was wearing did not. RP 1459-1461, 1470-1482, 1485, 1493-1494. For another example, it ignores the testimony of two homeless people who saw the last part of the assault, the only time when Monschke was actually present, who said the person they identified as Monschke did not participate in the assault. RP 1078, 1081081, 1090, 1157, 1159-1160, 1170-1171, 1214, 1233, 1269, 1271, 1321.

The State's presentation is unjustifiably inflammatory; it is more opinion that fact For example, it goes on at length about the violence associated with white supremacist groups and ignores that a State's expert from the Seattle Anti-Defamation League had to concede that he reviewed Monschke's Internet postings, and none of them advocated violence. RP 2687.

Most, importantly, the State ignores that the Pierce County Prosecutors involved have already conceded that Monschke was less culpable than his codefendants, but received a longer sentence:[2]

> "We [Prosecutors Jerry Costello and Greg Greer] think these guys [Pillatos and Butters] did more than Monschke did."

Tacoma News Tribune, Wednesday, September 8, 2004, Section B, pp 1-2, 4. Exhibit 13 to First PRP.

[2] Pillato's sentence was 361 months; Frye's was 165 months.

Further, the State ignores that Monschke explained that he met Pillatos and Butters and became involved in a white gang in a juvenile facility as a means of protection, but that his expert was not permitted to testify about his knowledge of this phenomenon in juvenile institutions. RP 2755-2761, 2915-2918. Thus, Monschke was not allowed to present evidence to the jury on how his youth played a part in commission of the crime and lessened his culpability.

2. The State fails to respond to the evidence of how Monschke's youthful brain influenced his participation in the crime and how he has rehabilitated himself in prison.

The state ignores all of the considerable evidence of Monschke's rehabilitation in prison. PRP 12-13, and the evidence of his undeveloped brain at the time of the crime. PRP 13-14

C. MONSCHKE'S PRP IS NOT TIME-BARRED.

As set out above, at the time of his sentencing, life without parole was mandatory upon conviction for aggravated murder. Monschke could not have argued his youth as mitigation or grounds for a sentence of less than life without parole at that time.

Since that time, however, the law on sentencing – with its new understanding of the differences between youthful and adult brains – has change dramatically. The decisions recognizing this new understanding represent a significant change under RCW 10.73.100(6) and apply retroactively to those who received life without parole sentences for crimes committed as juveniles which are older and final, as well as to sentences which are not yet final. See, e.g. Montgomery v. Louisiana, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), as revised (Jan. 27, 2016); State v. Scott, 416 P.3d 1182 (Wash. 2018).

This new understanding of the differences between youthful and adult brains can apply to those who are nineteen as well as to juveniles, as O'Dell held. Under the retroactivity test set out

by the Washington Supreme Court in Light-Roth, O'Dell, should also apply to those serving life without parole for those who were nineteen at the time they committed aggravated murder even if not for those convicted of lesser crimes who could have argued youth as mitigation at the time of their original sentencings.

For these reasons Monschke's raising of the issue should not be time-barred. Monschke raises a colorable claim that his youth and immature brain development contributed significantly to his participation in the crime.

Alternatively, the petition is being filed within one year of the decision of the Court of Appeals in Light-Roth, holding that O'Dell represented a significant change in the law, because – as noted above -- the Supreme Court's decision in Light-Roth set out a test which would affirm O'Dell as a significant change in the law for petitioners such as Mr. Monscke who could not have argued that their youth justified a sentence of less than life without parole at the time of their sentencing because life without was mandatory.

E. CONCLUSION

Mr. Monschke asks that his petition be granted.

DATED THIS 7th day of January, 2019.

Respectfully submitted,

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