No. 96772-5

IN THE SUPREME COURT OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF:

KURTIS MONSCHKE,

PETITIONER.

REPLY IN SUPPORT OF PERSONAL RESTRAINT PETITION

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I. INTRODUCTION

Five years ago, this Court noted that when it previously concluded "(t)he age of the defendant does not relate to the crime," it did not "have the benefit" of "studies that establish a clear connection between youth and decreased moral culpability for criminal conduct." *State v. O'Dell*, 183 Wash. 2d 680, 695, 358 P.3d 359 (2015). *See also Commonwealth v. Okoro*, 471 Mass. 51, 59-60 (2015) (because "research on adolescent brain development and related issues continues," court could not predict how the results of that research would ultimately "inform our understanding of constitutional sentencing as applied to youth.").

There is now a consensus that late adolescents are largely indistinguishable from their juvenile counterparts, at least in terms of the three attributes that make children "different": (1) they make impulsive and poorly considered choices; (2) they are influenced by others and their environment; and (3) they have great capacity for change. Mr. Monschke asks this Court to apply that consensus to the

evolving standards of decency. In contrast, the State's argument is firmly fastened to the past.

In its *Response*, the State argues that this Court should turn a blind eye to science and draw a fixed line at age 18. The State also argues that Monschke has failed to show prejudice because he has not presented evidence of a nexus between the mitigating qualities of youth and his crime of conviction. Current caselaw does not require such proof. Moreover, Monschke is undeniably a member of the late adolescent class who was sentenced under a statutory scheme which precluded the meaningful consideration of any mitigation, Finally, the State argues that this PRP is time barred, although its focus is almost entirely on the "change in the law" exception and does not dispute Monschke's contention that, if this Court concludes the statute mandating LWOP is unconstitutional, then Monschke's petition is timely.

The State's argument should be rejected by this Court. Instead, using *Miller* as a template, this Court should hold that late adolescents facing mandatory LWOP are "different," in the same way that juveniles are different.

II. ARGUMENT

A. The Evolving Standards of Decency

The United States Supreme Court decisions in *Roper*, *Graham*, and *Miller*, as well as this Court's decisions in *Bassett*, *Ramos*, *Houston-Sconiers*, and *O'Dell* were all premised on advances in the fields of developmental psychology and neuroscience showing fundamental differences between adolescent and adult minds.[1] The *Miller* court explained that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," including "in parts of the brain involved in behavior control." *Miller*, 567 U.S. at 471-72.

Nevertheless, the State argues that this Court should summarily dismiss this PRP by applying decades old caselaw, namely *State v. Grisby*, 97 Wn.2d 493, 497, 647 P.2d 6 (1982), and *State v. Hughes,* 106 Wn.2d 176, 203, 721 P.2d 902 (1986). There are several reasons why this Court should not do so.

[1] *Roper v. Simmons*, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); *Miller v. Alabama*, 560 U.S. 467 (2012); *State v. Bassett*, 192 Wash. 2d 67, 428 P.3d 343 (2018); *State v. Houston-Sconiers*, 188 Wash. 2d 1, 391 P.3d 409 (2017); *State v. Ramos*, 187 Wash. 2d 420, 387 P.3d 650 (2017); *State v. O'Dell*, 183 Wash. 2d 692, 358 P.3d 359 (2015).

First, *Grisby* involved a deeply flawed statute which provided different punishments for a defendant who pleaded guilty (life with parole) versus one who went to trial (life without parole or death). *See e.g.*, *Grisby v. Blodgett*, 130 F.3d 365, 370 (9th Cir. 1997) (striking down Grisby's LWOP sentence as unconstitutional penalty attached to his decision to go to trial). Mr. Grisby did not contend that he was part of any class of less culpable defendants. This Court responded, consistent with the law at the time, that only "death" was different. That has, of course, changed. Likewise, *Hughes* was decided before the death penalty was found to be unconstitutional and before scientists and courts recognized just how adolescents are different. Perhaps most importantly, if the State were correct that this Court is bound to apply these decisions, it would entirely eradicate the "evolving standards of decency" by making the cruel punishment clauses entirely static.

The concept of proportionality is central to the Eighth Amendment." *Graham,* 560 U.S. at 59. And courts view that concept less through a historical prism urged here by the State than according to "the evolving standards of decency

that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

B. The Creation of a New Set of Sentencing Rules for Juveniles Did Not Constitute a Refusal to Apply Those Rules to Late Adolescents.

While the "children are different" cases create exemptions for juveniles, those decisions do not reject similar rules for late adolescents—because no such claims were raised in those cases. Courts decide the issue presented. In *Roper*, for example, the Court described the issue before the Court as "whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime." *Roper,* 543 U.S. at 555–56.

Likewise, while the scientific research provided strong support for the reviewing courts' observations about juveniles, that research did not support treating a defendant's eighteenth birthday as the neurodevelopmental line between children and adults. *See, e.g.,* Laurence Steinberg, *Should the Science of Adolescent Brain*

Development Inform Public Policy?, Issues in Science and Technology (Spring 2012) (noting that "there is no simple answer to the question of when an adolescent brain becomes an adult brain"). *See also Moore v. Texas*, 581 U.S. ___, 137 S. Ct. 1039, 1053 (2017) (holding that when determining whether an inmate's execution would violate the Eighth Amendment due to intellectually disability, states must give proper deference to the "medical community's current standards" that reflect "improved [scientific] understanding over time").

C. There is a Scientific Consensus that Late Adolescents Share the Class Characteristics That Make Children Different.

There is no empirical justification for limiting the individualization requirement to offenders under the age of eighteen. Rather—as the American Bar Association recognized in a recent resolution calling for the elimination of the death penalty for offenders who were 18-21 at the time of their crimes—a large body of scientific research conducted over the past decade has "demonstrate[d] that 18 to 21 year olds have a diminished capacity to understand the consequences of their actions and control their behavior in

ways similar to youth under 18." American Bar Association Resolution 111 (2018). See also Andrew Michaels, *A Decent Proposal: Exempting Eighteen-to-Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. Rev. Law and Social Change 139, 161 (2016).

"Over the past decade, developmental psychologists and neuroscientists have found that biological and psychological development continues into the early twenties." Elizbeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 642 (2016). This research confirms that 18-21 year olds "are not fully mature adults" but rather are more like adolescents under the age of eighteen in the precise three ways the courts found to be of central importance to the constitutional analysis in *Miller*, *Houston-Sconiers*, and *Bassett*.

First, the research has established that late adolescents, like juveniles, are prone to risk-taking and impulsivity and are not yet mature enough to fully anticipate the future consequences of their actions. Researchers have found that young people develop "basic

intellectual abilities" (a measure of working memory, capacity to solve academic problems, and verbal fluency) much earlier than they develop "psychosocial maturity" (a measure of impulsivity, risk perception, sensation-seeking, future orientation, and resistance to peer influence). Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28(1) Dev. Rev. 78-106 (2008). While "basic intellectual abilities reach adult levels around age 16," the "process of psychological maturation" is not complete until "well into the young adult years." *Id.* While adolescents tend toward heightened sensation seeking due to "hormonal changes of puberty," their "brain systems that regulate impulse control" are not yet developed. Elizabeth S. Scott et al., *Young Adulthood as A Transitional Legal Category: Science, Social Change, and Justice Policy*, at 656, 657. This "maturational imbalance" results in "a period of vulnerability to risky behavior," including "criminal offending." *Id*. at 647.

To understand how this phenomenon works in real-life situations, psychologists distinguish between two different decision-making processes: "cold cognition," which refers to

"judgment in situations that permit unhurried decision making and consultation with others," and "hot cognition," which refers to "judgment in situations characterized by emotional arousal, time pressure, or the potential for social coercion." Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence* 202 (2014). For some time, scientists have understood that adolescents, as a result of their stage of neurodevelopment, make poorer decisions, take more risks, and act more impulsively when they are emotionally aroused and relying on hot cognition. See, *e.g.*, Eveline Crone et al., *Developmental Changes in Real Life Decision Making*, 25 Developmental Psychology 251, 252 (2004). In fact, the State's *Response* relies heavily on BJ Casey & Kristina Caudle, *The Teenage Brain: Self Control,* 22 Current Directions in Psychol. Sci. 86 (Apr. 1, 2013), which admittedly concludes that teenagers demonstrate restraint in "neutral" settings, but also concludes:

> However, in emotional contexts, adolescents' impulse-control ability is severely taxed relative to that of children and adults. This behavioral pattern is paralleled by exaggerated responses in reward-related circuitry that presumably are difficult to regulate because of less top down control from still-developing prefrontal connections in teenagers.

It was this body of research that led the courts to find that adolescents, because of their stage of neurodevelopment, are more prone than adults to "recklessness, impulsivity, and heedless risk-taking." *Miller*, 567 U.S. at 461 (internal quotation marks omitted).

Recent research has demonstrated that this phenomenon continues past adolescents' eighteenth birthdays. Scientists have found that, "relative to adults over twenty-one," young people between the ages of eighteen and twenty-one "show diminished cognitive capacity, similar to that of adolescents, under brief and prolonged negative emotional arousal." Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 Temple L. Rev. 769, 786 (2016). This research has also linked the 18-21-year olds' diminished cognitive capacity under emotionally charged circumstances to "decreased activity in the [brain's] cognitive-control circuitry." Alexandra O. Cohen et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, supra, 559.

In another study, researchers used functional imaging technology to observe young people's brains as they were exposed to emotionally neutral and emotionally charged stimuli. Marc D. Rudolph et al., *At Risk of Being Risky: The Relationship Between "Brain Age" under Emotional State and Risk Preference*, 24 Developmental Cognitive Neuroscience 93, 94-96 (2017). The researchers found that the brains of 18-21-year olds performed and looked like adult brains when exposed to the neutral stimulus but performed and looked like younger adolescents' brains when exposed to the emotionally charged stimulus. *Id.* at 102.

Scientists have also found that these phenomena appear to be universal. In a recent study of 5,000 people between the ages of ten and thirty from eleven culturally and economically diverse countries, researchers found that "sensation seeking is higher during adolescence—peaking at age 19—than before or after, whereas self-regulation continues to develop into the mid-20s." Laurence Steinberg et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, 21(2) Developmental Science 1, 2 (2017). And the researchers

found that "[t]hese patterns are strikingly similar across the 11 countries studied," despite great cultural and economic differences between those countries. *Id.*

This body of research demonstrates that a key characteristic of adolescence found to be of constitutional significance by this court—a propensity to recklessness, impulsivity, and heedless risk-taking—is present in late adolescents. And this characteristic is "now viewed as normative, driven by processes of brain maturation that are not under the control of young people," and typical of normally developing brains. Elizabeth S. Scott et al., *Young Adulthood as a Transitional Category*, supra, 647.

Second, the research has shown that, like younger adolescents, late adolescents are more vulnerable to negative outside influences than their adult counterparts. In one study, researchers examined a sample of 306 individuals in three age groups—adolescents (thirteen to sixteen), youths (eighteen to twenty-two), and adults (twenty-four and older)—and determined that "the presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions." Margo

Gardner et al., *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Dev. Psychology 625, 632, 634 (2005). And the research has identified an apparent link between peer influence on risk taking and increased activity in the brain's socio-emotional network, a part of the brain that does not begin to mature fully until the early twenties. *Id.*

Third, late adolescents, like younger adolescents, have greater prospects for rehabilitation than their older adult counterparts. Researchers have found that the propensity to engage in risky behavior peaks at age twenty. E.P. Shulman et al., *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50(1) Developmental Psychology 167-177 (2014). These risk-taking behaviors, and corresponding rates of criminality, then drop off dramatically as young people move from late adolescence and early adulthood into their mid-to late twenties. See Gary Sweeten et al., *Age and the Explanation of Crime, Revisited*, 42(6) *Journal of Youth and Adolescence* 921-938 (2013). Thus, while all adolescents are more prone to risk-taking and criminality, most will grow

out of it and stop offending by the time they leave their twenties.

This desistance trajectory is consistent with what scientists now know about neurodevelopment in late adolescence. Adolescence is a "remarkable period of brain reorganization and plasticity," Laurence Steinberg, A*ge of Opportunity: Lessons from the New Science of Adolescence*, supra, 22. During this time of heightened neuroplasticity, adolescents are able to learn new information and strengthen basic and advanced abilities to a greater degree than in later life. *Id.* at 24, 34.

In sum, current scientific research demonstrates that in all the ways that were significant to the *Miller* and *Bassett* Courts' constitutional analysis, late adolescents are much more like younger adolescents than they are to older adults.

D. Science Informs the Law

Considering these recent scientific advances, courts have begun to recognize that late adolescents cannot be treated the same as older, more fully developed adults when they are subjected to harsh criminal sanctions. *See, e.g., Cruz v. United States,* No. 11-CV-787 (JCH), 2018 WL

1541898, at *16 (D. Conn. Mar. 29, 2018) (unpublished decision holding that, in light of recent scientific developments, "*Miller* applies to 18-year-olds," and "the Eighth Amendment [thus] forbids a sentencing scheme that mandates life in prison without possibility of parole for offenders who were 18 years old at the time of their crimes" (citation and internal quotation marks omitted)); *Commonwealth v. Bredhold*, No. 14-CR-161, 2017 WL 8792559 at *1 (Ky. Cir. Ct. 2017) (holding that Kentucky death penalty statute is unconstitutional as applied to individuals under the age of twenty-one in light of recent research demonstrating that those individuals are "psychologically immature in the same way that individuals under the age of 18 were deemed immature, and therefore ineligible for the death penalty").

Today, there is no justifiable basis for excluding late adolescents from the individualization protection of the state and federal constitutions. The science now shows that, in all the ways that mattered to this Court's analysis in its recent juvenile sentencing cases, there is no constitutionally

significant difference between late adolescents and seventeen-year-old offenders.

E. Monschke Was Prejudiced

The State argues that Monschke must do more than show that he is a member of the late adolescent class. According to the State, even if late adolescents are distinguished by the same class characteristics as juveniles, he must present evidence showing an individualized link between those characteristics and the commission of his crime of conviction. *Response,* p. 20.

The State is wrong. This Court has expressly rejected that a defendant must "present expert testimony to establish that youth diminished his capacities for purposes of sentencing." *State v. O'Dell*, 183 Wash. 2d 680, 697, 358 P.3d 359, 367 (2015). Instead, a sentencing judge should be given the discretion to determine late adolescence as a possible mitigating circumstance considering the class characteristics, individual factors and the facts of the crime. *See also Graham*, 560 U.S. at 91 (Roberts, C.J., concurring) (noting that he would find the juvenile's life-without-parole sentence violated the Eighth Amendment in light of "the

particular facts of this case," without joining the majority's categorical ruling).

If, however, this Court concludes the science itself is in dispute, then this Court should remand for an evidentiary hearing. While this Court has already accepted the science as providing evidentiary support for the request for an exceptionally lenient sentence in *O'Dell*, Monschke invites an opportunity to resolve any evidentiary disputes at a hearing. *O'Dell*, 183 Wash. 2d at 692.

The studies cited by the State do not undermine Monschke's claim. As noted previously, when read in their entirety, they support Monschke's claim. The State additionally argues that the science is unhelpful because the most neuroscience can do is provide "general descriptions of brain maturation." *Response*, p. 13-14 (citing Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, Current Directions in Psychol. Sci. 22(2) (Apr. 16, 2013)).

Monschke agrees that there are limitations in obtaining individualized measures of neurodevelopment. However, that does not render the class characteristics

irrelevant. Otherwise, those characteristics would be equally irrelevant to juveniles. Instead, those class characteristics should be considered by a court in combination with circumstantial evidence of an individual defendant's maturation, his environment, and other salient factors in drawing a conclusion as to how those factors contributed to the crime of conviction—just as the State often relies on circumstantial evidence to prove a requisite mens rea. *See e.g., O'Dell*, 183 Wash. 2d at 697 (describing the lay testimony that a trial court should consider in evaluating whether youth diminished a defendant's culpability).

F. Monschke's Claim is Narrow

Finally, the State argues that if this Court extends the individualization requirement to late adolescents sentenced to mandatory LWOP that it would open the door to widespread challenges to all aspects of criminal sentencing. *Response,* p. 22. If such expansion is warranted by the evolving standards of decency, then the State invokes a "fear of too much justice." *McCleskey v. Kemp*, 481 U.S. 279, 339 1 (1987) (Brennan, J., dissenting).

However, Monschke's claim is narrowly tailored. It applies only to the most serious punishment allowed under Washington law. It does not seek to categorically prohibit that punishment. And, it is further narrowed because it is coupled with the requirement that it applies only to a class that shares the salient characteristics making juveniles "different."

The State is certainly correct that the state legislature has drawn a line at age 18, both in terms of separating juvenile from adult court and in several other regards. The State argues that this Court must respect that line. That is true, except when the line violates constitutional mandates. This Court has already found that the state and federal constitutions require different treatment for juveniles than was legislatively proscribed. The State's arguments challenge those decisions as unwise and unwarranted.

In contrast, Monschke seeks only a modest and logical extension. This is not the time to reverse the evolving standards of decency.

III. CONCLUSION

Just as the "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes," (*Miller*, 567 U.S. at 472), the same distinctive attributes applicable to late adolescents similarly diminish the penological justification of a making this State's most single-most serious punishment mandatory, precluding any consideration of facts which diminish culpability, including the neurodevelopmental truths discovered long after the passage of such legislation.

This Court should either grant Mr. Monschke's PRP or remand for an evidentiary hearing.

DATED this 4th day of March 2020.

RESPECTFULLY SUBMITTED:

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