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NO. 96772-5 (Consolidated with 96773-3)

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**SUPREME COURT OF THE**
**STATE OF WASHINGTON**

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IN RE THE PERSONAL RESTRAINT OF

DWAYNE EARL BARTHOLOMEW AND

KURTIS W. MONSCHKE,

Petitioners.

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# SUPPLEMENTAL BRIEF OF RESPONDENT

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MARY E. ROBNETT
Prosecuting Attorney

Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762
930 Tacoma Ave., Rm 946
Tacoma, WA 98402
(253) 798-7400

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## I. INTRODUCTION

Bartholomew and Monschke were adults when they committed capital murders resulting in mandatory life sentences. Decades later and years after their cases became final, they ask to be sentenced as juveniles for their adult crimes. They ignore long-standing precedent regarding the constitutionality of the capital punishment statute and the fact that the significant change in law that they rely upon is strictly limited to juvenile offenses. Their petitions must be dismissed as time barred. It is not constitutionally cruel to treat adults differently from children.

## II. RESTATEMENT OF THE ISSUES

A. Have the defendants demonstrated an exception to the time bar under RCW 10.73.100(2) where this Court repeatedly has held the mandatory life sentence in the capital punishment statute to be constitutional?

B. Have the defendants demonstrated an exception to the time bar under RCW 10.73.100(6) where

   1. *Miller* is explicitly limited to offenses committed before the age of eighteen and therefore not material to their adult crimes?

   2. This Court has held that *O'Dell* is not a change in law, but only the interpretation of a statutory provision that is not relevant to the defendants' sentences?

C. Based on a line of "children are different" cases, have the defendants established a constitutional requirement to treat adults as children?

D. Have the defendants demonstrated actual and substantial prejudice where they fail to provide any facts or evidence that their crimes resulted from traits related to transient immaturity?

## III. STATEMENT OF THE CASE

Both Petitioners Dwayne Bartholomew and Kurtis Monschke have been convicted of aggravated first degree murder and are serving life without parole sentences.

Kurtis Monschke: In 2003, to advance his status as a white supremacist, Monschke beat Randall Townsend to death with a baseball bat. *State v. Monschke*, 133 Wn. App. 313, 135 P.3d 966 (2006), *review denied* 159 Wn.2d 1010 (2007), *cert. denied* 522 U.S. 841 (2007). Monschke was the leader among co-defendants who premeditated the attack, purchased bats specially for this purpose, and then beat, kicked, and stomped the homeless, helpless victim over a railroad track. *Monschke*, 133 Wn. App. at 323; *In re Monschke*, 160 Wn. App. 479, 484, 251 P.3d 884, 888 (2010); Brief of Respondent at 2-6, *In re the Pers. Restraint of Monschke*, No. 96772-5 (Wash. Feb. 26, 2020). Monschke was 19 at the time of his offense.

Dwayne Bartholomew: In 1981, after informing others of his plan to rob the laundromat and "leave no witnesses," Bartholomew fired two bullets, killing 17-year-old laundry attendant Paul Edward Turner. *Bartholomew v. Wood*, 34 F.3d 870, 871 (9th Cir. 1994); *State v. Bartholomew*, 98 Wn.2d 173, 178-79, 654 P.2d 1170 (1982), *cert. granted, judgment vacated,* 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383

(1983). He confessed to a cellmate that the killing had been an execution. *Bartholomew*, 98 Wn.2d at 178-79. He told Turner to lie on the floor, asked his age, replied: "too bad," and shot him in the head. *Id.* Bartholomew threatened to kill his brother and his cellmate if they testified against him. *Id.* Bartholomew was 20 at the time of his offense.

At Bartholomew's original sentencing, a psychiatrist testified that Bartholomew has a personality disorder and does not care about the consequences of his actions. *Bartholomew*, 98 Wn.2d at 179. The jury considered various mitigating factors including whether he had the capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law and whether his age called for leniency. *State v. Bartholomew*, 101 Wn.2d 631, 647-48, 683 P.2d 1079 (1984) (RCW 10.95.070(6) and (7)). Finding no mitigating circumstances, the jury sentenced him to death. *State v. Bartholomew*, 104 Wn.2d 844, 845, 710 P.2d 196, 197 (1985).

On appeal, this Court held the statute unconstitutional insofar as it permitted the sentencing jury to consider nonstatutory aggravating circumstances (e.g. Bartholomew's uncharged offenses including two other robberies, a burglary, and an assault), the sentence was reversed. *Bartholomew*, 98 Wn.2d at 175-76, 197, 199. Even though the prosecutor decided not to seek the death penalty, a jury was empaneled on remand to

consider mitigating factors once again. *Bartholomew*, 104 Wn.2d at 846, 850. This time, the jury imposed a sentence of life without parole. *Wood v. Bartholomew*, 516 U.S. 1, 4, 116 S. Ct. 7, 9, 133 L. Ed. 2d 1 (1995).

In 2017, Bartholomew filed a CrR 7.8 motion which the superior court transferred as a personal restraint petition, noting the claim was time barred. This Court has accepted direct view, consolidated with Monschke's petition.

## IV. ARGUMENT

### A. No statutory exception to the time bar permits the disturbance of these long-final sentences.

There is no constitutional right to collateral review. The right is statutory and limited under RCW 10.73.090. The statute promotes fairness to victims and protects the state's legitimate interest in finality where the aggravated murders occurred 39 and 17 years ago.

Neither Bartholomew nor Monschke argue that their personal restraint petitions are timely under RCW 10.73.090. Their convictions were final over a decade ago. *Bartholomew v. Wood*, 34 F.3d 870, 871 (9th Cir. 1994) (noting that state remedies had been exhausted before habeas action was filed in Western District); *Monschke v. Washington*, 552 U.S. 841 (2007) (denying petition for certiorari).

Rather they argue that an exception applies under RCW 10.73.100(2) and (6). The threshold inquiry is whether either exception

applies. *Matter of Schorr*, 191 Wn.2d 315, 320, 422 P.3d 451 (2018). Neither exception applies.

**1. This Court has long held that the constitutions do not require that the sentencer consider the offender's particular circumstances before imposing mandatory life without parole under the capital punishment statute.**

If the statute which the defendant was convicted of violating is unconstitutional on its face or as applied to the defendant's conduct, there is an exception to the time bar under subsection (2). The party challenging the constitutionality of a statute must overcome the presumption that a statute is constitutional and prove its case beyond a reasonable doubt. *State v. Maciolek*, 101 Wn.2d 259, 263, 676 P.2d 996, 998 (1984).

The defendants argue that the constitutions require that the sentencer consider an adult offender's youth before imposing a mandatory life sentence under Chapter 10.95 RCW. They are wrong. And that they are wrong is a long decided question.

The cruel punishment clauses in the state and federal constitutions do not require a particularized consideration of the defendant's character and record before imposing life without parole for an aggravated first degree murder. *State v. Hughes*, 106 Wn.2d 176, 203, 721 P.2d 902 (1986); *State v. Grisby,* 97 Wn.2d 493, 497, 647 P.2d 6 (1982), *cert. denied sub nom. Frazier v. Washington,* 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983). More recently, this Court has reaffirmed this position in the context

of the persistent offender statute and *Miller*. *State v. Moretti*, 193 Wn.2d 809, 813, 446 P.3d 609 (2019); *State v. Witherspoon*, 180 Wn.2d 875, 890-91, 329 P.3d 888, 896 (2014) (holding *Miller* and *Graham* did not apply to persistent offenders who were adults at the time of each strike offense and received mandatory life sentences).

The year after the relevant iteration of the capital punishment statute was enacted under Laws of 1981, c. 138, §§ 3, 8, this Court took review of the mandatory life-without-parole provision. Comparing a life sentence to the death penalty, Frazier and Grisby argued that it was cruel and unusual punishment under U.S. CONST. amend. VIII and WASH. CONST. art. 1, § 14 to impose mandatory life without considering mitigating circumstances. *Grisby,* 97 Wn.2d at 497. They argued the court must "allow the particularized consideration of relevant aspects of the character and record of each convicted Defendant." *Id.* (citing *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976)). This Court disagreed, stating there is "no analogy between the death penalty and life imprisonment without parole." *Grisby,* 97 Wn.2d at 498 (citing *Woodson*, 428 U.S. at 305). *Accord State v. Dictado,* 102 Wn.2d 277, 296, 687 P.2d 172 (1984). *See also Graham v. Florida*, 560 U.S. 48, 69, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (a life without parole sentence shares some

characteristics with a death sentence, however, the death penalty is unique in its severity and irrevocability).

In the death penalty context, the result of the sentencer's consideration of mitigating factors is the difference between death and life. Bartholomew's sentencing jury actually did consider all mitigating factors, including his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law and whether his age called for leniency. *Bartholomew*, 101 Wn.2d at 647-48; *Bartholomew*, 104 Wn.2d at 846, 850. When they could not agree on the death penalty, he was sentenced to life. RCW 10.95.080(2).

> So long as the Legislature does not violate the state and federal constitutional directives against cruel and unusual punishment or excessive fines, it may restrict judicial discretion in imposing criminal sentences. We uphold the constitutionality of RCW 10.95.030(1) and .080(2).

*Hughes*, 106 Wn.2d at 203 (reaffirming that the constitutions do not require that a capital sentence be mitigated to a parolable sentence).

Death is different, but Bartholomew and Monschke have not been sentenced to death. Children are different, but Bartholomew and Monschke were both adults at the time of their offenses. Accordingly, they have no constitutional right to have the sentencer consider their immaturity. The statute with its mandatory penalty for adults is constitutional. Subsection (2) does not provide an exception to the time bar.

**2. There is no change in law which holds that an adult offender must be treated like a child.**

Under subsection (6), a significant change in law material to the defendant's sentence which applies retroactively would be an exception to the time bar. Monschke points to *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) as the change in law. Bartholomew claims the change in law can be found in a penumbra between *Miller* and *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359, 366 (2015). In fact, no case has prohibited mandatory life without parole for an adult offender convicted of aggravated first degree murder. Both are forced to admit as much. Monschke's Amended Petition (MAP) at 25 ("Monschke admits that there is no case directly on point"); Bartholomew's Reply at 4 ("this Petition is being filed too early ... because no case has squarely held that the imposition of life without parole on a 20 year old violates the federal or Washington State constitution").

The parties are asking for a material change in law. Until the law has changed in this respect, if it ever does, they have come "too early." The Court's task in this threshold inquiry is "to determine what the law is, not what it might eventually become." *Garcia v. Texas*, 564 U.S. 940, 941, 131 S.Ct. 2866, 180 L.Ed.2d 872 (2011) (refusing to stay death sentence). If they wanted to be the ones to make the argument, they have come too late. They may not request a change in law in time barred petitions.

**a) *O'Dell* was not a significant change in law and has no application to the capital punishment statute.**

Bartholomew explained that he filed the petition under the belief that *O'Dell* had announced a new constitutional rule. Bartholomew's Petition (BP) at 7. However, while his petition was pending, this Court made clear that *O'Dell* had not established a new rule. It only interpreted the plain language of the exceptional sentence provision in the Sentencing Reform Act (SRA). *Matter of Light-Roth*, 191 Wn.2d 328, 338, 422 P.3d 444, 449 (2018).

There, notwithstanding RCW 9.94A.535(1)(e), the sentencing court had refused to consider O'Dell's immaturity as a mitigating circumstance *O'Dell*, 183 Wn.2d at 683, 685-86. Because the court misunderstood its discretion to depart downward from the standard range, the case was remanded for a new sentencing hearing.

> We hold that a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is.

*Id.* at 698-99.

From this holding, Bartholomew interprets "there is no constitutional bright line dividing juvenile brains from adult brains at age eighteen with respect to determining culpability" and that "the principles underlying *Miller* applied to persons 18 years of age and older." BP at 7;

Reply at 2. This is not the holding. Bartholomew elevates dicta in a manner inconsistent with legal principles of case interpretation.

> [O]ur "duty to follow binding precedent is fixed upon case-specific holdings, not general expressions in an opinion that exceed the scope of a specific holding." *Id.* We believe "the very concept of binding precedent presupposes that courts are 'bound by holdings, not language.' " *Id.* at 242–43, 781 S.E.2d at 926 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 282, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001)). This limiting principle exists because "words [in judicial] opinions are to be read in the light of the facts of the case under discussion." *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S.Ct. 165, 89 L.Ed. 118 (1944); *see also Ameur v. Gates*, 759 F.3d 317, 324 (4th Cir. 2014).

*Jones v. Commonwealth*, 293 Va. 29, 56, 795 S.E.2d 705, 721 (2017) (holding 8th Amendment precedent regarding *Miller* does not extend to discretionary sentencing schemes).

If this were *O'Dell*'s holding, it would indeed be a significant change in law. But this Court held "*O'Dell* does not constitute a 'significant change in the law.' " *Matter of Light-Roth*, 191 Wn.2d 328, 338, 422 P.3d 444, 449 (2018). The decision did not turn on any constitutional principle, but on the interpretation of a statute. "RCW 9.94A.535(1)(e) has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward." *Light-Roth*, 191 Wn.2d at 336.

Neither Bartholomew nor Monschke were sentenced under the SRA. The capital punishment statute precedes and is separate from the

SRA. *Bartholomew*, 98 Wn.2d at 186-87. Their sentences were mandatory, not discretionary. Their sentencers had no ability to depart downward from a life sentence. *O'Dell* has no application to them.

**b) *Miller* has no application to adult offenders.**

Bartholomew and Monschke claim *Miller* is material to their adult sentences. The language of the holding plainly states otherwise.

> We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments."

*Miller*, 567 U.S. at 465 (emphasis added). *See also Montgomery v. Louisiana*, 136 S. Ct. 718, 726, 193 L. Ed. 2d 599 (2016).

The rule which came out of *Miller* is clearly limited to three necessary elements: the mandatory nature of the law, the life-without-parole sentence, and the offender being under the age of 18 at the time of the offense. The 8th Amendment is not offended by discretionary sentencing schemes, which do *not* "preclude a sentencer from taking into account an offender's age and the wealth of characteristics and circumstances attendant to it." *Jones v. Commonwealth*, 795 S.E.2d 705, 721, 709 (Va. 2017), *cert. denied*, 138 S.Ct. 81 (2017) (quoting *Miller*, 567 U.S. at 476). Nor is it offended by sentences which permit a juvenile offender a meaningful opportunity for release in his or her lifetime. *See e.g. Burrell v. State*, 207

A.3d 137 (Del. 2019) (25-year mandatory minimum sentence for juvenile offender did not run afoul of *Miller*); *State v. Rivera*, 172 A.3d 260, 267 (Conn. App. 2017) ("[U]nder *Miller*, a sentencing court's obligation to consider youth related mitigating factors is limited to cases in which the court imposes a sentence of life, or its equivalent, *without* parole."); *State v. Springer*, 856 N.W.2d 460, 467-68 (S.D. 2014) (*Miller* does not apply to a 261-year sentence with parole eligibility in 33 years); *State v. Vang*, 847 N.W.2d 248, 262-63 (Minn. 2014) (holding *Miller* inapplicable to a life sentence with the possibility of parole in 30 years).

And the last element (offenses committed before the age of 18) is the most pivotal one for this line of cases which "establish that children are constitutionally different from adults for persons of sentencing." *Miller*, 567 U.S. at 471. The case and its forebears are not offended or even concerned with sentences imposed on adults, regardless of their maturity.

Both defendants argue that the *Miller* holding turns on "brain science." This is false.

> [T]he line drawn by the Supreme Court at age 18 was not based primarily on scientific research. The Supreme Court acknowledged its line at age 18 was an imprecise "categorical rule[ ]" but emphasized that "a line must be drawn." *Roper*, 543 U.S. at 574, 125 S.Ct. 1183. The Court drew the line at age 18 because that "is the point where society draws the line for many purposes between childhood and adulthood." *Roper*, 543 U.S. at 574, 125 S.Ct. 1183.

> New research findings do not necessarily alter that traditional line between adults and juveniles.

*People v. Harris*, 120 N.E.3d 900, 913–14 (Ill. 2018).

"Currently, the only legitimate use of adolescent brain research in individual cases is to provide decision makers with general descriptions of brain maturation." 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) (there is no scientific basis for extrapolating group data to the measurement of an individual adolescent's neurobiological maturity for legal purposes, because there is too much variability within age groups and across development).[1] *See also* Terry A. Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice, 85 Notre Dame L. Rev. 89 (2009) (suggesting neuroscience does not shape legal decisionmakers' beliefs and values about youthful offenders, but is only read through the lens of existing beliefs and values); BJ Casey & Kristina Caudle, The Teenage Brain: Self Control, 22 Current Directions in Psychol. Sci. 82-87 (Apr. 1, 2013) (cautioning against myths and overgeneralizations about adolescence and noting "striking individual differences").[2]

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[1] https://journals.sagepub.com/doi/full/10.1177/0963721412471678
[2] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4182916/

The cases draw a bright line dividing juvenile offenders from adult offenders at age eighteen with respect to sentencing. *Miller*, 567 U.S. at 489 (prohibiting mandatory sentencing schemes which require life without parole for juvenile offenders); *Graham v. Florida*, 560 U.S. 48, 78, 82, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) ("differences between juvenile and adult offenders are too marked and well understood") ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide"); *Roper v. Simmons*, 543 U.S. 551, 574, 578, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (death penalty permitted for 18 year olds) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed"); *State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993) (death penalty not authorized for crimes committed by juveniles).

*Miller* does not apply to adult offenders. *Moretti*, 193 Wn.2d at 813; *Witherspoon*, 180 Wn.2d at 890-91; *State v. Robertson*, 884 N.W.2d 864, 877 (Minn. 2016) (rejecting equal protection argument under *Miller* where offender was 22 at time of the offense).

Bartholomew argues that he "cannot be fairly faulted for filing a plausible constitutional claim too soon" in light of the climate of change in the law. Reply at 4. But he can be turned down. And here he must be.

Procedural time bars do not permit this claim to be raised in a long-final, 40-year-old case where there has been no change in law material to adult offenders. *See In re Richey*, No. 77822-6-I, 2019 WL 6492484 (Wash. Ct. App. Dec. 2, 2019) (unpublished) (non-binding authority cited under GR 14.1) (holding *Miller* was not material to a 65-year sentence imposed for an offense committed at the age of 18 and dismissing petition as time barred).

### B. It is not cruel within the meaning of the Eight Amendment and Article 1, Section 14 to treat adults differently from children.

Bartholomew and Monschke are unhappy with a "bright-line cutoff" "dividing [juveniles from adults] at age eighteen." BP at 6; MAP at 26. But neither makes a reasoned argument for another means of distinguishing children from adults. In effect, they ask this Court to treat adults as children, where the jurisprudence they draw upon intends the opposite, i.e. it intends to distinguish children from adults.

The United States Supreme Court recognized that there is no perfect way to distinguish between the mature and the immature. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Simmons*, 543 U.S. at 573. Eighth Amendment jurisprudence drew the line where the legislatures frequently had: at 18 years of age.

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. [...] The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

*Simmons*, 543 U.S. at 574. "Juveniles—those under the age of 18—are frequently treated differently under the criminal law." *Shawn P.*, 122 Wn.2d 533, 565, 859 P.2d 1220 (1993). The constitutions permits the legislature to draw these lines where there is a rational basis. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 85–86, 120 S. Ct. 631, 647, 145 L. Ed. 2d 522 (2000). "These age distinctions are based on society's judgments about maturity and responsibility." *Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 974, 977 P.2d 554, 561 (1999).

If 18 is the line for death eligibility, the same line does not offend the constitution in a discussion of life sentences.

> [C]laims for extending *Miller* to offenders 18 years of age or older have been repeatedly rejected. See, *e.g.*, *United States v. Williston*, 862 F.3d 1023, 1039-40 (10th Cir. 2017) (declining to expand the holding of *Miller* to offenders who are " 'just over age 18' " at the time of their offenses); *United States v. Marshall*, 736 F.3d 492, 500 (6th Cir. 2013) (for eighth amendment purposes, an individual's eighteenth birthday marks the bright line separating juveniles from adults). *People v. Argeta*, 210 Cal.App.4th 1478, 149 Cal. Rptr.3d 243, 245-46 (2012) (rejecting argument to

> extend *Miller* to an offender who was 18 years, 5 months old at the time of his offense). We agree with those decisions and our appellate court that, for sentencing purposes, the age of 18 marks the present line between juveniles and adults.

*Harris*, 120 N.E.3d at 914.

The Defendants argue this Court should give constitutionally preferential treatment to adults who are irresponsible, impetuous, dependent, and weak of character and who commit crimes – in other words, criminals. But persons who commit crimes is not a suspect classification. *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1976). The cruel punishment clauses do not require that adult criminals be sentenced like children.

**C. Petitioners fail to prove actual and substantial prejudice.**

After the crimes have been investigated, the witnesses have testified, the jury has spoken – finding guilt beyond a reasonable doubt, and convictions and sentences and been upheld on appeal, there is a presumption of finality which is hard to overcome in a timely collateral attack. The courts' review becomes constrained, and relief extraordinary. *In re Fero*, 190 Wn. 2d 1, 14, 409 P.3d 214, 222 (2018). The defendants take on the burden of proof and are required to show both constitutional error and prejudice. *In re Cook*, 114 Wn.2d 802, 814, 792 P.2d 506 (1990); *Hews v. Evans*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983); RAP 16.7(a)(2). And the showing of prejudice the defendants must make becomes heightened. *Fero*,

190 Wn.2d at 15. Defendants must show actual and substantial prejudice: that, more likely than not, the outcome would have been different. *Matter of Meippen*, 193 Wn.2d 310, 315, 440 P.3d 978, 981 (2019). These standards are "justified by the court's interest in finality, economy, and integrity of the trial process and by the fact that the petitioner has already had an opportunity for judicial review." *Id.* (quoting *In re Pers. Restraint of Isadore*, 151 Wash.2d 294, 298, 88 P.3d 390 (2004)).

Notwithstanding this exacting standard, neither Bartholomew nor Monschke bring any new facts in their petitions to show that they have persuasive evidence of immaturity. Their age alone is "not a per se mitigating factor." *O'Dell*, 183 Wn.2d at 695. Bartholomew argues that a mandatory sentence is unconstitutional for those who "demonstrate that their brain development and age limited their culpability for the crime." Petition at 6. But neither have demonstrated what their brain development was at the time or why they should be considered less culpable.

The State has addressed Monschke's maturity in the Brief of Respondent, filed February 26. He was not dependent on others, financially or otherwise. He was the leader in this premeditated crime. And his racist devotion has not been transient.

Bartholomew also acted with solo, premeditated intent. *Bartholomew*, 98 Wn.2d at 177-78. He argues that he "was depressed" and

had "mental problems," but provides no record for this allegation. BP at 5. Perhaps he interprets this from another allegation – that he requested the death penalty at arraignment. BP at 4. No factual basis is presented for this claim either. In any case, depression is not associated with immaturity.

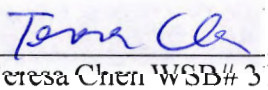
Neither record demonstrates the qualities that case law associates with immaturity. *Simmons*, 543 U.S. at 569-70 (discussing "[t]hree general differences between juveniles under 18 and adults"). Bartholomew and Monschke have not demonstrated that they deserved to be treated like children.

## V. CONCLUSION

This Court should hold that Bartholomew's and Monschke's petitions are time barred where there has been no change in law justifying the application of *Miller* to the sentences of adult offenders.

RESPECTFULLY SUBMITTED this 2nd day of March, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



Teresa Chen WSB# 31762
Deputy Prosecuting Attorney

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# PIERCE COUNTY PROSECUTING ATTORNEY

## March 02, 2020 - 2:48 PM

## Transmittal Information

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| **Appellate Court Case Number:** | 96772-5 |
| **Appellate Court Case Title:** | Personal Restraint Petition of Kurtis William Monschke |
| **Superior Court Case Number:** | 03-1-01464-0 |

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