

FILED
SUPREME COURT
STATE OF WASHINGTON
2/10/2020 4:38 PM
BY SUSAN L. CARLSON
CLERK

No. 96772-5

IN THE SUPREME COURT OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF:

KURTIS MONSCHKE,

PETITIONER.

2-10-20:
This amended PRP
replaces the PRP filed on
8-10-18.
*Supreme Court Clerk's
Office*

AMENDED PERSONAL RESTRAINT PETITION

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I. IDENTITY AND STATUS OF PETITIONER

Kurtis Monschke, Petitioner, applies for relief from confinement. Mr. Monschke (DOC # 871510) is current imprisoned at the Monroe Correctional Complex serving a life without parole sentence.

II. FACTS¹

Introduction

Kurtis Monschke was charged with aggravated first-degree murder. “A jury found Monschke guilty as charged and the court sentenced him to serve a mandatory life sentence without possibility of early release under RCW 10.95.030(1).” *State v. Monschke*, 133 Wash. App. 313, 328, 135 P.3d 966, 974 (2006). Monschke was 19 years old at the time of the crime.

The Crime

Along with several other individuals, Monschke was convicted of causing the death of Randy Townsend. Monschke’s co-defendants, Butters and Pillatos, pleaded guilty to first degree

¹ Mr. Monschke incorporates by reference the facts contained in his original petition, including his affidavit. Because that affidavit has already been provided to the Court and opposing counsel, Monschke does not attach it again to this amended petition.

murder, and co-defendant Frye pleaded guilty to second degree murder.

The evidence at trial showed that, without explanation, Butters took the bat he was carrying and hit Townsend, a homeless person who was not known to him, over the head:

The blow shattered the bat and sent Townsend to the ground. Butters and Pillatos then began kicking Townsend in the head. Pillatos picked up a large rock, later determined to weigh 38 pounds, and threw it on Townsend's face. Butters and Pillatos carried Townsend to the train tracks and placed him on his stomach with his head lying face down on the track. Butters then stomped on the back of Townsend's head. Although Townsend was still breathing, Butters exclaimed, "I killed that guy." 30 RP at 2346. Butters and Pillatos went to find Monschke.

State v. Monschke, 133 Wash. App. 313, 323, 135 P.3d 966, 971 (2006). After this lethal assault on Townsend, Butters and Pillatos took Monschke to Townsend's location. At trial there were differing accounts about what Monschke did:

Pillatos testified that Monschke hit Townsend in the head with the bat three or four times. Monschke and Butters testified that Monschke was somewhere else during the entire assault and that he used the bat afterwards simply to nudge Townsend to see if he was still alive. Butters also testified that he told officers that Monschke hit Townsend 10 or more times.

Monschke, 133 Wash. App. at 324.

At trial, evidence was also presented that Monschke met Pillatos and Butters and became involved in a white gang in a juvenile facility as a means of protection. However, the jury was not allowed to hear the defense expert's testimony about this phenomenon in juvenile institutions. RP 2755-2761, 2915-2918. At the time of the crime, Frye, Pillatos, and Monschke lived together.

Later, after the appeals of Butters, Pillatos and Monschke were final, the prosecutors acknowledged that Monschke was less culpable than the others but received a longer sentence: "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.

The Unheard and Unconsidered Mitigating Facts of Youth

Neither the jury nor the sentencing judge heard any testimony about brain development or the corresponding deficits of youth that exist in a teenager, like Monschke.

Mr. Monschke has now been imprisoned for 17 years. While in prison, Monschke he has taken part in and taught numerous rehabilitative programs. He has pursued an education. He has also made numerous contributions to charities. Monschke's

declaration, appended to the original PRP, is incorporated by reference.

III. ARGUMENT

A. **Mandatory Life Without Parole for a Late Adolescent Violates the Individualization Requirement of the Cruel Punishment Clauses of the State and Federal Constitutions.**

Introduction

Kurtis Monschke contends that the individualization requirement of the cruel punishment clauses of the state and federal constitutions renders a mandatory sentence of life without parole (LWOP) unconstitutional for late adolescents. The state and federal constitutions require a sentencing judge to consider and weigh the mitigating qualities of youth in determining whether LWOP is disproportionate and must have the corresponding discretion to impose a lesser sentence when merited.

There are two fundamental precepts underpinning Monschke's argument. First, life without parole or death in prison is now the most severe punishment that can be imposed under Washington law. Second, late adolescents share the same characteristics which led to the recognition that "children are

different” and are undeserving of the most serious punishments. Just as “death is different” and “children are different,” the evolving standards of decency now fully support the conclusion that mandatory life without parole for a late adolescent is also “different.”

This Court’s resolution of this issue is not constrained by past precedent. “Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete.” *Graham v. Florida*, 560 U.S. 48, 85 (2010) (Stevens, J., concurring).²

Instead, this Court’s recent decisions abolishing both the death penalty and LWOP for all youth provide a compelling basis to extend the individualization requirement to this case.

² The concept of evolving standards of decency comes from the case of *Trop v. Dulles*, where the Supreme Court explained that “the words of the [Eighth] Amendment are not precise, and ... their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” 356 U.S. 86, 100-01 (1958).

With the death penalty now part of this state’s history,³ mandatory LWOP is the only punishment which guarantees that a defendant will die in prison without consideration of any facts which mitigate culpability. It was this evolutionary change that resulted in Justice Yu’s call for “a serious reexamination of our mandatory sentencing practices” “to ensure a just and proportionate sentencing scheme.” *State v. Moretti*, 193 Wash. 2d 809, 835, 446 P.3d 609, 621 (2019) (Yu, J. concurring). Monschke respectfully asks this Court to heed that call.

In addition, the recent and accumulating knowledge that juveniles and late adolescents possess neurodevelopmental deficits has resulted in a sea-change in the sentencing of youth. For example, fifteen years ago the United States Supreme Court announced a nationwide prohibition against the executions of juveniles in *Roper v. Simmons*, 543 U.S. 551 (2005).⁴ More recently, this Court construed the cruel punishment clause of our constitution to guarantee a meaningful opportunity for release for

³ *State v. Gregory*, 192 Wash.2d 1, 427 P.3d 621 (2018) (because the death penalty, as administered in our state, fails to serve any legitimate penological goal, it violates cruel punishment clause of the state constitution).

⁴ This Court barred the death penalty for a juvenile in *State v. Furman*, 122 Wash.2d 440,858 P.2d 1092 (1993).

every juvenile, regardless of the crime(s) of conviction. *State v. Bassett*, 192 Wash.2d 67, 428 P.3d 343 (2018).

Considering these new standards of decency, this Court should hold the individualization requirement applies when the state's most severe punishment is mandatorily imposed on a cohort which is categorically less culpable than their fully adult counterparts.

The Individualization Requirement

The guarantee of proportionality is central to both the Eighth Amendment, and article I, section 14. *Graham v. Florida*, 560 U.S. 48, 59 (2010). This right “flows from the basic precept of justice that punishment for crime should be graduated and proportioned.” *Weems v. United States*, 217 U.S. 349, 367 (1910).

The protection against cruel punishment includes an individualization requirement rendering some mandatory sentences unconstitutional. *Miller v. Alabama*, 560 U.S. 467, 470 (2012) (the Constitution requires that a sentencer consider the characteristics of a defendant and the details of his offense before sentencing him to LWOP); *State v. Houston-Sconiers*, 188 Wash. 2d 1, 20, 391 P.3d 409, 419 (2017) (applying the rule that children

require “individualized sentencing consideration of mitigating factors” to less than life sentences).

The United States Supreme Court and this Court have established that both a crime and/or a category of defendant can be “different,” requiring the consideration of individualized mitigating circumstances before imposing sentence. This is a recognition that a process according no significance to relevant facets of the character or the circumstances of the particular offense excludes from consideration the possibility of “compassionate or mitigating factors stemming from the diverse frailties of humankind.” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). It treats all persons convicted of a designated offense “not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.” *Id.* See also William W. Berry III, *Individualized Sentencing*, 76 Wash. & Lee L. Rev. 13, 48–49 (2019).

This Court acknowledged the importance of the individualization requirement when it struck down as unlawful the Washington’s former mandatory death penalty scheme in *State v. Green*, 91 Wash. 2d 431, 446–47, 588 P.2d 1370, 1379 (1979), as

“invalid as it violates the eighth and fourteenth amendments to the United States Constitution.” In doing so, this Court affirmed that it is “essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense.” *Id.* at 445.

Miller, and *Graham* before it, expanded the scope of the individualization requirement by recognizing that children facing a mandatory LWOP sentence were also “different.” *Graham v. Florida*, 560 U.S. 48, 103 (2010) (Thomas, J., dissenting) (“Today’s decision eviscerates that distinction. ‘Death is different’ no longer ... [f]or the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone.”).

Miller did not strike down LWOP as a possible penalty. *But see State v. Bassett*, 192 Wash. 2d 67, 428 P.3d 343 (2018) (imposing a categorical ban on LWOP sentence for a juvenile). Instead, *Miller* held that discretion to impose a lesser punishment was constitutionally required. “Mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's

age and the wealth of characteristics and circumstances attendant to it.” *Id.* at 476.

There is strong support for the conclusion that LWOP is different, both nationally and especially in this state. *Graham* likened life without parole for juveniles to the death penalty. A non-discretionary punishment of LWOP “forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society.” 560 U.S. at 74. See also *id.* at 79 (“Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes.”).

Miller explicitly did not limit itself life without parole. It could have easily done so and did not. Instead, *Miller* grounded its “foundational principle” within the broader category of “a State’s most severe penalties.” *Id.*

This Court has likewise held that the individualization requirement applies whenever a mandatory penalty creates an

unacceptable risk of disproportionality, applying that requirement, first to life-equivalent terms in *State v. Ramos*, 187 Wash. 2d 420, 443, 387 P.3d 650, 662 (2017), and then to less than life sentences in *Houston-Sconiers*. “(W)e see no way to avoid the Eighth Amendment requirement to treat children differently, with discretion, and with consideration of mitigating factors, in this context. *Houston-Sconiers*, 188 Wash. 2d at 20. “Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements. *Houston-Sconiers*, 188 Wash. 2d at 21.

Put another way, the Eighth Amendment proportionality requirement imposes a positive duty—a requirement upon the sentencer before imposing a severe sentence—to consider the lessened culpability of a criminal defendant. Where the defendant is the member of a class of defendants who share qualities recognized by caselaw as mitigating and meriting lesser punishment, the individualization requirement renders a mandatory sentence unconstitutional.

Late Adolescents Share the Qualities of Youth that Make Juveniles “Different”

This Court acknowledged 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 Wash. 2d 420, 438, 387 P.3d 650, 660 (2017). Because juveniles are still maturing, neurodevelopmentally speaking, they “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 Wash. 2d 67, 90, 428 P.3d 343, 354 (2018). For the same reasons that children are different, late adolescents are different, too.

The “children are different” doctrine is premised on “[t]hree general differences between juveniles...and adults” that “render suspect any conclusion that a juvenile falls among the worst offenders.” *Roper*, 543 U.S. at 570.

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

The same is true of late adolescents. This Court has already recognized that late adolescents share these traits with their juvenile counterparts, making them different from adults.

In *O’Dell*, this Court specifically 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 Wash.2d at 695 (citing the findings that a child’s “transient rashness, proclivity for risk, and inability to assess consequences” lessen their culpability). In fact, *O’Dell* concluded that late adolescents and juveniles share the same salient class characteristics:

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. In *Miller, Roper, and Graham*, the Court recognized that these neurological differences make young offenders, in general, less culpable for their crimes: “the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences[;] ... [b]ecause ‘the heart of the retribution rationale’ relates to an offender’s blameworthiness, ‘the case for retribution is not as strong with a minor as with an adult.’ ” *Miller*, 132 S.Ct. at 2458, 2465 (internal quotation marks omitted) (fifth alteration in original) *quoting Graham*, 560 U.S. at 71, 130 S.Ct. 2011 and *citing Roper*, 543 U.S. at 571, 125 S.Ct. 1183).

State v. O’Dell, 183 Wash. 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 Wash. 2d 328, 337, 422 P.3d 444, 449 (2018) (“*O’Dell* broadened our understanding of youth as it relates to culpability.”). This statement applies not only to departures from the ability to depart from a presumptive sentencing ranges, but with equal, if not greater force to the

legislative decision to set LWOP as a mandatory or non-discretionary sentence.

The scientific evidence also demonstrates that there is not a meaningful material difference between late adolescent offenders and 17-year-old offenders. In 2010, for example, scientists published a study tracking the brain development of 5,000 children, which found that their brains were not fully mature until age 25. Dosenbach, et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 *Sci.* 1358, 138–59 (2010); 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* 1987–2002 (2012). The following year, scientists delved deeper, using diffusion tensor imaging (DTI) to show for the first time within individual subjects that white matter “wiring” 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).

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” continues into the early twenties. See Monahan, et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 *Crime J.* 557, 582 (2015).

Recent research has been especially supportive of the conclusion that 19-year-olds are indistinguishable from younger adolescents in terms of brain development. See, e.g., Icenogle, et al., *Adolescents’ Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a “Maturity Gap” in a Multinational, Cross-Sectional Sample*, 43 *L. & Human Behavior* 69 (2019). Like juveniles, because their brains are still developing late adolescents share 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, relative to adults over twenty-one, young adults show diminished cognitive capacity, similar to that of adolescents, under brief and prolonged negative emotional arousal); Laurence Steinberg et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, *Developmental Science* (2017).

In fact, late adolescents are more likely to take risks than either adults or middle or early adolescents. Studies show risk-seeking behavior peaks around ages 17 to 19 and then declines into adulthood. Steinberg *et al.*, *Around the World*, at 10 (graphing the trajectory of sensation-seeking behavior, as related to age, as an upside-down “U” with the peak at age 19). See also 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, the second characteristic that makes youth different. The ability to resist peer pressure is still developing during late adolescence. Susceptibility to peer pressure is higher in late adolescence than in adulthood, but slightly lower than in middle adolescence. Adults do not exhibit this behavior, but rather perform the same whether they are by themselves or with their peers. Among adolescents more than adults, the presence of peers “primes” a reward-sensitive motivational state that increases the subjective value of

immediately available rewards and thereby increases the probability that adolescents will 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).

Finally, the third characteristic of youth—that a juvenile’s personality traits are not as fixed—is equally applicable to emerging adults. Longitudinal studies have found that 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* at 9, 27 (“[M]ost identity development takes place during the late teens and early twenties.”)

Because neurodevelopment continues at least into the mid-20’s, there is a strong likelihood that some offenders facing a death-in-custody sentence can make a persuasive case that the state should not condemn them to die in prison. But mandatory sentences deny offenders, as well as the judges tasked with determining a fair sentence, this opportunity.

In a State Without the Death Penalty, A Mandatory Life Without Parole Sentence is Different

Where LWOP is a state's harshest penalty, as it now is in Washington, LWOP is constitutionally "different." See generally Josh Bowers, *Mandatory Life and the Death of Equitable Discretion*, in *Life Without Parole: America's New Death Penalty?* (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) (arguing that mandatory life-without-parole sentences are particularly egregious).

The United States Supreme Court has recognized the harsh nature of sentencing youth to die in prison. The Court explained that life without parole "alters the offender's life by a forfeiture that is irrevocable" and "deprives [individuals] of the most basic liberties without giving hope of restoration." *Graham*, 560 U.S. at 69-70. The sentence is "especially harsh" for children, who will "on average serve more years and a greater percentage of [their] li[ves] in prison than an adult offender." *Id.* at 70. 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)).

Because Monschke Does Not Seek a Categorical Bar, That Test is Inapplicable

Because Monschke does not argue for an outright ban on LWOP, neither the traditional *State v. Fain*, 94 Wash. 2d 387, 617 P.2d 720 (1980), proportionality analysis nor the recently employed categorical bar analysis in *Bassett*, *supra*, control here. In fact, *Miller* rejects the argument that the objective consensus of states must be determined by counting jurisdictions’ practices when a court is considering the application of the individualization requirement. Instead, the application of the individualization requirement “flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our 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, we have not scrutinized or relied in the same way on legislative enactments.” *Miller*, 567 U.S. at 483.

The central question, instead, is to what extent these core principles of the “differentness” doctrines, which have now been

expanded beyond the death penalty to the punishment of LWOP (and lesser punishments in Washington) and to children, justify expansion of the individualization requirement to the mandatory imposition of the most severe punishment available in this state on a class of defendants who share the salient class characteristics with their juvenile counterparts.

Instead of barring a particular sentence Monschke seeks the requirement that a sentencer follow a certain process—considering all mitigation—before imposing a particular penalty. That argument flows straightforwardly from the aforementioned precedents recognizing that individualized sentencing matters for purposes of meting out the laws’ most serious punishments on categories of individuals whose culpability may be undeserving of such a one-size-fits-all sentence.

This Court retains both the opportunity and the responsibility of interpreting the Eighth Amendment. This Court is the only arbiter of our state constitution. To that end, this Court should conclude the judicial exercise of independent judgment in construing both constitutional requirements leads to the conclusion that the individualization protection applies here.

This Court has previously concluded that Washington’s prohibition of cruel punishment in article I, section 14 provides a heightened protection against disproportionate sentences. *Bassett*, 192 Wn.2d 67. See also *Gregory*, 192 Wn.2d at 24 (article I, section 14 is more protective in the context of imposing the death penalty); *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).

Application of the individualization requirement to late adolescents subject to mandatory LWOP is also consistent with this Court’s longstanding recognition—for example, in *State v. Law*, 154 Wash. 2d 85, 110 P.3d 717 (2005)—that “the SRA requires factors that serve as justification for an exceptional sentence to relate to the crime, the defendant's culpability for the crime, or the past criminal record of the defendant.” *Law*, 154 Wash.2d at 89. This is because mitigating factors that have a nexus to the crime make the commission of those crimes less egregious. *Id.* at 98 (*quoting State v. Fowler*, 145 Wash.2d 400, 404, 38 P.3d 335 (2002)).

Finally, this Court has concluded that this result is required by the nondiscrimination mandate of the SRA, which provides that

sentences be imposed “without discrimination as to any element that does not relate to the crime or the previous record of the defendant.” RCW 9.94A.340.⁵

Mandatory sentencing runs afoul of this guarantee because it renders all mitigating factors irrelevant, eliminating the ability of the sentencing judge to find and give effect to those facts. Individualized sentencing restores this role to the sentencing judge. As Justice Madsen’s dissent in *State v. Brown*, 139 Wash. 2d 20, 32–33, 983 P.2d 608, 615 (1999), *overruled by State v. Houston-Sconiers*, 188 Wash. 2d 1, 391 P.3d 409 (2017), presciently decried that mandatory penalties sacrifice “individualized determinations of proportionality”:

“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

⁵ Mandatory LWOP also prohibits a sentence from considering the facts of the crime, including the role of an accomplice in the homicide. The degree of participation by an accomplice can differ dramatically from case to case. Our accomplice liability statute does not require involvement in a homicidal act and predicates criminal liability on assistance and general knowledge of the crime. *State v. Davis*, 101 Wash.2d 654, 657-58, 682 P.2d 883 (1984); *State v. Carothers*, 84 Wash.2d 256, 261-62, 525 P.2d 731 (1974). “Accomplice liability represents a legislative decision that one who participates in a crime is guilty as a principal, regardless of the degree of the participation.” *Id.* See also *State v. Dreewes*, 192 Wash. 2d 812, 824, 432 P.3d 795, 802 (2019).

discretion be preserved to impose exceptional sentences including downward departures.

This Court should “straightforwardly” apply precedent and conclude that the individualization requirement applies to a late adolescent otherwise subject to a non-discretionary LWOP sentence.

B. This Petition is Timely Because Mandatory Life Without Parole is Unconstitutional. In Addition, There Has Been a Material, Retroactive Change in the Law.

Two exceptions to the time bar make this petition timely. First, RCW 10.73.100 (2) provides that a PRP is not untimely when the “statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct.” As this brief demonstrates in the preceding sections, RCW 10.95.030 is both unconstitutional on its face and as applied because it requires a judge to impose life without parole for a late adolescent defendant convicted of aggravated murder in violation of the individualization requirement. In other words, if this Court concludes the statute making LWOP mandatory runs afoul of the state and/or federal constitution, then this petition is timely.

The second reason this petition is timely is because there has been a material change in the law that should be applied

retroactively. RCW 10.73.100 (6). Monschke admits that there is no case directly on point. However, “materiality” does not require a holding on “all fours.” The law has changed in a way that is “material” to the challenged sentence.

A change in the law is “material” when the new rule can be applied to the current case and does not require the announcement of an additional new rule. To illustrate, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that the execution of an intellectually disabled defendant was constitutionally prohibited. More recently, in *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986 (2014), that Court held the definition of subaverage intellectual functioning includes IQ scores that are 75 or below rendering statutes that only recognize scores of 70 or below unconstitutional.

The question then is whether *Hall* is a new rule or whether the material change in the law occurred in *Atkins*. To make that determination reviewing courts ask whether the “result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Teague v. Lane*, 489 U.S. 288, 301 (1989). Using this test, the Sixth Circuit has held that *Hall* represented

the application of *Atkins*, rather than a new rule. *Smith v. Sharp*, 935 F.3d 1064, 1084 (10th Cir. 2019).

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 extension, rather than a new rule. For that reason, Monschke asks this Court to apply the rule recognizing that children facing LWOP are protected by the individualization requirement to late adolescents.

That rule is substantive and, therefore, retroactive. This Court has previously held that this is a substantive rule of law: first, “that a sentencing rule permissible for adults may not be so for children,” rendering certain sentences that are routinely imposed on adults disproportionately too harsh when applied to youth, and second, that the Eighth Amendment requires another protection, besides numerical proportionality, in juvenile sentencings—the exercise of discretion. *Houston-Sconiers*, 188

Wash.2d at 19 n.4; *Ramos*, 187 Wash.2d at 441 (“*Miller* announces a substantive rule, not a procedural one.”). See also *Matter of Meippen*, 193 Wash. 2d 310, 326, 440 P.3d 978, 986 (2019) (Wiggins, J. dissenting). The change in the law here is substantive for the same reasons.

This petition is timely either because mandatory LWOP is unconstitutional as applied to the late adolescent class, because there has been a material and retroactive change in the law, or for both reasons.

IV. CONCLUSION

Like in *Ramos*, this Court’s “task” here is “to determine what procedures are necessary to give full effect” to whether a statutorily-mandated sentence creates “an unacceptable risk” that a teenager whose homicide offense is mitigated and reflects “transient immaturity will be unconstitutionally sentenced to life without parole.” *Ramos*, 187 Wash. 2d at 442. The principle guiding this Court’s analysis is that the States are laboratories for experimentation, “but those experiments may not deny the basic dignity the Constitution protects.” *Id.*

Based on the above, this Court should grant PRP. In the alternative, if the State disputes that adolescents share the same “mitigating qualities” that make “children” “different,” then this Court should remand for an evidentiary hearing.

DATED this 10th day of February 2020.

RESPECTFULLY SUBMITTED:

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February 10, 2020 - 4:38 PM

Transmittal Information

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Appellate Court Case Title: Personal Restraint Petition of Kurtis William Monschke
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