

FILED
Court of Appeals
Division II
State of Washington
8/8/2018 12:19 PM

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION 2

No. 96773-3

In re the Personal Restraint of)
)
DWAYNE EARL BARTHOLOMEW,) NO.
)
Petitioner.) PERSONAL RESTRAINT PETITION
_____)

A. STATUS OF PETITIONER

1. Petitioner Dwayne Bartholomew is confined in the Washington State Penitentiary at Walla Walla serving a sentence of life imprisonment without the possibility of parole imposed by the Pierce County Superior Court.

2. Petitioner was convicted of the crime of aggravated first degree murder.

3. Petitioner was sentenced after trial. The judge who imposed sentence was Hon. Robert Peterson. The sentence was imposed in December, 1986.

4. Petitioner's lawyer at the guilt innocence trial and first sentencing proceeding was Murray Anderson. His lawyers at the second and final sentencing were Timothy K. Ford and Rita Griffith.

5. Petitioner did appeal the decision of the trial court to the Supreme Court of Washington. His lawyer on appeal was Timothy K. Ford. The decisions of the Supreme Court of Washington were published. The citations to the appeal decisions are: State v. Bartholomew, 98 Wn.2d 173, 654 P.2d 1170, vacated sub. nom. Washington v. Bartholomew, 463 U.S. 1203, 77 L. Ed. 2d 1383, 103 S. Ct. 3530 (1983), adhered to on remand, State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984).

6. Since his conviction Petitioner has asked a court for relief from his sentence in addition to the appeals described above.

6.1 Petitioner filed a personal restraint petition in the Washington Court of Appeals, Division II, on the issue of ineffectiveness of trial counsel. The Chief Judge of the Court of Appeals dismissed the petition without hearing. In re Bartholomew, No. 12367-3-II. The Supreme Court of Washington denied review by a decision of the Commissioner dated May 1, 1990. These decisions are unpublished.

6.2 Petitioner filed a federal habeas corpus petition in the United States District Court for the Western District of Washington, raising claims of ineffective counsel and violations of his due process right to disclosure of exculpatory evidence. The petition was denied by unpublished order. The dismissal was reversed by a panel of the United States Court of Appeals for the Ninth Circuit on the ground that petitioner had been denied due process of law by the nondisclosure of exculpatory and impeaching evidence, Bartholomew v. Wood, 34 F.3d 870, 871 (9th Cir. 1994), but that decision in turn was reversed by the Supreme Court of the United States, Wood v. Bartholomew, 516 U.S. 1, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995).

7. The names of Petitioner's lawyers in the proceedings mentioned in paragraph 6 were Timothy K. Ford and Rita Griffith.

8. On October 16, 2017, Petitioner filed a pro se motion to modify judgment in the Pierce County Superior Court. Exhibit A. On October 17, 2017, without prior notice to Petitioner, that court transferred the motion to the Court of Appeals Division II. See Exhibit B. On December 29, 2017, the Clerk of the Court of Appeals dismissed the action for failure to pay a filing fee. Exhibit C.

B. GROUNDS FOR RELIEF

1. Petitioner should be given a new sentencing proceeding because the statute under which he was sentenced to life imprisonment without possibility of parole allowed no consideration of his age or any other mitigating circumstance, including the fact that he was only 20 years old at the time of the crime, which violates Article I section 14 of the Washington Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

2. The Supreme Court of the United States has held that the mandatory imposition of a sentence of life imprisonment without parole for persons less than 18 years old violates the Eighth and Fourteenth Amendment's prohibition against cruel and unusual punishment, in light of "evolving standards of decency that mark the progress of a maturing society." Miller v. Alabama, 567 U. S. 460, 469-470, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (citing Estelle v. Gamble, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). Courts must now recognize that juveniles are constitutionally different from adults and consider youth and attendant characteristics of youth in imposing sentence. Miller v. Alabama, 567 U. S. at 471. The primary relevant characteristics of youth 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-formed and less likely to constitute "irretrievable depravity." Montgomery v. Louisiana, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016), as revised (Jan. 27, 2016) (quoting and citing Miller, 132 S. Ct. 2464 and Roper v. Simmons, 543 U.S. 551, 569-579, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)).

3. Miller applies retroactively. Montgomery, 136 S. Ct. at 736. Miller also applies to de-facto life without parole sentences as well as actual life without the possibility of parole under

the principles of Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). State v. Ramos, 187 Wn. 2d 420, 387 P.3d 650, cert. denied, 138 S. Ct. 467, 199 L. Ed. 2d 355 (2017).

4. In State v. O'Dell, 183 Wn.2d 680, 696, 358 P.3d 359 (2015), the Court held that, based on scientific evidence regarding brain development, these constitutional principles require consideration of a defendant's young age as a mitigating factor, even for a person who was past his eighteenth birthday at the time the crime was committed. O'Dell, 183 Wn. 2d at 683. In In re the Matter of Light-Roth, 200 Wn. App. 149, 401 P.3d 459, review granted sub nom. In re Light-Roth, 189 Wn. 2d 1030, 408 P.3d 1094 (2017), the court similarly held this principle extended to those over the age of eighteen.

5. Petitioner's crime had all the earmarks of a depressed, impulsive youth. The homicide victim was killed by a single gunshot to the head, fired in the course of the robbery of a Tacoma Laundromat.

6. Petitioner's younger brother Rodney was present before or during the crime and told their older brother Bryce Bartholomew about it. Bryce Bartholomew contacted the police. Dwayne was arrested and questioned at the Puyallup City Jail. Dwayne told the arresting officers that, with Rodney's help, he had robbed the laundromat and had shot the victim accidentally. Dwayne's .22 caliber pistol was found lying in pieces on a table at his cousin's trailer where Dwayne had been staying.

7. On August 6, 1981, Dwayne was arraigned on the charge of first degree murder and pled not guilty. At arraignment, he asked if he could "request the death penalty," and said that would be his request.

8. Dwayne was depressed and had a history of suicidal ideation and mental problems at the time of the crime. He had been discharged from the army after being referred to mental health psychiatric facilities on more than one occasion.

9. Dwayne testified at his trial and his testimony was consistent with his earlier statements to police: that he robbed the laundromat with Rodney's help, that he had given Rodney some of the money and some marijuana for his help, and that the gun had gone off accidentally as he held it in his left hand and opened the cash drawer with his right hand.

10. The jury was given a general instruction that it could convict if it found that the defendant committed the murder

While in the course of, in the furtherance of, or in immediate flight from the commission of the crime of Robbery in the First Degree, or ... to conceal the commission of the aforesaid crime of Robbery in the First Degree, or to protect or conceal the identity of the defendant at the person who committed the aforesaid crime of Robbery in the First Degree.

11. Petitioner was sentenced to death. The death sentence was reversed because the statute on which it was based was unconstitutional and the prosecutor had concealed the results of a polygraph showing Rodney Bartholomew was deceptive in his denial of involvement in the crime.

12. At resentencing, the jury did not unanimously agree that there were insufficient mitigating circumstances to warrant leniency. Under RCW 10.95.080(2), that required imposition of a minimum sentence of life imprisonment without parole.

13. As set out above, in Light-Roth, the court held that the youth of the appellant, who was over eighteen at the time of the crime, 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 Light-Roth relied on, 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.

14. The scientific and legal principles applied in O'Dell and Light-Roth indicate that 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.

15. In Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), the Supreme Court held that execution of a person with an intellectual disability would violate the Eighth and Fourteenth Amendments. The Court noted that, among other reasons, persons with intellectual disabilities are more likely to give false confessions, to be poor witnesses and to be less able to give meaningful assistance to attorneys – characteristics not dissimilar to disabilities associated with youth. In Hall v. Florida, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014), the Court held that limiting the determination of intellectual disability to a bright-line cutoff of an IQ of less than 70 was unconstitutionally restrictive and that those seeking to establish intellectual disability in a capital trial are entitled to have concurrent deficits in intellectual and adaptive functioning considered for those with IQ's near, but over 70.

16. 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.

Also like determinations of intellectual disability, there is no constitutional bright-line dividing juvenile brains from adult brains at age eighteen with respect to determining culpability. The courts in O'Dell and Light-Roth have so held. Consideration of the realities of the differences between younger brains and adult brains is similarly mandated for those serving life without parole who were over eighteen but still young.

17. The Court of Appeals decision in Light-Roth was issued on August 14, 2017. See 200 Wn. App. at 149. This petition is being filed within one year of that date. This petition is also being filed while the Court of Appeals decision in Light-Roth is under review by the State Supreme Court. It anticipates that the Supreme Court's decision will affirm the constitutional requirement that youth be considered as a mitigating factor even for offenders who have passed their eighteenth birthday. It is being filed in advance of that ruling, to insure against any possible argument of a time bar. Cf. Tyler v. Cain, 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (interpreting federal habeas statute of limitation to require filing within one year of announcement of new constitutional rule, prior to determination of retroactivity).

18. Petitioner is filing this Petition in this Court because it is based on the legal principles and authority that Petitioner anticipates and believes will be established in a case now pending before this Court, and the retroactivity of those principles, which only this Court can determine.

19. No additional petitions or appeals are now pending in any court regarding the judgment under attack in this Petition.

20. Petitioner has no future sentences to serve. His only sentence is for the judgment under attack in this petition.

C. STATEMENT OF FINANCES

1. Petitioner does X does not ___ ask the court to file this without making him pay the filing fee because he is so poor he pay the fee.

2. Petitioner has a spendable balance of ~~\$198~~ ^{\$155.15} in his prison or institution account.

3. Petitioner does X does not ___ ask the court to appoint a lawyer for him because he is so poor he cannot afford to pay a lawyer.

4. Petitioner is ___ is not X employed.

5. During the past 12 months Petitioner did ___ did not X get any money from a business, profession or other form of self employment.

6. During the past 12 months, Petitioner

did did not

___ X get any rent payments.

___ X get any interest.

___ X get any dividends.

X ___ get any other money. If so, the amount of money I got was \$100

about every other month.

7. Petitioner

does does not

X ___ have any cash except as said in answer 2. If so, the total amount of cash he has is about ~~\$2400.~~ ^{less than \$2000.00}

___ X have any savings accounts or checking accounts.

___ X own stocks, bonds, or notes.

8. All real estate and other property or things of value which belong to Petitioner

Items

Value

None

9. Petitioner is ___ is not X married.

10. All of the persons who need me to support them are listed here.

Name and Address	Relationship	Age
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None

11. All the bills Petitioner owes are listed here.

Name of creditor	Address	Amount
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None

D. REQUESTS FOR RELIEF

WHEREFORE, Petitioner prays that the Court:

1. Permit him to proceed in forma pauperis without prepayment of costs and fees;
2. Appoint counsel to represent him in this Court;
3. Grant him leave to submit briefs and argument in support of this Petition;
4. Order a reference hearing on any facts alleged in this Petition that are disputed by the Respondent State of Washington;

5. Discharge Petitioner from his unconstitutional sentence of life imprisonment without possibility of parole and order him resentenced in a constitutional proceeding in which the mitigating circumstance of his youth can be considered;

6. Grant such other and further relief as may be appropriate under the circumstances.

E. CONCLUSION

Petitioner respectfully requests that his petition be granted.

DATED this 5 day of April 2018.



Timothy K. Ford, WSBA #5986
Rita J. Griffith, WSBA #14630
Attorneys for Petitioner

VERIFICATION

I, DWAYNE EARL BARTHOLOMEW, do hereby declare under penalty of perjury under Washington State law, that I have read the foregoing Personal Restraint Petition, including the Statement of Finances, I know the contents thereof and believe them to be true to the best of my own knowledge and belief.

DATED this 31st day of July, 2018, at Walla Walla, Washington.


Dwayne Earl Bartholomew

07/20/2018

Department of Corrections

PAGE : 01 OF 01

MDHOLDERMAN

WASHINGTON STATE PENITENTIARY

OIRPLRAR

10.2.1.18

**PLRA IN FORMA PAUPERIS STATUS REPORT
FOR DEFINED PERIOD 12/31/2017 TO 06/30/2018**

DOC# :	0000280766	NAME :	BARTHOLOMEW DWAYNE	ADMIT DATE :	12/23/1981
DOB :	10/05/1960			ADMIT TIME :	00:01

AVERAGE MONTHLY RECEIPTS	20% OF RECEIPTS	AVERAGE SPENDABLE BALANCE	20% OF SPENDABLE
91.67	18.33	98.88	19.78

EXHIBIT A



WORKING COPY DEPT 3

FILED IN COUNTY CLERK'S OFFICE

OCT 16 2017

PIERCE COUNTY, WASHINGTON KEVIN STOCK, County Clerk BY [Signature] DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF PIERCE

State of Washington, Plaintiff vs Dwayne E. Bartholomew, Defendant

No. 811005791

Motion to Modify and Correct Judgment and Sentence Pursuant to CrR 7.8

1. IDENTITY OF MOVING PARTY

I Dwayne E. Bartholomew, Defendant pro se, asks this Court for the relief designated in section 2 of this Motion.

2. RELIEF SOUGHT

Bartholomew ask this Court for the following relief:

- 1. That the decision reached by the Court of Appeals Division One, In the Matter of the Personal Restraint of Kevin Light-Roth, No. 751298-I, constitute a significant material change in the law, that applies retroactively. Thus, allowing Bartholomew's motion to fall into the exception for the one year time bar.
2. That this Court grant an evidentiary hearing to determine if the Court should render his sentence invalid, because the trial Court did not consider

whether his youthfulness justified an exceptional sentence below the standard range.

3. FACTS RELEVANT TO THE MOTION

The State charged Bartholomew with one count of aggravated murder in the first degree. At sentencing Bartholomew's counsel did not request the sentencing Court to consider Bartholomew's age when imposing sentence.

BECAUSE THE DECISION IN STATE v. O'DELL ANNOUNCED A SIGNIFICANT, MATERIAL CHANGE IN THE LAW THAT APPLIES RETROACTIVELY, BARTHOLOMEW'S MOTION SURVIVES THE TIME BAR MANDATED BY RCW 10.73.090.

"No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a Court of competent jurisdiction." RCW 10.73.090(1).

But, there are exceptions to the one-year time limit. RCW 10.73.100. The one-year limit does not apply to a petition that is based solely on the ground that there has been (1) a significant change in the law, (2) that is material to the defendant's sentence, and (3) applies retroactively. RCW 10.73.100(6).

RETROACTIVITY

"Whether a changed legal standard applies retroactively is a distinct inquiry from whether there has been a significant change in the law." In re Pers. Restraint of Tsai, 183 Wn.2d 91, 103, 351 P.3d 138 (2015).

The Supreme Court decision in State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015) significantly broadened the circumstances under which a defendant's youthfulness may justify an exceptional sentence below the standard range. O'Dell at 695-96. This announced a change in the interpretation of the SRA, specifically RCW 9.94A.535(1) and RCW 9.94A.535(1)(e). Because the SRA is a statute this new interpretation should apply retroactively.

MATERIAL TO SENTENCE

The change in the law announced in O'Dell is material to Bartholomew's sentence because he was only 20 years old when he committed his crime. Although Bartholomew did not seek an exceptional sentence downward based on his age, it would be unreasonable to hold that a case which announces a significant change in the law, because it has made a new argument available to Bartholomew, not material, because Bartholomew did not make that argument at trial.

The evidence is now strong that the brain does not reach its full development in those areas that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable until they are in their mid 20's. That evidence is highly relevant to Bartholomew's culpability for murder.

The trial records will show that Bartholomew's crime bears the now-recognized hallmarks discussed in In re Pers. Restraint of Kevin Light-Roth, No. 751298-I. Bartholomew's crime was impulsive; was committed in an emotional

heightened context; and displayed astonishingly poor judgment.

4. CONCLUSION

Because the change in the law announced in O'Dell is material to Bartholomew's sentence, this Court should -at the minimum- remand for a evidentiary hearing.

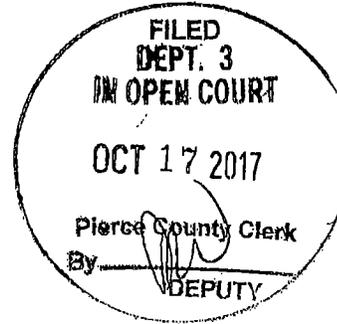
DATED this 26th Day of September, 2017

Respectfully submitted



Dwayne E. Bartholomew
#280766
P.O. Box 2049
Airway Heights, WA 99001

EXHIBIT B



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff

Cause No: 81-1-00579-1

vs.

ORDER ON DEFENDANT'S MOTION TO
MODIFY JUDGMENT AND SENTENCE

BARTHOLOMEW, DWAYNE EARL,
Defendant

CLERK'S ACTION REQUIRED

THIS MATTER came before the undersigned judge of the above entitled court upon review of the defendant's motion(s) filed on October 16, 2017. After reviewing the defendant's written pleadings, the court now enters the following order pursuant to CrR 7.8(c)(2):

A. IT IS HEREBY ORDERED that this petition is transferred to the Court of Appeals, Division II, to be considered as a personal restraint petition. The petition is being transferred because:

it appears to be time-barred under RCW 10.73.090;

is not time-barred under RCW 10.73.090, but is untimely under CrR 7.8(a)

and therefore would be denied as an untimely motion in the trial court; or

is not time barred but does not meet the criteria under CrR 7.8 (c)(2) to allow the court to retain jurisdiction for a decision on the merits.

If box "A" above is checked, the Pierce County Superior Court Clerk shall forward a copy of this order as well as the defendant's pleadings identified above, to the Court of Appeals.

1 B. IT IS HEREBY ORDERED that this court will retain consideration of the motion
2 because the following conditions have been met: 1) the petition is not barred by the one year
3 time bar in RCW 10.73.090, and either:

4 the defendant has made a substantial showing that he or she is entitled to relief; or

5 the resolution of the motion will require a factual hearing.

6 IT IS FURTHERED ORDERED that the defendant's motion shall be heard on its merits.

7 The State is directed to:

8 file a response by _____ . After reviewing
9 the response, the Court will determine whether this case will be transferred to the
10 Court of Appeals, or if a hearing shall be scheduled.

11 appear and show cause why the defendant's motion should not be granted. That
12 hearing shall be held on _____ at _____ a.m. / p.m.

13 As the defendant is in custody at the Department of Corrections, the State is further
14 directed to arrange for defendant's transport for that hearing.

15 If box "B" above is checked, the clerk is directed to send a copy of this Order to
16 the Appellate Division of the Pierce County Prosecutor's Office.

17 DATED this 17 of October, 2017.

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19
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25

FILED
DEPT. 3
IN OPEN COURT
OCT 17 2017
Pierce County Clerk
By [Signature] DEPUTY

[Signature]
JUDGE MICHAEL E. SCHWARTZ

EXHIBIT C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of:

DWAYNE E. BARTHOLOMEW,

Petitioner.

No. 51045-6-II

CERTIFICATE OF FINALITY

Pierce County

Superior Court No. 81-1-00579-1

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Pierce County.

This is to certify that the decision of the Court of Appeals of the State of Washington, Division II, filed on December 29, 2017, became final on January 30, 2018.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 15th day of February 2018.


Derek M. Byrne
Clerk of the Court of Appeals,
State of Washington, Division II

Dwayne Earl Bartholomew
DOC#280766
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint
Petition of

DWAYNE BARTHOLOMEW,

Petitioner.

No. 51045-6-II

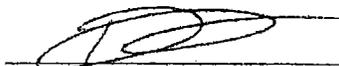
RULING DISMISSING PETITION

FILED
COURT OF APPEALS
2017 DEC 29 PM 2:17
STATE OF WASHINGTON
BY _____

THIS MATTER came on for hearing of the clerk's motion to dismiss on the ground of abandonment as petitioner has not paid a filing fee or filed a statement of finances. Petitioner has not responded to the Clerk's letter dated November 15, 2017, and it appears that the petition was taken for delay and should be dismissed for want of prosecution. RAP 18.9(a)-(b). Accordingly, it is

ORDERED that this petition is dismissed.

DATED this 29th day of December, 2017.


COURT CLERK

Dwayne Earl Bartholomew (via USPS)
DOC#280766
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001

MACDONALD HOAGUE & BAYLESS

August 08, 2018 - 12:19 PM

Filing Personal Restraint Petition

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: Case Initiation
Trial Court Case Title: State of Wash Vs Dwayne Earl Bartholomew
Trial Court Case Number: 81-1-00579-1
Trial Court County: Pierce County Superior Court
Signing Judge: Hon. Robert Peterson
Judgment Date: 12/1/1986

The following documents have been uploaded:

- PRP_Other_20180808121310D2148034_0138.pdf
This File Contains:
Other - Additional Authority
The Original File Name was Additional Authority and Attachment.pdf
- PRP_Personal_Restraint_Petition_20180808121310D2148034_6457.pdf
This File Contains:
Personal Restraint Petition
The Original File Name was Personal Restraint Petition and Exs 1-4.pdf

A copy of the uploaded files will be sent to:

- griff1984@comcast.net

Comments:

Sender Name: Timothy Ford - Email: timf@mhb.com
Address:
705 2ND AVE STE 1500
SEATTLE, WA, 98104-1796
Phone: 206-622-1604

Note: The Filing Id is 20180808121310D2148034