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No. 52354-0-II

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

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In re the Personal Restraint of:  
DWAYNE EARL BARTHOLOMEW,  
Petitioner.

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PETITIONER'S REPLY TO  
RESPONSE TO PETITION

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Most of the argument in the State’s Response to this Petition is boilerplate, and some of it has nothing to do with the issue raised here. We will respond only to the two points that relate to this case.

**1. This Petition is Not Untimely.**

Deaf to the irony, the State begins its too-late-filed Response by arguing that the petition fails because, it says, the Petition was filed too late. Response at 6-7.

In support of this, the Response correctly says that *Matter of Light-Roth*, 200 Wash. App. 149, 401 P.3d 459 (2017), one source of new law Petition relied on to invoke the exception to the time bar in RCW 10.73.100(6), was reversed by the Supreme Court in *Matter of Light-Roth (II)*, 191 Wash. 2d 328, 422 P.3d 444 (2018). But the reversal was on a ground different from the one this Petition relies on: it was based on the Supreme Court’s determination that the law regarding youth as a mitigating factor actually had not changed as it related to Mr. Light Roth, because “Light-Roth could have argued youth as a mitigating factor” at trial. *Light-Roth (II)*, 191 Wash. 2d at 338. “Contrary to Light-Roth’s contentions, RCW 9.94A.535(1)(e) has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward, and mitigation based on youth is within the trial court’s discretion.” *Light-Roth*, 191 Wash. 2d at 336.<sup>1</sup>

Petitioner Bartholomew, in contrast, was charged with aggravated first degree murder. He initially faced a death sentence and, as

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<sup>1</sup>The Response says that the Supreme Court’s *Light Roth* opinion held that *State v. O’Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015) is not retroactive. Response at 6-7. That is incorrect: the Supreme Court in *Light Roth* said quite clearly, “we do not reach whether [*O’Dell*] applies retroactively or is material to Light-Roth’s case.” 191 Wash. 2d at 338.

Respondent points out, he was able to argue to the jury that his youth was a mitigating factor which precluded imposition of such a sentence. But after the jury returned a verdict that spared him from the sentence of death, he could *not* argue, and the trial court could not consider, his youth as a mitigating factor justifying a sentence of less than life imprisonment without the possibility of parole, because the life without parole sentence was mandatory under RCW 10.95.080(2).

Imposing mandatory sentences of life without parole on youthful offenders under the age of 18 is what *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) held to be unconstitutional. If Mr. Bartholomew had been under 18 at the time of his crime, there is no question that he could successfully argue that his mandatory life without parole sentence would have to be reversed. But he couldn't make that argument based on *Miller* alone, because no case had held that the principles underlying *Miller* applied to persons 18 years of age and older. The Supreme Court in *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015) held for the first time that those principles extended to persons who were 18 at the time of their crimes. This Court's decision in *Light-Roth* held for the first time that those principles could apply to youthful offenders who were 19 years or older. That part of its ruling stands, despite the reversal on other grounds. *See, e.g., State v. Hart*, 195 Wn. App. 449, 462-463, 381 P.3d 142 (2016) (citing *State v. Arredondo*, 190 Wn. App. 512, 537-538, 360 P.3d 920 (2015)). It provided the first arguable legal basis for the argument Petitioner, who was twenty (20) years old at the time of his crime, is making here.

This Petition is also timely because it is based on newly available and emerging evidence that supports the extension of these constitutional principles to persons like Petitioner. RCW 10.73.100(2). This includes both scientific evidence regarding brain development<sup>2</sup> and an emerging judicial and legislative recognition that this requires consideration of youth as mitigation in cases involving young adults, reflecting evolving standards of decency which are relevant to the constitutional analysis in this area. *See, e.g., People v. Harris*, -- N.E.3d ---, 2018 WL 5075958 (Ill. 10/18/18) (remanding for determination of whether *Miller* should apply to 18 year olds); Calif. Stats. 2017, ch. 675, §§ 1, 2 (requiring youth offender parole hearings for life prisoners whose crimes were committed before age 25); *State v. Moretti*, 2017 WL 4899567, at \*18 (Wash. Ct. App. Oct. 31, 2017) (unpublished) (Bjorgen, C.J., dissenting) (“*O’Dell*, in other words, is instructing us that the very characteristics that underlie *Miller* and [*State v.*] *Houston–Sconiers*, [188 Wn.2d 1, 391 P.3d 409 (2017)] may persist well into one’s 20s.”)

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<sup>2</sup>See, e.g., J. Shreve, Beyond the Brain, NATIONAL GEOGRAPHIC 1/2/2019 (<https://www.nationalgeographic.com/science/health-and-human-body/human-body/mind-brain> [last visited 1/9/19]) (“The executive brain doesn’t hit adult levels until the age of 25” [quoting Jay Giedd of the National Institute of Mental Health]); F. Girgis, et al, *Toward a Neuroscience of Adult Cognitive Developmental Theory* FRONTIERS IN NEUROSCI. 2018 (published online 1/23/2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5787085/>, last visited 1/9/19) (“it is now well established that cognition continues to develop after early adulthood,”); C. Profaci “*Defining Cognitive Adulthood: When Neuroscience Influences Law*,” NEUWRITESANDIEGO 8/30/2018 (<https://neuwritesd.org/2018/08/30/defining-cognitive-adulthood-when-neuroscience-influences-law/> [last visited 1/9/19]; see also authorities cited in *State v. O’Dell*, 183 Wash. 2d 680, 691, 358 P.3d 359, 364 (2015).

The second irony of Respondent’s timeliness argument (in addition to the irony of making it in a flagrantly late-filed brief) is that, if anything, this Petition is being filed too early, rather than too late. That is because no case has yet squarely held that the mandatory imposition of life without parole on a 20 year old violates the federal or Washington State Constitution. But as Chief Judge Bjorgen’s dissent in the unpublished *Moretti* decision indicates, the constitutional handwriting is clearly on the wall: “the same characteristics that led to the Eighth Amendment analyses and holdings of *Roper*, *Graham*, and *Miller* and to the constitutional and statutory analyses and holdings of *Houston–Sconiers*, would apply equally to crimes committed at age 20.” *Moretti*, 2017 WL 4899567, at \*18.

Petitioners who do not act when they have the “tools to construct their constitutional claim” may forfeit them, *Engle v. Isaac*, 456 U.S. 107, 133, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982), and lawyers who delay anticipating developments in the law do so at their peril, see, e.g., *In re Pers. Restraint of Netherton*, 177 Wash.2d 798, 801, 306 P.3d 918 (2013). Especially in this constitutional area, where not only the state of the law but also “the direction of change” is relevant, *Roper v. Simmons*, 543 U.S. 551, 566, 125 S. Ct. 1183, 1193, 161 L. Ed. 2d 1 (2005), a Petitioner cannot be fairly faulted for filing a plausible constitutional claim too soon.

This issue and others similar to it are pending in a number of cases before this Court and others in this state. See, e.g., *State v. Krentkowski*, No. 49534-1-II; *State v. Guajardo*, No. 77856-1-I. It is ripe for decision and timely here.

**2. Petitioner’s Mandatory Life Sentence is Unconstitutional.**

The remainder of the argument in the State’s Response reflects a basic misunderstanding of the issue this Petition presents. This Petition is *not* challenging the constitutionality of the jury’s discretionary sentencing decision to spare Petitioner from the death sentence, because as Respondent points out (see Response at 9-10), youth was a mitigating factor the jury was free to consider in making that decision. What this Petition is challenging is the mandatory sentence of life imprisonment without parole that was imposed by the trial court, after the jury’s verdict, with respect to which by law neither youth nor any other mitigating factor could be considered.

There are no transcripts or other records of the proceedings in which the trial court imposed the life without parole sentence on Petitioner for the same reason: there were no such proceedings because, by law, the sentence of life without parole was mandatory and automatic after the death sentence was rejected. RCW 10.95.080(2).

The constitutionality of imposing a mandatory life without parole sentence on a youthful offender cannot depend on whether the defendant previously faced a death sentence from which he was spared by a jury. That was squarely held by the Court in *Montgomery v. Louisiana*, 136 S. Ct. 718, 726, 193 L. Ed. 2d 599 (2016), in which a life without parole sentence was held to be unconstitutional where the young defendant, like Petitioner, had been spared a death sentence by a jury.

As Chief Judge Bjorgen wrote in his dissent to the unpublished *Moretti* decision, the question presented here is “whether our law consigns one to imprisonment without hope of release, with no whisper of human

discretion and no consideration of the characteristics of youth, based in part on a crime committed when our law recognizes those characteristics persist.” *Moretti*, 2017 WL 4899567, at \*16. We submit the law no longer does so. As the Chief Judge said, “[o]ur state Supreme Court has embraced the reasoning of the *Roper* line of cases and extended that reasoning to hold that ‘[t]he Eighth Amendment [r]equires [s]entencing [c]ourts [t]o [c]onsider [t]he [m]itigating [q]ualities of [y]outh at [s]entencing, [e]ven in [a]dult [c]ourt.’” *Id.* (quoting *Houston–Sconiers*, 188 Wn.2d at 18). “The law acknowledges that one’s 18th birthday does not mark some abrupt and mystic translation into the mind of an adult.” *Id.* at \*18.

[T]he direction of change in this country is unmistakably and steadily moving toward abandoning the practice of putting child offenders in prison for their entire lives.... There is a clear trend of states rapidly abandoning or curtailing juvenile life without parole sentences. While this step is not dispositive, it weighs in favor of finding that sentencing juvenile offenders to life without parole is cruel punishment under article I, section 14. See *Graham*, 560 U.S. at 80, 130 S.Ct. 2011.

*State v. Bassett*, 428 P.3d 343, 352 (Wash. 2018).

Dwayne Bartholomew has been in prison for almost 40 years for a crime he committed when he was barely 20—a single-victim, single-shot robbery-murder by a depressed and unstable young man who had no record of violence. He has no hope of release for the rest of his life—not because anyone determined that he should suffer such a draconian punishment based on his crime and personal characteristics, but by mandatory direction of the law. *O’Dell*, *Light-Roth*, and the cases that have followed them clearly indicate that the application of such laws to a twenty year old can no longer bear scrutiny under the Eighth Amendment

and Article I, section 14, of the Washington Constitution. The Court should so rule.

DATED this 9<sup>th</sup> day of January, 2019.

          /s/ Timothy K. Ford            
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## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 9<sup>th</sup> day of January, 2019, I electronically filed the foregoing with the Clerk of Court using the Washington State Appellate Courts' Portal.

I certify that all participants in the case are registered Washington State Appellate Courts' Portal users and that service will be accomplished by the Washington State Appellate Courts Portal system.

/s/ Linda M. Thiel \_\_\_\_\_  
Linda M. Thiel, Legal Assistant

**MACDONALD HOAGUE & BAYLESS**

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**Transmittal Information**

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