

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC 22-700
LOWER COURT CASE NO. 081992CF0004510001XX**

**JACK R. SLINEY
Appellant,
v.
STATE OF FLORIDA
Appellee.**

APPENDIX OF REPLY BRIEF OF APPELLANT

RECEIVED, 09/26/2022 01:33:22 PM, Clerk, Supreme Court

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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 22-700
LOWER COURT CASE NO. 081992CF0004510001XX

JACK R. SLINEY

Appellant,

v.

STATE OF FLORIDA

Appellee.

APPENDIX A

APA Resolution (2022)



APA RESOLUTION on the Imposition of Death as a Penalty for Persons Aged 18 Through 20, Also Known As the Late Adolescent Class

AUGUST 2022

WHEREAS APA is the leading scientific and professional organization representing psychology in the United States; with more than 133,000 researchers, educators, clinicians, consultants, at all stages of their careers, as well as students among its members.

WHEREAS APA is dedicated to fairness, inclusion, diversity, and to the improvement of the human condition overall, as individuals and as a society, through the development and application of the psychological sciences.

WHEREAS APA is aware of the U.S. Supreme Court (SCOTUS) decision in *Roper v. Simmons* (543 U.S. 551, 568 2005) and notes that the APA *amicus curiae* brief submitted in this case was relied upon and cited often and favorably by SCOTUS in arriving at this landmark decision.

WHEREAS in this same *Roper* decision, SCOTUS reiterated and reinforced that death as a penalty must be limited to those persons who commit a narrow category of the most serious crimes and whose extreme culpability makes them eligible to be sentenced to death, as the most severe of punishments and most extreme application of the authority of the state (*Roper v. Simmons*, 2005).

WHEREAS in deciding *Roper v. Simmons*, SCOTUS held that adolescents involved in the criminal justice system and under 18 years of age are categorically less culpable than the average criminal, and subsequently ruled that application of death as a penalty to persons under 18 at the time of the offense is unconstitutional.

WHEREAS the conclusion of lesser culpability was based upon three primary findings by the *Roper* court: First, juveniles possess a lack of maturity and an underdeveloped sense of responsibility; second, adolescents who are involved in the criminal justice system are more vulnerable/susceptible to negative influences, such as peer pressure and other outside pressures; and third, the character of adolescents is not as fully formed as that of adults.

WHEREAS APA concludes, based on the current state of the psychological and related developmental sciences, that although the principal reason these three primary findings by the *Roper* court are true and accurate is the level of maturity (or immaturity)

of major brain systems at age 17, there is no neuroscientific bright line regarding brain development that indicates the brains of 18- to 20-year-olds differ in any substantive way from those of 17-year-olds (e.g., Bigler, 2021; Casey, Simmons, Somerville, & Baskin-Sommers, 2022; Gur, 2021).

WHEREAS assuming the commission of a crime by a member of the late adolescent class that qualifies as a statutorily defined death-eligible offense, the same youthful and immature characteristics that apply to categorically exempt 16- and 17-year-olds are similarly present in 18- to 20- year olds, rendering them less culpable and less susceptible to any deterrent value of the death penalty, thus failing to further the penological goals of retribution and deterrence.

WHEREAS neuroscientific research demonstrates brain development at age 17 has not become static and there is significant, ongoing brain development in the "late adolescent class" (Somerville, 2016). While some research on continued neurobiological development after 17 was published prior to the *Roper* decision, the question of whether members of the late adolescent class (ages 18 to 20) should be eligible for death as a penalty was not before SCOTUS at the time of the *Roper* decision and thus was not considered.

WHEREAS federal law previously officially recognized the "developmental period of childhood and adolescence" as extending past the age of 17 in binding legislation as early as 2000, extending by law the developmental period of childhood and adolescence to encompass the period up to age 22 (PUBLIC LAW 106-402—OCT. 30, 2000 114 STAT. 1683, the Developmental Disabilities Assistance and Bill of Rights Act of 2000).

WHEREAS as of 2013, the *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.; DSM-5; American Psychiatric Association, 2013) eliminated the age-18 cutoff for the expression and diagnosis of some developmental disorders, recognizing that the developmental period extends to age 18 and beyond.

WHEREAS consistent with this recognition of the extended nature of the developmental period, in 2021, the 12th edition of the American Association of Intellectual and Developmental Disabilities (AAIDD) Manual increased the age of onset criterion

for the diagnosis of intellectual disability (a neurodevelopmental disorder) from age 18 to age 22 (AAIDD, 2021).

WHEREAS much more extensive research has been conducted in developmental science in the years since several of these notable policy changes were enacted, and since the *Roper* decision, that significantly adds to the quantity and quality of existing scientific knowledge.

WHEREAS developmental neuroscience, including research on both the structure and function of brain development, establishes that significant maturation of the brain continues through at least age 20 (e.g., Bigler, 2021; Gur, 2021; McCaffrey & Reynolds, 2021; Somerville, 2016), especially in the key brain systems implicated in a person's capacity to evaluate behavioral options, make rational decisions about behavior, meaningfully consider the consequences of acting and not acting in a particular way, and to act deliberately in stressful or highly charged emotional environments, as well as continued development of personality traits (e.g., emotional stability and conscientiousness) and what is popularly known as "character" (e.g., Casey, Simmons, Somerville, & Baskin-Sommers, 2022; Casey, Taylor-Thompson, Rubien-Thomas, Robbins, & Baskin-Sommers, 2020; Harden & Tucker-Drob, 2011; McCaffrey & Reynolds, 2021; Roberts et al., 2006; Steinberg et al., 2018).

WHEREAS these brain regions are often referred to as executive control systems and include (but not exclusively) the prefrontal cortex and its connections throughout the brain. There is significant development of these brain systems that continues beyond the age of 20 (e.g., Somerville, 2016).

WHEREAS in the context of capital cases where death is a potential penalty, which typically involve crimes that have occurred in situations of high emotional arousal, it is especially noteworthy that current developmental science documents that during emotionally arousing situations, this late adolescent class responds more like younger adolescents than like adults (Figner et al., 2009; Cohen et al., 2016; Steinberg et al., 2008; Icenogle et al., 2019) though — like younger adolescents — show cognitive capacity similar to adults when not under pressure or heightened emotional arousal (Figner et al., 2009; Icenogle et al., 2019; Steinberg et al., 2008).

WHEREAS in considering youth who display more extreme behaviors (e.g., callousness, low empathy), there is emerging empirical evidence of change in the developmental course of these traits, even without intervention. Although a small group of youth show persistently high trajectories of extreme behaviors, the majority who initially show extreme behaviors exhibit decreasing patterns during development (Baskin-Sommers et al., 2015; Hawes et al., 2014).

WHEREAS the fact that neurobiological development in key brain systems associated with behavioral and emotional control continue after the age of 18, determining whether the nature of

the crimes committed by members of the late adolescent class and the level of culpability that should be ascribed to them truly constitutes the "worst of the worst" is inherently unreliable. Given the continued psychological development of these group members, predictions about their rehabilitation potential and likely future actions are equally unreliable. There is clear evidence of prolonged development far beyond the age of 17 and into the mid-20s, so that the psychological capacity of members of the late adolescent class to exercise a mature sense of responsibility, and to resist outside pressures is still very much in process (Steinberg et al., 2018). The significant structural and functional changes in the brain at this time corroborate these findings (e.g., Somerville, 2016).

WHEREAS it is clear the brains of 18- to 20-year-olds are continuing to develop in key brain systems related to higher-order executive functions and self-control, such as planning ahead, weighing consequences of behavior, and emotional regulation. Their brain development cannot be distinguished reliably from that of 17-year-olds with regard to these key brain systems (Cohen et al., 2016).

WHEREAS numerous lawmakers, governmental officials, and regulators have recognized multiple ages as demarcation points for independent decision-making and access to forms of employment, positions of authority and public trust, independent decision-making for various lifestyle, medical, and recreational events, and there are currently more than 3,000 laws and government regulations restricting the behavior and actions of persons under the age of 21 years in force in the United States (e.g., see review by Meggitt, 2021) that prohibit those under age 21 from engaging in such diverse activities as: legalized purchases of alcoholic beverages, legalized purchases of marijuana, legalized purchases of tobacco products (19 states); obtaining work as a Federal Marshall, FBI agent, or armed Treasury agent; to engage in blasting or the use of explosives, including operating a fireworks display; to obtain a license to carry a concealed handgun; to obtain a credit card without a cosigner; to act as a foster parent; to serve in the State legislature (32 states); to obtain various professional licenses; nine states require all persons under 21 to wear a helmet when riding a motorcycle; as examples among the more than 3,000 such laws. Such legislative and regulatory precedents also make it reasonable to make distinctions related to crime and punishment in the 18- to 20-year-old population; indeed, some states do so now with regard to retaining juvenile jurisdiction, as well as variables such as inmate housing as a function of age and sentencing restrictions and review. As of this writing in July of 2022, this trend is continuing with more states and local jurisdictions increasing the minimum age to purchase tobacco and also firearms from 18 to 21 years. Much of this restrictive legislation and regulations consider the issues of decision-making in highly stressful and extremely arousing circumstances (sometimes referred to as issues of decision-making during hot-versus-cold cognition) but other laws appropriately grant increasing rights to this age group when evaluating the maturity required to make careful/considered choices such as about personal health care,

voting, and other matters that need not to be made, and typically are not made, rashly in emotionally volatile circumstances as are the criminal actions that make such youth currently eligible for death as a penalty.

WHEREAS the Society for Black Neuropsychology, the Hispanic Neuropsychological Society, and the Asian Neuropsychological Association have concluded that racial factors significantly influence criminal justice system decision-making, resulting in disparate conviction rates, wrongful convictions, and levels of punishment (Ghandnoosh, 2015; Gross, Possley, & Stephens, 2017; Mitchell & MacKenzie, 2004; Nellis, 2016; Rucker & Richeson, 2021; Sentencing Project, 2013; Spohn, 2017; Sweeney & Haney, 1992) across common racial groupings in the United States. Racial factors also affect the system of death sentencing in the United States, where Black persons are perceived as more “deathworthy,” evaluated more unfavorably by capital jurors, and are more likely to be sentenced to death and to be executed than their White counterparts, especially when their victims were White (Baldus, Woodworth, Zuckerman, & Weiner, 1998; Beckett & Evans, 2016; Eberhardt, et al., 2006; Keil & Vito, 2006; Lyman, Baumgartner, & Pierce, in press-2022; Lynch & Haney, 2011; Phillips & Marceau, 2020), contributing to minorities’ overrepresentation on death row. For example, as recently as 2014, the proportion of Black people on death row was more than three times the proportion of Black people in the national population (Ford, 2014); current statistics demonstrating continued over-representation also can be found at the Death Penalty Information Center website, <https://deathpenaltyinfo.org/>; as well as individual states’ websites, such as the Texas Departmental of Criminal Justice website, where, as of July 1 of 2022, 45.7% of all death row inmates were designated as “Black” (http://www.tdcj.texas.gov/death_row/dr_gender_racial_stats.html), while in 2020, only 12.2% of the general population of Texas is designated as Black.

WHEREAS Black youth are punished more harshly than Whites (Morris & Perry, 2016) and significantly more likely to be perceived incorrectly as older and more responsible (Goff, et al., 2014), and therefore more likely to be treated as if they were adults in criminal proceedings in general. In combination, these race-based differences in treatment impact members of the late adolescent class, placing Black youth more at risk of facing and receiving the death penalty compared with their White peers. In fact, a recent analysis shows that non-White (Black, Hispanic, and “Other”) members of the late adolescent class (20 years old or younger at the time of their crime) represent approximately two-thirds of persons in that age group who are sentenced to death, as opposed to a little more than half of non-Whites who were 21 years or older who received death sentences. Moreover, since *Roper*, the racial disproportion in the 18-to 20-year-old late adolescent class has increased, with more than three-quarters of the non-White members of the late adolescent class sentenced to death as opposed to 20% of Whites (Baumgartner, 2022), clearly demonstrating the disproportionately biasing effects, as a function

of age, of minority racial status on the LAC when death is sought as a penalty.

WHEREAS in addition to the strong biasing effect of gender of the defendant on whether prosecutors seek death as a penalty (e.g., Shatz & Shatz, 2011), victim race and gender also affect who is sentenced to death (e.g., Baumgartner, Grigg, & Mastro, 2015; Baumgartner, Johnson, Wilson, & Whitehead, 2016; Pierce, Radelet, & Sharp, 2017).

WHEREAS psychological science research also indicates that members of the LGBTQ+ community and those with nontraditional sexual orientations are dealt with more harshly in their interactions with the criminal justice system, including harsher sentencing (Movement Advancement Project, 2016; Nadal, 2021).

WHEREAS historically, SCOTUS has emphasized death as a penalty should be reserved for persons whose crimes and culpability represent the “worst of the worst” (e.g., *Roper v. Simmons*, 543 U.S. 551, 568 2005; *Kennedy v. Louisiana*, 554 U.S. 407, 420, 2008; *California v. Brown*, 479 U.S. 538, 541, 1987) and, given its extreme severity and finality, that the penalty of death is qualitatively different from any other sentence (e.g., *Woodson v. North Carolina*, 428 U.S. 280, 305, 1976; *Lockett v. Ohio*, 438 U.S. 586, 604, 1978). SCOTUS has repeatedly acknowledged that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed (*California v. Brown*, 479 U.S. 538, 541, 1987).

WHEREAS a review of the scientific literature as noted above indicates that death as a penalty for the late adolescent class is typically based on unreliable determinations of members’ current culpability status and even more unreliable predictions of their future potential.

THEREFORE, BE IT RESOLVED that based upon the rationale of the *Roper* decision and currently available science, APA concludes the same prohibitions that have been applied to application of the penalty of death for persons who commit a serious crime at ages 17 and younger should apply to persons ages 18 through 20. The same scientific and societal reasons as given by the *Roper* court in banning death as a penalty for those under the age of 18 apply to the late adolescent class.

THEREFORE, BE IT RESOLVED that it is clear death as a penalty is not applied equally and fairly among members of the late adolescent class. In addition, extraneous factors such as race, ethnicity, and gender (of both the defendant and the victim) influence the discretionary decisions of prosecutors to seek and their success in obtaining death verdicts for defendants who are members of the late adolescent class. When considered in conjunction with neuroscientific evidence of the degree of continuing development of key brain systems that remains to be accomplished in the late adolescent class, these and other status variables act to create biases and prejudices that lead to a higher probability of error by

triers of fact in death penalty cases. In combination, these factors render the application of the death penalty to members of the late adolescent class inherently more unreliable and morally abhorrent in a developed society that is concerned with equality, generally and specifically, in legal justice for all.

THEREFORE, BE IT RESOLVED that APA calls upon the courts and the state and federal legislative bodies of the United States to ban the application of death as a criminal penalty where the offense is alleged to have been committed by a person under 21 years of age.

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Appellant,

v.

STATE OF FLORIDA

Appellee.

APPENDIX B

Matter of Monschke, 197 Wash. 2d 305, 306,

482 P.3d 276 (2021).

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by State v. Kasparova, Wash.App. Div. 1, November 15, 2021

197 Wash.2d 305
Supreme Court of Washington.

In the MATTER OF the Personal
Restraint of Kurtis William MONSCHKE,
Petitioner.

In the Matter of the Personal Restraint of
Dwayne Earl Bartholomew, Petitioner.

NO. 96772-5 (consolidated with), NO. 96773-3

Argued: 05/14/2020

Filed: March 11, 2021

Synopsis

Background: Petitioners, each of whom had been convicted of aggravated first-degree murder when they were 19 or 20 years old, which convictions had been affirmed on direct appeal, 101 Wash.2d 631, 683 P.2d 1079, and 133 Wash.App. 313, 135 P.3d 966, filed personal restraint petitions in which they challenged the constitutionality of their resulting mandatory, nondiscretionary sentences of life imprisonment without the possibility of parole. The Court of Appeals transferred petitions to Supreme Court without ruling on the merits.

Holdings: The Supreme Court, McCloud, J., held that:

[1] the one-year time limit for filing a personal restraint petition did not apply to petitions, and

[2] state constitutional provision prohibiting cruel punishment prohibited the mandatory life sentences.

Petitions granted.

González, C.J., concurred and filed opinion.

Owens, J., dissented and filed opinion, which Johnson, Madsen, and Stephens, JJ., joined.

West Headnotes (5)

[1] **Sentencing and Punishment**—Necessity of conviction

Convictions under unconstitutional statutes are as no conviction at all and invalidate the prisoner's sentence.

[2] **Habeas Corpus**—Errors or irregularities; prejudice

A personal-restraint petitioner must show actual and substantial prejudice resulting from the alleged error.

[3] **Habeas Corpus**—Limitations applicable

One-year time limit for filing personal restraint petition did not apply to petitions challenging the constitutionality of statute mandating a life sentence without parole for aggravated murder as applied to petitioners, who argued that their ages of 19 and 20 years old at the time of their offenses meant that they were juvenile offenders and that a mandatory life sentence was therefore precluded; even though petitioners were challenging their mandatory life sentences, they were nonetheless challenging the constitutionality of the aggravated-murder statute. (Per McCloud, J., with three justices concurring and one justice concurring separately.) U.S. Const. Amend. 8; Wash. Const. art. 1, § 14; Wash. Rev. Code Ann. §§ 10.73.100(2), 10.95.030.

3 Cases that cite this headnote

[4] Sentencing and Punishment—Juvenile offenders

State constitutional prohibition on cruel punishment prohibits sentences of life without parole for juvenile offenders and requires court to exercise complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even when faced with mandatory statutory language. Wash. Const. art. 1, § 14.

5 Cases that cite this headnote

[5] Habeas Corpus—Delinquents and young offenders
Homicide—Murder
Sentencing and Punishment—Age
Sentencing and Punishment—Juvenile offenders

State constitutional provision prohibiting cruel punishment prohibited mandatory life sentences for 19-year-old and 20-year-old convicted of aggravated murder, and thus the offenders were entitled to new sentencing hearing at which the trial court would have to consider whether each offender was subject to the mitigating qualities of youth. (Per McCloud, J., with three justices concurring and one justice concurring separately.) Wash. Const. art. 1, § 14; Wash. Rev. Code Ann. § 10.95.030.

4 Cases that cite this headnote

West Codenotes

Unconstitutional as Applied

Wash. Rev. Code Ann. § 10.95.030.

Appeal from Pierce County Superior Court, Docket No: 03-1-01464-0, Honorable Lisa Worswick, Judge

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Opinion

GORDON McCLOUD, J.

**277 *306 ¶ 1 Dwayne Earl Bartholomew and Kurtis William Monschke were each convicted of aggravated first degree murder and sentenced to life in prison without possibility of parole—a mandatory, nondiscretionary sentence under Washington's aggravated murder statute. RCW 10.95.030. Bartholomew was 20 years old; Monschke was 19. Many years after their convictions, each filed a personal restraint petition (PRP) asking us to consider whether article I, section 14 of our state constitution or the Eighth Amendment to the United States Constitution permits a mandatory life without parole (LWOP) sentence for youthful defendants like themselves. Specifically, they ask us to decide whether the constitutional requirement that judges exercise discretion at sentencing,¹ which forbids such mandatory LWOP sentences for those under 18, also forbids those sentences for 18- to 21-year-old defendants.

¶ 2 Modern social science, our precedent, and a long history of arbitrary line drawing have all shown that no clear line exists between childhood and adulthood. For some purposes, we defer to the legislature's decisions as to who constitutes an "adult." But when it comes to mandatory LWOP sentences, *Miller's* constitutional guarantee of an individualized sentence—one that considers the mitigating *307 qualities of youth—must apply to defendants at least as old as these defendants were at the time of their crimes. *Miller v. Alabama*, 567 U.S. 460, 469-80, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Accordingly, we grant both PRPs and order that Bartholomew and Monschke each receive a new sentencing hearing.

Facts

¶ 3 Juries convicted both petitioners of aggravated first

degree murder, Bartholomew in 1981 and Monschke in 2003.

¶ 4 Bartholomew told his brother that he intended to rob a laundromat and “ ‘leave no witnesses.’ ” *State v. Bartholomew*, 98 Wash.2d 173, 177-78, 654 P.2d 1170 (1982), vacated, 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983), *adhered to on remand*, 101 Wash.2d 631, 683 P.2d 1079 (1984). He took \$237 from the cash drawer and fatally shot an attendant in the course of the robbery. *Id.* at 178, 654 P.2d 1170. He was 20 years old.

¶ 5 A jury initially sentenced Bartholomew to death. *Id.* at 179, 654 P.2d 1170. But we vacated his death sentence, and then, on remand, a jury sentenced him to LWOP, instead. *Id.* at 216, 654 P.2d 1170; *Bartholomew*, 101 Wash.2d at 648, 683 P.2d 1079; *State v. Bartholomew*, 104 Wash.2d 844, 710 P.2d 196 (1985); see *Wood v. Bartholomew*, 516 U.S. 1, 4, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995).

¶ 6 Monschke and his friends associated themselves with the white supremacist group “Volksfront.” *State v. Monschke*, 133 Wash. App. 313, 333, 135 P.3d 966 (2006). In March 2003, the group purchased baseball bats with the goal of helping a member earn “red [shoe]laces”—a symbol “that the wearer had assaulted a member of a minority group.” *Id.* at 323, 135 P.3d 966 (alteration in original). Separated from Monschke, two members of this group located and savagely beat a homeless man with the bats, rocks, and steel-toed boots. *Id.* They then fetched Monschke, who struck the man 10 to 15 times with a bat **278 while his friends continued to kick the *308 man’s head. *Id.* at 323-24, 135 P.3d 966. Monschke pondered whether “ ‘God gives us little brownie points for this.’ ” *Id.* at 324, 135 P.3d 966. The man died in the hospital after 20 days on life support. *Id.* at 320, 135 P.3d 966. Monschke was 19 years old.

¶ 7 Monschke received a mandatory LWOP sentence. *Id.* at 328, 135 P.3d 966.

¶ 8 Both sentences were mandatory for these young men. RCW 10.95.030 provides that any person who is convicted of aggravated murder and not sentenced to death² “shall be sentenced to life imprisonment without possibility of release or parole.”

¶ 9 The petitioners initially filed their PRPs in the Court of Appeals. They claimed that mandatory LWOP is unconstitutionally cruel when applied to youthful defendants like themselves. They argued that developments in neuroscience have rendered a bright line at age 18 arbitrary and that defendants age 21 and

younger should receive the benefit of the same constitutional protections that this court and the United States Supreme Court have recognized for juveniles. The Court of Appeals transferred both petitions to this court without ruling on the merits, pursuant to RAP 16.5.³ We consolidated the two petitions and now grant both.

*309 Analysis

I. Because the Petitions Claim the Aggravated Murder Statute Is Unconstitutional as Applied, They Are Exempt from the One-Year Time Bar

¹¹¶ 10 Both petitioners’ sentences became final long ago, and petitioners are generally barred from filing a PRP “more than one year after the judgment becomes final.” RCW 10.73.090(1). But six enumerated exceptions temper this one-year time bar. RCW 10.73.100. One of these exceptions allows petitioners to file a PRP without any deadline if the “statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant’s conduct.” RCW 10.73.100(2). This exception is important because convictions under unconstitutional statutes “are as no conviction at all and invalidate the prisoner’s sentence.” *In re Pers. Restraint of Runyan*, 121 Wash.2d 432, 445, 853 P.2d 424 (1993).

¹² ¹³¶ 11 Each petitioner challenges the constitutionality of RCW 10.95.030, the aggravated murder statute, as applied to him. They do so for the same reason: the statute required mandatory LWOP, while the Washington State Constitution requires the court to exercise discretion at sentencing due to their age. If they are correct that the aggravated murder statute is unconstitutional as applied, then the time bar presents no obstacle to their petitions.⁴ RCW 10.73.100(2).

¶ 12 The dissent would draw a distinction between “convictions” and “sentences” and restrict the unconstitutional *310 statute time bar exception to only unconstitutional “convictions.” Dissent at 291. But we need not decide today whether RCW 10.73.100(2) provides a time bar exception for other unconstitutional sentencing statutes; in this case, the petitioners challenge not a regular sentencing statute but the aggravated murder **279 statute. The aggravated murder statute is different than other sentencing statutes—it requires the State to charge and the jury (or other trier of fact) to find the defendant “guilty” of that very same aggravated murder

charge. In other words, petitioners' challenge to the constitutionality of the aggravated murder statute, which criminalizes premeditated first degree murder as aggravated murder in certain circumstances, is a challenge to the criminal statute that they were "convicted of violating." RCW 10.95.030; 10.73.100.⁵

¶ 13 To be sure, petitioners challenge the section of the aggravated murder statute that requires LWOP for all convictions, RCW 10.95.030, and not the section that defines aggravated murder and lists aggravating circumstances, RCW 10.95.020. See *State v. Goldberg*, 149 Wash.2d 888, 894, 72 P.3d 1083 (2003), *overruled on other grounds by State v. Guzman Nuñez*, 174 Wash.2d 707, 713, 285 P.3d 21 (2012) ("RCW 10.95.020 defines the aggravating circumstances that make premeditated murder first degree murder punishable under that chapter rather than under the Sentencing Reform Act of 1981, chapter 9.94A RCW."). But they challenge the constitutionality of the aggravated *311 murder statute nonetheless—the statute they were each "convicted of violating," in the words of RCW 10.73.100(2).

¶ 14 That statutory exception to the one-year time bar thus clearly applies here. We therefore need not address the concurrence's point that RCW 10.73.100(6)'s exception to the time bar applies here, also.

II. The Aggravated Murder Statute Is Unconstitutional As Applied to Youthful Defendants Because It Denies Trial Judges Discretion To Consider the Mitigating Qualities of Youth

¶ 15 Article I, section 14 of the Washington Constitution prohibits "cruel punishment."⁶ It does not prohibit mandatory (or discretionary) LWOP sentences for all aggravated murder defendants. *State v. Hughes*, 106 Wash.2d 176, 202, 721 P.2d 902 (1986); *State v. Grisby*, 97 Wash.2d 493, 497-98, 647 P.2d 6 (1982). But it does prohibit LWOP sentences for "juvenile offenders." *State v. Bassett*, 192 Wash.2d 67, 90, 428 P.3d 343 (2018). That state constitutional bar against "cruel punishment," like the Eighth Amendment bar against "cruel and unusual punishments," also forbids mandatory LWOP sentences for juvenile offenders. *Miller*, 567 U.S. at 479, 132 S.Ct. 2455. It further requires courts to exercise "complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant," even when faced with mandatory statutory language. *State v. Houston-Sconiers*, 188 Wash.2d 1, 21, 391 P.3d 409 (2017).

**280 *312 ¶ 16 These petitioners argue that the protection against mandatory LWOP for juveniles should extend to them because they were essentially juveniles in all but name at the time of their crimes. As the discussion below shows, we agree.

¶ 17 Preliminarily, though, we need to clarify why we take this approach, rather than the "categorical" approach that the dissent advances. Dissent at 291–92 (citing *Bassett*, 192 Wash.2d at 85-86, 428 P.3d 343, for the categorical bar test, and *State v. Fain*, 94 Wash.2d 387, 397, 617 P.2d 720 (1980), for the proportionality test).

¶ 18 The categorical bar test that we used in *Bassett* and the proportionality test that we used in *Fain* were designed for a different purpose. We apply them to determine when a particular punishment is categorically cruel in violation of article I, section 14 in the first place. *Bassett*, 192 Wash.2d at 83, 428 P.3d 343. But we already know that mandatory LWOP is unconstitutionally cruel as applied to youthful defendants. *Miller*, 567 U.S. at 479-80, 132 S.Ct. 2455. We need not decide whether new constitutional protections apply in this case because the petitioners do not ask for new constitutional protections. Rather, they ask us to apply the existing constitutional protections of *Miller* to an enlarged class of youthful offenders older than 17.⁷ Accordingly, instead of the categorical bar test, we scrutinize whether an arbitrary distinction between 17- and 18-year-olds for purposes of mandatory LWOP passes constitutional muster.⁸

*313 ¶ 19 All parties agree that neuroscience does not provide any such distinction. The petitioners have shown that many youthful defendants older than 18 share the same developing brains and impulsive behavioral **281 attributes as those under 18. Thus, we hold that these 19- and 20-year-old petitioners must qualify for some of the same constitutional protections as well.

A. Constitutional Protections for Youthful Criminal Defendants Have Grown More Protective over the Years

¶ 20 We first look to the history of constitutional protections against cruel sentences for juveniles under the Eighth Amendment. While the United States Supreme Court has *314 drawn bright lines between various ages and types of defendants, those bright lines have shifted over time.

¶ 21 At the time of the nation's founding, "the common law set the rebuttable presumption of incapacity to

commit any felony at the age of 14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7.” *Stanford v. Kentucky*, 492 U.S. 361, 368, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989) (citing 4 William Blackstone, Commentaries *23-24; Matthew Hale, Pleas of the Crown 24-29 (1800)), *overruled in part by Roper v. Simmons*, 543 U.S. 551, 574-75, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *State v. J.P.S.*, 135 Wash.2d 34, 37, 954 P.2d 894 (1998) (recognizing the same original common law ages and that “Washington codified these presumptions, changing the age of incapacity to 7 and younger and the age of presumed capacity to 12 and older”).

¶ 22 The United States’ “age of majority” was largely set at 21, until it changed to 18 “for reasons quite unrelated to capacity.” Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 Tulane L. Rev. 55, 57 (2016). Twenty-one had been the “near universal” age of majority in the United States from its founding until 1942 when “wartime needs prompted Congress to lower the age of conscription from twenty-one to eighteen, a change that would eventually lead to the lowering of the age of majority generally.” *Id.* at 64; Pub. L. No. 77-772, 56 Stat. 108, 1019 (1942) (changing selective service registration age to 18). The linking of military obligation and political participation led to the Twenty-Sixth Amendment; in 1971, it lowered the voting age to 18. *Id.* at 64-65; U.S. Const. XXVI. States across the country—including Washington—quickly followed suit, lowering the “age of majority” to 18 for many purposes.* RCW 26.28.010; Laws of 1971, 1st Ex. Sess., ch. 292, § 1.

*315 ¶ 23 The age at which the Eighth Amendment prohibits imposition of capital punishment on a youthful defendant has also changed with time. In two plurality opinions in the late 1980s, the United States Supreme Court held that capital punishment was unconstitutional for a 15-year-old offender, but permissible for 16- or 17-year-old offenders. *Thompson v. Oklahoma*, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988); *Stanford*, 492 U.S. 361, 109 S.Ct. 2969. Justice O’Connor, the determinative fifth vote in each case, based the difference on her understanding that “no national consensus forbids the imposition of capital punishment on 16- or 17-year-old capital murderers” as distinct from 15-year-olds. *Stanford*, 492 U.S. at 381, 109 S.Ct. 2969 (O’Connor, J., concurring in part and concurring in the judgment). She recognized that “[t]he day may come when there is such a general legislative rejection of the execution of 16- or 17-year-old capital murderers that a clear national consensus can be said to have developed,” but she did not believe that day had arrived in 1989. *Id.* at 381-82, 109 S. Ct. 2969.

¶ 24 Sixteen years later, it had. In *Roper*, the Court held that executing a defendant under 18 was categorically unconstitutional. The court based this change on “[t]hree general differences between juveniles under 18 and adults.” *Roper*, 543 U.S. at 569, 125 S.Ct. 1183. First, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young,” resulting in “‘impetuous and ill-considered **282 actions and decisions.’” *Id.* (alteration in original) (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). Second, “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)). And third, “the character of a juvenile is not as well formed as that of an adult.” *Id.* at 570, 125 S.Ct. 1183. *Roper* recognized that the “qualities that distinguish juveniles from adults do *316 not disappear when an individual turns 18” but held that “a line must be drawn.” *Id.* at 574, 125 S. Ct. 1183. Because “[t]he logic of *Thompson* extends to those who are under 18” and because “18 is the point where society draws the line for many purposes between childhood and adulthood,” the Court made it “the age at which the line for death eligibility ought to rest.” *Id.* at 574-75, 125 S. Ct. 1183 (citing *Thompson*, 487 U.S. at 833-38, 108 S.Ct. 2687).

¶ 25 As Eighth Amendment jurisprudence forbidding the execution of adolescent offenders developed, the law regarding intellectually disabled defendants followed a parallel track.¹⁰ The United States Supreme Court had allowed execution of the intellectually disabled in 1989, *Penry v. Lynaugh*, 492 U.S. 302, 340, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (plurality portion), *abrogated by Atkins v. Virginia*, 536 U.S. 304, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). As in *Stanford*, the majority recognized that “a national consensus against execution of the mentally retarded may someday emerge reflecting the ‘evolving standards of decency that mark the progress of a maturing society’” but did not believe such a consensus existed in 1989. *Id.*

¶ 26 That consensus had arrived by 2002. As *Roper* signaled a change from *Stanford*, so *Atkins* signaled a change from *Penry*. 536 U.S. at 321, 122 S.Ct. 2242 (holding that execution of the intellectually disabled violates the Eighth Amendment). Indeed, *Roper* relied in part on *Atkins* as an example of “society’s evolving standards of decency.” 543 U.S. at 563, 125 S.Ct. 1183. *Atkins* provided an example of changing standards, even though the “rate of change in reducing the incidence of

the juvenile death penalty” had been much slower than the *317 pace at which states abolished capital punishment for the intellectually disabled. *Id.* at 565, 125 S. Ct. 1183.

¶ 27 The changes from *Stanford* and *Penry* to *Atkins* and *Roper* resulted from a perceived change in direction across the country. Recognizing the shift, the Court observed that “[i]t is not so much the number of these States [that forbade execution of the intellectually disabled] that is significant, but the consistency of the direction of change.”¹¹ *Atkins*, 536 U.S. at 315, 122 S.Ct. 2242; see *Bassett*, 192 Wash.2d at 86, 428 P.3d 343 (quoting *Atkins* for this same proposition).

¶ 28 Clearly, bright constitutional lines in the cruel punishment context shift over time in order to accord with the “evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion).

****283 B. The Court Will Not Necessarily Defer to Legislative Bright-Line Drawing When Determining What Constitutes Cruel Punishment**

¶ 29 *Roper* set a bright constitutional line based on “where society draws the line for many purposes between childhood and adulthood.” 543 U.S. at 574, 125 S.Ct. 1183. But some bright statutory lines fail to comply with the Eighth Amendment.

¶ 30 In *Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014), for example, a Florida court sentenced a defendant to death, despite his unchallenged evidence of an intellectual disability. The record contained ample evidence of this intellectual disability. *Id.* But a Florida statute required that “as a threshold matter, Hall *318 show an IQ [intelligence quotient] test score of 70 or below before presenting any additional evidence of his intellectual disability.” *Id.* at 707, 134 S. Ct. 1986.

¶ 31 In evaluating the constitutionality of this rigid bright line of an IQ of 70, the Court first reiterated that the intellectually disabled “may not ... receive the law’s most severe sentence.” *Id.* at 709, 134 S. Ct. 1986 (citing *Atkins*, 536 U.S. at 318, 122 S.Ct. 2242). The Court then stated the issue presented: “how intellectual disability must be defined in order to implement the[] principles and the holding of *Atkins*.” *Id.* at 709-10, 134 S. Ct. 1986. To analyze the cutoff rule, the Court considered

“psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine how the scores relate to the holding of *Atkins*”—it was “proper to consult the medical community’s opinions.” *Id.* Though “[i]t is the Court’s duty to interpret the Constitution ... it need not do so in isolation.” *Id.* at 721, 134 S. Ct. 1986. “The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community’s diagnostic framework.” *Id.*

¶ 32 Considering three criteria by which the medical community defines intellectual disability,¹² “Florida’s rule disregard[ed] established medical practice in two interrelated ways. It [took] an IQ score as final and conclusive evidence of a defendant’s intellectual capacity, when experts in the field would consider other evidence” and it “relie[d] on a purportedly scientific measurement of the defendant’s abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.” *Id.* at 712, 134 S. Ct. 1986. By failing to account for other factors, “and setting a strict cutoff at 70, Florida ‘[went] against the unanimous professional consensus.’ ” *Id.* at 722, 134 S. Ct. 1986. “An IQ score is an approximation, not a final and infallible assessment of intellectual functioning.” *Id.*

*319 ¶ 33 Though IQ was “of considerable significance,” state use of IQ scores to determine death eligibility “must afford these test scores the same studied skepticism that those who design and use these tests do, and understand that an IQ test score represents a range rather than a fixed number.” *Id.* at 723, 134 S. Ct. 1986. It was unconstitutional “to execute a man because he scored 71 instead of 70 on an IQ test.” *Id.* at 724, 134 S. Ct. 1986.

¶ 34 Like the Florida statute at issue in *Hall*, our aggravated murder statute sets a flat cutoff line in determining a defendant’s sentence: age 18. RCW 10.95.030(3)(a)(ii). Yet many other statutes draw lines at many other ages between 8 and 26. We next turn to these statutes to get a sense of how our legislature has defined the “age of majority.”

C. The Concept of an “Age of Majority” Is Inherently and necessarily Flexible

¶ 35 *Roper* set 18 as a constitutional bright line for death eligibility because it “is the point where society draws the line for many purposes between childhood and adulthood.” 543 U.S. at 574, 125 S.Ct. 1183. Washington calls that general line the “age of majority”: “[e]xcept as otherwise specifically provided by law, all persons shall

be deemed and taken to be of full age for all purposes at the **284 age of eighteen years.” RCW 26.28.010.¹³ But as it turns out, areas “otherwise specifically provided by law” abound.

¶ 36 The Washington Criminal Code itself draws lines between many distinct ages besides 17 and 18. It renders children under 8 incapable of committing crime. RCW 9A.04.050. And children between 8 and 12 are presumed incapable of committing crime. *Id.* The Juvenile Justice Act of 1977 defines “juvenile,” “youth,” and “child” all synonymously *320 to mean “any individual who is under the chronological age of eighteen years and who has not been previously transferred to adult court.” RCW 13.40.020(15). But individuals transferrable to such adult court may be as young as 15 if charged with a serious violent offense—or any age if charged with murder or custodial assault while already under sentence.¹⁴ RCW 13.40.110(1)(a), (b). When a child remains in juvenile court, that juvenile court may, in some scenarios, maintain “residual” jurisdiction until the child reaches age 25. RCW 13.04.030(1)(e)(v)(C)(II).

¶ 37 Other criminal statutes draw the line between “childhood” and “adulthood” at other ages. *See, e.g.*, RCW 9A.44.079(1) (setting oldest possible age of a victim of the crime, “Rape of a child,” at 15); RCW 66.44.290(4) (making it a misdemeanor for persons under 21 to purchase liquor). Plenty of examples outside the criminal law context exist as well. *See, e.g.*, RCW 46.20.031(1) (setting minimum age to receive a driver’s license at 16), .265(2) (suspending juvenile driving privileges until various ages between 17 and 21); RCW 70.24.110 (allowing those 14 or older to obtain medical care for sexually transmitted diseases without parental consent); RCW 74.13.031(12) (providing government authority for “adoption support benefits, or relative guardianship subsidies on behalf of youth ages eighteen to twenty-one years” who meet certain conditions), (16) (providing government authority to “provide independent living services to youths, including individuals who have attained eighteen years of age, and have not attained twenty-three years of age”); *see also* 42 U.S.C. § 18014(d)(2)(E) (providing Affordable Care Act medical coverage to “adult children” through age 26).

¶ 38 These numerous meanings of “child” and “adult” located throughout the code do not reflect inconsistency. They reflect the need for flexibility in defining the nebulous *321 concept of “adulthood” or “majority.” Accordingly, dividing lines are set at different ages in different contexts. Among these many ages of “majority” that Washington chooses for various contexts, the age at which our legislature has required mandatory LWOP for

defendants convicted of aggravated murder sits at 18.¹⁵ RCW 10.95.030(3).

D. No Meaningful Developmental Difference Exists Between the Brain of a 17-Year-Old and the Brain of an 18-Year-Old

¶ 39 *Roper* considered juveniles’ lack of maturity and responsibility, their vulnerability to negative influences, and their transitory and developing character when it increased the minimum age for death eligibility from 16 to 18. 543 U.S. at 569-70, 125 S.Ct. 1183. All three of these factors weigh in favor of offering similar constitutional protections to older offenders, also, because neurological science recognizes no meaningful distinction between 17- and 18-year-olds as a class.

¶ 40 We have already concluded that under the Sentencing Reform Act of 1981, ch. 9.94A **285 RCW, “age may well mitigate a defendant’s culpability, even if that defendant is over the age of 18.” *State v. O’Dell*, 183 Wash.2d 680, 695, 358 P.3d 359 (2015). The fact that the legislature “did not have the benefit of psychological and neurological studies showing that the ‘parts of the brain involved in behavior control’ continue to develop well into a person’s 20s” was one of the factors that compelled that conclusion. *Id.* at 691-92, 358 P.3d 359 (footnote omitted) (quoting *Miller*, 567 U.S. at 472, 132 S.Ct. 2455 (quoting *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010))). The same scientific developments compel us to come to a similar conclusion under article I, section 14.

*322 ¶ 41 *O’Dell* cited articles discussing neurological science extensively. 183 Wash.2d at 692 n.5, 358 P.3d 359 (citing Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 *Notre Dame L. Rev.* 89, 152 & n.252 (2009); MIT *Young Adult Development Project: Brain Changes*, Mass. Inst. of Tech.,

<http://hr.mit.edu/static/worklife/youngadult/brain.html>

(last visited Mar. 8, 2021); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 *Ann. N.Y. Acad. Sci.* 77 (2004)). The parties bring additional, more recent studies, to our attention. *See, e.g.*, Pet’r’s Suppl. Br. (Bartholomew) at 9-10 (citing, e.g., Kathryn Monahan et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 *Crime & Just.* 577, 582 (2015); Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 *Temple L. Rev.* 769 (2016); Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category:*

Science, Social Change, and Justice Policy, 85 Fordham L. Rev. 641 (2016)). The overarching conclusion compelled by these sources is clear: “biological and psychological development continues into the early twenties, well beyond the age of majority.” Scott, *supra*, at 642.

¶ 42 The State does not dispute this conclusion. Rather, it contends that *Miller* is not about “brain science” at all and it cites experts who resist the use of neuroscience in legal decision-making altogether. Suppl. Br. of Resp’t at 12-13. While all three articles cited by the State emphasize the difficulty of analyzing *individual* adolescent brains, they support the petitioners’ position that there is no distinctive scientific difference, in general, between the brains of a 17-year-old and an 18-year-old. Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research & the Law*, 22 Current Directions in Psychol. Sci. 158, 161 (2013) (“So far, neuroscience research provides group data showing a developmental trajectory in brain structure and function during adolescence and into adulthood.”); Maroney, *supra*, at 94 (“Rather than raising deep and likely *323 unsolvable questions about human agency, [neuroscience] simply reinforces the (once) non-controversial idea that, as a group, young people differ from adults in systematic ways directly relevant to their relative culpability, deterability, and potential for rehabilitation.”); B.J. Casey & Kristina Caudle, *The Teenage Brain: Self Control*, 22 Current Directions in Psychol. Sci. 82 (2013) (discussing overgeneralizations of adolescent brains but never mentioning what age is meant by “adolescence”). Maroney criticizes the way courts have used neuroscience to justify their conclusions and argues that “the impact of adolescent brain science on juvenile justice has been strongly cabined by the extrinsic reality of legal doctrine.” Maroney, *supra*, at 144-45.

¶ 43 The State’s conclusion from these articles appears to be that because there is no accounting for the brain development and maturity of particular individuals, we may as well give up and let the legislature draw its arbitrary lines—because they will necessarily be arbitrary no matter where they are drawn. But giving up would abdicate our responsibility to interpret the constitution. The State is correct that every individual is different, and perhaps not every 20-year-old offender will deserve leniency on account of youthfulness. But the variability in individual attributes of youthfulness are exactly why courts must have discretion to consider those attributes as they apply to each individual youthful offender. That is why mandatory sentences for youthful defendants are unconstitutional. *Miller*, 567 U.S. at 477-80, 132 S.Ct. 2455 (requiring consideration of the **286 specific

youthful characteristics of each individual defendant); *Houston-Sconiers*, 188 Wash.2d at 23, 391 P.3d 409 (requiring consideration at sentencing of defendant’s individual youthful characteristics and many other individual factors related to culpability).

¶ 44 In fact, this court has already invalidated age 18 as an arbitrary bright line in the context of capacity to consent to abortion. In *324 *State v. Koome*, 84 Wash.2d 901, 530 P.2d 260 (1975) (plurality opinion), we evaluated the constitutionality of a statute that required pregnant women under 18 to get parental consent to obtain an abortion. We held that such an abridgment of the young woman’s right to make this decision about her reproductive health was unconstitutional. *Id.* at 909-10, 530 P.2d 260.¹⁶ We noted that “[p]arental authority wanes gradually as a child matures; it does not suddenly disappear at adulthood. Similarly, the ability to competently make an important decision, such as that to have an abortion, develops slowly and at different rates in different individuals.” *Id.* at 910-11, 530 P.2d 260. While we acknowledged that the State may “create age limits which do not perfectly correspond with the capacity of minors to act as adults,” we held that “a subjective inquiry into the maturity of each individual minor is a practical impossibility, and any flat age limit is necessarily arbitrary.” *Id.* at 911, 530 P.2d 260. “In such circumstances imprecision in age classifications may be permissible, perhaps even where important rights are affected, because it is inevitable.” *Id.* But, in the abortion context, “these reasons for setting arbitrary age requirements [were] not present” because “[t]he age of fertility provides a practical minimum age requirement for consent to abortion, reducing the need for a legal one.” *Id.* (citing *Ballard v. Anderson*, 4 Cal. 3d 873, 883, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971)).

¶ 45 Science may assist our understanding of not just sexual development but also neurological development. Neuroscientists now know that all three of the “general differences between juveniles under 18 and adults” recognized by *Roper* are present in people older than 18. 543 U.S. at 569, 125 S.Ct. 1183. While not yet widely recognized by legislatures, we *325 deem these objective scientific differences between 18- to 20-year-olds (covering the ages of the two petitioners in this case) on the one hand, and persons with fully developed brains on the other hand, to be constitutionally significant under article I, section 14.

Parole Sentences Extends to Youthful Defendants Older Than 18

¹⁵¶ 46 Much like the Florida IQ cutoff in *Hall*, RCW 10.95.030 disregards many scientific indicia of youthfulness in favor of a single, relatively inconsequential number: a defendant's age. Just as "an individual's intellectual functioning cannot be reduced to a single numerical score," neither can an individual's level of maturity. *Hall*, 572 U.S. at 713, 134 S.Ct. 1986. Though we sometimes allow legislative "age limits which do not perfectly correspond with the capacity of minors to act as adults," we will not hesitate to strike them down where they violate the constitution, especially where better, more scientific age limits are available. *Koome*, 84 Wash.2d at 911, 530 P.2d 260. We hold that the aggravated murder statute's rigid cutoff at age 18 combined with its mandatory language creates an unacceptable risk that youthful defendants without fully developed brains will receive a cruel LWOP sentence.

¶ 47 But we also recognize that every individual is different. *See, e.g., Bonnie & Scott, supra*, at 161 ("[T]he research does not currently allow us to move from that group data to measuring the neurobiological maturity of an individual adolescent because there is too much variability within age groups and across development. Indeed, we do not currently **287 have accurate behavioral measures of maturity." (citation omitted)). Though a categorical constitutional rule may be appropriate prohibiting LWOP sentences for offenders younger than 18, *Bassett*, 192 Wash.2d at 90, 428 P.3d 343, the petitioners have neither argued nor shown that LWOP would be *categorically* unconstitutional as applied to older defendants.

*326 ¶ 48 What they have shown is that no meaningful neurological bright line exists between age 17 and age 18 or, as relevant here, between age 17 on the one hand, and ages 19 and 20 on the other hand. Thus, sentencing courts must have discretion to take the mitigating qualities of youth—those qualities emphasized in *Miller* and *Houston-Sconiers*—into account for defendants younger and older than 18. Not every 19- and 20-year-old will exhibit these mitigating characteristics, just as not every 17-year-old will. We leave it up to sentencing courts to determine which individual defendants merit leniency for these characteristics. Our aggravated murder statute's requirement of LWOP for *all* defendants 18 and older, regardless of individual characteristics, violates the state constitution.¹⁷

¶ 49 Because the aggravated murder statute that petitioners were convicted of violating is unconstitutional as applied to their conduct, the one-year time bar for

collateral attacks does not apply. RCW 10.73.100(2).¹⁸

III. We Do Not Abandon the Categorical Bar Analysis; Our Decision "Flows Straightforwardly from Our Precedents" as Did the Decision in *Miller*

¶ 50 The dissent accuses us of manufacturing a "false distinction to sidestep *Bassett*" by applying *Miller* to a new class of defendants without invoking *Fain*'s proportionality test or *Bassett*'s categorical bar test. Dissent at 292–93. But this distinction (between cases subject to the categorical bar analysis and cases subject to a different analysis) is not new.

*327 ¶ 51 Contrary to the dissent's characterization, dissent at 292, *Miller* itself expressly declined to apply a categorical bar analysis. It did not "categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Supreme Court] did in *Roper* or *Graham*." 567 U.S. at 483, 132 S.Ct. 2455. Instead, *Miller* "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* This made *Miller* "different from the typical [case] in which we have tallied legislative enactments"—in other words, different from *Bassett* and other categorical rule cases.¹⁹ *Id.*

¶ 52 In fact, *Miller* explicitly clarified that it "flow[ed] straightforwardly" from "the principle of *Roper, Graham*, and our *individualized sentencing* cases that youth matters for purposes of meting out the law's most serious punishments." *Id.* (emphasis added). **288 It did not flow from a tallying of legislative enactments across the country; it did "not scrutinize[] or rel[y] in the same way on legislative enactments." *Id.* (citing *Sumner v. Shuman*, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987); *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Eddings*, 455 U.S. 104, 102 S.Ct. 869).

¶ 53 As the discussion above shows, neither do we.

¶ 54 Instead our decision today, like the *Miller* decision, draws from the line of cases that *Miller* cited for its "individualized sentencing" principle. Those decisions all relied on the rule, first announced in *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (plurality opinion), that "consideration of the character *328 and record of the individual offender and the circumstances of the particular offense" are "a constitutionally indispensable part of the process of inflicting the penalty of death." And those decisions all applied that rule to invalidate a state death penalty

sentencing scheme, irrespective of any national consensus for or against the specific statute or sentencing practice. *Sumner*, 483 U.S. at 83-85, 107 S.Ct. 2716 (striking down a Nevada statute requiring the death penalty for defendants convicted of murder while serving a life sentence without possibility of parole); *Lockett*, 438 U.S. at 608, 98 S.Ct. 2954 (striking down an Ohio statute that limited mitigating circumstances a trial court could consider before imposing death); *Eddings*, 455 U.S. at 113, 102 S.Ct. 869 (requiring sentencing courts to consider mitigating evidence, even where that mitigating evidence did not support a legal excuse from criminal liability). *Miller* then applied that principle of “individualized sentencing,” developed in the death penalty context, to the juvenile LWOP context. 567 U.S. at 483, 132 S.Ct. 2455 (citing *Sumner*, 483 U.S. at 66, 107 S.Ct. 2716; *Lockett*, 438 U.S. at 602-08, 98 S.Ct. 2954; *Eddings*, 455 U.S. at 110-17, 102 S.Ct. 869).

¶ 55 As the discussion above also shows, so do we.²⁰ In fact, we repeat the *Miller* approach today. Our decision that individual youthful characteristics may mitigate the sentences of these two young petitioners “flows straightforwardly from our precedents.” *Id.* No *Fain* or categorical bar analysis is necessary to reach this decision.

***329 Conclusion**

¶ 56 There is no meaningful cognitive difference between 17-year-olds and many 18-year-olds. When it comes to *Miller*’s prohibition on mandatory LWOP sentences, there is no constitutional difference either. Just as courts must exercise discretion before sentencing a 17-year-old to die in prison, so must they exercise the same discretion when sentencing an 18-, 19-, or 20-year-old. We grant Monschke’s and Bartholomew’s PRPs and vacate their mandatory LWOP sentences. We remand each case for a new sentencing hearing at which the trial court must consider whether each defendant was subject to the mitigating qualities of youth.

WE CONCUR:

Yu, J.

Montoya-Lewis, J.

Whitener, J.

González, C.J. (concurring)

¶ 57 I concur with the lead opinion that the petitioners are entitled to a new sentencing hearing to determine whether their ages at the time of their crimes is a mitigating factor justifying a downward departure from the standard sentence. I part company, however, with its analysis of the retroactivity of *State v. O’Dell*, 183 Wash.2d 680, 358 P.3d 359 (2015). As the dissent properly notes, RCW 10.73.100(2) applies to violations of substantive criminal statutes that have been found ****289** unconstitutional, not sentencing statutes. However, I continue to believe that *O’Dell* is a significant change in the law that applies retroactively when material. *In re Pers. Restraint of Light-Roth*, 191 Wash.2d 328, 338-39, 422 P.3d 444 (2018) (González, J., concurring) (citing RCW 10.73.100(6)). Accordingly, I concur.

OWENS, J. (dissenting)

¶ 58 Kurtis Monschke and Dwayne Bartholomew committed brutal murders decades ago. At the time, they were 19 and 20 years old, respectively. ***330** They were not children. Under Washington law, when an individual turns 18 years old, they are empowered to make a range of life-altering decisions: suddenly, they can form contracts, drop out of school, get married, work a hazardous job, and serve in the military. But at this same moment, they also obtain the full responsibilities and consequences of adulthood, and the court will no longer intervene on their behalf on the basis of age. Nonetheless, the lead opinion holds today that we must create an exception in treating these individuals as adults when they commit aggravated murder between the ages of 18 and 20. Mandatory life without parole (LWOP) sentences are now prohibited for this age category. The lead opinion crafts this new rule by filtering our state constitution’s “cruel punishment” prohibition through a handful of scientific studies and circumvents the reality that no legislatures or courts in the other 49 states have ever recognized such a protection. Wash. Const. art. I, § 14. As the final arbiters of what “cruel” means under article I, section 14 of our state constitution, this court must use a disciplined and evenhanded approach in evaluating its meaning. If we do not, we risk transforming our protection against “cruelty” into whatever is supported by a smattering of studies and five concurring members of this court.

¶ 59 At the heart of this case is the important question of when a person should be held fully accountable as an adult. This is a question that requires a meticulous examination of a number of scientific, moral, ethical, and practical considerations. Our court is not a legislature, and it is insufficiently equipped to decide this issue on selectively presented evidence put forth by limited parties on a constrained schedule. The lead opinion broadly seeks to protect against the “unacceptable risk that youthful defendants without fully developed brains will receive a cruel LWOP sentence.” Lead opinion at 286. But I struggle to identify at what precise age we will stop redrawing these lines based on this brain development evidence, be it 20, 22, 25, or even *331 older. I further caution that today’s decision may eventually compel us to revisit and invalidate a staggering number of LWOP and Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, sentences for this growing group under our recent decisions in *State v. Bassett*¹ and *State v. Houston-Sconiers*.² This task would tremendously burden the State’s resources and the victims’ families. I respectfully dissent.

ANALYSIS

I. The Legislature’s Determination of the Age of Majority Encapsulates More Considerations Than When a Youth’s Brain Is Fully Developed

¶ 60 The lead opinion today announces a broad new constitutional safeguard protecting “youthful defendants [ages 18 to 20] without fully developed brains.” Lead opinion at 286. In doing so, the lead opinion extends a protection to convicted murderers that may shield these individuals from the full legal consequences of their actions. I note that once an individual turns 18 years old in Washington, he or she can form contracts, drop out of school, enter into marriage, vote in an election, obtain a driver’s license, work a hazardous job, and enlist in the military. Upon turning 18, individuals receive all of these rights of adulthood, regardless of whether their brains are fully developed. At 18, the court will no longer interfere with the **290 exercise of these rights on the basis of age. Additionally, these rights are accompanied by the responsibilities and consequences of adulthood.

¶ 61 Children are different, certainly. But Monschke and Bartholomew were not children when they brutally murdered their victims. When a child becomes an adult is a *332 question that necessarily involves significant input from a variety of disciplines. The lead opinion today casts aside this long-standing deference to the legislature because it believes that the current line at 18 is “arbitrary.” Lead opinion at 285. The lead opinion contends the line at 18 is arbitrary because there is “no distinctive scientific difference, in general, between the brains of a 17-year-old and an 18-year-old”; and it notes that at 18, these youths’ brains are not fully developed, which leads to decision-making based on immaturity and impulsivity. Lead opinion at 285. But the lead opinion assumes that the legislature did not already know or account for this when it enacted the age of majority. For example, the legislature may have set the age of majority based on when an individual has *sufficient* brain development, experience, and legal autonomy to make important life decisions, like deciding to commit a crime. Today’s reasoning ignores the possibility that the age of majority is based less on scientific exactitude, and more on “society’s judgments about maturity and responsibility.” *Davis v. Dep’t of Licensing*, 137 Wash.2d 957, 974, 977 P.2d 554 (1999).

¶ 62 In prohibiting mandatory LWOP, the lead opinion now requires courts to exercise discretion in imposing LWOP sentences upon 18-20 year olds, as it asserts that we must provide individualized sentencing for defendants “at least as old as [20].” Lead opinion at 277, 286–87 (citing *Miller v. Alabama*, 567 U.S. 460, 469-80, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)).

¶ 63 I first note that nowhere does *Miller* require that we draw a line at 20. Lead opinion at 277. Further, the lead opinion’s requirement of “individualized sentenc[ing],” conflicts with our precedent, *State v. Grisby*, 97 Wash.2d 493, 497, 647 P.2d 6 (1982), which held that adults are not entitled to such a “ ‘particularized consideration’ ” under our state constitution’s cruel punishment prohibition. Lead opinion at 277, 287 n.17 (quoting *Grisby*, 97 Wash.2d at 497, 647 P.2d 6). Thus, the court today overrules precedent that dictates *333 that adults are not entitled to individualized sentencing, despite the fact that petitioners failed to make the requisite showing that *Grisby* is incorrect or harmful. *State v. Barber*, 170 Wash.2d 854, 863, 248 P.3d 494 (2011).

¶ 64 I further note the surprising optimism about the courts’ ability to exercise discretion in imposing an LWOP sentence now that mandatory LWOP is prohibited. This requires distinguishing young defendants whose crimes reflect “transient immaturity” from those whose

crimes reflect “irreparable corruption.” *Miller*, 567 U.S. at 479-80, 132 S.Ct. 2455. This optimism is negated by our recent holding in *Bassett* where we invalidated all LWOP sentences for juveniles, reasoning that courts are incapable of accurately making this determination. *Bassett*, 192 Wash.2d at 89, 428 P.3d 343 (quoting *Roper v. Simmons*, 543 U.S. 551, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)). Given the difficulty even “expert psychologists” have in making this determination, I do not foresee the courts adequately exercising discretion this time around. *Id.*

¶ 65 I additionally highlight our recent rulings in *Bassett*, 192 Wash.2d 67, 428 P.3d 343, and *Houston-Sconiers*, 188 Wash.2d 1, 391 P.3d 409, and their potential implications in light of the court’s holding today. These cases respectively invalidated all LWOP sentences and effectively eliminated the SRA’s mandatory sentencing requirements for juveniles based on *Miller*, 567 U.S. 460, 132 S.Ct. 2455 (holding mandatory LWOP for juveniles is cruel). As today’s holding almost identically mirrors *Miller*, I believe the lead opinion today paves a path for the court to invoke the same logic underlying *Houston-Sconiers* and *Bassett* to revisit and invalidate a staggering number of LWOP and SRA sentences, particularly in light of the retroactive nature of *Houston-Sconiers* established in *In re Personal Restraint of Ali*, 196 Wash.2d 220, 226, 242, 474 P.3d 507 (2020).

¶ 66 As the consequences of today’s decision are potentially severe, I would exercise **291 restraint in interpreting our state constitution. I believe that the people of Washington *334 and their representatives are fully capable of enacting laws that reflect the “ ‘evolving standards of decency that mark the progress of a maturing society.’ ” *Miller*, 567 U.S. at 494, 132 S.Ct. 2455 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). And if the legislature is not up to this task, we nonetheless have sufficient constitutional doctrine to guide us in addressing these matters, as I later address.

II. The Limitations of Personal Restraint Petitions Are Eroded by Invoking The “Constitutionality” Exception to the Time Bar under RCW 10.73.100(2)

¶ 67 Under Washington law, Bartholomew and Monschke as convicted murderers do not have unlimited attempts to appeal their sentences. Rather, convicted appellants are limited to one direct appeal as of right and discretionary review as granted by this court through a petition for review. After that, appellants have one year to bring

additional postconviction challenges to a valid judgment through a personal restraint petition (PRP), unless subject to an exception. RCW 10.73.090, .100. These limitations help manage the flow of postconviction relief, protect the judiciary’s time and resources, and foster respect for the finality of judicial decisions.

¶ 68 The lead opinion today relies on RCW 10.73.100(2) as an exception to the time bar to give the petitioners another shot at crafting a new constitutional rule and overturning precedent. Lead opinion at 278, 287. This exception reads, in part, “The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds: ... [t]he statute that the defendant *was convicted of violating* was unconstitutional on its face or as applied to the defendant’s conduct.” RCW 10.73.100(2) (emphasis added).

¶ 69 This “constitutionality” exception is inapplicable according to the very plain language of the statute. This exception limits the challenge to the *statute* that the defendant “*was convicted of violating*.” *Id.* (emphasis added). This *335 exception is inapplicable because the petitioners were not convicted of violating the mandatory LWOP sentencing statute, RCW 10.95.030. They were convicted of aggravated murder—RCW 10.95.020. The legislature clearly distinguishes between sentences and convictions in the collateral attack statute. *See* RCW 10.73.100(5), (6). But the lead opinion altogether bypasses the plain language of the statute and, instead, erroneously relies on *In re Personal Restraint of Runyan* to justify its position—quoting that “*convictions* under unconstitutional statutes ... ‘are as no *conviction* at all and invalidate the prisoner’s *sentence*.’ ” Lead opinion at 278 (emphasis added) (quoting 121 Wash.2d 432, 445, 853 P.2d 424 (1993)). This quote only further solidifies that this exception applies to *convictions* and not *sentences*, and that it is wholly inapplicable to the petitioners.

¶ 70 By forcing these PRPs through this exception, the court now permits virtually all challenges to sentences while also, and most notably, avoiding the retroactivity analysis required for changes in the law. *See* RCW 10.73.100(5), (6); RAP 16.4(c)(4).

¶ 71 Retroactivity analysis is important because not every procedural technicality merits overturning a valid sentence or conviction. Yet, the lead opinion nonetheless shoehorns the petitioners’ claims through this exception, and in doing so, bypasses this important barrier that safeguards the State’s resources and the families of victims from having to endure another trial or sentencing hearing.

¶ 72 Monschke and Bartholomew have been incarcerated for decades. They had their day in court to challenge their convictions and assert novel legal theories. Their time expired, and they must now wait to see if other challengers are able to mount a successful legal challenge that is material to their cases. See RCW 10.73.100(6). Today, the lead opinion stretches the “constitutionality” exception beyond credulity to address the merits of Monschke’s and Bartholomew’s petitions. In doing so, it greatly expands the *336 scope of personal restraint petitions in Washington. The people of Washington are entitled to their day in court. Monschke and Bartholomew had theirs. I am concerned that **292 the rights of others will be diluted as courts must stretch thin resources even thinner to address this new class of collateral attacks.

III. The Court Must Apply *Bassett* To Determine What a “Cruel” Punishment Is Because Prohibiting Mandatory LWOP Is a Categorical Bar under *Ali*

¶ 73 In deciding what punishments are prohibited under article I, section 14 of our state constitution, we must determine what “cruelty” is. To do this, the court has previously applied the *categorical bar*³ test outlined in *Bassett*, 192 Wash.2d at 85-86, 428 P.3d 343. The *Bassett*⁴ test provides a balanced approach for evaluating whether a punishment is cruel under the state constitution as applied to a certain class of persons by (1) analyzing whether this punishment is barred by other states through their legislatures and judiciaries and (2) exercising our independent judgment in determining the culpability of the group when considering the crime and if the punishment serves legitimate penological goals. *Id.* at 85-87, 428 P.3d 343.

¶ 74 We are bound to apply *Bassett* based on our recent decision in *In re Personal Restraint of Ali*, where we held that *Miller*, 567 U.S. 460, 132 S.Ct. 2455, was a *categorical bar on punishment* when *Miller* prohibited imposing mandatory LWOP sentences on juveniles. *In re Pers. Restraint of Ali*, 196 Wash.2d at 231-32, 238-39 n.5, 474 P.3d 507. There, we based our reasoning on *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). In assessing *Miller*’s retroactivity, *Montgomery* held that *337 *Miller*’s rule was retroactive because *Miller* categorically barred mandatory LWOP by “render[ing] life without parole an unconstitutional penalty for ‘a class of defendants because of their status’—that is, juvenile offenders whose crimes

reflect the transient immaturity of youth.” *Montgomery*, 136 S. Ct. at 734 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), abrogated by *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)).

¶ 75 As *Montgomery* clarifies, *Miller* was a case involving a categorical bar. This case is directly analogous to *Miller* and should also be analyzed under *Bassett*’s categorical bar approach. To make a very plain comparison, *Miller* barred imposing mandatory LWOP sentences on juveniles. Here, the lead opinion prohibits imposing mandatory LWOP sentences on defendants between the ages of 18 and 20. The *only difference* between this case and *Miller* is that we substitute “juveniles” with “defendants age 18 to 20.” Accordingly, because *Miller* was a categorical bar case, this case is as well. Therefore, we must apply *Bassett* to determine whether mandatory LWOP is cruel punishment for this particular class.

¶ 76 But instead of simply applying *Bassett*, the lead opinion crafts a false distinction to sidestep *Bassett* by reasoning that it is not actually creating a *new class* but, rather, is only “enlarg[ing]” the class of “youthful defendants” who were protected in *Miller*. Lead opinion at 280, 287 n.17. This distinction is empty and of little help to the lead opinion because *Bassett* also merely “enlarged” *Miller*’s initial class.

¶ 77 *Miller* defined the initial class⁵ of juveniles protected from LWOP as all “but the rarest of juvenile offenders, *338 those whose crimes reflect permanent incorrigibility.” *Montgomery*, 136 S. Ct. at 734. In *Bassett*, we “enlarged” this class to include those defendants originally excluded from *Miller*—those **293 whose crimes could have been said to have reflected “permanent incorrigibility.” *Bassett*, 192 Wash.2d at 72, 88-89, 428 P.3d 343. *Bassett* was an extension of a class in the same sense that petitioners here are “extending” the class. Thus, even if petitioners are merely extending the class as the lead opinion claims, they do not get to create a new and less rigorous test. They must apply our precedent of “extending” a class, which is *Bassett*.

¶ 78 And while we could easily get lost in the semantical forest of distinguishing “enlarging” a class from defining a proximate yet distinctive class, common sense provides a sufficiently clear solution that should dictate the result. If we were to decide *Miller* again today under our state constitution, those juveniles would be subject to the categorical bar test, pursuant to *Bassett* and *Ali*. And had Monschke and Bartholomew brought their claims alongside those juveniles, they would be subject to the

same exacting standard. I see no reason to require any less of the petitioners here today.

IV. *Applying Bassett, We Should Find That No States Have Expressly Exempted This Age Group (18-20) from Mandatory LWOP and That Young Adults Are More Responsible for Their Actions*

¶ 79 If the lead opinion applied *Bassett*, it would conclude that there are no states that have expressly exempted 18-20 year olds from mandatory LWOP through the legislative or judicial process. The lead opinion concedes there is “no national majority” of states with such a rule and, furthermore, fails to show there are *any such states* with such a rule. Lead opinion at — n.8. But nonetheless, the lead opinion would apparently rewrite the national trend inquiry to include evaluation of factors such as legislation that “carve[s] out rehabilitative space for ‘young’ or ‘youthful’ *339 offenders as old as their mid-twenties.” *Id.* But this approach vastly departs from our holding in *Bassett*, which expressly directs us to look at the national trends as applied to the “*sentencing practice at issue.*” *Bassett*, 192 Wash.2d at 83, 428 P.3d 343 (emphasis added) (citing *Graham v. Florida*, 560 U.S. 48, 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)). While the lead opinion provides support for treating young adults with the leniency of the juvenile system in limited circumstances, none of their authorities address the *sentencing practice at issue*, i.e., mandatory LWOP for aggravated murder.

¶ 80 But even assuming we could broaden our inquiry, there is still insufficient evidence to find that the sentence is *unconstitutional beyond a reasonable doubt.* *Bassett*, 192 Wash.2d at 77, 428 P.3d 343 (citing *State v. Hunley*, 175 Wash.2d 901, 908, 287 P.3d 584 (2012)). The lead opinion relies on laws in Washington D.C., Florida, and South Carolina, among others, as states that create classes of “young adults” who may be treated with leniency under the juvenile system. Lead opinion at 280 n.8.

¶ 81 But even these laws do not provide the support that the lead opinion claims for an “affirmative trend” that is relevant to the petitioners, as many of these statutes *expressly exempt* those young adults who commit murder or other violent crimes from being treated with more leniency. *Id.* at 280 n.8. For example, Washington D.C. carves out a “rehabilitative space” as the lead opinion asserts, but this “rehabilitative space” applies only to “person[s] [who have] committed a crime other than

murder.” D.C. Code 24-901(6). Florida, likewise, permits lenient treatment as “youthful offender[s]” only for those who did not commit a capital or life felony. Fla. Stat. Ann. § 958.04(1)(c). And South Carolina treats as “youthful offenders” only those who have not been convicted for a “violent crime.” S.C. Code Ann. § 24-19-10(d)(ii).

¶ 82 The lead opinion further erroneously relies on support from our state’s laws when it notes that our juvenile court system can retain jurisdiction over juveniles in limited *340 circumstances until the age of 25. Lead opinion at 284 (citing RCW 13.04.030(1)(e)(v)(C)(II)). Notably, however, our juvenile courts have no jurisdiction over 16-and 17-year-old juveniles who are charged with murder. RCW 13.04.030(1)(e)(v)(A), (C)(I); *see also* RCW 13.40.300(5) (subject to only a few exceptions, “the juvenile court has **294 no jurisdiction over any offenses alleged to have been committed by a person eighteen years of age or older”).

¶ 83 Thus, not only is there almost no evidence that there is a national trend of carving out a “rehabilitative space” for young adult murderers, but our own legislature has expressly spoken on this issue: young murderers are to be treated the same as adults under our laws.

¶ 84 But the lead opinion unnecessarily analyzes these statutes in the first place because the petitioners—required to prove the unconstitutionality of their sentences *beyond a reasonable doubt*—have put forth no such evidence of *any* legislative or judicial trend. *Bassett* 192 Wash.2d at 77, 428 P.3d 343 (citing *Hunley*, 175 Wash.2d at 908, 287 P.3d 584); *see* lead opinion at 287 (“[T]he petitioners have neither argued nor shown that LWOP would be *categorically* unconstitutional as applied to older defendants.”). The lead opinion far exceeds the confines of judicial restraint when it finds these authorities on its own accord and argues them on behalf of the petitioners. The petitioners have plainly put forth no evidence of a legislative trend, and this factor should weigh heavily against the petitioners.

¶ 85 Next, applying our independent judgment under the second prong of *Bassett*, the petitioners are fundamentally different from juveniles—they can get jobs, quit school, get married, form contracts, and drive cars—all without the permission of their parents. No longer juveniles with subordinate rights, these adults have the legal ability to “‘extricate’ ” themselves from “ ‘criminogenic setting[s].’ ” *Roper*, 543 U.S. at 569, 125 S.Ct. 1183 (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity,*

*Diminished Responsibility, and *341 the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). Aggravated murder is undoubtedly one of the most serious crimes on the books, and permanently isolating murderers like Monschke and Bartholomew serves the legitimate penological goals of retribution, deterrence, and incapacitation. As the *Bassett* test does not weigh in this new class's favor, I would hold that mandatory LWOP is not unconstitutionally cruel.

analysis. This will potentially flood courts with petitions, deprive courts of resources, and weaken protections against overturning finalized convictions and sentences on technicalities. Third, the lead opinion ignores our Washington "cruel" punishment jurisprudence by ignoring *Bassett*. By doing this, the lead opinion circumvents the reality that no states have extended such a protection, and jeopardizes our balanced approach to assessing "cruelty." The lead opinion's monumental rule today entails severe consequences that may lead to extending prohibitions of mandatory LWOP and SRA sentences to this new group under *Houston-Sconiers* *342 and *Bassett*. This deserves a much more cautious approach, and I respectfully dissent.

CONCLUSION

¶ 86 The lead opinion's ruling contains three critical flaws when it requires courts to exercise discretion in imposing LWOP sentences for 18-20 year olds. First, the lead opinion improperly strips the legislature's role in defining the age of majority and replaces it with a handful of scientific studies. The court's second guessing of the legislature is questionable as this court is inferior to the legislature in both time and resources to adequately consider the issue. Second, the lead opinion improperly applies the "constitutionality exception" under RCW 10.73.100(2) and circumvents the necessary retroactivity

Johnson, J.

Madsen, J.

Stephens, J.

All Citations

197 Wash.2d 305, 482 P.3d 276

Footnotes

- 1 See *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *State v. Houston-Sconiers*, 188 Wash.2d 1, 391 P.3d 409 (2017).
- 2 Since these cases, we have held the death penalty unconstitutional in Washington, *State v. Gregory*, 192 Wash.2d 1, 35, 427 P.3d 621 (2018), converting all death sentences in the state to LWOP and rendering LWOP the only statutorily permissible aggravated murder sentence for persons 18 and older.
- 3 Order Transferring Pet. to Supreme Court, *In re Pers. Restraint of Monschke*, No. 52286-1-II (Wash. Ct. App. Jan. 22, 2019); Order Transferring Pet. to Supreme Court, *In re Pers. Restraint of Bartholomew*, No. 52354-0-II (Wash. Ct. App. Jan. 22, 2019).
- 4 A PRP petitioner must also show actual and substantial prejudice resulting from the alleged error. *In re Pers. Restraint of Meippen*, 193 Wash.2d 310, 315-16, 440 P.3d 978 (2019) (petitioner unable to show prejudice because record indicated resentencing would be unlikely to reduce petitioner's sentence). But unlike the petitioner in *Meippen*, no judge has ever exercised any discretion in sentencing Monschke or Bartholomew. Under the aggravated murder statute, the trial court was statutorily required to sentence them each to life without parole. If petitioners are entitled to any of the discretionary protections afforded juvenile defendants, then the trial court must receive a chance to exercise that discretion. And the petitioners must receive a new sentencing proceeding that accounts for the mitigating qualities of youth and complies with article I, section 14.
- 5 Petitioners' claim that RCW 10.73.100(2) reaches sentences as well as convictions is also consistent with our precedent. We have rejected a distinction between "sentence[s]" and "conviction[s]" in the PRP time bar context as "absurd." *In re Pers. Restraint of Skylstad*, 160 Wash.2d 944, 952, 162 P.3d 413 (2007). In *Skylstad*, we interpreted RCW 10.73.090(3)(b), which stated that a criminal "judgment becomes final on ... [t]he date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction." *Id.* at 947, 162 P.3d 413 (emphasis added) (quoting RCW 10.73.090(3)(b)). The State "focuse[d] solely on

one word—conviction—rather than reading the sentence and the statute as a whole.” *Id.* at 953, 162 P.3d 413. We acknowledged that “conviction, judgment, and sentence certainly are not interchangeable” but held that a “direct appeal from [a] conviction cannot be disposed of until both [the] conviction *and* sentence are affirmed and an appellate court issues a mandate terminating review of both issues.” *Id.* at 953-54, 162 P.3d 413 (emphasis added).

- 6 We have “ ‘repeated[ly] recogni[zed] that the Washington State Constitution’s cruel punishment clause often provides greater protection than the Eighth Amendment.’ ” *State v. Bassett*, 192 Wash.2d 67, 78, 428 P.3d 343 (2018) (alterations in original) (quoting *State v. Roberts*, 142 Wash.2d 471, 506, 14 P.3d 713 (2000)). Specifically, we have identified that “in the context of juvenile sentencing, article I, section 14 provides greater protection than the Eighth Amendment.” *Id.* at 82, 428 P.3d 343. In this context, where it is “well established” that a state constitutional provision is more protective than the United States Constitution, there is no need to conduct a *Gunwall* analysis each time a new question is presented. *State v. Mayfield*, 192 Wash.2d 871, 878-79, 434 P.3d 58 (2019); see *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986). We “may assume an independent state analysis is justified and move directly to the merits.” *Mayfield*, 192 Wash.2d at 879, 434 P.3d 58.
- 7 For a fuller discussion of the need to apply the distinct *Miller* approach that we apply here, see Part III, *infra*.
- 8 It is certainly true that under the categorical bar test, we would typically consider “(1) whether there is objective indicia of a national consensus against the sentencing practice at issue and (2) the court’s own independent judgment based on ‘the standards elaborated by controlling precedents and by the [c]ourt’s own understanding and interpretation of the [cruel punishment provision]’s text, history, ... and purpose.” ’ ” *Bassett*, 192 Wash.2d at 83, 428 P.3d 343 (alterations in original) (quoting *Graham v. Florida*, 560 U.S. 48, 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 421, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008))). The dissent errs, however, in denying that there is any national trend worthy of note for purposes of that test. There is certainly no national majority of state legislatures or courts prohibiting mandatory LWOP for 18- to 20-year-olds. But there is definitely an affirmative trend among states to carve out rehabilitative space for “young” or “youthful” offenders as old as their mid-20s. See, e.g., Colo. Rev. Stat. § 18-1.3-407(2)(a)(III)(B) (defining “[y]oung adult offender” to mean “a person who is at least eighteen years of age but under twenty years of age when the crime is committed and under twenty-one years of age at the time of sentencing”); D.C. Code 24-901(6) (defining “[y]outh offender” as “a person 24 years of age or younger at the time that the person committed a crime other than murder” or several other specific crimes); Fla. Stat. Ann. § 958.04 (permitting courts to sentence as “ ‘youthful offenders’ ” defendants between 18 and 21 of a noncapital or “life” felony); Ga. Code Ann. § 42-7-2(7) (defining “[y]outhful offender” to mean “any male offender who is at least 17 but less than 25 years of age at the time of conviction and who in the opinion of the department has the potential and desire for rehabilitation”); Mich. Comp. Laws Ann. § 762.11(1) (permitting sentencing courts to designate certain offenders between age 17 and 21 as “youthful trainee[s],” up to age 24 with the consent of the prosecutor); S.C. Code Ann. § 24-19-10(d)(ii) (defining “[y]outhful offender” to include persons “seventeen but less than twenty-five years of age at the time of conviction for an offense that is not a violent crime” and meets other specifications); Vt. Stat. Ann. tit. 33 § 5281 (allowing “defendant[s] under 22 years of age” to move to be treated as a “youthful offender”); see also Connie Hayek, Nat’l Inst. of Just., Environmental Scan of Developmentally Appropriate Criminal Justice Responses to Justice-Involved Young Adults 6 (2016) (analyzing and evaluating over 130 programs for “justice-involved young adult[s]” across the country), <https://www.ojp.gov/pdffiles1/nij/249902.pdf> [<https://perma.cc/DT9N-FRPW>]. “One rationale for young offender status is to protect young offenders from the harshness and collateral consequences of criminal prosecution and conviction.” Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 660 n.123 (2016) (citing *Raines v. State*, 294 Ala. 360, 317 So. 2d 559, 561 (1975); *People v. Perkins*, 107 Mich.App. 440, 309 N.W.2d 634, 636-37 (1981)); see also Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 4 Wis. L. Rev. 669, 682-88 (2018) (“Broader trends seek to treat a larger group of young adult offenders as a distinct category.”).
- 9 Several states continue to recognize an age of majority older than 18. See, e.g., Miss. Code Ann. § 1-3-27 (defining minor as “any person, male or female, under twenty-one years of age”); Ala. Code § 26-1-1 (setting age of majority at 19); Neb. Rev. Stat. § 43-245 (“Age of majority means nineteen years of age.”). As we discuss in further detail below, the statutory “age of majority” is riddled with exceptions.
- 10 For many years the Supreme Court spoke of the intellectually disabled as “mentally retarded.” *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). It has since recognized and approved a change in terminology to “intellectually disabled” to “describe the identical phenomenon.” *Hall v. Florida*, 572 U.S. 701, 704, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014). We use the term “intellectually disabled” throughout this opinion.

- 11 To be sure, the shift that led to *Roper* and *Atkins* concerned the cruelty of capital punishment. But since those cases, the United States Supreme Court and our court have recognized the similarities between capital punishment and LWOP. *Graham*, 560 U.S. at 69-70, 130 S.Ct. 2011 (an LWOP sentence “ ‘means the 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 convict], he will remain in prison for the rest of his days’ ” (alteration in original) (quoting *Naovarath v. State*, 105 Nev. 525, 526, 779 P.2d 944 (1989))); *Bassett*, 192 Wash.2d at 87-88, 428 P.3d 343 (same). And under the Washington Constitution, LWOP sentences for juveniles are impermissibly cruel. *Bassett*, 192 Wash.2d at 91, 428 P.3d 343.
- 12 These criteria were “significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period.” *Hall*, 572 U.S. at 710, 134 S.Ct. 1986 (citing *Atkins*, 536 U.S. at 308 n.3, 122 S.Ct. 2242).
- 13 Some specific enumerated “purposes” for which age 18 is relevant include allowing 18-year-olds to “enter into any marriage contract without parental consent,” “execute a will,” “vote in any election if authorized by the Constitution,” and “enter into any legal contractual obligation and to be legally bound thereby.” RCW 26.28.015(1)-(4). Many of these purposes also include the tautological qualification “if otherwise qualified by law.” RCW 26.28.015(1)-(3).
- 14 Until 2018, transfer to adult court was mandatory for 16- and 17-year-olds who committed class A felonies, as well as 17-year-olds who committed various other crimes. Laws of 2018, ch. 162, § 4.
- 15 It was initially the United States Supreme Court, and not the Washington Legislature, who set this line at 18. Until *Miller*, RCW 10.95.030 required LWOP for all defendants without taking age into account at all. Laws of 2014, ch. 130, § 9. That statute was updated in 2014 with what has been referred to as the “*Miller*-fix”: it brought Washington statutory law into compliance with the constitutional principles of *Miller*. See, e.g., *Bassett*, 192 Wash.2d at 77, 428 P.3d 343.
- 16 The lead opinion received four votes. *Koome*, 84 Wash.2d at 914, 530 P.2d 260. The concurrence, which provided the fifth vote, agreed that it would “reach the same result as the [lead] opinion regarding the constitutional infirmities of the present statute.” *Id.* (Finley, J. concurring). It added that while the State could conceivably draft an abortion restriction consistent with the constitution, the age-related parental consent requirement considered by the court was unconstitutional. *Id.* at 915-17, 530 P.2d 260.
- 17 Contrary to the dissent’s accusation, we do not overrule *Grisby*. *Grisby* held that a “particularized consideration” of individual circumstances is not required for an LWOP sentence for most criminal defendants. *Id.* at 497, 132 S. Ct. 2455. But youthful defendants have been an exception to this general rule for many years. See, e.g., *Miller*, 567 U.S. 460, 132 S.Ct. 2455; *Houston-Sconiers*, 188 Wash.2d 1, 391 P.3d 409. Today’s ruling only expands the class of defendants who qualify for that existing exception.
- 18 Petitioners suggest that they also meet the time bar exceptions for sentence in excess of jurisdiction and retroactive change in the law under RCW 10.73.100(5) and (6). Am. PRP (Monschke) at 24-25; Pet’r’s Suppl. Br. (Bartholomew) at 18-19; see concurrence. Because we hold the unconstitutional statute exception applies, we need not rule on these other exceptions to the statutory time bar.
- 19 The dissent characterizes *Bassett* as “ ‘enlarg[ing]’ ” the *Miller* class to include “ ‘permanent[ly] incorrigibl[e]’ ” youths. Dissent at 292–93 (quoting *Bassett*, 192 Wash.2d at 72, 88-89, 428 P.3d 343). But *Miller* and *Bassett* are not equivalent rulings about different classes—they differ in kind. *Bassett* categorically prohibited LWOP for defendants 18 and younger. 192 Wash.2d at 91, 428 P.3d 343. *Miller* disavowed categorical rules, instead, mandating only “a certain process” be followed “before imposing a particular penalty.” 567 U.S. at 483, 132 S.Ct. 2455. In this regard, our decision today is like *Miller* and not like *Bassett*. We do not categorically prohibit LWOP for 18- to 20-year-olds, but we require that courts must exercise some discretion in sentencing them.
- 20 Our decision in *Houston-Sconiers* took that same *Miller* approach of valuing “individualized sentencing” and applying it to juveniles who were not sentenced to LWOP. 188 Wash.2d at 20, 391 P.3d 409. Although the Supreme Court had “not applied the rule that children are different and require individualized sentencing consideration of mitigating factors” in the exact situation before the court, we applied the *Miller* principle—the “requirement to treat children differently, with discretion, and with consideration of mitigating factors”—to that non-LWOP situation. *Id.* We did not analyze statutes from other states, nor did we turn to *Fain*’s proportionality test. Our decision flowed naturally from *Miller* and applied its principles in a new context.
- 1 192 Wash.2d 67, 428 P.3d 343 (2018) (holding that all LWOP sentences for juveniles are unconstitutionally cruel under the

Washington Constitution).

- 2 188 Wash.2d 1, 391 P.3d 409 (2017) (holding that courts have full discretion to depart from juvenile SRA sentences based on “youthfulness”).
- 3 Our other approach to cruelty, not applicable here, is the *Fain* proportionality test and it addresses sentences that are disproportionate to the crime. *Bassett*, 192 Wash.2d at 82, 428 P.3d 343 (citing *State v. Fain*, 94 Wash.2d 387, 617 P.2d 720 (1980)).
- 4 The lead opinion expressly does not apply the categorical bar test of *Bassett* because it claims the petitioners did not argue for a categorical bar. Lead opinion at 286–87.
- 5 *Miller* further never exempted a vague class of “youthful defendants” as the lead opinion claims. Lead Opinion at 280. *Miller*’s holding expressly applied to “juveniles” under age 18: “[w]e 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, 132 S.Ct. 2455; U.S. Const. amend. VIII.

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 22-700
LOWER COURT CASE NO. 081992CF0004510001XX

JACK R. SLINEY

Appellant,

v.

STATE OF FLORIDA

Appellee.

APPENDIX C

Wittmen Court Minutes

COURT ORDER/NOTICE/MINUTES
Charlotte County, Florida

FAILURE TO APPEAR MAY RESULT IN A FORFEITURE OF A BOND AND/OR BENCH WARRANT

Judge: SCOTT H CUPP Type of Court: CRIMINAL STATUS HEARING
 Seq#: 1 Case#: 92000487F Date: 09/20/2022 Time: 11:00 am 1100 AM
 Name KEITH HARTLEY WITTEMEN JR Def. Present Y/N: AC Bondsman: _____ Amt \$ 0.00
 Cnt: Lvl: Deg: Ticket#: Agency: Statute
 1 F C FIRST DEGREE MURDER
 2 F C FIRST DEGREE MURDER
 3 F S COMMIT ROBBERY WHILE ARMED WITH WEAPON 2814
 Attorney: ALLISON FERBER MILLER Present Y/N: _____ ASA: BIANCA BENTLEY *VIA ZOOM*
 Clerks: lorim / Bailiff: LESLIE BAKER Court Reporter: Court Smart

Bond Hearing: _____ Motions: _____ Granted: _____ Denied: _____ Reserve Ruling: _____
 _____ Bond Revoked _____ Payment Plan _____ Motion to Suppress _____
 _____ ROR _____ Buyout of CSH _____ Motion in Limine _____
 _____ Reduced to \$ _____ Convert \$ to CSH _____ Withdraw _____
 _____ Denied _____ Terminate Probation _____

Arraignments: _____ Cont-Stip _____ Cont-ASA _____ Cont-PV _____ Cont-CRT _____ Cont-DEF _____ Cont-PD _____ Plea Not Guilty _____ Granted 10 days	Docket Sounding: _____ Cont-Stip _____ Cont-ASA _____ Cont-PV _____ Cont-CRT _____ Cont-DEF _____ Cont-PD _____ Set for Trial _____ Set for Plea	Plea: _____ Guilty _____ Not Guilty _____ Nolo Contendere _____ Orig Withdrawn _____ Oral _____ Written _____ Court Accepts Plea _____ PSI Ordered	State Action: _____ Nolle Prosequi _____ Dismissed _____ No Information _____ Oral _____ Written _____ Upgrade to Felony _____ Reduce to Misdemeanor
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Court Ordered: _____ Verdict: _____ Oaths To: _____
 _____ Court Rm & Hall Sounded _____ By Jury: _____
 _____ No Response _____ Guilty _____
 _____ Bench Warrant \$ _____ Not Guilty _____
 _____ Bond Estreated _____ By Judge: _____
 _____ BW Set Aside/Recall _____ Guilty _____ Exhibits: _____
 _____ Bond Estr Set Aside _____ Not Guilty _____
 _____ Order to Show Cause _____ Judgment Of Acquittal _____
 _____ Remanded To Sheriff _____ Dismissed _____

Next Court Appearance: _____ Date: _____ Time: _____ AM / PM
 _____ Arraignment Continued
 _____ Case Management Conference
 _____ Hearing
 _____ Plea & Sentencing
 _____ Jury Trial
 _____ Non Jury Trial
 _____ Calendar/Trial Call
 _____ Pre Trial Conference
 _____ VOP Hearing
 _____ Drug Court/MHC

Comments: *Clarification on prior sentence. Court - will have JA set future court date.*

Acknowledged By: _____
 _____ Defendant's Signature

Done and ordered this Tuesday, September 20, 2022 in Punta Gorda, Florida
 Clerk of the Circuit Court

 Deputy Clerk

_____ Presiding Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Honorable Donald H. Mason, jgibbs@ca.cjis20.org; Assistant Attorney General Scott Browne, scott.browne@myfloridalegal.com and capapp@myfloridalegal.com; and Assistant State Attorney Cynthia Ross, cross@sao.cjis20.org and ServiceSAO-CH@sao.cjis20.org, and mailed via U.S.P.S. to Jack Sliney, DOC #305288, Union Correctional Institution on this 26th day of September, 2022.

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