

BARRY C. MASSEY, JR.
Memorandum in Support of Clemency

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“From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

Introduction

On January 10, 1987, Barry Massey and Michael Harris, with the intent to commit a robbery, entered a shop in Steilacoom, Washington, owned and operated by Paul Wang. When the pair exited the shop, Mr. Wang lay brutally murdered. Barry initially confessed to a principal role in the crime, offered a version of events inconsistent with the objectively knowable facts of the crime scene, and then recanted that confession. In separate trials, Michael and Barry were convicted of Aggravated First Degree Murder and given sentences of Life Without the Possibility of Parole. Barry was sentenced on August 3, 1988. Two years younger than his accomplice, Barry was 13 years old at the time of the crime. He had no prior criminal contact with the police and had been evaluated by two psychologists prior to his trial as having a mental age of 9.9.

The memorandum requests that Barry’s sentence be commuted to 23 years, describes his childhood, details the facts relating to Mr. Wang’s murder, identifies the problems with Barry’s interrogation and confession, examines his declination hearing and trial, and describes the many extraordinary circumstances warranting the issuance of a clemency.¹ All of the documents referred to in footnotes are available for review, but have not been submitted with this memorandum due to their sheer volume. The memorandum is accompanied by a DVD that contains a 1990 public television documentary concerning the case, audio files of Barry’s and Michael’s 1987 interrogations, the 1988 audio file of Melody Anderson’s statement concerning her discussions with Barry and Michael, and videos of two speeches given by Barry at the separate funerals of his grandparents.²

Barry’s Request for Clemency

After being incarcerated for 19 years, and with the unprecedented written support of 14 Washington State Department of Corrections (DOC) Officers, Barry first petitioned Governor Christine O. Gregoire for clemency in March 2006. The Clemency and Pardons Board (Board) heard his petition on September 15, 2006. The Board continued the hearing to October 30, 2006, and, on that date, recommended to the Governor on a 4-1 vote that Barry’s sentence be commuted to 25 years, as long as he remained free of

¹ This memorandum would not have been possible without the invaluable assistance of Nicholas Thomas, who devoted countless hours in reconciling numerous drafts, Rhonda Massey, who coordinated the many meetings and conferences with Barry essential to the preparation of the memorandum, David Lance, Joshua Duffy, Lauren King, and many other volunteers.

² A special thank you goes to Barry’s uncle, David Bonds, the Information Technology Director for Emerald Queen Casino, who assisted in the creation of the DVD that accompanies this memorandum.

major infractions for six additional years.³ Six additional years coincides with the end of the Governor's second term in 2012. In March 2007, the Governor denied Barry's petition and invited him to seek reconsideration in 2010.⁴

Barry has been incarcerated for over 23 years. He has consistently demonstrated to all who have observed him or reviewed his case that his circumstances are extraordinary. Despite receiving a life sentence, a sentence suggesting he was a child beyond rehabilitation and ineligible for redemption, Barry never saw himself that way and has grown into a caring son, cousin, friend, husband, and step-father. He has become everything society could ask of him.

Notwithstanding the Governor's 2007 invitation to Barry to re-petition in June 2010, which he has done,⁵ there are four reasons for this request to the Governor to exercise her exclusive constitutional clemency authority:

1. Additional extraordinary circumstances in support of a positive clemency recommendation have been identified, developed, and discussed below.
2. Since the 2006 clemency hearing, Barry has complied with the Board's proposed condition that he remain major infraction free. In fact, he has been free of major infractions for the last 13 years.⁶
3. John Turner, the Board's lone member who in 2006 voted to deny Barry clemency later expressed remorse for that vote during the September 10, 2009 clemency hearing of Williard Jimmerson, Jr. Mr. Turner said: "And Mr. Jimmerson, I want you to know my vote here, my motion here is a lot because of some guilt [sic] feelings I have over my vote over the Barry Massey matter. And that still bugs me an awful lot." As a result, even with a change of Board members since Barry's 2006 petition (Amanda Lee replacing the Hon. Robert Windsor on May 1, 2007), it is highly likely that re-petitioning to the Board will result in a favorable recommendation.
4. While Governor Gregoire denied the 2006 petition of Gerald Hankerson,⁷ and similarly invited Gerald to re-petition in 2010, the Governor commuted Gerald's life sentence in April 2009 without requiring the re-petition.

In light of the above-listed reasons and the many extraordinary circumstances discussed in this memorandum, I respectfully request that you consider commuting Barry's sentence to 23 years.

³ Washington State Clemency and Pardons Board (Board) Hearing Transcript, October 30, 2006, at 25.

⁴ Governor's Office letter to counsel for B. Massey denying his clemency request dated March 14, 2007.

⁵ Barry re-petitioned the Clemency and Pardons Board for a hearing on December 7, 2009, but has not been notified at this time whether the Board will schedule a hearing.

⁶ In late 2008, a guard randomly selected Barry for a pat down as inmates entered the cafeteria for lunch. The guard instructed Barry to pat himself down. Barry received a minor infraction for pointing out to the guard that it was the guard's duty – not the inmates – to conduct the pat-downs.

⁷ Gerald Hankerson was convicted in April 1988 of First Degree Aggravated Murder, for a crime committed at the age of 18, and sentenced to serve Life Without the Possibility of Parole.

The Governor has Exclusive Power to Grant Clemency

Article III, § 9 of the Washington State Constitution and RCW 9.94A.885 authorize the granting of executive clemency in extraordinary cases. Washington courts have stated that this power rests “exclusively” with the Governor. *In re Costello*, 22 Wn.2d 697, 705 (1945); *Honore v. State Bd. Of Prison Terms and Paroles*, 77 Wn.2d 697, 700 (1970) (the Legislature has not prescribed the power in a way that would allow any delegation). It is therefore within the Governor’s power to grant clemency with or without a recommendation from Washington’s Clemency and Pardons Board. Further, the Governor’s power is not qualified beyond the statutory requirement that a case receiving executive mercy be “extraordinary.”

There are numerous extraordinary circumstances in Barry Massey’s case – whether considered individually or in their totality – that warrant the granting of executive clemency. One can look only at the inhumanity of incarcerating a 13-year-old child who had no criminal history, a mental age of 9.9, and no violent tendencies, to a sentence of life without the possibility of parole. Or one can look at the same argument in conjunction with other circumstances including Barry’s limited culpability, the absence of any forensic evidence supporting that he was the principal actor, a false confession used to convict him, inconsistent use of evidence by the prosecution, compelling changes in the laws pertinent to his case, his extraordinary rehabilitation evidenced by the 14 DOC Officers who have written about his positive behavior or in support of him,⁸ strong support from family members and others in the community, and Barry’s loving relationship and marriage to Rhonda Massey. Either way, the conclusion is the same: extraordinary circumstances exist, and Barry is deserving of mercy.

Nevertheless, to effectively understand why Barry’s petition warrants an exercise of executive clemency, it is necessary to familiarize oneself with the environment in which he spent what little of his childhood was not behind bars. Barry’s background stands in stark contrast with that of his accomplice, Michael Harris. Their very different stories provide significant insight into their innate personalities.

Barry’s Childhood

Barry’s earliest memories are of playing sports and of longing for attention from his mother, Diane Massey. He remembers being a physically gifted child who played football and basketball. He recalls riding his bike to school and then to practice. Barry found solace in athletics, seeking fatherly comfort in the encouraging words of his coaches, one of whom, Tacoma attorney James Buckley, served as Barry’s defense counsel in the prosecution of Mr. Wang’s murder.

Despite his athletic talent, Barry struggled academically. By the time he was 13, his mental age was 9.9, and he could not sort by color or shape – a skill most children

⁸ Superintendent Ken Quinn, C/O Robert Moser, C/O Shane Zey, C/O Tom Wright, C/O Ronald Weed, C/O A. Sorenson, C/O C. Joehnk, Retired Counselor Craig Yost, C/O Debra Washington, C/O Barry Paggi, C/O Edwin Gonzalez-Lebron, C/O Daniel Engel, and C/O Diane Willeiksen.

possess by age eight.⁹ Fortunately, Barry's involvement in school sports allowed him time to escape his personal challenges, and the emotional impediments that he faced at home. Barry's mother, Diane Massey, had only achieved a 5th grade education and was raising three children on her own.¹⁰ By all accounts, she did her best with modest means. Barry's father, Barry Sr., was a cocaine addict who left the family and moved to Memphis, Tennessee, in 1983.¹¹ For reasons Barry cannot recall, his older brother, Andre, and younger sister, Nikisha, seemed to get all the attention. Barry recalls feeling alone as a child; his sister was too young to be a confidant, he was not close to his brother, and his contact with his father was too infrequent and sporadic to cultivate any kind of meaningful father-son relationship.

When asked as an adult why he befriended Michael Harris, Barry's explanation was understandably simple. Michael, who was well-known at Lakewood, Washington's Mann Junior High School,¹² had developed a reputation as a bully and garnered misplaced respect. Michael seemed to pay attention and went out of his way to befriend Barry. For Barry, a quiet, unassuming, and lonely child, it felt good to have a respected (even if feared) older boy as a friend.

Barry had no prior contact with law enforcement and by most accounts was a quiet, well-mannered child. His school records showed only two disciplinary incidents: one for "showing off" in gym class and one for "loitering at school."¹³ In short, nothing in his past indicated that he was capable of committing a violent crime.

Michael's Childhood

While Michael Harris also came from a broken home, he, unlike Barry, consistently demonstrated violent and aggressive tendencies.¹⁴ In short, a host of incidents in Michael's past indicated his capability to commit a violent crime. His tumultuous beginnings were described in a probation report as follows:

⁹ <http://www.seattleweekly.com/2007-07-04/news/gov-gregoire-one-tough-clemency-judge.php>

¹⁰ Diane Massey had a live-in boyfriend, Earl Smith, at the time. According to Barry, the relationship ended several years ago.

¹¹ Tab 5: Massey Probation Officer's Report at 2. Barry lived with his father in Tennessee from July 1983 through July 1984 and visited him on other summers. He returned to live with his mother because he missed her and his siblings. Although his biological father was not living at home, Barry considers his mother's boyfriend, Earl Smith, to be a father figure.

¹² During the 1986-87 school year, Mann Middle School was named Mann Junior High and housed 7th, 8th and 9th graders. In that year, Barry was in the 7th grade, and Michael was in the 9th grade.

¹³ Tab 7: Massey School Court Report at M05897; Tab 1: Declination Transcript at 129-30 (testimony of Elmer Keiski, Coordinator for Community Services Juvenile Court Liaison Officer, Clover Park School District).

¹⁴ Tab 14: Harris School Court Report at M00502 (2/27/86 entry regarding assaulting another student by slamming the student's head into a window); *id.* (2/28/86 entry regarding threatening the same student); *id.* at M00503 (9/7/86 entry regarding Michael assaulting another student and threatening his life); *id.* (10/15/86 entry regarding Michael being suspended for fighting); *id.* (11/24/86 entry regarding Michael pushing C.J. Villamor against the wall because he believed C.J. was lying about him).

Mr. Harris is the legal father of Michael. Michael's biological father is unknown. Michael is the product of an affair between his mother, Rita, and an unknown person during Mr. Harris' absence from the home while on a tour in Viet Nam [sic]. ... Rita Harris is presently residing in her native Germany. Mr. and Mrs. Harris were divorced in 1977, and Michael has had limited contact with his mother by telephone since that time. There has been no physical contact between Michael and his mother since the divorce.¹⁵

For a time, Michael wanted to live with his mother; however, she did not want custody of him following her return to Germany. Michael's legal father was abusive and would beat him with a belt, resulting in welts and bruising.¹⁶ "Following the beatings, Michael would fantasize about hitting his father with a baseball bat or retaliating in some aggressive fashion."¹⁷ Michael also frequently ran away from home, sometimes for up to three weeks. As a runaway, Michael often stayed with his sister, with friends, or in abandoned buildings.¹⁸

Michael had a History of Burglary, Drug Use, and Brute Intimidation of Children

Michael's school records, police and probation records, and other psychological reports suggest that he was quite the opposite of Barry. Beginning as early as second grade, he was frequently violent in school.¹⁹ His violent acts included slamming a classmate's head into a window, throwing girls against lockers, threatening classmates, fighting, and shooting a person with a BB gun.²⁰ He also had a history of burglary, intimidation, and chemical dependency.²¹

In December 1984, at the age of 13, Michael and Weson Tengtragoon committed a string of burglaries, including breaking into a home to steal a handgun and jewelry, breaking into a second home to steal shotgun shells and fishing tackle, stealing a moped from McChord Air Force Base, and stealing jewelry and two knives from yet another

¹⁵ Tab 11: 1987 Harris Probation Report at M00475.

¹⁶ Tab 12: Marra/Harris Psychological Evaluation at M00492.

¹⁷ *Id.*

¹⁸ Tab 2: Pretrial Hearing Transcript at 1064; Tab 11: 1987 Harris Probation Report at M00474; Tab 12: Marra/Harris Psychological Evaluation at M00491.

¹⁹ Tab 12: Marra/Harris Psychological Evaluation at M00491; Tab 14: Harris School Court Report at M00500 (describing Michael talking back to a teacher and refusing to go to the office for using profanity in the hall); *id.* at M00501-503 (listing disciplinary incidents dating back to 7th grade).

²⁰ Tab 14: Harris School Court Report at M00502 (2/27/86 entry regarding assaulting another student by slamming the student's head into a window); *id.* (2/28/86 entry regarding threatening the same student); *id.* at M00503 (9/7/86 entry regarding Michael assaulting another student and threatening his life); *id.* (10/15/86 entry regarding Michael being suspended for fighting); *id.* (11/24/86 entry regarding Michael pushing C.J. Villamor against the wall because he believed C.J. was lying about him); Tab 11: Harris Probation Report at M00473 (citing an instance where Michael shot a youngster with a BB gun).

²¹ Tab 12: Marra/Harris Psychological Evaluation at M00491. *See also* Tab 12: at 3 (Harris' 1987 forensic evaluation report states he was high when he shot another child with a BB gun); Tab 11: at 11 (Harris' May 27, 1987 probation report states that Michael took 3 to 4 hits of speed a few days prior to "the alleged offense").

home.²² When questioned about the burglaries by police, Michael initially blamed a third person; Michael later admitted that he and Tengtragoon committed the robberies and had decided to blame a third person if they were caught.²³ This string of robberies is important because it is one of Michael's earliest known demonstrations of criminal conduct, manipulation of another child, and his propensity to blame others for his own transgressions. Michael was ultimately detained at Remann Hall, a Washington Juvenile Detention Facility, where he served 29 days (and 12 months community supervision) for the burglaries.²⁴

In August 1985, while on probation for the 1984 burglaries, Michael stole a bicycle.²⁵ Then, in September of 1985, he shot a child with a BB gun.²⁶ The impact of the shot to the child was so severe that the child had to have the BB surgically removed.²⁷ A subsequent psychological examination of Michael concluded: "He exhibits no remorse for having hurt another person."²⁸ Michael was then detained again in Remann Hall, entering on September 6, 1985. However, he escaped after 32 days on October 8, 1985. He was found and returned on October 10, 1985, and released 62 days later on December 12.²⁹ In addition to serving 94 days in Remann Hall, Michael received 12 months' community supervision for the bicycle theft and the shooting.³⁰ Then, in September of 1986, Michael punched another child and was sentenced to ten days' detention at Remann Hall for assault.³¹

Michael also had a history of drug use, including alcohol, marijuana, cocaine, speed,³² and hallucinogens.³³ Furthermore, according to Harris' May 27, 1987 probation report, Michael took 3 to 4 hits of speed a few days prior to Mr. Wang's murder. As a result, while housed in Remann Hall, he was required to participate in drug and alcohol counseling.³⁴

On approximately December 20, 1986, Michael convinced Barry to accompany him to a house that Michael had observed for some time along his paper route.³⁵ At some point, Michael and Barry snuck into the home but were interrupted by its resident, Martha Davis. As Michael and Barry fled the home, they knocked Ms. Davis to the ground.

²² Tab 11: at M00473.

²³ Tab 15: Police Report at M03636-8; Tab 15: Police Report at M03639-41.

²⁴ Tab 11: 1987 Harris Probation Report at M00473-74; Tab 15: 1984 Harris Probation Report at M00483-85.

²⁵ Tab 16: M00486. Report to the Court.

²⁶ Tab 11: Harris Probation Report at M00473.

²⁷ Tab 16: at M05985.

²⁸ Tab 16: Rudner/Harris Psychological Evaluation at M03656. *See also* Tab 24: Anderson Interview Transcript at 4 (describing Mike not caring if someone dies and that he doesn't "care about anybody but himself").

²⁹ Tab 11: 1987 Harris Probation Report at M00474.

³⁰ Tab 11: 1987 Michael Probation Report at M00473-74.

³¹ Tab 11: 1987 Harris Probation Report at M00473; Tab 17.

³² Tab 11: at M00475.

³³ Tab 12: Marra/Harris Psychological Evaluation at M00491.

³⁴ Tab 11: 1987 Harris Probation Report at M00474.

³⁵ *See* at M00491.

Later that evening, she was taken to the hospital for observation and released.³⁶ Michael stole a gun, car keys, and a garage door opener from the house. The gun was used in Mr. Wang's murder the following month, while the keys and garage door opener were subsequently recovered from Michael's residence.³⁷ Having never been near a gun³⁸ and feeling increasingly threatened by Michael, Barry recalled trying to avoid him after the burglary.

Michael then manipulated C.J. Villamor, a younger child who he had assaulted a month earlier, into accompanying him to Ms. Davis' house.³⁹ While there, he showed C.J. the stolen gun and lied by saying he had gotten it from a friend.⁴⁰ Michael stated to C.J., "I feel like shooting somebody,"⁴¹ and then asked C.J. to help him steal a car using the garage opener and key that he had taken from Ms. Davis' home.⁴² However, the theft was never attempted.

Despite his efforts to avoid Michael following the burglary, Barry indicated that "Mike was persistent in making contact with him, and essentially that's why he ended up being with him, as if his own wishes didn't really matter all that much."⁴³ In January, mere days before Mr. Wang's murder, Michael pulled out the gun he stole from Ms. Davis and pointed it against the head of a boy named Marcus Bell.⁴⁴ For Barry, who witnessed both this incident and some of Michael's prior aggressive and criminal behavior toward other children,⁴⁵ and for Marcus, who directly experienced it, Michael's use of fear and intimidation to control his younger peers was again reinforced. Although Barry later stated that he did not think that Michael intended to shoot Marcus with the gun,⁴⁶ Dr. Norma Tropp, a Probation Department psychologist who analyzed Barry, believed that he was in fact frightened of Michael.⁴⁷ Michael also recognized Barry's fear and exploited it for his benefit. While the two were housed in Remann Hall following the murder, Michael "began making power threats toward Barry M. saying he was a 'fucking nigger' [sic] and he could make [Barry] do anything."⁴⁸

³⁶ Tab 5: Massey Probation Report at M01447.

³⁷ Id.; Tab 2: Pretrial Hearing Transcript at 1057, 1060; Tab 18: Supplementary Police Report at M00537.

³⁸ Tab 6: Massey Letter to Clemency Board at 2.

³⁹ Tab 2: Pretrial Hearing Transcript at 1058-59.

⁴⁰ Tab 24: C.J. Villamor Interview Transcript at M00515-16.

⁴¹ Id. at M00516.

⁴² Id. at M00517-78.

⁴³ Tab 1: Declination Transcript at 493; Tab 8: Tropp Report 1 at 4; *see also* Tab 6: Massey Letter to Clemency Board at 2; *see also* Melody Anderson's Statement, April 6, 1988, at 6 minutes, 30 seconds (describing Michael Harris as an incredibly persistent and persuasive individual).

⁴⁴ Tab 4: Massey Trial Transcript at 591.

⁴⁵ Tab 1: Declination Transcript at 489-90 (Dr. Muscatel states that Barry relayed stories of seeing Michael "slam a boy against a wall causing the boy to cry" and was aware "that on two other occasions Mike had been in fights at school and had been suspended").

⁴⁶ Tab 9: Muscatel Report at M00110.

⁴⁷ Tab 10: Tropp Report 2 at M06962.

⁴⁸ Tab 29: Incident Report (Jan. 30, 1987) at M00509.

Barry's Mental Age

Throughout his young life, Barry struggled academically. His developmental challenges were initially noted in the first grade, which he repeated.⁴⁹ He was also assessed as needing special education services in fifth grade.⁵⁰ In addition, testing performed prior to Barry's declination hearing by the Defense's psychologist, Dr. Kenneth Muscatel, indicated that Barry "was performing at a level much more commensurate with a child not even a mature teenager."⁵¹ In a report preceding the hearing, Dr. Muscatel stated:

Based upon the psychological interviews and testing there is clearly no reason to decline this boy. He is seen as both lack [sic] the sophistication and maturity to be declined, and lacks the severe disturbance and uncontrollability which would make his placement in the juvenile [sic] court system unadvisable. From this context, his lack of serious disturbance makes him very treatable.⁵²

Tests performed by Dr. Muscatel before Barry's sentencing indicated that Barry was not disturbed or violent.⁵³ The psychologist instead found him to be a non-manipulative, passive follower whose thinking was uncritical and accepting.⁵⁴ Dr. Muscatel further stated that his professional opinion, based on psychological testing, was that Barry had become unexpectedly involved as a passive participant in a violent crime.⁵⁵

The Probation Department's psychologist, Dr. Tropp, similarly found Barry to be immature, easily manipulated, naïve, and intellectually limited.⁵⁶ She believed it extremely unlikely that Barry would be the one who plotted the crime.⁵⁷ Dr. Tropp further determined that Barry was functioning with a mental age of 9.9 years at that time.⁵⁸ In addition, both psychologists determined that Barry had an I.Q. of approximately 77 or 78⁵⁹ – well within the bottom tenth percentile of 13-year-olds.⁶⁰

⁴⁹ Tab 7: Massey School Court Report at M05901.

⁵⁰ Id. at M05897; Tab 1: Declination Transcript at 280-92 (testimony of Maura Jennifer Cullen, school psychologist that performed Barry's educational assessment in the 5th grade in which she found Barry was functioning at a second grade level for reading, mid-third grade for math, and second grade for written language); id. at 366 (testimony of Dexter Wayne Clark, special education teacher, testifying that Barry was below average in sophistication and that "[h]e has a difficult time expressing himself when he gets excited.").

⁵¹ Tab 1: Declination Transcript at 495-96 (testimony of Dr. Muscatel).

⁵² Tab 9: Muscatel Report at M00111.

⁵³ Barry Massey Presentence Investigation Report at M01078.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Tab 8: Tropp Report 1 at M06482.

⁵⁹ Tab 2: Pretrial Hearing Transcript at 354 (testimony of Dr. Tropp); Tab 1: Declination Transcript at 495.

⁶⁰ *Reflections of Violence* (KTPS TV 28 film broadcast Nov. 12, 1990) at 23 minutes, 47 seconds.

The Murder of Paul Wang

On January 9, 1987, Michael took Barry to an empty house across from where Michael's father lived.⁶¹ As the afternoon progressed into the evening, Barry eventually stayed overnight in the house, having no opportunity to call home to tell his mother where he was. According to Dr. Muscatel, this was likely the first or second time Barry had stayed out all night.⁶² At some point during the evening, Michael and Barry spoke about robbing a store at the Steilacoom marina. Barry thought that they would simply go into the store, take a few items, and leave – an idea reinforced by Michael's suggestion that they make masks in order to hide their identities from the storeowner.⁶³ When asked why he stayed overnight, Barry explained that he kept waiting for Michael to take him home – as Barry was afraid of the dark and scared to walk home on his own⁶⁴ – and that “Mike kept saying that he would, until Barry finally got so tired that he simply fell asleep.”⁶⁵ This explanation suggests that Barry did not comprehend the implications or seriousness of his conversation with Michael or of Michael's suggestions. Understandably panicked by his absence, Barry's mother unsuccessfully looked for him that evening and eventually called the police to report him as missing.⁶⁶

The next morning, Michael convinced Barry that since Barry was likely already in trouble for staying out without his mother's permission, they might as well get something to eat and then go to the Steilacoom marina store.⁶⁷ Michael assured Barry that he would be in no more trouble than he already was, if Barry remained with Michael until 3:00 or 4:00 pm.⁶⁸ Barry did expect his mother to reprimand him, but he believed his older friend's assurances.⁶⁹ Therefore, Barry stayed with Michael. The pair took a bus to the Steilacoom Marina.⁷⁰ Michael brought the gun he previously stole in the Davis robbery,⁷¹ but assured Barry that he would only use it to scare the owner.⁷² After waiting in a nearby park and walking in and out of the store several times without wearing masks, the pair again entered once the store was free of customers.⁷³ The investigation and the

⁶¹ Tab 10: Tropp Psychological Evaluation at M06963.

⁶² *Reflections of Violence* (KTPS TV 28 film broadcast Nov. 12, 1990) at 22 minutes, 30 seconds

⁶³ Tab 6: Massey Letter to Clemency Board at 2. (“We’d even made ski masks the night before so that we could get in and out of the store without the owner recognizing us.”); Tab 1: Declination Hearing Transcript at 218-19.

⁶⁴ Tab 10: Tropp Report 2 at M06963; Tab 2: Pretrial Hearing Transcript at 378 (testimony of Dr. Tropp).

⁶⁵ Tab 8: Tropp Report 1 at M06484.

⁶⁶ See Tab 5: Massey Probation Report at M01449 (Mrs. Massey “was concerned on January 9, 1987, when Barry did not return from school and so contacted the police to enter a missing persons report.”); Tab 19: Morrison Report at 2 (describing being dispatched to Barry's home to “take a missing juvenile report”); Tab 2: Pretrial Hearing Transcript at 134-35 (Officer Marsha Barnhill stating that Officer Morrison told her that Barry was the subject of a missing persons report).

⁶⁷ Tab 10: Tropp Report 2 at M06963.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Tab 6: Massey Letter to Clemency Board at 2.

⁷¹ See Tab 5: Massey Probation Report at 1.

⁷² See Tab 10: Tropp report 2 at M06963 (“Barry did not expect to see the man shot.”).

⁷³ Tab 6: Massey Letter to Clemency Board at 2 (“When we went in the store, we didn’t have the masks on because Mike said we were just going to check to see if there were customers”).

trial records did not conclusively establish whether it was Michael or Barry who pulled the gun and shot Mr. Wang.

However, according to Barry, once the boys were inside the store, Michael walked up to the counter, pulled the gun, and told Mr. Wang to freeze and give him money.⁷⁴ Mr. Wang then reached toward the register, and Barry heard the gun go off.⁷⁵ Michael had shot Mr. Wang in the torso.⁷⁶ Barry then recalled hearing a second gunshot and seeing Mr. Wang disappear behind the counter.⁷⁷ Shocked by what had suddenly occurred, Barry remembers “flinching and pulling my arms in tight to my chest as I saw the store owner disappear behind the counter.”⁷⁸

Shaken by the shooting, Barry attempted to leave but Michael threatened him, compelling him to stay.⁷⁹ Michael ordered Barry to start taking items from the store,⁸⁰ so Barry put candy and children’s playing cards in his pockets while Michael forced open the register and grabbed the money.⁸¹ As Barry was taking the candy and playing cards, he saw Michael remove a fishing knife from an adjacent display and bend down behind the counter.⁸² Barry was unable to see what was happening because the counter was made of solid wood.⁸³ An autopsy later revealed that Mr. Wang had been shot twice, stabbed seven times, and sustained no defensive wounds.⁸⁴

Michael and Barry then fled the marina store through an adjacent wooded area and up a muddy embankment to a road, dropping several items along the way.⁸⁵ As they fled, Michael hid the gun⁸⁶ and repeatedly told Barry not to implicate him if either of them were caught because Michael would be in trouble due to his previous record.⁸⁷ Thus, Michael asked Barry to take the blame if they were caught. He also threatened to hurt Barry if Barry snitched.⁸⁸ The pair subsequently hitched a ride from David Griffin, someone who had seen them playing in a park adjacent to the marina store prior to the murder.⁸⁹

⁷⁴ *Id.* at 2.

⁷⁵ *Id.*

⁷⁶ Tab 4: Massey Trial Transcript at 284-85.

⁷⁷ Tab 6: Massey Letter to Clemency Board at 2.

⁷⁸ *Id.*

⁷⁹ Tab 4: Massey Trial Transcript at 703, 710; *see also* Melody Anderson’s Statement, April 6, 1988, at 6 minutes, 30 seconds (describing Michael Harris as an incredibly persistent and persuasive individual).

⁸⁰ Tab 10: Tropp Report 2 at M06964

⁸¹ Tab 20: Massey Interrogation Transcript at 2.

⁸² Tab 6: Massey Letter to Clemency Board at 3.

⁸³ Tab 1: Declination Transcript at 487; Tab 10: Tropp Report 2 at 2 (“Barry believes he may have been by a counter when he saw Michael’s arm going up and down when the stabbing occurred. He reported that he remembers only parts of what occurred.”).

⁸⁴ Tab 4: Massey Trial Transcript at 285.

⁸⁵ Tab 4: Massey Trial Transcript at 204-207.

⁸⁶ Tab 1: Declination Transcript at 249-50.

⁸⁷ *See* Tab 9: Muscatel Report at M 00109.

⁸⁸ Tab 8: Tropp Report 1 at M06485 (“Barry stated Michael seriously threatened him after the murder and also did so in detention. He has felt intimidated by Mike for some time.”).

⁸⁹ Tab 4: Massey Trial Transcript at 266, 271.

Meanwhile, a citizen visiting Mr. Wang's shop called the police to report the crime scene. Pierce County Police Officers were immediately dispatched to set up road blocks in the neighborhood surrounding the marina. One of the officers dispatched was Officer Eileen Morrison. Coincidentally, Officer Morrison had just reviewed Diane Massey's missing person report on Barry, which had been filed the night before. Moments after setting up her road block, Officer Morrison noticed Griffin's truck approaching and stopped it. She asked the occupants, Mr. Griffin, Michael, and Barry, for identification. When Barry – who had no official identification – stated his name, Officer Morrison immediately removed him from the truck, stating something to the effect of "You're in trouble.... Your mother has reported you missing." She placed Barry in her patrol vehicle and allowed Mr. Griffin and Michael to drive away without further investigation.

While Barry was in Officer Morrison's vehicle, a K-9 police dog emerged over the embankment that Michael and Barry had just ascended. It picked up Barry's scent, moved towards Officer Morrison's vehicle, and circled it. Officers directed Barry to step out of the vehicle, causing the K-9 unit to lurch towards him, indicating Barry's involvement.⁹⁰ Officers then determined that Barry's shoes matched footprints emanating from the crime scene⁹¹ and placed him under arrest.⁹² When officers searched Barry, they found some children's trading cards and a few coins.⁹³

Following Barry's arrest, a number of events occurred that reflected his mental age and susceptibility to peer pressure. First, Barry did not understand his *Miranda* warnings, and the officers involved in his interrogation did not take any specific measures to assure that the juvenile they were questioning actually comprehended his *Miranda* rights. Second, Barry gave a series of false confessions in accordance with Michael's mandate that Barry not implicate him in the murder.

Barry Did Not Understand His *Miranda* Warnings

After the officers arrested Barry, they stated *Miranda* warnings to him. They did not, however, explain the meaning of the warnings.⁹⁴ This is critical for the following reason:

[S]pecial education children, because they are slow learners, are taught to obey. In fact, they quickly learn that the best way to stay out of trouble is to do what they are told. And even to the point that they will not tell you they do not understand because that's, number one, embarrassing. Number two, one often gets in trouble for saying I can't or I don't know. People don't believe you. Unless they have had experience with such

⁹⁰ See, e.g., Tab 2: Pretrial Hearing Transcript at 50-53.

⁹¹ Tab 19: Report of Officer Morrison at 3.

⁹² *Id.*

⁹³ Tab 1: Declination Hearing Transcript at 225-26; Tab 4: Massey Trial Transcript at 358-9.

⁹⁴ Tab 2: Pretrial Hearing Transcript at 27-32, 81, 87-89; Tab 20: Massey Interrogation Transcript at 1.

children and know how to speak in simple terms and yet get across the feeling to the student that it's all right if you say I don't know.⁹⁵

At the police station, Barry demonstrated a failure to comprehend the implications of what happened at the Steilacoom marina, when he asked Officer David Hall if he was going to go to jail.⁹⁶ Officer Hall eventually placed Barry in an interrogation room without a parent or attorney present,⁹⁷ as it was the department's policy to not call the parents of juveniles in custody until they had been booked.⁹⁸ When Barry was evaluated by Dr. Tropp on April 8, 1988, after his interrogation, the psychologist opined that "He did not understand that he was waiving his rights against self-incrimination...."⁹⁹ Further, at a pretrial hearing on April 19, 1988, Dr. Tropp testified that in her opinion Barry could not have understood his *Miranda* rights.¹⁰⁰

Barry's False Confession

Following his arrest, Barry gave four different accounts of the facts and circumstances surrounding the murder of Mr. Wang. In his first three accounts, he did not implicate Michael as the shooter, in accordance with Michael's mandate that Barry not implicate him in the murder.¹⁰¹ Barry gave the first account directly to Officer Morrison, after his arrest. Barry's second account was given to Officer Hall at the police station, prior to Barry's transfer to Remann Hall; it was this account that the prosecution focused on during Barry's declination hearing and trial. The third account was given to John Moore, an off-duty Remann Hall employee, after Barry had been booked and detained at the facility. In the second and third confessions, Barry implicated himself as the principal actor in the murder of Mr. Wang. In Barry's fourth account, which was given days later, he fully recanted his prior confessions.

Barry's First Account

Following his arrest and first *Miranda* warning, Barry told Officer Morrison that he had been in the marina and touched a knife in Mr. Wang's neck, but that he did not stab Mr. Wang.¹⁰² Barry said that he and Michael happened upon Mr. Wang, after Wang had been killed, and took some items from the store.¹⁰³

⁹⁵ Tab 2: Pretrial Hearing Transcript at 368 (testimony of Dr. Tropp); *see also* Tab 10: Tropp Report 2 at M06965 (special education students are particularly conforming to adults and therefore Barry "will attempt to do what is expected of him, whether or not he understands why it is wanted nor exactly what is wanted").

⁹⁶ Tab 20: Massey Interrogation Transcript.

⁹⁷ Tab 2: Pretrial Hearing Transcript at 101. The State relied upon the fact that Barry waived his *Miranda* rights and did not specifically ask for a parent or attorney to be present. *See, e.g. id.* at 96-97.

⁹⁸ *Id.* at 170, 174-75.

⁹⁹ Tab 10: April 8, 1988 Report at M06964

¹⁰⁰ Tab 2: Pretrial Hearing Transcript at 413.

¹⁰¹ Tab 8: Tropp Report 1 at M06485 ("Barry stated Michael seriously threatened him after the murder and also did so in detention. He has felt intimidated by Mike for some time.").

¹⁰² Tab 1: Declination Hearing Transcript at 221-224; Tab 4: Massey Trial Transcript at 360.

¹⁰³ Tab 19: Morrison Report at 3-4. Tab 1: Declination Transcript at 162-63; Tab 2: Pretrial Hearing Transcript at 21-23 (Officer Morrison testifying that these statements were unsolicited).

Barry's Second Account

Once back at the police station, Barry was interrogated by Officer Hall. During the interrogation, Barry stated “then we went back in there, we, um, well, *I, I* shot him twice and he still wasn't dead so *I* stabbed him twice”¹⁰⁴ Barry's fumbling of his words suggests he was following Michael's mandate by working hard to craft a story that inculpated only him.

Officer Hall described Barry as quiet and subdued during the interrogation;¹⁰⁵ this is likely because Barry was experiencing Post Traumatic Stress Disorder as a result of witnessing the murder.¹⁰⁶ At Barry's declination hearing, testimony by Dr. Tropp explained this lack of emotion during the interrogation; she noted: “People in shock sometimes conform automatically. They also speak without expression.”¹⁰⁷ Dr. Tropp further stated:

Supporting the fact that he was manipulated into being present and shocked by the murder is the fact that he admitted he still feels as if his ending up in Remann Hall is unreal. Such feelings are typical when one has experienced a severe shock. Persons in shock do not think clearly. They speak in a monotone, which could be mistaken for a lack of feeling.¹⁰⁸

Recounting his interrogation with Officer Hall years later, Barry stated “[I] was thinking if I could tell them a story, it would be over with and I could go home. I knew Mike had been in trouble before and that I hadn't, so I took the blame because I thought I was helping Mike and I didn't know what else to do.”¹⁰⁹ Further, according to Dr. Tropp, “[E]ven after Barry gave his false confession, he did not expect to be charged with murder. I asked him what he thought was the worst possible thing that could happen to him. He replied that having Michael Harris beat him would be the worst as he had seen people who had been beaten by Michael and heard of what happened to some others.”¹¹⁰ As a result, Barry gave the statement in which he took the blame for both the shooting and the stabbing.

¹⁰⁴ Massey Confession, January 10, 1987 at 5 minutes, 52 seconds; *see also* Tab 20: Massey Interrogation Transcript at 2.

¹⁰⁵ Tab 2: Pretrial Hearing Transcript at 93.

¹⁰⁶ Tab 10: Tropp Report 2 at M06962 (“Barry seems to be having flashbacks, a common symptom when one has experienced a severe trauma. The fact that he is suffering from Post Traumatic Stress Disorder is consistent with his statement that he did not know that Harris planned to kill the owner of the marina.”).

¹⁰⁷ Tab 8: Tropp Report 1 at M06484; Tab 2: Pretrial Hearing Transcript at 310 (In contrast, the police reported that Michael was crying throughout his interrogation). Tab 2: Pretrial Hearing Transcript at 157 (The arresting officer also testified that Michael was *not* acting like he was in shock, just that he was upset).

¹⁰⁸ Tab 8: Tropp Report 1 at 5.

¹⁰⁹ Tab 6: Massey Letter to Clemency Board at 3.

¹¹⁰ Tab 10: Tropp Report 2 at M06964.

According to a 2006 account from Northwestern University School of Law Professor Steven A. Drizin, a nationally known and respected expert on false and problematic confessions,¹¹¹ Barry's confession to Officer Hall was not corroborated by the physical or forensic evidence, and bears many of the hallmarks associated with unreliable and false confessions. As Professor Drizin explained, "[c]onfessions are only as strong as the evidence which corroborates them,"¹¹² and that the "best way to determine a confession's trustworthiness is to evaluate the fit between ... the account the suspect gives after he admits to the crime and the objectively knowable facts of the crime."¹¹³ In this case, the only evidence suggesting that 13-year-old Barry was the principle actor rather than a passive accomplice were this confession and the self-serving statements made by Michael Harris. There was no other evidence indicating Barry was the principle actor.

The forensic evidence in the case suggests that Michael Harris was the perpetrator of the crime. First, while no blood was found on any of Barry's clothing, blood matching the victim's was found on Michael's pants.¹¹⁴ Second, a paraffin test performed on Barry's hands following his arrest did not indicate that he had fired a gun.¹¹⁵ This test was particularly relevant given the fact that Barry was arrested and tested immediately after the murder, sparing him no time to wash his hands or rid himself of evidence that would inculcate him—unlike Michael Harris, who was not apprehended until many hours later. Third, Barry's fingerprints were not found on the knife used to stab Mr. Wang.¹¹⁶

The confession itself indicates that Barry's statements to Officer Hall were likely false. According to Professor Drizin, when a confessor did not participate in the specific actions about which he is confessing (and therefore lacks personal knowledge of the facts about the crime):

...he will be forced to either guess or to claim a lack of knowledge. When he does, he will often make mistakes. His confession will often be riddled with errors and lacking in specifics. If his narrative fits poorly with the crime facts, fails to corroborate known information and provide unknown information and contains errors about information he should have known if he was involved in the crime, his confession is unreliable and quite possibly false.¹¹⁷

Barry's account to Officer Hall did not fit the objectively knowable facts of the crime in two critical respects: (1) Barry stated that he stabbed Mr. Wang twice, when in fact Mr. Wang had been stabbed seven times; (2) when Barry was pressed for details

¹¹¹ Prof. Steven Drizin was retained in 2006 by Barry's first clemency petition counsel, Perkins Coie, LLP, to analyze Barry's confession.

¹¹² Tab 21: Drizin Report at 12.

¹¹³ *Id.* at 8.

¹¹⁴ Tab 3: Harris Trial Transcript at 552.

¹¹⁵ Tab 1: Declination Transcript at 301-305.

¹¹⁶ Tab 1: Declination Transcript at 300.

¹¹⁷ Tab 21: Drizin Report at 8.

about the shooting, he stated that he shot Mr. Wang in the leg when in fact Mr. Wang was shot in the chest and the head.¹¹⁸

From the time he was arrested to the time he was sentenced, Barry underwent eleven psychological evaluations.¹¹⁹ These evaluations also supported that Barry's confession to Officer Hall may have been false, given his limited mental capabilities at the time. Research has shown that juveniles and people with limited mental capabilities are more prone to make false confessions due to their relative inability to comprehend the consequences of making such statements.¹²⁰

Finally, in a report dated April 8, 1988, Barry stated to Dr. Tropp that during his taped interrogation with Officer Hall, Hall "sometimes reversed the tape and recorded over some of what was said."¹²¹ If such conduct occurred, it calls into question the validity of the interrogation and the corresponding tape ultimately used to convict Barry.

Barry's Third Account

After his arrest and confession, Barry was booked and detained at Remann Hall. The police department contacted Mrs. Massey approximately five hours after Barry was detained and informed her that he had been arrested for murder. She and other family members immediately went to Remann Hall to see him.¹²² After speaking with Barry and identifying a number of holes in his confession,¹²³ Mrs. Massey requested that John Moore, a family friend and employee at Remann Hall, come to the facility.¹²⁴ After Mr. Moore arrived, Mrs. Massey asked Barry to tell them the truth about the events surrounding the robbery and murder.¹²⁵

Barry told Moore that Michael gave him the gun when the pair arrived at the marina.¹²⁶ Barry then said that while holding Mr. Wang at gunpoint, the gun went off and he shot Mr. Wang in the leg area.¹²⁷ When pressed for the location of the wound, Barry claimed a lack of knowledge, one of the tell-tale signs of a false confession, when he said

¹¹⁸ Tab 1: Declination Transcript at 619; Tab 2: Pretrial Hearing Transcript at 252; Tab 4: Massey Trial Transcript at 290-91.

¹¹⁹ Dr. Kenneth Muscatel evaluated Barry on the following dates: January 30, 1987; February 10, 1987; February 18, 1987; and March 9, 1987. Dr. Norma Tropp evaluated Barry on the following dates: March 23, 1987 (report dated Mar. 27, 1987); April 5-6, 1988 (report dated April 8, 1988). Dr. Craig Apperson evaluated Barry on the following dates: October 18, 1988; November 2, 1988; and November 23, 1988 (report dated November 29, 1988). Dr. Trowbridge evaluated Barry on April 25, 1988. Carl Redick evaluated Barry on May 2, 1988 (report dated May 6, 1988).

¹²⁰ Tab 21: Drizin Report at 6-7.

¹²¹ Tab 10: Tropp Report 2 at M06963.

¹²² Tab 2: Pretrial Hearing Transcript at 246-47.

¹²³ Tab 6: Letter from Barry Massey to Clemency Board at 3 ("My mother kept asking me to explain it over and over again. The more I talked about it, the more holes she found in my story. I kept tripping over little things in the story, and my mom knew I was lying.").

¹²⁴ Tab 2: Pretrial Hearing Transcript at 244-46, 248.

¹²⁵ *Id.* at 251.

¹²⁶ *Id.* at 252.

¹²⁷ *Id.* at 252; Tab 1: Declination Transcript at 619.

he was not sure where Mr. Wang had been shot but that he saw Mr. Wang bend down, so he assumed it was the lower torso.¹²⁸ Barry stated he then gave the gun back to Michael, who told Barry to kill Wang but Barry refused this command.¹²⁹

When asked why he didn't tell the truth initially, Barry indicated that "he was afraid."¹³⁰ This notion that Barry – quite reasonably – feared Michael, and therefore falsely confessed to take the blame for Michael's actions, was supported by notations in Barry's Remann Hall file relating to Michael's conduct while they were both detained there. Specifically, this file indicated Michael had threatened Barry about Barry's statements regarding the crime.¹³¹ In any event, Barry's third account remained quite inconsistent with the fact that Mr. Wang was shot in the chest and head, and then stabbed seven times.

Barry's Fourth Account

Barry did not officially¹³² recant his previous confessions until days later, when he gave separate but consistent accounts to Dr. Muscatel and Dr. Tropp.¹³³ Dr. Muscatel stated that in their interviews Barry was very consistent in communicating that he did not kill Mr. Wang.¹³⁴ Dr. Muscatel further opined that, based on the interviews and Barry's limited ability to present abstract sets of situations, Barry had merely substituted himself for Michael in confessing.¹³⁵ Such a scenario would account for the glaring deficiencies in Barry's second and third accounts, where he claimed responsibility for being the principal actor.

Michael's Arrest & Statements

After Officer Morrison removed Barry from David Griffin's truck, she allowed Mr. Griffin to drive away with Michael.¹³⁶ Michael subsequently paid Mr. Griffin \$10 from a wad of bills he was carrying to take him to a nearby bus stop.¹³⁷

Later that evening, police located Michael at a friend's apartment, arrested him,¹³⁸ and seized from Michael's person a large wad of cash¹³⁹ and his backpack, which

¹²⁸ Tab 1: Declination Transcript at 619; Tab 2: Pretrial Hearing Transcript at 252.

¹²⁹ Tab 2: Pretrial Hearing Transcript at 252.

¹³⁰ *Id.* at 273.

¹³¹ Tab 1: Declination Transcript at 399-400, 405-6, 419, 422.

¹³² Barry has stated that he first recanted to his mother, though this recantation was not captured in any official, citable record.

¹³³ Tab 8: Tropp Report 1 at M06484, Dr. Tropp opined: "I question his confession and believe it likely came about due to his genuine fear for his own safety. He was intimidated by an older youth and was acting more from fear than from an awareness of the implication of switching Mike's name and putting his own in its place."

¹³⁴ Tab 1: Declination Transcript at 488.

¹³⁵ *Id.* at 489.

¹³⁶ Tab 19: Morrison Report at 2.

¹³⁷ Tab 3: Harris Trial Transcript at 241; Tab 4: Massey Trial Transcript at 330.

¹³⁸ Tab 3: Pretrial Hearing Transcript at 193-194; Tab 19: Barnhill Report at M07991-96.

¹³⁹ Tab 4: Massey Trial Transcript at 56; Tab 1: Declination Transcript at 237.

contained several items stolen from Mr. Wang's store.¹⁴⁰ When initially arrested, Michael stated to police, "This is the worst thing I've ever done. Am I going to prison?"¹⁴¹

Later, however, Michael steadfastly denied being the principal actor. Once at the station, officers asked him if he wanted to talk, and he replied, "I might as well tell you the truth because you're going to find out anyway."¹⁴² Initially, Michael said that he and Barry went to the marina to get food and found Mr. Wang dead behind the counter.¹⁴³ However, when officers eventually took a taped statement from him several hours later, Michael blamed the entire homicide on Barry.¹⁴⁴ Of particular significance in that taped statement was the fact that Michael, unlike Barry, was able to describe certain objectively knowable facts concerning Mr. Wang's wounds: he knew Mr. Wang had been shot in the head,¹⁴⁵ he knew Mr. Wang had been stabbed numerous times, and he knew Mr. Wang sustained a stab wound to the neck.¹⁴⁶

Michael's knowledge of the details of Mr. Wang's murder was underscored by one particular statement that became a critical issue throughout the courses of both Michael's and Barry's trials. There is a moment near the end of Michael's taped interrogation where he is asked about the timing of when he had the gun. When the taped statement was initially transcribed, the transcribing officer inaccurately typed Michael's response as, "What do you mean after this happened? After he shot the dude?"¹⁴⁷ The prosecutor later argued that Michael's statement was clarified to say, "After *I* shot the dude?"¹⁴⁸ As detailed below, the State altered its position on the content of Michael's inculpatory statement depending on whether Barry or Michael was on trial.

Next, the police were initially unable to find the gun used in Mr. Wang's murder, despite using K-9 dogs in their search. Later that evening, following Michael's interrogation, police took him to the crime scene. Although the search took place in the dark, Michael led officers directly to the gun, which was hidden under grass and sod, near a path leading to a footbridge that passed over railroad tracks.¹⁴⁹

Michael was subsequently booked and detained at Remann Hall and immediately attempted to learn where Barry was housed from the facility's staff.¹⁵⁰ Consistent with

¹⁴⁰ Tab 2: Pretrial Hearing Transcript at 1114.

¹⁴¹ Tab 2: Pretrial Hearing Transcript at 107.

¹⁴² *Id.* at 310.

¹⁴³ *Id.* at 312.

¹⁴⁴ Tab 3: Pretrial Hearing Transcript at 153-157; Tab 1: Declination Transcript at 227, 232, 234-6.

¹⁴⁵ See Tab 22: Harris Interrogation Transcript at 4 ("And then I think he shot him in his face.").

¹⁴⁶ Tab 2: Pretrial Hearing Transcript at 155.

¹⁴⁷ Tab 23: Original Harris Interrogation Transcript at M01533 (emphasis added).

¹⁴⁸ Michael Harris Confession, January 10, 1987, at 33 minutes, 25 seconds; *see also* Tab 22: Harris Interrogation Transcript at 15 (emphasis added). Note that this statement is very difficult to hear on the tape. The word processor who transcribed the tape is unfamiliar with the case and was not told about this issue; she transcribed the statement as: "After *I* shot the dude."

¹⁴⁹ Tab 1: Declination Transcript at 249; Tab 2: Pretrial Hearing Transcript at 161-62, 209; Tab 4: Massey Trial Transcript at 222-24.

¹⁵⁰ Tab 29: Incident Report (Jan. 11, 1987) at M03661.

his past intimidating behavior, Michael continued to threaten Barry in front of other youth and Remann Hall staff.¹⁵¹ In particular, Michael threatened to beat Barry up if he did not lie for Michael about who killed Mr. Wang.¹⁵² Michael also admitted to another detainee, Melody Anderson, that he murdered Mr. Wang so there would be no witnesses to the robbery.¹⁵³

In sum, unlike Barry, Michael knew the objectively knowable facts of Mr. Wang's murder; possessed all of the cash stolen from the store's register; knew exactly where the gun used in the murder was hidden; admitted to being the principal actor in Mr. Wang's murder to a fellow Remann Hall inmate and explained to her the motive underlying the murder; made witnessed threats to Barry to elicit Barry's continued silence; and, according to the Prosecution, implicated himself as the principal actor in a taped statement.

Barry's Declination Hearing

In February 1987, the State sought to try Barry as an adult, and on April 13, 1987, Hon. Arthur W. Verharen took the extraordinary step of declining jurisdiction – sending a 13-year-old child with a mental age of 9.9 years into the adult criminal justice system and towards a minimum sentence of life without the possibility of parole.¹⁵⁴

In 1987, under *Kent v. United States*, 383 U.S. 541, 566-67 (1966), there were eight factors for the Court to consider in declining jurisdiction:

- (1) The seriousness of the alleged offense and the need to protect the community;
- (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
- (3) Whether the alleged offense was against persons or against property;
- (4) The prosecutive merit of the complaint;
- (5) Whether there are adult co-defendants that should be tried with the juvenile in a single proceeding;
- (6) The sophistication and maturity of the juvenile;
- (7) The record and previous criminal history of the juvenile; and
- (8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile by the use of procedures, services and facilities currently available to the juvenile court.¹⁵⁵

¹⁵¹ Tab 29: Incident Report (Jan. 30, 1987) at M00509. *See also* Tab 29: Letter from James Buckley to Dan Erker (Mar. 18, 1987) at M01308.

¹⁵² Tab 29: Incident Report (Jan. 14, 1987) at M01454.

¹⁵³ Melody Anderson's Statement, April 6, 1988, at 5 minutes, 25 seconds; Tab 4: Massey Trial Transcript at 702; Tab 25: Anderson Interview Transcript (while the two were in the recreation area of Remann Hall, Michael told her that he shot and stabbed the victim and that Barry didn't do "[n]othing, but I made sure that Barry stayed there. ... Cuz I don't want to do the full time. I want Barry to do half my time")

¹⁵⁴ Tab 30: *State v. Massey*, No. 182682 R020, Motion for Declining Jurisdiction of Juvenile Court (Pierce Co. Juv. Ct., Feb. 9, 1987).

¹⁵⁵ *See Kent v. United States*, 383 U.S. 541, 566-67 (1966).

While all the factors need not be involved in an individual case, a Judge could consider any relevant factors in a specific case before deciding whether to decline jurisdiction over a juvenile defendant. *Id.* At Barry's hearing, the State focused on the first, second, and eighth factors to justify a decision to decline. The Defense focused on the sixth factor in arguing that jurisdiction should be retained.

In arguing the first and second factors, the State relied heavily on Barry's suspect confession to Officer Hall – introducing a transcript of the interrogation and playing the confession tape in court.¹⁵⁶ Barry's defense counsel, James Buckley, did not adequately respond to this, as he did not highlight the unreliable and false confession issues at the hearing (nor did he do so at trial). The State also relied heavily on Michael's statement – the version implicating Barry – arguing that because Barry's and Michael's statements contained consistencies, they must be accurate.¹⁵⁷ In addition, the State elicited evidence from Dr. Emmanuel Lacsina, the Pierce County Medical Examiner, detailing the volume and severity of the victim's wounds.¹⁵⁸

Regarding the eighth factor, the State elicited testimony related to the comparative security and programming at DOC facilities versus those at Juvenile Rehabilitation Administration (JRA) facilities.¹⁵⁹ The State assured the Court that even if declined, Barry would likely stay in a JRA facility at least until the age of 16, and probably until the age of 18.¹⁶⁰ The State's witnesses suggested that even in the worst case scenario, DOC could handle a child under 18 because they were cognizant of the need to provide special protections to youth in DOC facilities.¹⁶¹ This testimony was augmented by the State's written motion stating that Barry would be housed in a JRA facility.¹⁶² The State also elicited testimony suggesting that if jurisdiction were retained, the risk to the community was too great that Barry would be released before adequate rehabilitation could take place (noting the possibility of early release and that the maximum juvenile court sentence was until the age of 21).¹⁶³

¹⁵⁶ See Tab 1: Declination Transcript at 154, 169.

¹⁵⁷ Tab 1: Declination Transcript at 232-39, 252, 274, 276-77, 629-30. After several of the State's witnesses had referenced and discussed Michael's statement, defense counsel introduced a transcript of the statement. *Id.* at 450-51.

¹⁵⁸ See, e.g., *id.* at 136-146.

¹⁵⁹ See *id.* at 72-82 (testimony of Marlin D. Holden, Correctional Program Manager at Shelton); *id.* at 83-100 (testimony of James Giles, Superintendent at Echo Glen Children's Center); *id.* at 101-125 (Dale Saling, Juvenile Rehabilitation Counselor Diagnostic Coordinator for Pierce and Kitsap Counties).

¹⁶⁰ See *id.* at 97 (testimony of James Giles that declined youth would likely stay in JRA until age 18); *id.* at 103, 109 (testimony of Dale Saling that a child under 16 would most likely go to a JRA facility). See also *id.* (testimony of Ted Eiswald, Cottage Supervisor at Green Hill School called by the Defense, agreeing that youth under 16 would go to a JRA facility first).

¹⁶¹ See *id.* at 73, 75, 81 (testifying that there were 2-4 youth under the age of 18 at Shelton and that the DOC knew youth may need special protections); *id.* at 75 (testimony of Marlin D. Holden that DOC had counselors available).

¹⁶² Tab 31: *State v. Massey*, No. 182682 R010/R020, State's Memorandum in Support of Motion to Decline (Pierce Co. Juv. Ct. Mar. 30, 1987) at 8 (M03706-14).

¹⁶³ Tab 1: Declination Transcript at 113-14 (testimony of Dale Saling that Barry could be released earlier if he progressed on rehabilitation and treatment). See also *id.* at 474-76 (testimony of defense witness Ted Eiswald that Green Hill School had held a 12.5 year old adjudicated delinquent on a first degree murder charge who was released in less than five years because JRA was able to treat him).

Barry's defense counsel again failed to adequately respond. Prior to Barry's declination hearing, Drs. Tropp¹⁶⁴ and Muscatel¹⁶⁵ had opined that Barry should not be declined because, among other reasons, he did not pose a threat of violence to society. While these expert testimonies could have been used to counter the State's argument that a failure to decline was the functional equivalent of placing society at risk, defense counsel raised no such points.

Instead, the Defense focused on the sixth factor regarding the sophistication and maturity of the juvenile. Along with testimony from members of the community and educators, the Defense presented testimony from the probation officer¹⁶⁶ assigned to Barry's case, its psychologist (Dr. Muscatel) and the Probation Department's psychologist (Dr. Tropp), who determined Barry was functioning with a mental age of 9.9 years at the time of the crime.¹⁶⁷

On April 13, 1987, however, the Court declined jurisdiction.¹⁶⁸ In doing so, it accepted the State's argument that the Court should discount testimony from the psychological experts because they had relied on Barry's account that he was a passive participant in the crime.¹⁶⁹ Instead, the Court accepted the State's arguments, finding in part: "The time constraints of the juvenile system do not permit consistent rehabilitation and do not provide adequate time to rehabilitate and control the defendant consistent with society's right to protection."¹⁷⁰

Further, and despite DOC's assurances to the Court that Barry (1) would likely stay in a JRA facility and (2) would only be incarcerated with DOC's general population while he was a minor under the worst case scenario, Barry was immediately transferred to DOC custody after his sentencing and placed in solitary confinement for several months. Then, at the age of 15, and for his protection, Barry was placed directly into DOC's Special Offender Center – a center that housed mentally-ill inmates – for several

¹⁶⁴ Tab 8: March 27, 1987 report at M06484.

¹⁶⁵ Tab 9: Muscatel Report at M00111.

¹⁶⁶ Tab 5: Massey Probation Report at M01451; *see as* Tab 5: Report to the Court by Massey's Probation Officer at M01451 ("After considering the lack of sophistication and maturity of Barry Massey and considering the availability of resources for him in the juvenile system, I recommend that the Court not decline jurisdiction.") Tab 1: at 566 (Michael Harris' probation officer also testified that he believed "Barry would be amenable to treatment in [a] juvenile facility.") *Id.* at 566. In contrast, Harris' probation officer recommended that he be declined. *See* Tab 11: Harris Probation Report at M00479.

¹⁶⁷ Tab 8: Tropp Report 1 at M06482.

¹⁶⁸ Tab 33: *State v. Massey*, No. 182682 R020, Order Declining Jurisdiction of Juvenile Court (Pierce Co. Juv. Ct., Apr. 13, 1987) (hereinafter "Declination Order").

¹⁶⁹ *Id.* at 2-3 ("The court finds that substantial evidence establishes the defendant was an active participant in the crime. In light of the fact that the psychological and treatment recommendations were predicated on the defendant's account of his passive role in the crimes, the recommendation that the defendant be retained in the juvenile system is unsupported by substantial evidence."); *see also* Tab 1: Declination Transcript at 658.

¹⁷⁰ Tab 33: Declination Order at 3; *see also* Tab 1: Declination Transcript at 658.

months. Following his tenure at the Special Offender Center, Barry was transferred directly into DOC's general population without any special protections.¹⁷¹

Pre-Trial Hearings

To determine the admissibility of Barry's statements, the Defense requested a hearing under Criminal Court Rule 3.5,¹⁷² focusing on whether Barry understood his *Miranda* rights. While Dr. Tropp testified that Barry was not capable of understanding those rights,¹⁷³ the Court determined that Barry's statements to the police were admissible. The Court also determined that Barry's statements at Remann Hall to John Moore were inadmissible because Moore was both a family friend and a Remann Hall employee at the time of Barry's statement. For that reason, Barry should have been re-Mirandized before speaking to Moore – the fact that he was not rendered the statement inadmissible.¹⁷⁴

The Court also held a hearing to determine whether Barry was competent to stand trial. In her March 1987 evaluation, Dr. Tropp concluded that Barry lacked the requisite competence.¹⁷⁵ Further, the State's trial expert, Dr. Trowbridge, was asked if Barry could have faked the results of tests conducted by Drs. Tropp and Muscatel indicating the extent of Barry's immaturity and the improbability of his being the principal actor. In answering that question, Dr. Trowbridge stated the following:

I don't think he faked. I think that the test results that are reported by Drs. Tropp and Muscatel are similar to the impression that I got of Barry just from talking to him of what his potential was. In reading both of these psychologists' reports—and I would add that I know both of these psychologists personally—they didn't seem to think so either. So I would think it's very unlikely that Barry would have been able to do that. And I really don't think he's sophisticated enough to do that effectively.¹⁷⁶

Despite the conclusions drawn by Dr. Muscatel and Dr. Tropp, and despite Dr. Trowbridge's testimony, the Court found Barry competent to stand trial.¹⁷⁷

¹⁷¹ Tab 32: Legal Face Sheet at 1.

¹⁷² A hearing under Criminal Court Rule 3.5 is used to determine whether a defendant's statement to police officers during an initial investigation can be admissible at trial.

¹⁷³ Tab 2: Pretrial Hearing Transcript at 413.

¹⁷⁴ Tab 2: Pretrial Hearing Transcript at 777.

¹⁷⁵ Presentence Investigation Report at M01078 (Dr. Tropp stated that she believed Barry was incapable of aiding in his own defense).

¹⁷⁶ Tab 2: Pretrial Hearing Transcript at 562 (testimony of Dr. Trowbridge).

¹⁷⁷ Barry's recollection of the trial renders this determination questionable. See Tab 6: Massey Letter to Clemency Board at 3 ("When I went to trial, I lacked the understanding of how serious the situation was. All I knew was that going to court meant I got to wear my own clothes. I remember that I didn't understand what people were talking about so I often put my head on the table and fell asleep during the trial.").

Michael's Trial

In light of Barry's recanted confession and Michael's continued insistence that Barry committed the murder, the Pierce County Prosecutor's Office tried Barry and Michael separately. Barry opted for a jury trial, and Michael was tried first opting for a bench trial. In both trials, Judge Donald H. Thompson (Ret.) presided, and then-Deputy Prosecutor Thomas Felnagle was the State's lead lawyer in the cases.¹⁷⁸

An important component of Michael's trial was the State's treatment of both Michael's and Barry's confessions. First, the State successfully excluded Barry's confession on the basis that it was not reliable and should not be admitted because it did not meet the standard of having corroborating evidence, "[t]hat is, corroborating circumstances over and above the statement against penal interest."¹⁷⁹ Additionally, for the first time since Michael and Barry were arrested, the State took the position that Michael had slipped up during his interrogation and said "After *I* shot the dude?" In the State's opening statement, the prosecutor said:

And, finally, late in the tape—and this is something that the State has only just discovered in repeated listenings to the tape, Michael is asked toward the end of the tape about the fact that he got the gun back from Barry after Mr. Wang was shot. And in that conversation, Michael appears confused about what the officer is asking him, and at one point responds back to the officer, "After I shot the dude?" And it's a slip that was not immediately noticed by the officers when they took that particular statement. But I believe the Court, in listening closely to the tape, will come to the conclusion that that is exactly what Michael says: "After I shot the dude?"¹⁸⁰

Another critical factor in Michael's trial was that the State contended Michael—not Barry—was the principal actor.¹⁸¹ However, the State did "not attempt to point out to [the jury] who actually imbedded each of those stab wounds, or who actually fired each of those shots."¹⁸² Instead, the State took pains to cast the crime as a "joint enterprise" arguing that "each of these two defendants is equally guilty for the entire crime."¹⁸³

The State – not the Defense – further elicited testimony from Dr. Lacsina regarding the relative heights of Barry (5'6"), Michael (5'10"), and the victim (5'8"),

¹⁷⁸ Hon. Thomas Felnagle served as General Counsel to Governor Booth Gardner from 1990 to 1992, and is currently a Pierce County Superior Court Judge.

¹⁷⁹ Tab 3: Harris Trial Transcript at 288-89. *See also* Tab 2: Pretrial Hearing Transcripts at 1148 (counsel for Michael Harris stating: "Well, it is ironic, Your Honor, because it wasn't long ago that the state was arguing to this Court that there was obvious indicia of reliability in the statement of Barry Massey. I've now been handed this morning a brief indicating that suddenly Barry Massey's statement has no indicia of reliability, and I don't know what's changed.").

¹⁸⁰ Tab 3: Harris Trial Transcript at 66-67.

¹⁸¹ *Id.* at 55-56 ("Mr. Harris is charged as the principal.").

¹⁸² *Id.* at 60.

¹⁸³ *Id.* *See also id.* at 67.

suggesting that given the bullets' trajectories and angles of entry, the height of the counter, and the distance between the gun and Mr. Wang, Barry—but not Michael—would have been too short to have been the shooter:

Q: Doctor, did the trajectories and the angles of these wounds indicate anything about the relative position from the victim of the assailant?

A: ... The head wounds: The person who shot Mr. Wang would have been in front, and here, again, considering the motions of two different people, the trajectory was from right to left and sharply downward.

Q: So the person who inflicted the injury to Mr. Wang's head would have been higher than –

A: Yes.

Q: —the head?

A: Yes.¹⁸⁴

Dr. Lascina also opined that the gun would have likely been within six inches of Mr. Wang's head when fired.¹⁸⁵ Additionally, the State introduced forensic evidence showing that no blood was found on Barry's clothes, but that blood matching the victim was found on Michael's clothes.¹⁸⁶ The reason for eliciting this testimony became clear in the State's closing:

Your Honor, when the trial began I indicated to you that the evidence would show that there were three possible scenarios for Michael Harris's involvement in this homicide. And I indicated that the first was that Michael assisted somehow specifically in the stab wounds and the gunshots. The second scenario was that Michael assisted in the robbery/homicide, knowing that it was going to be a robbery/homicide, but perhaps not specifically involving himself in the shooting or stabbing. The third scenario was what ... the [D]efense describe[s] as Michael buying into a robbery without foreknowledge that this was going to be a homicide also.

Now, as to the first of those scenarios that Michael actually stabbed or shot the victim, Paul Wang, the State submits to you that the clear implication, the clear logic, the circumstances and common sense would indicate to us that Michael Harris did involve himself in the stabbing and shooting.¹⁸⁷

It's Michael Harris who ends up with a drop of blood of a type similar to Paul Wang's on the inside upper thigh of his pants. And it's Michael Harris who is able to sit in the back seat of the car and lie to Officer Morrison about what's in the bag. Now, this is not someone who is

¹⁸⁴ See, e.g., Tab 3: Harris Trial Transcript at 481-83, 489-493, 555.

¹⁸⁵ *Id.* at 490.

¹⁸⁶ *Id.* at 396-98, 400-01.

¹⁸⁷ *Id.* at 534-35.

panicked and someone who is aghast at what Barry Massey has done. And this is certainly not someone that wants to withdraw from this criminal enterprise.¹⁸⁸

And further, within the description of the statement, Michael in one of those scenarios describes how he's back by the fishing lures, and Barry kind of reaches over and shoots him in the head. How could he see him shoot him in the head from, first off, back by the fishing lures, and second off, over that counter? Now, the Court will recall the counter is of good size and if he's shooting him down over the counter from the kind of position Dr. Lascina describes, Michael's view would have been totally obstructed. Further, he describes this scenario of Paul Wang going down and Barry Massey shooting him in the head as he is going down. Yet still, Dr. Lascina describes this as a contact wound from somewhere in the area of six inches. Now, how can Barry Massey, at 5 foot 6 inches, reach over here to this moving target and get the gun within six inches of Paul Wang's head and shoot him the way Michael Harris describes?¹⁸⁹

The State also took issue with Michael's statement, in which he blamed Barry for the homicide. Again, the State did not attempt to prove who shot and stabbed Mr. Wang because it did not need to, given that even if Michael's statement was believed, he was still guilty of Aggravated First Degree Murder under an accomplice liability theory. However, in its closing, the State acknowledged that the statement had to be questioned because, "[a] lot of this depends on believing Michael's statement outright without any indication that Michael might be manipulating his statement to his own betterment."¹⁹⁰

If this case were to [sic] the jury I would point out certain things, and I will do so to the Court, too, because I think they are important to giving us the kind of insights we need, the kind of overlay we need to determine what Michael Harris's real role in this criminal enterprise was. And in saying that, I need to respond to something that was raised by the defendant in the opening argument, and also has been raised at various other times. The State has submitted Michael Harris's taped statement and somehow the [D]efense would have you believe that because we put the taped statement into evidence we're bound either by that statement to agree that every word of it is true or to reject it in its totality. There could be nothing further from the truth in that. *Of course, the taped statement is important to the State because it sets out certain amounts of knowledge and participation by Michael Harris. But certainly the State is not forced and I urge the Court not to close its mind to the fact that that statement is nothing more than a culmination of statements that Michael Harris gave to get himself out of this, to paint himself in as small a role as possible.* And in looking at his statement, the Court must be aware that it has to be

¹⁸⁸ *Id.* at 552.

¹⁸⁹ *Id.* at 555.

¹⁹⁰ *Id.* at 544.

viewed with a look to all the circumstances and all the nuances surrounding the case.

What are some of those circumstances and nuances? First, it's Michael Harris that not just takes the money from the cash register but ends up with all the money in the case, an indication as to the relative roles of Michael Harris and Barry Massey.

Further, it's Michael Harris who has the primary motive in this case. He is the one that is on the run. If you will recall, the testimony was that Barry Massey had been gone for like a day, and his mother was already calling, wondering where he was. But it's Michael Harris that is out there on the run. It's Michael Harris that wants to set himself up. It's Michael Harris that needs the equipment. It's Michael Harris, further, who is the older of the two. It's Michael Harris who is the bigger of the two. Again, some indication as to what the relative relationship between these two crime partners would be ... It's Michael that has the final say on what activities are going on in this particular robbery-homicide. It's Michael Harris who primarily responds to [the construction worker who picked up the pair] when he's asked to give them a ride.

Further, in looking at Michael's credibility [sic] is something that I pointed out in the opening and that is that Michael Harris did not just gush this statement out. Michael Harris gave three separate statements, the first being that he denied any knowledge of the homicide at all and what happened at marina. Second, that he came upon Paul Wang only after Paul Wang had been killed. And then the third statement to the Steilacoom Police and Marsha Barnhill about Barry Massey having done everything. *For these reasons the Court has to view with some concern Michael's statement that Barry Massey did everything in this particular case.*¹⁹¹

Michael Harris was ultimately found guilty of Aggravated First Degree Murder, receiving the mandatory sentence of Life Without Parole. In successfully prosecuting him, the State relied heavily on evidence that established Michael's principal role in Mr. Wang's murder – a tactic likely augmented by the State's success in excluding Barry's taped confession *as unreliable*.

¹⁹¹ *Id.* at 550-553 (emphasis added). *See also id.* at 544 (“What about the money? Who ends up with the money? It's Michael Harris that takes all the money out of the cash register. What could be more central to this entire enterprise than the guy who takes the money out of the cash register?”); *id.* at 545 (“Who ends up with the gun then? The same person that had the gun to begin with. And who is it that disposes of the gun itself? Michael Harris?”).

Barry's Trial

At Barry's trial, however, the State switched tactics, arguing that Barry shot and stabbed Mr. Wang.¹⁹² In its opening, the State relied heavily on Barry's confession, asking the jury to "listen closely" and "specifically observe the demeanor, the way Barry Massey sounds on the [confession] tape."¹⁹³ In fact, the primary evidence that the State relied upon at trial was Barry's confession to Officer Hall, playing the tape for the jury.¹⁹⁴

While some of the forensic evidence introduced in Michael's trial was also introduced in Barry's,¹⁹⁵ the State did not argue (as it had in Michael's trial) that certain forensic evidence meant Barry was too short to be the shooter, and the Defense failed to make the connection.¹⁹⁶ Barry's defense attorney, James Buckley, did not attend Michael's trial, did not know what evidence had been used against Michael, and did not know that the Pierce County Prosecutor's Office had succeeded in characterizing Barry's confession as unreliable in Harris' trial.

Instead of focusing on forensics, Buckley, who had never defended a felony crime, focused on whether Barry had the capacity to premeditate a homicide, soliciting testimony regarding Barry's special education needs¹⁹⁷ and arguing Michael had manipulated him.¹⁹⁸ The Defense did elicit testimony that the blood found on Michael's pants was the blood type of the victim;¹⁹⁹ however, the State discounted this evidence by inappropriately commenting on it during closing arguments – theorizing as to how it might have gotten there without any supporting testimony or evidence.²⁰⁰

¹⁹² See, e.g., Tab 4: Massey Trial Transcript at 46.

¹⁹³ *Id.* at 65.

¹⁹⁴ Tab 4: Massey Trial Transcript at 568.

¹⁹⁵ See, e.g., *id.* at 282, 284, 288 (medical examiner testified that the shot to the head was within 6 to 18 inches and that the trajectory of the bullet was sharply downward); *id.* at 96, 287 (testimony that Mr. Wang was 5'8" tall); *id.* at 269 (testimony that Barry was quite a bit smaller than Michael); *id.* at 361 (testimony that Barry was 5'6").

¹⁹⁶ There was also an indication in the hearing that there may have been even more evidence that Barry was not the shooter. A police officer testified that he had seen powder burns on the victim's jacket, indicating that the weapon was fired between 3 and 18 inches from the victim. *Id.* at 244, 247-8. The first time that the medical examiner was alerted to that fact was the day before he testified in Barry's trial, when the prosecutor informed him. *Id.* at 296. He had missed the gunpowder on the clothing, as it may have been brushed off when paramedics tried to revive the victim or during transport. *Id.* at 310, 318-21. Previously, the medical examiner had assumed that the shot to the body was at least 18 to 24 inches away. *Id.* at 284. This new evidence showed that the first shot was also made at close range, indicating that a taller person who could reach over the counter made that shot as well.

¹⁹⁷ *Id.* at 71-75, 80-81

¹⁹⁸ *Id.* at 76-79, 82-83.

¹⁹⁹ *Id.* at 457-60.

²⁰⁰ *Id.* at 1393 ("If Michael Harris took the car keys, it might also be interesting to note that, if you remember, Michael Harris had one spot of blood on his pants. And I submit to you there's two likely ways, based on what Barry is telling us, that Michael Harris got those blood stains—or that single drop of blood. One was rifling through Paul Wang's pants to check for these car keys, and two was being at the cash register, just as Barry said, when Barry was doing the stabbing."). See also *id.* at 1441 (Defense closing: "Now, you've been told that somehow that, well, Michael probably got the blood on him as he went through the guy's—through the man's pocket. There is nothing to say he went through the pocket. Why is it so hard to say Michael got the blood on him when he killed the man? Why is that so difficult to say?").

In addition, the Court made a number of evidentiary rulings against the Defense:

- (1) The Defense attempted to call a number of witnesses whose testimony was excluded by the Court, including Melody Anderson (the girl at Remann Hall to whom Michael admitted responsibility for Mr. Wang's murder) and the psychologist who analyzed Michael;²⁰¹
- (2) Evidence of Michael's prior criminal acts and threats against Barry were not admitted;
- (3) Barry's statements recanting his confession were excluded as inadmissible hearsay;²⁰²
- (4) Michael was called as a witness, but pled the Fifth Amendment.

In addition to those rulings, Michael's statement was not admitted into the record, and the State reversed its position on the statement again, arguing for the purposes of Barry's trial that it was inconclusive whether Michael said, "after I shot the dude" or "after he shot the dude."²⁰³

In closing, the State reminded the jury that to find Barry guilty of Aggravated First Degree Murder, it did not need to decide whether Barry committed the murder. Instead, the jury was instructed that it should find Barry guilty on an accomplice liability theory, even if it believed Barry had not actually premeditated the murder, so long as Michael had done so.²⁰⁴ In making that argument, the State spoke in sharp contrast to its closing in Michael's trial in which it cast Michael as the orchestrator of the crime, coercing Barry to follow along. Referring to Barry as a "man child,"²⁰⁵ the State said:

We submit to you that this is not a case of a good guy and a bad guy committing a robbery. It's not the case of the 15-year old bully and a 14-year old²⁰⁶ dupe out at the marina. It's not the case of a master manipulator and some mentally diseased younger boy or child out there. What it is [sic] the case of two people, both having involved themselves in the robbery and the murder that took place at the Steilacoom Marina.²⁰⁷

²⁰¹ The court did state that Ms. Anderson's statement may be admissible upon a showing of corroboration, but the defense made no further attempt to corroborate it. See Tab 4: at 725-26.

²⁰² *Id.* at 1246-1252 (Defense counsel argued that what Barry said was an exception to hearsay because experts are allowed to testify regarding what they rely upon in forming opinions; yet, the court excluded it, reasoning that only the expert opinion itself was admissible); *id.* at 1269 (defense counsel argued that the statements met the medical statement exception, but the court disagreed).

²⁰³ See, e.g., Tab 28: *State v. Massey*, No. 87-1-01354-7, Respondent's Brief (Ct. App. Div. II Oct. 3, 1989) at 36 ("The statements proffered by the defendant were not corroborated and did not have the necessary high probability of trustworthiness. First, Michael's taped statement cannot be said to conclusively state 'after I shot the dude' as the defendant contends. Experts were unable to render an opinion as to whether the mumbled phrase was 'after I shot the dude' or 'after he shot the dude.'").

²⁰⁴ Tab 4: Massey Trial Transcript at 1375.

²⁰⁵ *Id.* at 1406-7.

²⁰⁶ As Barry was 13-years-old when the murder was committed, the Prosecutor's referring to him at trial as a 14-year-old was an error.

²⁰⁷ Tab 4: Massey Trial Transcript at 1379.

Thus, the jury was not required to – and did not – determine whether Barry was actually the principal actor in the crime.

In short, at Barry’s trial there was no evidence, physical or otherwise, supporting that he was the murderer except for his confession – a confession he recanted and the Prosecutor’s Office colored as unreliable during Michael Harris’ trial. Barry’s defense counsel did not challenge the prosecution’s tactics in using Barry’s confession, and the jury ultimately placed great importance on it (even asking to have the tape and transcript allowed into the jury room).²⁰⁸

Ultimately, the jury also found Barry guilty of Aggravated First Degree Murder. The verdict form submitted to the jury did not require the jury to indicate whether it believed Barry or Michael to be the principal actor in the crime.²⁰⁹ Barry was consequently sentenced to the mandatory minimum sentence of life in prison without the possibility of parole.²¹⁰

The Deputy Prosecutor in Barry’s trial, now the Honorable Thomas Felnagle, noted after Barry’s declination, conviction, and subsequent sentence, that the result may have been a function of deficiencies in the criminal justice system. He said in 1989: “As it stands now the ... only options are staying in the juvenile system until they’re 21 and then being released outright or going all the way to life without the chance of parole. Maybe we ought to explore if there is some in-between ground there.”²¹¹ Then in 2000, Judge Felnagle again commented on Barry’s case and expressed the need for society to reevaluate sentencing alternatives for children convicted of murder saying: “Kids don’t think like adults do. Their brains don’t work the same way.”²¹² His comments conveyed then, as they do now, an awareness of the rigidity and perhaps unyielding harshness of Washington’s sentencing guidelines in cases where children in their early teens are sentenced to Life Without Parole. Given the introduction of HB 1507 in the 2010 legislative session (23 years after Barry’s conviction), a bill that seeks to end sentences of life without the possibility of parole for certain juveniles, it appears that some Washington State legislators feel the same way. Until HB 1507 passes, however, a Governor’s pardon is Barry’s only chance at freedom.

The State Used an Accomplice Liability Theory that No Longer Exists

Throughout the course of Michael’s and Barry’s trials, the State relied on a theory of accomplice liability, positing that both Michael and Barry were guilty of Aggravated First Degree Murder regardless of who actually killed Mr. Wang. For example, in a pretrial hearing regarding whether the trials should be severed, the State argued:

²⁰⁸ *Id.* at 1471.

²⁰⁹ *See id.* at 1497-8.

²¹⁰ Tab 39: Judgment and Sentence.

²¹¹ *Reflections of Violence* (KTPS TV 28 film broadcast Nov. 12, 1990) at 49 minutes.

²¹² Ruth Teichroeb, *A Door Slammed Shut on Youth*, Seattle P.I., Oct. 5, 2000, available at <http://www.seattlepi.com/local/life05.shtml>.

The bulk of these two statements [sic] by Barry Massey and Michael are the same. They are reliable and they corroborate one another. The words Paul Wang spoke as he was shot, what he said before and after, what he did, the sequence of events, those kind of things, the observations of each match and corroborate one another. The differences are as to who had the gun, who had the knife and whose idea it was. The differences, Your Honor, are legally irrelevant. They are accomplices. If we demonstrate the accomplice status of the two, then the acts of one are the acts of the other.²¹³

In Michael's trial, the State told the Court: "In this State at this time, as the Court knows, there is no longer a distinction between being a principal or accomplice..."²¹⁴ and Michael "is charged as the principal. He may be convicted or acquitted as either principal or an accomplice under the law of Washington State as it stands right now."²¹⁵

Likewise, in Barry's trial, the State argued the following in its closing:

What does it mean to be an accomplice? Well, he told you that an accomplice is somebody that assists or aids or helps or encourages whatever criminal activity he's being involved with, or whatever element of the crime that you're worried about. What does that mean exactly? It means that the defendant himself, Barry Massey, in those areas where the judge tells you accomplice liability applies, he doesn't have to be the one to have done whatever it is.²¹⁶

Thus, to find Barry guilty of aggravated murder, the jury was allowed to find that Michael had the intent to commit a premeditated murder. A jury could not make this finding today because Washington law now adheres to the common sense notion that a defendant's sentence cannot be increased by an aggravating factor based solely on the mental state of a co-defendant. *In re Howerton*, 109 Wn. App. 494, 501-02 (2001). Therefore, while Barry could still have been found guilty of first degree murder on an accomplice liability theory, aggravating factors could not have been applied based on Michael's premeditated intent to kill Mr. Wang. As demonstrated in the sentencing table below -- absent the application of that aggravating factor, the trial judge would have had an opportunity to consider mitigating factors such as Barry's age and his lack of criminal history in determining a sentence between 20 and 26 years.²¹⁷

²¹³ Tab 2: Pretrial Hearing Transcript at 892-93.

²¹⁴ Tab 3: Michael Trial Transcript at 55.

²¹⁵ *Id.* at 55-56.

²¹⁶ Tab 4: Massey Trial Transcript at 1375.

²¹⁷ RCW 9.94A.310-320 (1987). In 1987 there was also a possible two year enhancement for robbery. RCW 9.94A.310(3). Whatever sentence was issued would have been subject to up to a 33 percent reduction for good time.

**MURDER + ROBBERY – 1987
(WEAPONS ENHANCEMENT & RUN CONSECUTIVELY)**

	Low End of Range	High End of Range
1st Degree Murder	+ 20 years	+ 26 years and 241 days
1st Degree Robbery	+ 2 years and 210 days	+ 3 years and 150 days
Total possible good and earned time reduction (1/3 off)	- 7 years and 164 days	- 9 years and 337 days
Loss of good time (465 days)	+ 1 year and 100 days	+ 1 year and 100 days
Earned time (1007.32 days, but capped so no more than 1/3 reduction total)	- 1 year and 100 days	- 1 year and 100 days
TOTAL	17 years and 46 days	22 years and 54 days
<i>Applicable Release Date</i>	<i>February 21, 2004</i>	<i>February 27, 2009</i>

Barry’s Extraordinary Rehabilitation

Barry’s Incarceration History

A psychological evaluation following Barry’s post-trial incarceration at an adult prison revealed that he was completely unprepared to be incarcerated with adults.²¹⁸ Based in part on those evaluations, DOC segregated Barry, placing him in solitary confinement and in the Special Offender Center. As a result, Barry was kept in his cell by himself for 23 hours a day. Then, at the age of 15, after an intervening transfer and time in solitary confinement, DOC placed Barry in the general prison population.²¹⁹

Barry’s early years of incarceration were marked by several infractions²²⁰ stemming from the difficulties he faced being imprisoned with adults, something he was ill-equipped to deal with at such a young age. These infractions relate to his loss of good time noted above, which, at the time, Barry agreed to in lieu of other corrective action, since to him preserving good time while serving a life sentence did not make sense. From age 15 to age 19, he received 27 infractions. He also received three infractions in a one-year period between 1994 and 1995, two of which were for possessing less than \$10. His early years in prison reflect his struggles to adjust.

Then, in 1996, Barry’s major infraction history abruptly ends. He recalls committing himself to being something more than a man serving a life sentence and something better than the problematic inmates who surrounded him (many of whom would get another chance at freedom). As Barry matured, he simply rejected the negative aspects of prison life, and for the last 13 years he has not only been a model prisoner, but has remained free of major infractions. This fact is particularly impressive when one

²¹⁸ See generally Tab 40: DOC Psychological Evaluation.

²¹⁹ Tab 32: Legal Face Sheet at 1.

²²⁰ Id. at 14-16.

considers Barry's transfer to Walla Walla State Penitentiary after his 2006 clemency hearing (where the Board recommended clemency conditioned on his remaining free of major infractions). Following the recommendation and transfer, Barry became a target for any inmate looking to make a name for himself within one of DOC's most challenging facilities. Barry, however, remained both a positive force within DOC and free of major infractions. This, among many other aspects of Barry's prison life, is truly remarkable and has resulted in positive recognition from those who interact with him most often: DOC employees.

Barry's Growth and Contributions

Barry has worked to better himself through education, community outreach, and successful programming. Besides earning his GED in 1996,²²¹ Barry worked to earn a certificate in Personal Training through correspondence courses. He has maintained employment in prison²²² and was described by one employer as "highly regarded and considered a hard working, dependable, and trustworthy employee/inmate."²²³ Further, as a Tier Representative, Barry often facilitates constructive communications between inmates and DOC Officers, assisting new, younger inmates as they transition into DOC and providing a sense of calm and security within DOC facilities. He has successfully pursued all programming opportunities available to him, which by DOC policy is severely limited to inmates sentenced to Life Without Parole.²²⁴

Barry joined DOC officials and like-minded inmates in developing DOC's At Risk Youth Program ("Program"), an educational outreach program for middle and high school students, children on probation, and child sexual offenders. He worked closely in developing the Program with his dear friend, Gerald Hankerson, another young man sentenced to Life Without the Possibility of Parole, whom the Governor pardoned in 2009. Barry also actively participated as a Program panelist at the Monroe Correctional Complex from 1997 to 2006,²²⁵ speaking to middle school students about responsible decision-making, peer pressure, and the consequences that can result from one's actions.²²⁶

Barry's Strong Support System Outside of Prison

Throughout his 23-year incarceration, Barry has maintained a strong support system outside of prison. If pardoned, his family, with whom he has maintained a very

²²¹ Massey 2006 Clemency Petition, Exhibit 22.

²²² Barry has worked as a Recreation Porter, garment maker, sheet metal fabricator and fitness instructor.

²²³ Massey 2006 Clemency Petition, Exhibits. 2, 10, 17-19, 26, 35-36.

²²⁴ When asked why he has not done more in prison to improve himself, Barry offered a startling explanation. Because of his sentence, he is denied certain educational opportunities, such as training in building maintenance, roofing, welding. He said in a straightforward tone, "I can't move forward and I don't want to move back." "They'll let me take correspondence courses, but I have to pay for them. They won't let me work at jobs where I can earn more money." "I'm just wasting away here. So I just keep myself to myself and stay out of trouble."

²²⁵ Massey 2006 Clemency Petition, Exhibits 9-11, 22, 27-29.

²²⁶ *Id.*

close relationship (and in particular his uncle, David Bonds, Information Technology Director at the Emerald Queen Casino) fully intend to assist him. As Barry puts it, “David has just walked the straight and narrow road. He’s always been the one in my family that has just done the right thing. I look up to him.” David has become a surrogate father to Barry and has sought to keep him connected and aware of his family’s daily lives. He has invited Barry to several family funerals and arranged for Barry to speak publicly at these events by coordinating the hiring of private guards to accompany Barry. Each time Barry has given a eulogy outside the confines of prison, onlookers have been surprised at his leadership, his refusal to show despair regarding his situation, his understanding of the need to shape the direction of the next generation of children, and his willingness to confront the loss of leadership within his own family. David Bonds has further offered to provide Barry with support until Barry has obtained full employment.

While his mother, Diane Massey, who turns 60 in 2010, is eager to embrace and support her son upon his release, she is fighting stage 4 cancer and contemplating ending further treatment. This weighs heavily on Barry, who hopes to one day be reunited with her and see her through this phase of her life.

In addition, the Pierce and King County chapters of the NAACP have offered their collective hands in finding Barry employment and providing community support upon release, and the Tacoma Ministerial Alliance is eager to provide Barry a platform from which he can assist youths in troubled Tacoma communities. Bernie Dobson, Vice President of Operations at Elliott Bay Metal Fabricating, Inc. (one of Barry’s previous Correctional Industries employers), stated that he would be willing to hire Barry as a fabricator for his business should Barry be granted clemency.²²⁷ Similarly, Bull Stewart of Columbia City Fitness has offered Barry employment in his gym as a certified physical fitness trainer upon his release.

Barry’s additional support network includes in part: People's Institute NW, The Village of Hope, Citizens for Responsible Justice, Greater Mt. Baker Baptist Church, First AME, The Social Justice Network, The Lutheran Public Policy Committee, The Black Collective, The Washington Association of Churches, Shiloh Baptist Church, St. John Baptist Church, The Prison Education Network, National Exodus Council, Outside Chance, Eastside Salishan Lutheran Church, 5th District AME Church, Snohomish County Young Democrats, and numerous other individuals and organizations.

Further, several DOC employees who have closely observed him over the years have written about Barry’s positive behavior or in support of his petition for clemency. Those include:

Monroe Superintendent Ken Quinn, who wrote, “Mr. Massey maintains a positive attitude and has become an effective role model for other offenders by his good example. Mr. Massey is a team player who communicates effectively and politely with staff as well as other offenders.”²²⁸

²²⁷ Massey 2006 Clemency Petition, Exhibit 36.

²²⁸ Massey 2006 Clemency Petition, Exhibit 8.

Retired Correctional Counselor Craig Yost, who wrote, “[Mr. Massey] is a reasonable man and that is the best I can say about anyone in the prison world, inmate or staff.”²²⁹

Correctional Officer Debra Washington, who wrote, “I/M Massey’s personal growth has been a pleasure to watch. He takes responsibility for himself in all aspects of his life. I have watched him mentor younger offenders with that being his ‘creedo,’ take responsibility for yourself. . . . I/M Massey has the respect of both Staff and Inmates alike. I have asked his advice in the past on how to gain compliance with other offenders with the least amount of resistance. This kind of assistance is not given out to staff by most Inmates, but, I/M Massey has enough self-confidence and ethics to help when asked.”²³⁰

Correctional Officer C. Joehnk, who wrote, “I have been employed for approx. 17 years as a correctional officer at Washington State Reformatory. During this time I have observed Inmate Massey, Barry #942583 grow into adulthood. He has matured into a responsible individual who stays out of trouble and works hard.”²³¹

Correctional Officer Tom Wright, who wrote, “Many years ago, Barry was one of the original inmates involved in creating a Youth Awareness Program that is still in effect to this day. This program has touched hundreds of troubled youth. I have sat in these programs and listened to Barry talk to the kids. He has a genuine concern in what he says and the message he tries to get across to the youth who come in for the programs.”²³²

Correctional Officer Robert Moser, who wrote, “I have literally watched this young man for the past 17 years grow up and mature before my very eyes. As I reflect on how he has been able to rise above the negativity that surrounds him, I can honestly say that I am proud of the man that he has become.”²³³

Correctional Officer Shane Zey, who wrote, “If Barry Massey were to be granted clemency and moved in next door to me, I would greet him with open arms and welcome him to the neighborhood and not lose a minute of sleep over it.”²³⁴

More importantly, Barry’s wife, Rhonda Massey, a former DOC Correction Officer and currently an Investigator with the Snohomish County Public Defenders Office, and his step-children look forward to welcoming him home upon his release.

²²⁹ Massey 2006 Clemency Petition, Exhibit 16.

²³⁰ Massey 2006 Clemency Petition, Exhibit 17.

²³¹ Massey 2006 Clemency Petition, Exhibit 14.

²³² Massey 2006 Clemency Petition, Exhibit 11.

²³³ Massey 2006 Clemency Petition, Exhibit 9.

²³⁴ Massey 2006 Clemency Petition, Exhibit 10.

The Clemency & Pardons Board's 2007 Recommendation

In 2007, the Board voted 4-1 to recommend commuting Barry's sentence to 25 years, so long as he remained free of any major infractions,²³⁵ which Barry has done thus far. The Board settled on 25 years by determining that if Barry had been convicted of First Degree Murder with a firearm, he would have received a sentence of 22 to 28 years. The Board then factored Barry's 542 days of good time²³⁶ into the sentence and concluded that commuting his sentence to 25 years would have resulted in a January 4, 2012, release date.

The Board found that the following demonstrated that extraordinary circumstances existed in Barry's case warranting the exercise of executive clemency:

- The severity of the sentence imposed upon a child, coupled with his mental capacity at the time of the crime;²³⁷
- Emerging research on juvenile brain development;²³⁸
- Evidence suggesting Barry was not the principal actor;²³⁹
- Barry's strong support system;²⁴⁰
- Barry's service to the community;²⁴¹
- The enormous outpouring of support for Barry's petition, including letters from correctional officers;
- The notion that Barry posed no threat to society if released; and²⁴²
- The Board took the position that RCW 9.94A.540, which allows judges to ignore mandatory minimum sentences in sentencing juveniles tried as adults, applied to Aggravated First Degree Murder.²⁴³

With the exception of Board Member Turner, who voted against recommending a sentence commutation, the Board was unequivocal in its belief that Barry had done all that he could humanly do to demonstrate his rehabilitation. The Honorable Robert Windsor stated: "[I]t is abundantly clear to me from reading many letters and hearing from him that... the thought that he could be a threat to society now just doesn't rest with me."²⁴⁴ Likewise, Member Margaret Smith noted: "[I]t's clear to me that he's rehabilitated. And I find very, very telling in that front [sic] all of the support that he has from within the prison system, from the guards that deal with prisoners day in and day out, and the guards that feel there is not a risk of future dangers with this man."²⁴⁵

²³⁵ Clemency and Pardons Board Meeting, October 30, 2006 at 25.

²³⁶ Clemency and Pardons Board Meeting, October 30, 2006 at 12.

²³⁷ *Id.* at 15.

²³⁸ *Id.* at 17.

²³⁹ *Id.* at 10.

²⁴⁰ *Id.* at 15.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 16.

²⁴⁴ *Id.* at 14.

²⁴⁵ *Id.* at 15.

Barry's Case is Extraordinary

Barry's case is extraordinary for numerous reasons.

It is extraordinary that Barry's defense counsel had only defended misdemeanor crimes before representing Barry, failed to attend Michael Harris' trial, failed to challenge Barry's confession at the declination hearing and at trial, and failed to focus on the forensic evidence pointing to Michael Harris as the principal actor.

It is extraordinary that all of the crime-related factors under *Kent v. United States*, 383 U.S. 541, 566-67 (1966), considered by the juvenile court in declining jurisdiction over Barry involved Michael Harris' conduct – not Barry's.

It is extraordinary that a Washington court found a 13-year-old child with a mental age of 9.9 and an inability to understand his *Miranda* rights competent to stand trial.

It is extraordinary that the Probation Department's, the Defense's, and the State's psychologists *all* agreed, prior to his trial, that Barry was not a threat to society and was not faking his inability to understand his *Miranda* warnings.

It is extraordinary that a psychologist's report states that the interrogating officer turned off the tape during Barry's interrogation, reversed it, and recorded over sections – thereby calling into question the validity of the interrogation and the corresponding tape and transcription ultimately used to convict Barry.

It is extraordinary that the prosecution argued that Michael Harris' inculpatory statement "After I shot the dude?" pointed to Michael as the principal actor in his trial while calling Barry's confession unreliable, then switched tactics in Barry's trial characterizing him as a "man-child" who fully participated in joint criminal enterprise while relying on Barry's confession as the cornerstone of its case against him.

It is extraordinary that the prosecution noted that the forensic evidence – including the blood evidence and the shooting trajectories and angles – pointed to Michael Harris as Mr. Wang's killer, not Barry.

It is extraordinary that our sentencing laws removed all judicial discretion and required the rigid application of a life without parole sentence to a child for a crime in which all psychologists who reviewed Barry concluded that he unexpectedly became a passive participant in a violent crime.

It is extraordinary that in sentencing 13-year-old Barry, the Court was unable to consider any mitigating circumstances.

It is extraordinary that Barry, a child with no criminal history and no violent tendencies, was ultimately sentenced to life without parole, despite evidence suggesting that he was not the principal actor and that he falsely confessed to a crime.

It is extraordinary that while Washington law now recognizes that a defendant's sentence cannot be increased by an aggravating factor based solely on the mental state of a co-defendant, *In re Howerton*, 109 Wn. App. 494, 501-02 (2001), Barry Massey remains subject to a sentence based on Michael Harris' intent to commit a premeditated murder.

It is extraordinary that numerous community members have written in support of Barry, including 14 DOC Officers who did so in contravention of written DOC policies.

It is extraordinary that Barry stands as the youngest person in the nation ever sentenced to Life Without the Possibility of Parole, an ignominious distinction given the 2005 legislation eliminating mandatory minimum sentences for juveniles tried as adults signed into law by Governor Christine O. Gregoire.²⁴⁶

It is extraordinary that Barry has remained free of major infractions for the last 13 years.

It is extraordinary that, despite being given no hope of redemption, Barry has become a positive role model within, and an asset to, DOC; worked to improve lives of youths at risk; maintained strong family and community support; and remained focused on his family, his wife, and his step-children.

It is truly extraordinary that, despite his sentence, Barry has consistently and successfully worked hard to become an emotionally whole and loving person, and has acquired the necessary tools to become a valuable member of society.

Conclusion

The clemency power held only by the Governor under the Washington State Constitution, Article III, §9, RCW 9.94A.728(5), and RCW 9.94A.885(1), serves as a hedge against punishment that proves to be too harsh, too rigid, too unyielding in the face of humanity. It is specifically designed to provide discretion where our courts are forced to sentence according to ever stricter guidelines that take fewer and fewer mitigating factors into consideration. The power to grant clemency flows from our most ancient spiritual teachings of divine mercy, grace, and forgiveness. It is the Governor's power to grant in extraordinary cases.

Barry's case is extraordinary.

Life came down to a few moments. For both Barry and the Wang family, it was forever changed the moment that first shot was fired on a cold winter day 23 years ago.

²⁴⁶ RCW 9.94A.540.

Today is another one of those moments. It is time to correct a second injustice, the injustice of sentencing a child with a mental age of 9.9, who became passively involved in a violent crime, to a sentence of life without parole. It is time for the people of Washington, speaking through our Governor, to correct this injustice—the kind of injustice that just four years ago led our State to ban the mandatory nature of the sentence that Barry received. This is a chance to demonstrate that Washington’s criminal justice system reflects the will of the State’s residents, as first enunciated in the 2005 prohibition of mandatory minimum sentences for juveniles. It is time to acknowledge the many extraordinary circumstances that exist in Barry’s case.

Governor Gregoire, in this instance, clemency is everything that is compassionate and right. I ask you to use the power given to you. I ask you to grant mercy to Barry by commuting his sentence from Life Without the Possibility of Parole to 23 years.

Very truly yours,

Richard E. Mitchell

Enclosure (1) - DVD