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HAND DELIVERED

Clemency and Pardons Board
Office of the Governor
Legislative Building
416 – 14th Avenue Southwest
P.O. Box 40002
Olympia, WA 98504-0002

**Re: Barry C. Massey, Jr.: Request for Reduction of Sentence
Institution Number 942583**

Dear Clemency and Pardons Board:

Barry Massey respectfully submits this supplemental letter in support of his request that the Clemency and Pardons Board (the "Board") recommend to Governor Christine Gregoire that his sentence be reduced to 20 years. This letter addresses the State's response to Mr. Massey's clemency petition, which was received on August 16. In its response, the State misstates relevant facts and improperly discounts the bases upon which Mr. Massey seeks clemency. The following briefly addresses and corrects some of those errors.

I. Mr. Massey Has Accepted Responsibility

Mr. Massey has accepted responsibility for Mr. Wang's death. In his petition, Mr. Massey appropriately asks this Board to consider his legal culpability given the evidence which was never presented to his jury, including new juvenile brain development research that was unavailable at the time of his trial. However, presenting such information to this Board and maintaining that he was not the principal in the crime that took Mr. Wang's life does not negate Mr. Massey's belief that he is morally culpable for Mr. Wang's death. The guards and volunteers at the Monroe Correctional Complex ("Monroe") who know Mr. Massey best confirm that Mr. Massey's sense of responsibility is genuine. For example, Officer Shane Zey states:

[36331-0001/SL062290.120]

[Mr. Massey] has always been open and honest about [the crime], never ducking his responsibility in what happened. I believe he is truly remorseful for what took place that day and wishes he could go back in time and stop it from happening.

Ex. 10. His colleague, Officer Diane Willeikesen agrees:

Even though his life was pruned by an evil act he'll always agonize about, he has taken responsibility for it. He has remorse and shame, even embarrassment when he speaks about it.

Ex. 21.

Mr. Massey does not dispute that this crime was horrendous or that he deserved to be punished severely. He merely contends that given the information only this Board will be able to consider and the overwhelming evidence of his rehabilitation, 20 years in prison is a significant and appropriate degree of punishment.

II. Issues Exist Relating to Mr. Massey's Legal Culpability

There are, in fact, significant problems which undermine Mr. Massey's legal culpability which this Board can appropriately consider. First and foremost, the forensic evidence developed by the police places Mr. Massey in the role of an accomplice, not the principal. That evidence showed that, based upon the angle of entry of the bullet, Mr. Massey was too short to have been the shooter. It further indicated that Mr. Harris was likely the only of the two boys to come in direct contact with Mr. Wang, because only Mr. Harris had blood matching Mr. Wang's on his clothing following the crime. *See* Petition at 18. This evidence conflicts with Mr. Massey's false confession to the police, which was further undermined by the fact that Mr. Massey did not know critical details about the crime that the principal would have known. *See* Petition at 18-19; Ex. 7. The State attempts to deflect this evidence by pointing to a statement given by Michael Harris which the State itself has described as "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." *See* Petition at 20. The State has included a transcript of Mr. Harris's confession at Exhibit 3 to its response. As detailed in Mr. Massey's original petition, the State has previously determined that this transcript is inaccurate. *See* Petition at 21. This inaccurate transcript has Mr. Harris stating that Mr. Massey was the shooter. In fact, the State reviewed the tape and determined that Mr. Harris actually stated, "After *I* shot the dude?" *See* Petition at 21.

By raising these issues, Mr. Massey is not, as the State suggests, attempting to re-litigate his case before this Board. Mr. Massey is not asking this Board to second guess the decisions made by any court or jury. He is simply asking this Board to consider the circumstances surrounding his crime and his trial, as well as who he has become today in determining whether to recommend that he receive a reduced sentence. There is nothing improper about this request. Moreover, in making this argument, the State misstates various facts that should be corrected so that the Board can make its determination based on an accurate record.

First, contrary to the State's contention, the jury in Mr. Massey's case did not make a determination as to who actually committed the murder. Rather, the jury returned a general verdict in which it did not express whether it believed Mr. Massey to be an accomplice or the principal. *See* Ex. 45. The jury had been instructed that it could apply aggravating factors to Mr. Massey if he "*or an accomplice*" caused the death of Mr. Wang in flight from or in furtherance of a felony. *See* Ex. 46 (emphasis added). *See also* Petition fn. 11 (quoting the prosecution's closing remarks in which the State informed the jury that Mr. Massey "doesn't have to be the one to have done whatever it is." Because the verdict form did not require the jury to state whether it was convicting Mr. Massey as the accomplice or principal or even which aggravating factor it applied, the State cannot now look into the mind of the jurors to make claims as to what the jury believed. Additionally, what Mr. Massey has asked this Board to consider is evidence that the jury never heard. His jury never heard that Mr. Harris had stated, "After *I* shot the dude." It never heard that forensic evidence existed which indicates that Mr. Massey was too short to have shot Mr. Wang. It never heard expert testimony regarding false confessions. And it never heard the scientific research we now have available which indicates that Mr. Massey could not have premeditated a murder, a requisite to a conviction with aggravating factors.

Second, the State refers to the verdict that was written by the trial judge in Mr. Harris's trial, but does not make clear that the verdict was sealed before the trial judge had an opportunity to hear mitigating evidence presented during Mr. Massey's trial which strongly suggested that Mr. Harris was the principal. And again, the trial judge, like Mr. Massey's jury, had no opportunity to consider evidence which was not developed until years after these trials were concluded.

Third, the State incorrectly argues that Mr. Massey has "subtly" asked the Board to second guess the juvenile court's declination decision. *See* Response at 4. Mr. Massey has not done

so, nor does he ask that now.¹ The State appears to have confused Mr. Massey's reference to EHB 1187, which applies to juveniles who have already been declined, and considered that to be an argument that Mr. Massey should not have been declined. Mr. Massey acknowledges that even with new scientific evidence regarding juvenile brain development, Mr. Massey was likely to be declined due to the severity of the crime charged. What the passage of EHB 1187 shows, is that the people of Washington now believe that juveniles who commit serious crimes should be subjected to something more than the punishment that they would receive in a juvenile court, but that they need not be punished as severely as adults.

Finally, the State argues that this Board should reject Mr. Massey's petition because the issues raised therein have been previously addressed in the appellate courts. That contention is inaccurate. Mr. Massey's trial counsel filed a direct appeal within one year of the date of conviction, only two of which are even tangentially related to this petition: (1) the sufficiency of evidence for conviction and (2) the proportionality of the sentence to the crime. As detailed above, Mr. Massey does not argue to this Board that the jury's determination that he was either an accomplice or the principal was based upon insufficient evidence, but rather that there is mitigating evidence his jury never heard which this Board may now consider. With respect to the latter, Mr. Massey does not ask the court to determine that life without the possibility of parole is never an appropriate punishment for aggravated first degree murder, but that Mr. Massey's exceptional rehabilitation is a sufficient basis for a reduction of that sentence. As the State is aware, Mr. Massey is now procedurally barred from raising these claims in any court.

Likewise, Mr. Massey's recent personal restraint petition only raised one issue relevant to this petition: that the aggravating factor jury instructions used at his trial were erroneous given changes in Washington law. That claim was precluded on procedural grounds. The remaining issues in that personal restraint petition do not directly relate to the issues raised in this petition. They related only to the constitutionality of his declination proceedings and the use of Mr. Harris's confession in those proceedings; he does not ask this Board to consider those issues.

Essentially, the State is suggesting that because Mr. Massey ever sought relief through the courts, he should be precluded from seeking clemency on any basis. To accept that position would gut the authority of this Board and the Governor to recognize cases in which meritorious

¹ The State also has misread the petition as arguing that Mr. Massey should be released due to prison overcrowding. *See* Response at 6. Mr. Massey has not made this argument and agrees with the State that the cost of incarceration is not a relevant consideration.

arguments may be precluded from review by the courts and where evidence shows that a petitioner is rehabilitated. Those considerations are justly left to the purview of the Governor and this Board.

III. Mr. Massey's Age Is a Relevant Consideration

The State is wrong to suggest that this Board disregard that Mr. Massey was 13 years old and had a mental age of 9.9 years at the time of the crime. The United States Supreme Court, the Washington Legislature, and Governor Gregoire have found the scientific evidence on juvenile brain development identified by Mr. Massey to be a valuable and relevant consideration when determining culpability, and this Board may as well. That research, conducted years after Mr. Massey's conviction, proves that adolescents are less able than adults to make moral judgments, understand the consequences of their actions, or premeditate. This new evidence is the basis for the Legislature's unanimous passage and Governor Gregoire's approval of legislation which provides that even children who commit murder and are tried as adults need not be punished as severely as adults. Further, the fact that juveniles are less able to comprehend the long term consequences of their actions provides insight into why Mr. Massey falsely confessed. Even though these facts are equally true for a 13 year old brain in 1987 as they are for a 13 year old brain in 2006, no judge or jury has had an opportunity to consider his confession in light of that information. Put simply, Mr. Massey's age and mental capacity are indeed relevant and should be factored into this Board's recommendation.

IV. This Board May Consider the Extensive Evidence of Mr. Massey's Rehabilitation

The Board may also consider Mr. Massey's significant and extensive efforts to improve himself and the environment around him. Contrary to the State's unsupported assertions, Mr. Massey's efforts while incarcerated at Monroe have been and continue to be extraordinary, singular, and unique. The proof of Mr. Massey's exemplary conduct lies in the numerous support letters submitted by Monroe guards and prison volunteers who have worked and, essentially, lived with Mr. Massey for the majority of his life. Those men and women have expressed that Mr. Massey is "inspirational," "responsible," "exemplary," "dependable," "impressive by any standard," and a person of "compassion," "ethics," and "respect." Exs. 9-21, 26-27, 30-33, 47-51. Tellingly, the State does not dispute or even address the guards' or volunteers' support of Mr. Massey's petition. Instead, the State attempts to make light of Mr. Massey's infraction-free record over the past 10 years, focusing only on the difficulties Mr. Massey faced as an immature teenager growing up in an adult prison. Although not proud of his choices, Mr. Massey admittedly engaged in inappropriate behavior in order to survive as best as he

could. *See* Ex. 2 at 4. Over ten years ago, Mr. Massey decided to take a different course, and since that time has remained infraction free.

Mr. Massey is hopeful that this Board will recognize and appreciate how significant his infraction-free record over the last 10 years has been not only to Mr. Massey, but to the safety and security of the prison and the guards who work there. As with the other letters submitted by correctional officers, the letter of support submitted by Mikaele Naikovu exhibits the respect Mr. Massey has earned from the officers who have come to know him. Mr. Naikovu was frequently posted in the visitation room at Monroe, and in that role he watched Mr. Massey interact with his family, other inmates, and correctional staff. Mr. Naikovu describes Mr. Massey as a role model who demonstrated appropriate attitudes for younger inmates who “followed his conduct toward staff,” thereby making Mr. Naikovu’s “job easier.” In addition, Mr. Naikovu believes that Mr. Massey’s efforts to create a morning exercise program for other inmates helped ease tension levels within the prison. Mr. Naikovu concludes his letter by stating: “He was very respectful and therefore I have no hesitation in recommending Mr. Massey for his clemency, I believe that if given the opportunity, he will be an asset to society....” Ex. 47. *See also* Ex. 48.

The State’s argument also focuses exclusively on Mr. Massey’s infraction history. Mr. Massey’s rehabilitation goes far beyond that. Mr. Massey has also obtained an education and significant work experience. He has been devoted to the development of and participation in the Youth Program, through which he has worked with at-risk youth three to four times per month over the past 10 years. He has been an integral member of the Concerned Lifer’s Organization, the Black Prisoners’ Caucus, the Prison Awareness Program, and a collaborative program with Seattle University.

The value of these activities is critically important to the guards and volunteers who work at Monroe. Also included in this supplement is a letter from Linda Thomas, with Monroe’s Community Involvement Office. In this position, Ms. Thomas has witnessed Mr. Massey’s work as a panel member in the Youth Program. She reports:

[Mr. Massey] is a marvelous witness to at risk children 12 years of age to seniors in high school. This program addresses the risks youth face every day in an increasingly violent society. The panel members talk about their crimes, how it has affected them and the victims they have created. They do not make excuses and they do not ask for pity.... Mr. Massey has been exemplary in his role as a member of this panel. He has received numerous letters from kids stating he has made a positive difference in their lives. The letters thank Mr. Massey for his contribution to the program and for the positive influence he has given them. As

facilitator of this program, I have personally witnessed his ability to get kids to open up and talk about themselves. After-visit surveys from the program overwhelmingly reflect the importance this program is to those participating. Mr. Massey's contribution to this positive role in today's community youth speaks highly of the changes he has undergone during his years of incarceration.

Ex. 49. As expressed in his petition and letter to the Board, if released, Mr. Massey hopes to continue utilizing his talents by working with at-risk youth.

Mr. Massey's ability to connect with others is also described in a letter of support received from Maureen Finneran. Ms. Finneran came to know Mr. Massey through her volunteer work with the Concerned Lifer's Organization. She notes that she found it remarkable that Mr. Massey never complained about growing up in prison, but accepted his experience as an opportunity to educate other young people about the consequences of criminal activity. Ms. Finneran found Mr. Massey to be thoughtful and insightful, and a person who strove to contribute to his community. Her time working with Mr. Massey has had a lasting impact on her life:

Barry continues to inspire me to this day – he is someone who is not satisfied with just being, he wants to know about the world, about life and he has worked hard to gain that knowledge, whether it be through programs like ours or through individual study.... Barry's dedication to being a better person, physically and mentally, has amazed and inspired me. Over the years, I have come to know Barry as curious, mild-mannered, committed and courageous man. He has overcome tremendous struggles in his life to educate himself and put himself on a path towards making a difference in other people's lives.

Ex. 50:

Likewise, Adrian Johnson, who participated as a volunteer in the Prison Awareness Project, describes Mr. Massey as follows:

It was hard to believe that someone who had spent a major portion of his childhood incarcerated could remain so positive. I had expected someone in his situation to become increasingly bitter, and develop a hatred toward the system and society that placed him in his situation. But what I saw from Barry was someone who had taken responsibility for his actions, and was determined to live a positive life regardless of his surroundings.

Ex. 51.

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Mr. Massey's efforts to re-join society, improve himself and make a positive difference for others will undoubtedly be bolstered and encouraged by the family of his uncle, David Bonds, with whom he will reside upon release. The letter submitted by Mr. Bonds' daughter, Kimiko, details the stability of that home. In Mr. Bonds' home, Mr. Massey will be held to a high degree of accountability, and the sense of responsibility Mr. Bonds has cultivated amongst his own children will be expected of Mr. Massey as well. *See Ex. 52.* Mr. Massey and his family would also be provided with support from the greater community, including the community of faith at St. John Baptist Church in Tacoma, Washington. *See Ex. 53.*

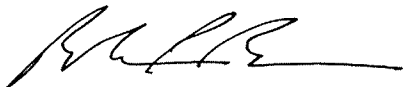
V. Conclusion

The people of Washington, as a matter of justice, have created a constitutional body – this Board – for the purpose of considering the very facts that the State has encouraged this Board to ignore. The clemency process reflects the community's understanding of the limitations of our court system and desire to provide an opportunity for convicted persons – no matter what the crime – who are rehabilitated to seek release. Accordingly, it is entirely appropriate for this Board to consider the overwhelming evidence in support of Mr. Massey's request for clemency.

Mr. Massey's recognition of his role in our society and deep commitment to becoming a better person come as no surprise to those who know him best. He accepts responsibility for his participation in a crime as a young boy and has spent over 19 years working to become a better person and earn his way back into society. In light of his remarkable and inspiring conduct, his dedication to improving the lives of at-risk youth, and the likelihood that he would be a responsible and productive member of society, Mr. Massey respectfully requests that the Board recommend to Governor Gregoire that his sentence be reduced to 20 years.

Thank you again for your consideration of Mr. Massey's request for clemency.

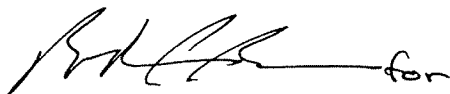
Sincerely,



Brendyn P. Ryan



Beth A. Colgan
Columbia Legal Service



Charles C. Sipos