SUPEREME COURT NO. 93376-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEAN ALLEN THOMPSON,

Petitioner.

ON PETITIONER FOR DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 47229-5-II
Kitsap County Superior Court No. 13-1-00973-9

ANSWER TO MEMORANDUM OF AMICI CURIAE

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	Lila Jane Silverstein 1511 3rd Avenue Suite 701 Seattle, Wa 98101-3647 Email: lila@washapp.org; wapofficemail@washapp.org **Additional proof of service attached.**	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED October 4, 2016, Port Orchard, WA **Original e-filed at the Supreme Court; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Kitsap County Deputy Prosecuting Attorney JOHN L. CROSS.

II. COURT OF APPEALS DECISION

The State respectfully requests that this Court deny review of the Court of Appeals unpublished decision in *State v. Thompson*, No. 47229-5-II (6/14/16), a copy of which is attached to the petition for review as appendix A.

III. COUNTERSTATEMENT OF THE ISSUES

The Court of Appeals, in conformity with well-established principles, held Petitioner Thompson's sentence was lawful. The question presented is thus whether this Court should decline to accept review when none of the criteria set forth in RAP 13.4(b) are met.

IV. STATEMENT OF THE CASE[1]

Sean Allen Thompson was charged by information filed in Kitsap County Superior Court with assault in the first degree. CP 1. A first amended information was later filed changing the charge to assault in the second degree. CP 25. The defendant was advised that if he had been twice convicted of a "most serious offense" the penalty in the present case

[1] The following statement of facts and procedures is lifted from Respondent's brief in the Court of Appeals; citation is to the record on review in that court.

is life in prison without the possibility of parole. CP 25.

At trial, the defense asserted proposed instructions on the lesser offense of assault in the forth degree and on self-defense. The trial court gave these instructions. CP 107-113. The jury returned a verdict of guilty to the charge of assault in the second degree. CP 117.

At sentencing the state presented the testimony of Sergeant Keith Hall a Kitsap County Sheriff's officer employed as jail records management system administrator. Id. at 3. Sergeant Hall established the identity of Thompson with regard to his prior offenses. Certified copies of the judgment and sentence from Thompson's two previous convictions for most serious offenses were presented to the court. CP 136 (assault in the second degree entered 9/20/07 (certification appears at CP144)); CP 147 (robbery in the second degree entered 9/24/04 (certification appears at CP 155)). Each of these two documents recited that the crime of conviction constituted a "most serious offense." (assault in the second degree j and s at CP 143; robbery in the second degree j and s at CP 154). The trial court pronounced a sentence of life without possibility of parole. CP 172.

These procedures resulted from an incident where Thompson was drinking heavily with his friend Brock Nye and a girl. RP (12/8/14) 277-78. Having been caught in the rain, the three changed clothes and where drinking and hanging out in Nye's bedroom. RP (12/8/14) 280.

In the bedroom, Nye was "fooling around" with the girl. RP (12/8/14) 282. Thompson "was trying to jump into it" by pulling the girl away and making out with her as well. RP (12/8/14) 282-83. Nye withdrew not wanting to engage in a "three-way." Id. In another room, Thompson approached Nye and they began to argue. RP (12/8/14) 286. Nye told Thompson he was being rude and vulgar and "that's when he struck me," throwing "a left and a right and landed on my face." RP (12/8/14) 286.

Thompson threw Nye to the ground. Id. After that, Nye could not remember what happened. RP (12/8/14) 291. He awoke with his hands covered in blood and his "head was split open." RP (12/8/14) 292. He was covered with a lot of blood and his finger was broken. RP (12/8/14) 297. There was a "golf ball-sized knot" on his forehead. RP (12/8/14) 305. He had staples in his head wound for two to three weeks. RP (12/8/14) 309.

Police responded to the house. Nye exclaimed to Thompson in the presence of responding police that Thompson had hit him with a fireplace shovel. RP (12/9/14) 489. The police found Nye with blood on his clothing and "all over the front of him." RP (12/9/14) 470. Thompson did not appear to be injured. RP (12/9/14) 491. Despite his later claim of lack of memory, Nye recounted being assaulted with a fireplace shovel to

responding officers. RP (12/9/14) 510-11. He described the attack as "He [Thompson] was relentless. He just kept going." RP (12/9/14) 512. He described his broken finger as a defensive wound. RP (12/9/14) 514. Thompson was arrested. RP (12/9/14) 515.

V. ARGUMENT

THIS COURT SHOULD DENY REVIEW BECAUSE THOMPSON'S SENTENCE COMPORTS WITH THE COMMUNITY'S EVOLVING NEED FOR SAFETY AND AS SUCH IS NOT IN CONFLICT WITH WASHINGTON PRECEDENT, DOES NOT RAISE A SIGNIFICANT CONSTITUTIONAL ISSUE, AND IS NOT OF ELEVATED PUBLIC CONCERN.

1. None of the considerations governing acceptance of review set forth in RAP 13.4(b) support acceptance of review.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

None of these considerations supports acceptance of review.

2. The Court of Appeals decision does not conflict with this Court's precedent.

Amici argue that advancements in the neurological science

constitute a "paradigm shift" in that science that has been appreciated by the United State Supreme Court. In turn, this "shift" should drive this Court's article 1, §14 cruel punishment analysis. There is no paradigm shift in neuro-science. *See generally* Kuhn, T., *The Structure of Scientific Revolutions,* 2d Ed., The University of Chicago Press, 1962. One day, neuro-science may supplant other areas of behavioral science. That day has not come.

The present scientific advances underline the hardly novel notion that children are different from adults. The law has long recognized this difference as seen in child labor laws, prohibitions on the use of certain substances, voting laws; in pieces of law like the Juvenile Justice Act or the jurisprudence on whether an offender in juvenile court may demand a jury trial. The phrase indicating that neurological maturity may occur "closer to 25, when we are allowed to rent a car," hits the mark. *State v. O'Dell,* 183 Wn.2d 680, 692 ftnt. 5, 358 P.3d 359 (2015). The car rental industry has needed no prompting from neurological science to know that it wants to protect its fleet from the recklessness of youth. That the science is currently more able to point to the physiological reasons for some of the developmental deficits of childhood does not change our long-standing recognition of those deficits.

Moreover, the recognition is part of the analysis in *Miller v.*

Alabama ___*U.S.*___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); analysis relied upon in *O'Dell.* In *Miller,* Justice Kagan for the majority, applied Eighth Amendment precedent that "adopted a categorical [ban] on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." 132 S.Ct. at 2463 (alteration added). The class of offenders is juveniles. *Amici* stretches the analysis in referring to "young offenders" (brief at 2) or "young adult" (brief at 3); categories of offenders not encompassed by the United States Supreme Court's cases.

The Court's decision rests, in part, "on common sense—on what any parent knows. . ." Id. at 2464 (internal quotation omitted). The decision thereafter refers to the class rather interchangeably as either "children" or "juveniles." *See also State v. Witherspoon,* 180 Wn.2d 875, 890, 329 P.3d 888 (2014) ("*Graham* and *Miller* un-mistakenly rest on the difference between children and adults and the attendant propriety of sentencing children to life in prison without possibility of parole."). This categorical approach, then, limits the jurisprudence on this issue to the class of children. The United States Supreme Court did not in *Miller, Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed. 2d 1 (2005) , *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 176 825 (2010), or any other case, seek to expand the definition of child or juvenile in order to

expand the reach of those cases. As the dissent below observed "the specific holdings of these three cases [*Roper, Graham,* and *Miller*] do not aid Thompson." *State v. Thompson,* No. 47229-5-II (slip. op. 6/14/16) (alteration added).

But *O'Dell* does enlarge the category by 10 days. And it may given that article 1, §14 is held to be more protective than the Eighth Amendment. In the present case, however, Thompson wants this Court to extend that category by 12 years. It is not inconsistent with *O'Dell* for this Court to refuse to consider such a huge expansion of that case or the principles and precedents that warranted the decision in that case. The public likely has little interest in such a huge expansion and the Washington Constitution does not mandate it.

3. Thompson was sentenced for his conduct at age 30 and reference to his criminal history as required by RCW 9.94A.570 offends neither article 1 §14 nor article 1, § of the Washington Constitution

A*mici* asserts that evolving standards of decency mandate review. But the standards are evolving with regard to our punishment of children, not adults. Thompson was 30 years old and under any definition, neuro-psychological or legal, was an adult when sentenced. Nothing in this record warrants a finding that Thompson was too young or infirm to understand the warnings he twice received that the POAA would be applied if he did not curtail his violent behavior. Thompson's "personal

characteristics" (Brief at 3) include, first and foremost, his personal behavior. Thompson embodies a counterfactual to the emerging science argument: his behavior did not change, even at an age well above the 25 year old maturity supposition.

This Court has repeatedly upheld the POAA under similar attacks. The *Witherspoon* Court observed,

> The life sentence contained in RCW 9.92.090 is not cumulative punishment for prior crimes. The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime.

180 Wn.2d at 888-889 (page break and internal quotation omitted), *citing State v. Rivers,* 129 Wn.2d 697, 714-15, 921 P.2d 495 (1996). This principle is the same now. The dissent below tacitly understood this legal principle in its wondering as to how a remedy would be fashioned. When Thompson was 20, he received six months for his violent behavior. This because of his youth; that is, he had not yet amassed the history of recidivism warranting enhanced punishment. When he was sentence this time, he had amassed that recidivism.

It is anathema to suppose a constitutional violation that has no remedy. But the dissent below ignores the above principle and the record herein in saying that the "characteristics of youth" should have been considered in imposing the present sentence. *State v. Thompson, supra (Bjorken, C.J.* dissenting). Then, the dissent concedes that there is no

principled way to circumscribe the category in which it wants to place Thompson—"the temporal reach of this requirement is fog-bound." Id. Apparently, the dissent below and *amici* here would have us time travel back to Thompson's first strike sentencing and, at that point, "consider" that Thompson was 20 at the time he committed that crime. To what end? Such consideration would not change the fact of the crime, improve his sentence at that time (he received only six months), or expunge the strike from his record. Thus the necessity of confining analysis to the present sentencing proceeding and the necessity of confining evolving standards jurisprudence to a definable category--children. The upshot would be a holding that RCW 9.94A.570 does not apply to first (or second or third) strike sentencing if the offender found guilty of a most serious offense is 20 (or 22 or 23 or 24 or 25 or ? (will we entertain an argument that the particular offender at, say, 30 is a slow developer and should still be regarded as a youth?)) Clearly, then, the dissent below and *amici* here have no principled remedy for the infirmity they suppose. Significantly, they do not advance an argument explaining what the trial court is to do with offenders like Thompson.

The public knew what it wanted done with offenders like Thompson. Initiative 593 was passed by the voters by a 3 to 1 margin. *See* Cullen, F.T., Fisher, B.S., Applegate, B.K., *Public Opinion About*

Punishment and Corrections, 27 Crime and Justice, 1, 38 (2000). The life without release sentence under the initiative is designed to protect the community and improve public safety. As late as 2011, legislative attempts to limit the POAA failed. *See* Senate Bill 5236 (2011 Regular Session) (maximum term of life and minimum term of 15 years for offenders whose strikes are solely second degree assault or second degree robbery). The public's interest in enhancing public safety remains the case.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny Thompson's petition for review.

DATED October 4, 2016.

Respectfully submitted,

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Supreme Court of Washington No. 93376-6

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I hereby certify that on this 4th day of October, 2016 the above were served Respondent's Answer to Amici Curiae.

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