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Division II
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint Petition of

ANDREW KENNEDY,

Petitioner.

PERSONAL RESTRAINT PETITION

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A. STATUS OF PETITIONER

Andrew Kennedy, Petitioner, challenges his Cowlitz County Superior Court judgment and sentence for murder (Case No. 04-1-01203-9). Mr. Kennedy (DOC # 310424) is currently incarcerated in the Coyote Ridge Correctional Center, in Connell, Washington.

B. FACTS

Mr. Kennedy was convicted by bench trial of murder by abuse. He was sentenced to 31 ½ years in prison. Mr. Kennedy was 19 at the time of his charged crime. As the unpublished direct appeal opinion summarized:

> In 2004, Kennedy assumed custody of his cousin's 10–month–old daughter, Kieryn Severson. Two months later, Kieryn died when Kennedy took her into his bedroom and intentionally swung her head into a stationary object with violent force. Kennedy had also intentionally hurt Kieryn several times before her death, leaving large bruises on her arms and head, breaking her arm, and intentionally stopping her breathing for short periods.

State v. Kennedy, 150 Wash. App. 1040 (2009). Additional facts are attached to this petition and appear in the argument section below.

C. ARGUMENT

Introduction

Mr. Kennedy seeks a new sentencing hearing. Although he brings this petition more than a year after his conviction was final, he contends that

advances in neuroscience applicable to late adolescents or "emerging adults" constitute newly discovered evidence rendering his sentence a manifest injustice. When Kennedy was convicted and sentenced, the neuroscience pertaining to late adolescents was not sufficiently developed to support an exceptionally lenient sentence based on an impaired ability of a defendant to conform his actions to the requirement of the law. Now, it is. As a result, Kennedy contends that newly available evidence supports this petition and makes it both timely and meritorious.

Developing Science Constitutes Newly Discovered Evidence

Advances in science and medicine can constitute newly discovered evidence.

Until recently, neuroscience did not provide enough factual support to show that a late adolescent's commission of a crime was substantially impaired due to a still-developing brain. While we have largely understood the deficits associated with juvenile brains for over a decade, our understanding that late adolescent brains are more like juvenile than adult brains is much more recent. As a result, Mr. Kennedy could not have made the requisite showing in order to support a request for an exceptionally lenient sentence at the time of his sentencing and not until recently.

A PRP is timely when it rests on newly discovered evidence. RCW 10.73.100(1). To obtain a new trial based on newly discovered evidence,

Kennedy must show " 'the evidence (1) will probably change the result of the sentencing; (2) was discovered since sentencing; (3) could not have been discovered previously by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.' " *In re Pers. Restraint of Brown*, 143 Wash.2d 431, 453, 21 P.3d 687 (2001) (quoting *State v. Williams*, 96 Wash.2d 215, 223, 634 P.2d 868 (1981)). Additionally, because Mr. Kennedy filed this PRP after the one-year period for collateral attacks under RCW 10.73.090 had expired, he must also prove that he " 'acted with reasonable diligence in discovering the [new] evidence and filing the petition.' " *In re Pers. Restraint of Stenson*, 174 Wash.2d 474, 485, 276 P.3d 286 (2012) (*quoting* RCW 10.73.100(1)).

Likewise, under RAP 16.4, a court will grant relief to a petitioner if the petitioner's restraint is unlawful because, among other reasons, "(m)aterial facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding." RAP 16.4(c)(3).

In other words, "newly discovered evidence" means evidence that was unavailable at the time of trial, not unexplored. For that reason, Washington courts have correctly held that the newly discovered evidence test is not met where an expert witness reaches an opinion different than the opinion proffered at trial based on the same facts and science available at the time of

trial because such "new" opinions could have been discovered and presented at trial with the exercise of due diligence, *State v. Harper*, 64 Wash. App. 283, 293, 823 P.2d 1137 (1992). While the failure to exercise diligence might support a claim of ineffectiveness, it does not justify an otherwise untimely PRP.

"Newly discovered evidence" as used in RCW 10.73.100(1), includes material advances or changes in science and or medicine. Such a construction comports with the plain meaning of the statute and is consistent with the test employed by previous Washington courts. *In re Stenson*, 174 Wash.2d 474,276 P.3d 286 (2012) (undisclosed photographs which put previously known evidence in a new light constituted newly discovered evidence).

When there are significant advancements or changes in scientific methodology, the underlying facts may not be new. But the science is new. And, with the new science the meaning or significance of the underlying facts can change or be revealed. *See Sewell v. State,* 592 N.E.2d 705, 707-08 (Ind. Ct. App. 1992). The rationale of *Sewell* is compelling. That court found that in "promoting the orderly ascertainment of the truth," post-conviction courts may consider scientific advances because "advances in technology may yield potential for exculpation where none previously existed." *Id*. While each marginal advance in science cannot form the basis of a new sentencing hearing, watershed developments are a different story.

It is for these reasons that numerous courts from other jurisdictions have recognized that advancements in science and/or medicine may constitute newly discovered evidence. *See e.g., Bunch v. State*, 964 N.E.2d 274, 289 (Ind. Ct. App. 2012) ("we do agree with Bunch that, just as the evolving science of DNA analysis became accepted as the scientifically reliable method for accurately interpreting even previously-existing DNA evidence, fire victim toxicology analysis has become recognized as a scientifically reliable method to better interpret existing evidence, and that it has done so since the time of Bunch's trial); *Smith v. Florida*, 23 So.3d 1277, 1278 (Fla. Dist. Ct. App. 2010) (concluding that new comparative bullet lead analysis ("CBLA") research discrediting CBLA evidence presented at trial may constitute newly discovered evidence warranting a new trial); *Clark v. Florida*, 995 So.2d 1112, 1113-14 (Fla. Dist. Ct. App. 2008) (concluding that advances in science discrediting the scientific theory advanced by the state at trial may constitute newly discovered evidence warranting a new trial); *New Jersey v. Behn*, 868 A.2d 329, 343 (N.J. Super. Ct. App. Div. 2005) (granting new trial for murder and armed robbery based on new scientific conclusions regarding composition bullet lead analysis, noting "[s]cience moves inexorably forward and hypotheses or methodologies once considered sacrosanct are modified or discarded").

Mr. Kennedy's Claim is Based on Newly Discovered and Newly Available Evidence

Mr. Kennedy's PRP rests on two sources of information: the declaration of Laurence Steinberg is the newly discovered/available evidence and Mr. Kennedy's own declaration makes Dr. Steinberg's new evidence material to his sentence.

First, Dr. Steinberg's declaration establishes that the brain science focusing on late-adolescents has only been recently available. He posits:

> Over the past two decades, considerable scientific evidence has accumulated demonstrating that, compared to adults, adolescents are more impulsive, prone to engage in risky and reckless behavior, motivated more by reward than punishment, and less oriented to the future and more to the present. These characteristics of adolescents are now viewed as normative, driven by processes of brain maturation that are not under the control of young people.

Steinberg Declaration at ¶ 9.

Later, he adds:

> In the past ten years, additional scientific evidence has accrued indicating that many aspects of psychological and neurobiological immaturity characteristic of early adolescents and middle adolescents are also characteristic of late adolescents.

Id. at ¶ 11. Finally, he explains:

> Further study of brain maturation conducted during the past decade has revealed that several aspects of brain development affecting judgment and decision-making are not only ongoing during early and middle adolescence but continue at least until age 21. As more

> research confirming this conclusion has accumulated, the notion that brain maturation continues into late adolescence became widely accepted among neuroscientists by 2015. This contemporary view of brain development as ongoing at least until age 21 stands in marked contrast to the view held by scientists as recently as 15 years ago. We now know that, in many respects, individuals in their late teens and early 20s are more neurobiologically similar to younger teenagers than had previously been thought.

Id. at ¶ 17.

Based on this evidence, Mr. Kennedy has at least established a prima facie case that this petition is based on competent, admissible, and newly discovered evidence that was not available previously.

The Developments in Neuroscience Put Mr. Kennedy's Conduct in a New Light and Are Highly Mitigating.

Dr. Steinberg's declaration describes several neurodevelopmental deficits relevant to this case.

> ..*adolescents are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation.* When asked to make a decision about a course of action, compared to adults, adolescents have more difficulty identifying the possible costs and benefits of each alternative, underestimate the chances of various negative consequences occurring, and underestimate the degree to which they could be harmed if the negative consequences occurred.
>
> As a consequence of this gap between intellectual and emotional maturity, the tendencies of adolescents and people in their early 20s, relative to individuals in their mid- or late 20s, to be more focused on rewards, more impulsive, and more myopic *are exacerbated when adolescents are making decisions in situations that are emotionally arousing, including those that generate negative emotions, such as fear, threat, anger, or anxiety.* Psychologists distinguish between "cold

> cognition," which refers to the thinking abilities used under calm circumstances, and "hot cognition," which refers to the thinking abilities used under emotionally arousing ones. Adolescents' deficiencies in judgment and self-control, relative to adults, are greater under "hot" circumstances in which emotions are aroused than they are under calmer, "cold" circumstances.
>
> Given these deficits it thus not surprising that in "recent experimental studies of risk-taking, *the peak age for risky decision-making has been determined to be in the late teens and early 20s.* This age trend is consistent with epidemiological data on age trends in risky behavior, which show peaks in the adverse outcomes of risk-taking in the late teens and early 20s in a wide range of behaviors, including driver deaths, unintended pregnancy, arrests for violent and non-violent crime, and binge drinking." Moreover, as "a result of neurobiological immaturity, young people, even those past the age of majority, continue to demonstrate difficulties in exercising self-restraint, controlling impulses, considering future consequences, making decisions independently from their peers, and resisting the coercive influence of others."
>
> Extensive studies demonstrate that important neurobiological development is ongoing throughout the teenage years and continues into the early 20s. *As a result of neurobiological immaturity, young people, even those past the age of majority, continue to demonstrate difficulties in exercising self-restraint, controlling impulses, considering future consequences, making decisions independently from their peers, and resisting the coercive influence of others. Heightened susceptibility to emotionally laden and socially charged situations renders adolescents more vulnerable to the influence of others, and in such situations young people are even less able to consider and weigh the risks and consequences of a chosen course of action.* Many of the same immaturities that characterize the brains of individuals younger than 18, and that have been found to mitigate their criminal culpability, are characteristic of the brains of individuals between 18 and 21.

Id. at ¶ 19, 23, 24, 30.

Mr. Kennedy's declaration makes it clear how those deficits were manifested in this terrible crime:

> 1. When I was 19, I caused the death of Kieryn Brenda Severson, who died days before her first birthday.
>
> 2. I caused her death when I suddenly lost control of my emotions and seriously hurt her.
>
> 3. Growing up, I had difficulty controlling my emotions. I was often anxious and when stressed I would lose control. When I lost control, sometimes I acted out without thinking. Sometimes, like with Kieryn, I acted violently.
>
> 4. It is hard to explain. I never planned to hurt Kieryn. I never wanted to hurt her. But, when she was crying and I could not find a way to comfort her, I would feel my emotions quickly rise and it was like my brain turned off. All of a sudden, I was hurting her. At that moment, I was not thinking. I was not considering options. I was not thinking about stopping. I just acted in a way that makes me deeply ashamed.

Taken as a whole, both declarations read in connection with the crime provide support for the conclusion that Mr. Kennedy's ability to conform his conduct to the requirements of the law was substantially impaired—a mitigating factor.

It is important to stress, that Mr. Kennedy's moral failing was monumental. But his culpability is also lessened because of his diminished ability due to his still-developing brain. Mr. Kennedy's declaration concludes:

> 5. Now that I am older, I can better control my emotions. Now that I am older, when I feel my emotions starting to take over I can stop and figure out ways to calm down or options to remove myself from the situation. Back then, I did not have the same abilities that I do today.

6. I am not trying to justify my actions. My actions are not justifiable. Instead, I am only trying to explain how back then I lost control, acted violently, did not think, did not consider Kieryn, did not consider any consequences, just acted like I was on some sort of terrible and harmful auto-pilot.

7. Once again, I am sorry. I am ashamed. I am responsible.

D. CONCLUSION

Based on the above, this Court should call for a response and, depending on the response, either grant this petition or remand for an evidentiary hearing.

DATED this 10th day of April 2019.

Respectfully Submitted:

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DECLARATION OF LAURENCE STEINBERG

I, Laurence Steinberg, declare as follows:

1. My name is Laurence Steinberg. My address is 1924 Pine Street, Philadelphia, Pennsylvania, 19103, USA.

2. I hold the degrees of A.B. in Psychology from Vassar College (Poughkeepsie, New York) and Ph.D. in Human Development and Family Studies from Cornell University (Ithaca, New York).

3. I am a developmental psychologist specializing in adolescence, broadly defined as the second decade of life. Throughout this document, "adolescence" refers to the period of development from age 10 to age 20. Adolescence can be further divided into three phases: early adolescence (10 through 13), middle adolescence (14 through 17) and late adolescence (18 through 20).

4. I am on the faculty at Temple University, in Philadelphia, Pennsylvania, USA, where I am a Distinguished University Professor and the Laura H. Carnell Professor of Psychology. I am a Fellow of the American Psychological Association, the Association for Psychological Science, and the American Academy of Arts and Sciences, and a member of the Society for Research in Child Development and the Society for Research on Adolescence. I was a member of the National Academies' Board on Children, Youth, and Families and chaired the National Academies' Committee on the Science of Adolescence. I was President of the Division of Developmental Psychology of the American Psychological Association and President of the Society for Research on Adolescence.

5. I received my Ph.D. in 1977 and have been continuously engaged in research on adolescent development since that time. I am the author or co-author of approximately 450 scientific articles and 17 books on young people. Prior to my appointment at Temple University, where I have been since 1988, I was on the faculty at the University of Wisconsin—Madison (1983-1988) and the University of California, Irvine (1977-1983). From 1997-2007, I directed the John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and

Juvenile Justice, a national multidisciplinary initiative on the implications of research on adolescent development for policy and practice concerning the treatment of juveniles in the legal system. I also have been a member of the MacArthur Foundation Research Network on Law and Neuroscience, a national initiative examining the ways in which neuroscientific research may inform and improve legal policy and practice.

6. Since 1997, I have been engaged in research on the implications of research on adolescent development for legal decisions about the behavior of young people. More specifically, my colleagues and I have been studying whether, to what extent, and in what respects adolescents and adults differ in ways that may inform decisions about the treatment of juveniles under the law.

7. I have been qualified as an expert in state courts in Alaska, Arizona, Arkansas, Delaware, Florida, Kentucky, Nevada, Pennsylvania, Tennessee, and Wisconsin, as well as the United States District Courts for the Eastern District of New York, the Southern District of New York, and the District of Connecticut. I have also been deposed as an expert in cases in California, Colorado, Pennsylvania, Rhode Island, and Wisconsin; in U.S. District Courts in the Western District of Washington and the District of Colorado; and in the Military Court of Commission Review in Guantanamo Bay, Cuba. In addition, I was the lead scientific consultant for the American Psychological Association (APA) when the Association filed Amicus Curiae briefs in *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2011); and *Roper v. Simmons*, 543 U.S. 551 (2005). One of my articles, "Less Guilty by Reason of Adolescence," (co-authored with Elizabeth Scott),[1] was cited in the Court's majority opinions in *Roper* and in *Miller*, as was the APA amicus brief that I helped draft.

REFERRAL QUESTION

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[1] Steinberg, L., & Scott, E. (2003). Less guilty by reason of adolescence: Developmental immaturity, diminished responsibility, and the juvenile death penalty. *American Psychologist*, *58*, 1009-1018.

8. Mr. Jeffrey Ellis, an attorney with the Law Offices of Alsept & Ellis, requested that I outline the current understanding of neurobiological and psychological development during adolescence, the ways in which neurobiological immaturity impacts behavior and psychosocial development during this period, and the basis for and evolution of the understanding of ongoing behavioral development during these years. I have been specifically asked to summarize the state of the scientific literature on brain and psychological development during late adolescence. The scientific question I have been asked to address is whether individuals between 18 and 21 also share the attributes of adolescents under 18 that trigger the constitutional protections the Supreme Court has already recognized for mid-adolescents.

OVERVIEW OF ARGUMENT

9. Over the past two decades, considerable scientific evidence has accumulated demonstrating that, compared to adults, adolescents are more impulsive, prone to engage in risky and reckless behavior, motivated more by reward than punishment, and less oriented to the future and more to the present. These characteristics of adolescents are now viewed as normative, driven by processes of brain maturation that are not under the control of young people.

10. In several landmark cases decided between 2005 and 2016, the U.S. Supreme Court held that these aspects of juvenile immaturity mitigate criminal responsibility in ways that must be taken into account in sentencing decisions.

11. In the past ten years, additional scientific evidence has accrued indicating that many aspects of psychological and neurobiological immaturity characteristic of early adolescents and middle adolescents are also characteristic of late adolescents.

12. Although late adolescents are in some ways similar to individuals in their mid-20s, in other ways, and under certain circumstances, they are more like individuals in early and middle adolescence in their behavior, psychological functioning, and brain development. Developmental science therefore does not

support the bright-line boundary that is observed in criminal law under which 18-year-olds are categorically deemed to be adults.[2]

13. The recognition that the same sort of psychological and neurobiological immaturity characteristic of juveniles under the age of 18 also describes individuals between 18 and 21 suggests that the logic reflected in the U.S. Supreme Court decisions in *Roper*, *Graham*, *Miller*, and in *Montgomery v. Louisiana*, also applies to late adolescents.

BRAIN DEVELOPMENT CONTINUES BEYOND THE TEEN YEARS

14. For most of the 20th century, scientists believed that brain maturation ended sometime during late childhood, a conclusion based on the observation that the brain reached its adult size and volume by age 10. This conclusion began to be challenged in the late 1990s, as a result of research that examined the brain's internal anatomy as well as patterns of brain activity, rather than focusing solely on the brain's external appearance.[3]

15. The advent of functional Magnetic Resonance Imaging (fMRI) permitted scientists and researchers to actually observe the brains of living individuals and examine their responses to various stimuli and activities. The results of this examination demonstrated that key brain systems and structures, especially those involved in self-regulation and higher-order cognition, continue to mature throughout adolescence.[4]

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[2] Scott, E., Bonnie, R. & Steinberg, L. (2016). Young adulthood as a transitional legal Category, *Fordham Law Rev*iew, *85*, 641-666.

[3] Gogtay, N., et al. (2004). Dynamic mapping of human cortical development during childhood through early adulthood. *Proceedings of the National Academies of Sciences*, *101*, 8174–8179; Giedd, J., Blumenthal, J., Jeffries, N., Castellanos, F., Liu, H., Zijdenbos, A., . . . Rapoport, J. (1999). Brain development during childhood and adolescence: a longitudinal MRI study. *Nature Neuroscience.* 2, 861–863; Sowell, E., Thompson, P., Leonard, C., Welcome, S., Kan, E., & Toga, A. (2004). Longitudinal mapping of cortical thickness and brain growth in normal children. *Journal of Neuroscience*, *24*, 8223–8231.

16. In response to these revelations about ongoing brain maturation, researchers began to focus on the ways in which adolescent behavior is more accurately characterized as reflecting psychological and neurobiological immaturity.[5] The results of many of these studies and descriptions of adolescent behavior were used by the United States Supreme Court, first in *Roper v. Simmons*, and later in *Graham v. Florida, Miller v. Alabama*, and *Montgomery v. Louisiana*, as the foundation for the high court's conclusions that adolescents prior to the age of majority should not be treated as adults by the criminal justice system, because their brains and resulting behavior cannot be characterized as fully mature and, as a consequence, that their culpability is not comparable to and should not be equated with that of fully mature adults.[6] In addition, the Court noted that because psychological and neurobiological development were still ongoing in adolescence, individuals were still amenable to change and able to profit from rehabilitation.

17. Further study of brain maturation conducted during the past decade has revealed that several aspects of brain development affecting judgment and decision-making are not only ongoing during early and middle adolescence, but continue at least until age 21. As more research confirming this conclusion has accumulated, the

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[4] Casey, B. J., Tottenham, N., Liston, C., & Durston, S. (2005). Imaging the developing brain: What have we learned about cognitive development? *Trends in Cognitive Science, 9,* 104–110.

[5] Steinberg, L., & Scott, E. (2003). Less guilty by reason of adolescence: Developmental immaturity, diminished responsibility, and the juvenile death penalty. *American Psychologist*, *58*, 1009-1018.

[6] The American Psychological Association filed briefs as amicus curiae in *Roper*, *Graham*, and *Miller*, outlining the state of neuropsychological and behavioral research on adolescent brain development and behavior for the Court. *See* Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646); Brief for the American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Mental Health America as Amici Curiae Supporting Petitioners, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412), *Sullivan v. Florida*, 560 U.S. 181 (2010) (No. 08-7621); Brief for the American Psychological Association, and the Missouri Psychological Association as *Amici Curiae* Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

notion that brain maturation continues into late adolescence became widely accepted among neuroscientists by 2015.[7] This contemporary view of brain development as ongoing at least until age 21 stands in marked contrast to the view held by scientists as recently as 15 years ago. We now know that, in many respects, **individuals in their late teens and early 20s are more neurobiologically similar to younger teenagers than had previously been thought**.

PSYCHOLOGICAL IMMATURITY IN ADOLESCENCE

18. Research on psychological development during adolescence conducted during the past 15 years also has led scientists to revise longstanding views of this age period. Conclusions drawn from this psychological research parallel those drawn from recent studies of brain development and indicate that **individuals in their late teens and early 20s are less mature than their older counterparts in several important and legally-relevant ways**.[8] The results of these psychological studies, including many that have been conducted by my research group, have been found not only in the United States, but around the world.[9]

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[7] Dosenbach, N., et al. (2011). Prediction of individual brain maturity using fMRI. *Science*, *329*, 1358–1361; Fair, D., et al. (2009). Functional brain networks develop from a "local to distributed" organization. *PLoS Computational Biology*, *5*, 1–14; Hedman A., van Haren N., Schnack H., Kahn R., & Hulshoff Pol, H. (2012). Human brain changes across the life span: A review of 56 longtitudinal magnetic resonance imaging studies. *Human Brain Mapping, 33*, 1987-2002; Pfefferbaum, A., Rohlfing, T., Rosenbloom, M., Chu, W., & Colrain, I. (2013). Variation in longitudinal trajectories of regional brain volumes of healthy men and women (ages 10 to 85 years) measured with atlas-based parcellation of MRI. *NeuroImage, 65*, 176-193; Simmonds, D., Hallquist, M., Asato, M., & Luna, B. (2014). Developmental stages and sex differences of white matter and behavioral development through adolescence: A longitudinal diffusion tensor imaging (DTI) study. *NeuroImage*, *92*, 356-368. Somerville, L., Jones, R., & Casey, B.J. (2010). A time of change: behavioral and neural correlates of adolescent sensitivity to appetitive and aversive environmental cues. *Brain & Cognition, 72*, 124-133.

[8] For a recent review of this research, see Steinberg, L. (2014). *Age of opportunity: Lessons from the new science of adolescence*. New York: Houghton Mifflin, Harcourt.

[9] Duell, N., Steinberg, L., Chein, J., Al-Hassan, S., Bacchini, D., Chang, L, . . . Alampay, L. (2016). Interaction of reward seeking and self-regulation in the

19. First, adolescents are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation. When asked to make a decision about a course of action, compared to adults, adolescents have more difficulty identifying the possible costs and benefits of each alternative, underestimate the chances of various negative consequences occurring, and underestimate the degree to which they could be harmed if the negative consequences occurred.[10]

20. Second, adolescents and people in their early 20s are more likely than older individuals to engage in what psychologists call "sensation-seeking," the pursuit of arousing, rewarding, exciting, or novel experiences. As a consequence of this, young people are more apt to focus on the potential rewards of a given decision than on the potential costs.[11] Other studies have indicated that heightened risk taking among adolescents is due to the greater attention they pay to the potential rewards of a risky choice relative to the potential costs. This tendency is especially pronounced among individuals between the ages of 18 and 21.[12]

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prediction of risk taking: A cross-national test of the dual systems model. *Developmental Psychology*, *52*, 1593-1605; Duell, N., Steinberg, L., Icenogle, G., Chein, J., Chaudary, N., Di Giunta, L., . . . Chang, L. (2018). Age patterns in risk taking around the world. *Journal of Youth and Adolescence*, *47,* 1052-1072. Steinberg, L., Icenogle, G., Shulman, E., Breiner, K., Chein, J., Bacchini, D., . . . Takash, H. (2018). Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation. *Developmental Science*, *21*, 1-13.

[10] Grisso, T., Steinberg, L., Woolard, J., Cauffman, E., Scott, E., Graham, S., Lexcen, F., Reppucci, N., & Schwartz, R. (2003). Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants. *Law and Human Behavior*, *27*, 333-363.

[11] Steinberg, L., Albert, D., Cauffman, E., Banich, M., Graham, S., & Woolard, J. (2008). Age differences in sensation seeking and impulsivity as indexed by behavior and self-report: Evidence for a dual systems model. *Developmental Psychology*, *44*, 1764-1778.

[12] Cauffman, E., Shulman, E., Steinberg, L., Claus, E., Banich, M., Graham, S., & Woolard, J. (2010). Age differences in affective decision making as indexed by performance on the Iowa Gambling Task. *Developmental Psychology*, *46*, 193-207; Steinberg, L., Icenogle, G., Shulman, E., Breiner, K., Chein, J., Bacchini, D., . . . Takash, H. (2018). Around the world, adolescence is a time of heightened

21. Third, adolescents and people in their early 20s are less able than older individuals to control their impulses and consider the future consequences of their actions and decisions. In general, adolescents are more short-sighted and less planful than adults, and they have more difficulty than adults in foreseeing the possible outcomes of their actions and regulating their behavior accordingly. Importantly, gains in impulse control continue to occur after age 18 and into the early 20s.[13]

22. Fourth, the development of basic cognitive abilities, including memory and logical reasoning, matures before the development of emotional maturity, including the ability to exercise self-control, rein in sensation seeking, properly consider the risks and rewards of alternative courses of action, and resist coercive pressure from others. Thus, a young person who appears to be intellectually mature may also be socially and emotionally immature.[14]

23. As a consequence of this gap between intellectual and emotional maturity, the tendencies of adolescents and people in their early 20s, relative to individuals in their mid- or late 20s, to be more focused on rewards, more impulsive, and more myopic are exacerbated when adolescents are making decisions in situations

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sensation seeking and immature self-regulation. *Developmental Science*, *21*, 1-13.

[13] Steinberg, L., Graham, S., O'Brien, L., Woolard, J., Cauffman, E., & Banich, M. (2009). Age differences in future orientation and delay discounting. *Child Development, 80,* 28-44); Steinberg, L., Albert, D., Cauffman, E., Banich, M., Graham, S., & Woolard, J. (2008) Age differences in sensation seeking and impulsivity as indexed by behavior and self-report: Evidence for a dual systems model. *Developmental Psychology, 44,* 1764-1778; Steinberg, L., Icenogle, G., Shulman, E., Breiner, K., Chein, J., Bacchini, D., . . . Takash, H. (2018). Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation. *Developmental Science*, *21*, 1-13.

[14] Icenogle, G., Steinberg, L., Duell, N., Chein, J., Chang, L., Chaudary, N., . . . Bacchini, D. (2018). Adolescents' cognitive capacity reaches adult levels prior to their psychosocial maturity: Evidence for a "maturity gap" in a multinational sample. Unpublished paper under review. Department of Psychology, Temple University; Steinberg, L., Cauffman, E., Woolard, J., Graham, S., & Banich, M. (2009). Are adolescents less mature than adults? Minors' access to abortion, the juvenile death penalty, and the alleged APA "flip-flop". *American Psychologist*, *64*, 583-594.

that are emotionally arousing, including those that generate negative emotions, such as fear, threat, anger, or anxiety. Psychologists distinguish between "cold cognition," which refers to the thinking abilities used under calm circumstances, and "hot cognition," which refers to the thinking abilities used under emotionally arousing ones. Adolescents' deficiencies in judgment and self-control, relative to adults, are greater under "hot" circumstances in which emotions are aroused than they are under calmer, "cold" circumstances.[15]

24. Fifth, adolescents' deficiencies in judgment are exacerbated by the presence of peers. It is well established that a disproportionate amount of adolescent and young adult risk taking occurs in the presence of peers.[16] Scientists believe that this is because, when they are with their peers, young people pay relatively more attention to the potential rewards of a risky decision than they do when they are alone, and that they are especially drawn to immediate rewards, including both material rewards (e.g., money, drugs) as well as social rewards (e.g., praise, the admiration of others).[17] In our research lab, we have shown that the mere presence of peers activates the brain's "reward center" among adolescents and people in their early 20s, but has

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[15] Cohen, A., Breiner, K., Steinberg, L., Bonnie, R., Scott, E., Taylor-Thompson, K., . . . Casey, B.J. (2016). When is an adolescent an adult? Assessing cognitive control in emotional and non-emotional contexts. *Psychological Science*, *4*, 549-562; Steinberg, L., Cauffman, E., Woolard, J., Graham, S., & Banich, M. (2009). Are adolescents less mature than adults? Minors' access to abortion, the juvenile death penalty, and the alleged APA "flip-flop". *American Psychologist*, *64*, 583-594.

[16] Albert, D., & Steinberg, L. (2011). Peer influences on adolescent risk behavior. In M. Bardo, D. Fishbein, & R. Milich (Eds.), *Inhibitory control and drug abuse prevention: From research to translation*. (Part 3, pp. 211-226). New York: Springer.

[17] O'Brien, L., Albert, D., Chein, J., & Steinberg, L. (2011). Adolescents prefer more immediate rewards when in the presence of their peers. *Journal of Research on Adolescence*, *21*, 747-753; Silva, K., Patrianakos, J., Chein, J., & Steinberg, L. (2017). Joint effects of peer pressure and fatigue on risk and reward processing in adolescence. *Journal of Youth and Adolescence*, *46*, 1878-1890; Weigard, A., Chein, J., Albert, D., Smith, A., & Steinberg, L. (2014). Effects of anonymous peer observation on adolescents' preference for immediate rewards. *Developmental Science*, *17*, 71-78.

no such effect on adults.[18] It is thus not surprising that a much greater proportion of juvenile crimes, compared to adult crimes, occur when individuals are in groups.[19]

25. The combination of heightened attentiveness to rewards and still-maturing impulse control makes middle and late adolescence a time of greater risk-taking than any other stage of development. This has been demonstrated both in studies of risk-taking in psychological experiments (when other factors, such as outside influences, can be controlled) and in the analysis of data on risky behavior in the real world.[20]

26. In recent experimental studies of risk-taking, the peak age for risky decision-making has been determined to be in the late teens and early 20s.[21] This age trend is consistent with epidemiological data on age trends in risky behavior, which show peaks in the adverse outcomes of risk-taking in the late teens and early 20s in a wide range of behaviors, including driver deaths, unintended pregnancy, arrests for violent and non-violent crime, and binge drinking.[22]

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[18] Chein, J., Albert, D., O'Brien, L., Uckert, K., & Steinberg, L. (2011). Peers increase adolescent risk taking by enhancing activity in the brain's reward circuitry. *Developmental Science*, *14*, F1–F10; Smith, A., Steinberg, L., Strang, N., & Chein, J. (2015). Age differences in the impact of peers on adolescents' and adults' neural response to reward. *Developmental Cognitive Neuroscience*, *11*, 75-82.

[19] Zimring, F., & Laquear, H. (2015). Kids, groups, and crime: In defense of conventional wisdom. *Journal of Research in Crime and Delinquency*, *52,* 403-415.

[20] Duell, N., Steinberg, L., Icenogle, G., Chein, J., Chaudary, N., Di Giunta, L., . . . Chang, L. (2018). Age patterns in risk taking around the world. *Journal of Youth and Adolescence*, *47*, 1052-1072.

[21] Braams, B., van Duijvenvoorde, A., Peper, J., & Crone, E. (2015). Longitudinal changes in adolescent risk-taking: A comprehensive study of neural responses to rewards, pubertal development and risk taking behavior. *Journal of Neuroscience, 35*, 7226-7238; Shulman, E., & Cauffman, E. (2014). Deciding in the dark: Age differences in intuitive risk judgment. *Developmental Psychology*, *50,* 167-177.

[22] Willoughby, T., Good, M., Adachi, P., Hamza, C., & Tavernier, R. (2013). Examining the link between adolescent brain development and risk taking from a social-developmental perspective. *Brain and Cognition*, *83*, 315-323.

NEUROBIOLOGICAL ACCOUNTS OF ADOLESCENT IMMATURITY

27. Many scientists, including myself, believe that the main underlying cause of psychological immaturity during adolescence and the early 20s is the different timetables along which two important brain systems change during this period, sometimes referred to as a "maturational imbalance." The system that is responsible for the increase in sensation-seeking and reward-seeking that takes place in adolescence, which is localized mainly in the brain's limbic system, undergoes dramatic changes very early in adolescence, around the time of puberty. Attentiveness to rewards remains high through the late teen years and into the early 20s. But the system that is responsible for self-control, regulating impulses, thinking ahead, evaluating the rewards and costs of a risky act, and resisting peer pressure, which is localized mainly in the prefrontal cortex, is still undergoing significant maturation well into the mid-20s.[23] Thus, during middle and late adolescence there is an imbalance between the reward system and the self-control system that inclines adolescents toward sensation-seeking and impulsivity. As this "maturational imbalance" diminishes, during the mid-20s, there are improvements in such capacities as impulse control, resistance to peer pressure, planning, and thinking ahead.[24]

28. Studies of structural and functional development of the brain are consistent with this view. Specifically, **research on neurobiological development**

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[23] Casey, B. J., et al. (2010). The storm and stress of adolescence: Insights from human imaging and mouse genetics. *Developmental Psychobiology*, *52*, 225-235; Shulman, E., Harden, K., Chein, J., & Steinberg, L. (2015). Sex differences in the developmental trajectories of impulse control and sensation-seeking from early adolescence to early adulthood. *Journal of Youth and Adolescence*, *44*, 1-17; Steinberg, L. (2008). A social neuroscience perspective on adolescent risk-taking. D*evelopmental Review*, *28*, 78-106; Van Leijenhorst, L., Moor, B. G., Op de Macks, Z. A., Rombouts, S. A. R. B., Westenberg, P. M., & Crone, E. A. (2010). Adolescent risky decisionmaking: Neurocognitive development of reward and control regions. *NeuroImage, 51*, 345–355.

[24] Albert, D., & Steinberg, L. (2011). Judgment and decision making in adolescence. *Journal of Research on Adolescence*, *21*, 211-224; Blakemore, S-J., & T. Robbins, T. (2012). Decision-making in the adolescent brain. *Nature Neuroscience*, *15*, 1184-1191.

shows continued maturation into the early or even mid-20s of brain regions and systems that govern various aspects of self-regulation and higher-order cognitive function. These developments involve structural (i.e., in the brain's anatomy) and functional (i.e., in the brain's activity) changes in the prefrontal and parietal cortices, as well as improved structural and functional connectivity between the limbic system and the prefrontal cortex. The structural changes are primarily the result of two processes: synaptic pruning (the elimination of unnecessary connections between neurons, which allows the brain to transmit information more efficiently), and myelination (the growth of sheaths of myelin around neuronal connections, which functions as a form of insulation that allows the brain to transmit information more quickly). Although the process of synaptic pruning is largely finished by age 16, myelination continues into the late teens and throughout the 20s.[25] Thus, although the development of the prefrontal cortex is largely complete by the end of middle adolescence, the maturation of connections between this region and regions that govern self-regulation and the brain's emotional centers, facilitated by the continued myelination of these connections, continues into late adolescence and may not be complete until the mid-20s.[26] As a consequence, late adolescents often have difficulty controlling their impulses, especially in emotionally arousing situations.

29. Recent studies that my colleagues and I conducted, of middle adolescents, late adolescents, and individuals in their mid-20s, illustrate this point. We assessed individuals' impulse control and brain activity while experimentally

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[25] For reviews of changes in brain structure and function during adolescence and young adulthood, see Blakemore, S-J. (2012). Imaging brain development: The adolescent brain. *Neuroimage*, *61*, 397-406; Engle, R. (2013). The teen brain. *Current Directions in Psychological Science*, *22 (2)* (whole issue); and Luciana, M. (Ed.) (2010). Adolescent brain development: Current themes and future directions. *Brain and Cognition, 72* (2), whole issue; and Spear, L., & Silveri, M. (2016). Special issue on the adolescent brain. *Neuroscience and Biobehavioral Reviews, 70* (whole issue).

[26] Khundrakpam, B, Lewis, J., Zhao, L., Chouinard-Decorte, F., & Evans, A. (2016). Brain connectivity in normally developing children and adolescents. *NeuroImage, 134*, 192-203; Steinberg, L. (2013). The influence of neuroscience on U.S. Supreme Court decisions involving adolescents' criminal culpability. *Nature Reviews Neuroscience*, *14,* 513-518.

manipulating their emotional state. Under conditions during which individuals were not emotionally aroused, individuals between 18 and 21 exhibited impulse control and patterns of brain activity comparable to those in their mid-20s. But under emotionally arousing conditions, 18- to 21-year-olds demonstrated levels of impulsive behavior and patterns of brain activity that were comparable to those in their mid-teens.[27] In other words, under some circumstances, the brain of a 18- to 21-year-old functions in ways that are similar to that of a 16- or 17-year old.

CONCLUSION

30. Extensive studies demonstrate that important neurobiological development is ongoing throughout the teenage years and continues into the early 20s. As a result of neurobiological immaturity, young people, even those past the age of majority, continue to demonstrate difficulties in exercising self-restraint, controlling impulses, considering future consequences, making decisions independently from their peers, and resisting the coercive influence of others. Heightened susceptibility to emotionally laden and socially charged situations renders adolescents more vulnerable to the influence of others, and in such situations young people are even less able to consider and weigh the risks and consequences of a chosen course of action. **Many of the same immaturities that characterize the brains of individuals younger than 18, and that have been found to mitigate their criminal culpability, are characteristic of the brains of individuals between 18 and 21**.

31. **Criminal acts committed by adolescents, even those past the age of majority, are best understood in light of their neurobiological and psychological immaturity. For this reason, it is inappropriate to assign the same degree of culpability to criminal acts committed at this age to that which would be assigned to the behavior of a fully mature and responsible adult**.

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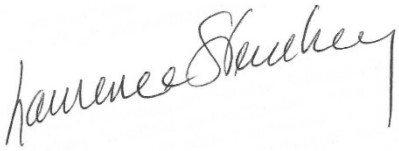
[27] Cohen, et al. (2016). When is an adolescent an adult? Assessing cognitive control in emotional and non-emotional contexts. *Psychological Science*, *4*, 549-562; Rudolph, M., Miranda-Dominguez, O., Cohen, A., Breiner, K., Steinberg, L., . . . Fair, D. (2017). At risk of being risky: The relationship between "brain age" under emotional states and risk preference. *Developmental Cognitive Neuroscience*, *24*, 93-106.

32. In his majority opinion in *Roper v. Simmons*, Justice Kennedy noted three characteristics of juveniles that diminish their criminal responsibility: their impetuosity, their susceptibility to peer influence, and their capacity to change. In Justice Kennedy's opinion in *Graham v. Florida*, as well as Justice Kagan's opinion in *Miller v. Alabama*, the Court noted that the characterization of juveniles as inherently less mature than adults, and therefore less responsible for their crimes, was supported by a growing scientific literature affirming adolescents' neurobiological as well as psychological immaturity. In the six years that have elapsed since *Miller*, more scientific evidence consistent with these arguments has continued to accrue.

33. Recent discoveries in psychological science and in brain science, as well as changes in society, should ask us to rethink how we view people in late adolescence and young adulthood in terms of their treatment under the law. It is now clear that neurobiological and psychological immaturity of the sort that the Supreme Court referenced in its opinions on the diminished culpability of minors is also characteristic of individuals in their late teens and early 20s. **Certainly, there is no scientific evidence to suggest that a meaningful psychological or neurobiological distinction can be drawn between individuals who are nearly 18 years old and those who are between 18 and 21**. Thus, for the very same reason that the Supreme Court found capital punishment and mandatory life without the possibility of parole in cases involving defendants under the age of 18 to be unconstitutional, these penalties should be prohibited in cases involving defendants under the age of 21.

34. I believe that the facts I have stated in this report are true and that the opinions I have expressed are within a reasonable degree of scientific certainty.



Laurence Steinberg, Ph.D.
Philadelphia, PA
August 29, 2018

DECLARATION OF ANDREW KENNEDY

I, Andrew Kennedy declare:

1. When I was 19, I caused the death of Kieryn Brenda Severson, who died days before her first birthday.

2. I caused her death when I suddenly lost control of my emotions and seriously hurt her.

3. Growing up, I had difficulty controlling my emotions. I was often anxious and when stressed I would lose control. When I lost control, sometimes I acted out without thinking. Sometimes, like with Kieryn, I acted violently.

4. It is hard to explain. I never planned to hurt Kieryn. I never wanted to hurt her. But, when she was crying and I could not find a way to comfort her, I would feel my emotions quickly rise and it was like my brain turned off. All of a sudden, I was hurting her. At that moment, I was not thinking. I was not considering options. I was not thinking about stopping. I just acted in a way that makes me deeply ashamed.

5. Now that I am older, I can better control my emotions. Now that I am older, when I feel my emotions starting to take over I can stop and figure out ways to calm down or options to remove myself from the situation. Back then, I did not have the same abilities that I do today.

6. I am not trying to justify my actions. My actions are not justifiable. Instead, I am only trying to explain how back then I lost control, acted violently, did not think, did not consider Kieryn, did not consider any consequences, just acted like I was on some sort of terrible and harmful auto-pilot.

7. Once again, I am sorry. I am ashamed. I am responsible.

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my ability.

13 February 2019, Coyote Ridge Correction Center

Date and Place

Andrew Kennedy

VERIFICATION OF PETITION

I, Andrew Kennedy verify that the attached petition is true and correct and filed on my behalf.

13, February 2019, Coyote Ridge Correction Center
Date and Place

Andrew Kennedy

ALSEPT & ELLIS

April 10, 2019 - 1:49 PM

Filing Personal Restraint Petition

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Appellate Court Case Number:	Case Initiation
Trial Court Case Title:	State Vs Andrew Steven Kennedy
Trial Court Case Number:	04-1-01203-9
Trial Court County:	Cowlitz Superior Court
Signing Judge:	
Judgment Date:	

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