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No. 92605-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ZION D. HOUSTON-SCONIERS and TRESON LEE ROBERTS,

Petitioners

(Consolidated cases for trial and on appeal)

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RESPONSE TO *AMICUS* BRIEF OF WAPA ON  
BEHALF OF PETITIONER  
TRESON ROBERTS

---

KATHRYN A. RUSSELL SELK  
WSBA No. 23879  
Counsel for Petitioner Roberts  
RUSSELL SELK LAW OFFICE  
1037 Northeast 65<sup>th</sup> Street, PMB 176  
Seattle, Washington 98115  
206.782.3353

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A. ARGUMENT IN RESPONSE TO *AMICUS*

CATEGORICAL “AUTOMATIC DECLINE” OF JUVENILES  
IS NO LONGER CONSTITUTIONAL AND THE ARGUMENTS  
OF *AMICUS* TO THE CONTRARY SHOULD BE REJECTED

The Washington Association of Prosecuting Attorneys (“WAPA”),  
has filed a motion and Memorandum as *amicus curiae* (“Memo”).

WAPA does not argue any of the issues regarding the imposition of  
mandatory adult flat-time sentencing enhancements or the actual  
sentences imposed. Memo at 1-16. Instead, it argues solely that  
automatic decline is constitutional and In re Boot, 130 Wn.2d 553, 925  
P.2d 964 (1996), has been unaffected by the sea change we have seen in  
caselaw coming from our nation’s highest court. See id. This Court  
should reject each of WAPA’s arguments in turn.

Many of the arguments WAPA makes are amply addressed in  
pleading already filed. A few points deserve brief mention, however.

First, although WAPA argues the continuing validity of Boot, it  
fails to discuss the basis for that decision - or mention that its main  
premise (and the case it came from) has since been overruled. See Memo  
at 1-16. Boot rejected both the 8<sup>th</sup> Amendment and due process challenges  
to auto-decline on the grounds that there were no constitutional  
differences between juveniles and adults for those purposes. Boot, 130  
Wn.2d at 571. Boot took that proposition from Stanford v. Kentucky, 492

U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), and Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), overruled Stanford. See Boot, 130 Wn.2d at 571; Roper, 543 U.S. at 560-66.

Notably, the basis for that overruling was the recognition that the very holding of Stanford on which the Boot Court relied was constitutionally infirm. See Roper, 543 U.S. at 564-65.

WAPA's arguments also depend upon this Court deciding to narrow the scope of Miller v. Alabama, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), its antecedents and progeny. WAPA suggests Petitioners are improperly trying to stretch Miller beyond the limited reach of sentencing, and urges this Court to find that Boot was not "undermined" by Miller. Memo at 5-8. Indeed, WAPA argues that Miller, Roper et al simply "mandate that age be considered at the time of sentencing." Memo at 8.

Thus, WAPA is trying to constrain our new understanding of the neurological development of the adolescent brain as if it is irrelevant to anything but sentencing. But the U.S. Supreme Court has already rejected this same constraint, a year *before* Miller, when it relied on the same considerations of the unique and transient vulnerabilities of youth outside

of the sentencing realm. See J.D.B. v. North Carolina, 564 U.S. \_\_\_, 131 S. Ct. 2394, 2397, 180 L. Ed. 2d 310 (2011) (applying the same factors later listed in Miller and the “differentiating characteristics of youth” in the context of interrogation). WAPA does not mention J.D.B. despite the significance of that case to WAPA’s argument that the ideas behind Miller have no currency outside sentencing. Memo at 1-16.

Notably, in J.D.B., the Court specifically stated that failing to apply the same evidence regarding juvenile development to the situation would be “to ignore the very real differences between children and adults,” and, further, “to deny children the full scope of the procedural safeguards” to which they are entitled. J.D.B., 131 S. Ct. at 2405-2406.

WAPA also relies on the theory that the Eighth Amendment should not apply and RCW 13.04.030 is not “punitive” because it is hypothetically possible that a juvenile automatically transferred “may actually face a *less punitive* sentence than one who remains under the jurisdiction of the juvenile court.” Memo at 10 (emphasis in original). But WAPA itself recognizes that the intent of the automatic decline statute is to further intent “*to punish* with certainty and more severity” certain juvenile offenders. Memo at 5, quoting, State v. Posey, 161 Wn.2d 638, 644, 167 P.3d 560 (2007) (emphasis added; citations omitted).

Further, WAPA's attempt to minimize the extremely stark differences between the juvenile and adult court systems and their consequences is not well taken. This Court has repeatedly recognized those differences and that the loss of juvenile court jurisdiction has an extreme potential impact. See, State v. Saenz, 175 Wn.2d 167, 283 P.3d 1094 (2012). And this Court has recently recognized that the qualities that distinguish juveniles from adults do not disappear when they turn 18 - a further reason automatically treating children ages 16 and 17 as adults is constitutionally disproportionate. See State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015).

Ultimately, WAPA does not dispute or challenge any of the fundamentals; that juveniles are developmentally different as recognized in Miller et al. Memo at 1-16. It does not dispute or present any studies to counter the many, many resources relied on by our nation's highest court in finding children fundamentally different for criminal justice purposes. Memo at 1-16. And it does not provide any rebuttal to the evidence cited by counsel and other *amici* indicating that automatic decline does *not* serve the intended purposes and instead decreases public safety and has little deterrent effect. Memo at 1-16. WAPA's failure to discuss these concepts is particularly telling in light of WAPA's statement

of interest, which repeats the now-debunked theory that “[t]he automatic placement in adult court of juveniles who commit the most serious crimes” results in “a sentence commensurate with their crime” and “helps ensure the safety of the public.” Memo at 1. This generalized declaration in the face of the evidence to the contrary suggests a need for caution in accepting their generalizations throughout.

Indeed, some of those generalizations are based on citations which are no longer good or facts which are no longer true. WAPA relies on two appendices as supporting its declarations regarding the practices and laws of other states. Memo at 12-13. While the appendices were printed on September 2 of this year, they are based on stale information; Appendix A is based upon a summary from 2014, and Appendix B is based on a summary from 2015. Memo at App. A and B.

But even a cursory search shows serious problems with relying on that secondary and old information. For example, WAPA’s information cites Georgia as having an upper age for juvenile court jurisdiction as 16; but effective May 5, 2015, that limit was raised to 17. See 2015 Ga. Laws Act 75 (H.B. 361). Louisiana is also wrong: it has gone from 16 to 17 and enacted sweeping changes including prohibiting jail for kids under 13 for misdemeanors, limiting sentences for nonviolent offenders to months, not years, requiring a review after 6 months of custody and other reforms.

See 2016 Laws (SB 301, SB 302, SB 303, SB 324). South Carolina is wrong; they raised the age to 17. 2016 Laws of S.C., S916.

Further, the information provided by *amicus* does not provide the full story. Effective January 1, 2016, Illinois no longer allows automatic transfer for armed robbery with a firearm. See 705 ILCS 405/5-130 (West 2016) (Public Act 99-258). And it no longer allows such transfer for 15 year olds. Id. Utah has drastically reduced what they call “direct file,” eliminating it for anyone accused as an accomplice. See Utah Laws 2015, (SB 167). WAPA’s incomplete and old information does not accurately reflect the depth of the actual reality across the country.

Like in other states, our state’s harsh mandatory transfer laws were enacted in the face of fears which have now been completely proven wrong. The implications - especially for our children of color - have been extreme and stark. By automatically treating all 16 and 17 year olds accused of committing a serious violent felony as if they were equally as mature and culpable as adults and depriving them of any consideration of the mitigating factors of youth, our state’s automatic decline law, either separately or together with the application of mandatory flat-time sentencing enhancements as in this case, violates state and federal

prohibitions against cruel and unusual punishment and runs afoul of due process protections. This Court should so hold.

B. CONCLUSION

For the reasons stated herein, this Court should grant relief.

DATED this 30th day of September, 2016.

Respectfully submitted,

*/s/ Kathryn A. Russell Selk*

KATHRYN RUSSELL SELK, WSBA No. 23879

Counsel for Petitioner Roberts

RUSSELL SELK LAW OFFICE

1037 Northeast 65<sup>th</sup> St. #176

Seattle, Washington 98115

(206) 782-3353

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Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Brief via electronic mail (per agreement by the below) upon the following:

counsel for codefendant Zyion Houston-Sconiers at sccattorney@yahoo.com;

the prosecutor's office at pcpatccf@co.pierce.wa.us, and Thomas Roberts at troberts@co.pierce.wa.us;

counsel for amicus at: talner@aclu.org ;  
hgateless@ccyi.org ; travis@washapp.org ;  
nick.allen@columbialegal.org; changro@seattleu.edu;  
hillary.behrman@teamchild.org ; Cindy@defensenet.org;  
amanda@defensenet.org ; suzanne@suzanneelliotlaw.com.

DATED this 30th day of September, 2016.

Respectfully submitted,

/s/ Kathryn A. Russell Selk

KATHRYN RUSSELL SELK, WSBA No.  
23879

Counsel for Mr. Roberts

RUSSELL SELK LAW OFFICE

1037 Northeast 65<sup>th</sup> St. #176

Seattle, Washington 98115

(206) 782-3353

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Kathryn Russell Selk

No. 23879  
Russell Selk Law Office  
1037 N.E. 65<sup>th</sup> #176  
Seattle, WA. 98115

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Russell Selk Law Office  
PMB #176  
1037 NE 65th St  
Seattle, WA 98115  
Phone: 206.782.3353

[KARSdroit@aol.com](mailto:KARSdroit@aol.com)