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No. 95263-9
Consolidated with 95510-7 and 96061-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY ALLEN MORETTI;
HUNG VAN NGUYEN;
FREDERICK ORR

Appellants.

On Appeal from the Superior Court of the
State of Washington for Grays Harbor County

AMICI CURIAE BRIEF OF JUVENILE LAW CENTER,
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS, WASHINGTON DEFENDER ASSOCIATION, AND
TEAMCHILD, IN SUPPORT OF APPELLANTS
MORETTI, NGUYEN, AND ORR

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amici are non-profit organizations that advocate for the integration of research regarding adolescent development into juvenile justice practice and policy. This research shows that young people who enter the justice system need extra protection and special care, and that adolescent immaturity often manifests in ways that implicate culpability, including a diminished ability to assess risks, make good decisions, and control impulses. Many of the same immaturities that characterize the brains of individuals younger than 18 years old, and that have been found to mitigate their criminal culpability, are also characteristic of the brains of individuals between the ages of 18 and 21 years, and even up to the mid-20s. For these reasons, Amici believe that, like those under 18 years of age, adolescents between the ages of 18-21 years old should be held accountable, but also that they cannot be held to the same standards of blameworthiness and culpability as their mature adult counterparts.

Juvenile Law Center advocates for rights, dignity, equity, and opportunity for young people in the child welfare and justice systems through litigation, appellate advocacy, and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law

Center strives to ensure that laws, policies, and practices affecting young people advance racial and economic equity and are rooted in research, consistent with the unique developmental characteristics of youth and young adults, and reflective of international human rights values. Juvenile Law Center has represented hundreds of young people and filed influential amicus briefs in state and federal cases across the country.

The Washington Association of Criminal Defense Lawyers (“WACDL”) is a nonprofit association of over 1,100 attorneys practicing criminal defense law in Washington State. As stated in its bylaws, WACDL was formed “to improve the quality and administration of justice.” The issue for which WACDL submits this amicus brief directly bears on this purpose. WACDL has filed numerous amicus briefs in this Court. Undersigned counsel has authority to appear on behalf of WACDL as amicus in this case.

The Washington Defender Association (“WDA”) is a non-profit association representing more than 25 public defender offices and over a 1,600 indigent criminal defense attorneys, investigators, social workers and children’s civil rights attorneys throughout the state of Washington. WDA and its members are committed to supporting and improving indigent defense and the lives of indigent defendants and their families. A primary purpose of WDA is to improve the administration of justice and stimulate

efforts to remedy inadequacies in substantive and procedural law that contribute to injustice. For many years, WDA has been actively involved in issues related to youthful offenders, juvenile justice and representation of youth in both the juvenile and adult courts. WDA and its members have previously been granted leave to file amicus briefs on many issues related to criminal defense, representation of the indigent clients and the unique needs of youth in our justice systems.

TeamChild is a nationally-recognized, nonprofit civil legal aid organization with offices in Pierce, Spokane, Yakima, and King Counties. TeamChild's mission is to uphold the rights of youth involved or at risk of involvement in the juvenile justice system to help them secure the education, healthcare, housing, and other support they need to achieve positive outcomes in their lives. TeamChild draws on multiple strategies to advance this mission with an emphasis on direct representation and advocacy. TeamChild specifically works with youth (ages 12-24) to determine, identify, and overcome barriers to accessing appropriate community-based support and often shares that information with sentencing courts. TeamChild has represented youth charged as adults and young adults facing criminal charges. TeamChild has also participated as amicus in many cases to advocate for youth in Washington State and nationally.

II. STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case as set forth by Appellants.

III. INTRODUCTION

In *Miller v. Alabama*, the United States Supreme Court ruled that mandatory life without parole sentences for juveniles convicted of homicide violate the 8th Amendment of the United States Constitution. The Court, relying on the same underlying scientific research used to bar the death penalty for juveniles, held that children were less culpable than their adult counterparts because of their immaturity, impetuosity, susceptibility to peer influence, and greater capacity for rehabilitation. The Washington Supreme Court accepted these scientific findings and held that Washington Const. art. I, § 14 provides even greater protection.

Modern research now indicates that individuals retain these characteristics well into their twenties. As young adults possess the same characteristics that the Supreme Court has determined reduce a juvenile's culpability, lengthy sentences for this population are also disproportionate under the Eighth Amendment. Because the Persistent Offender Accountability Act (POAA) does not allow for individualized sentencing that accounts for a young adult's developmental immaturity and ongoing neurological development and requires mandatory imposition of

life without parole, it must be ruled unconstitutional under the state and federal constitutions, as applied to young adults.

IV. ARGUMENT

A. Courts must consider emerging research on youth brain development during sentencing

The Supreme Court has acknowledged the developmental differences between children and adults and held that these differences require either the outright banning of certain punishments or the individualized consideration of a defendant's youthful characteristics prior to imposition of certain harsh sentences routinely meted out to adults. Research has shown the "differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Roper v. Simmons*, 543 U.S. 551, 572, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding that imposing the death penalty on individuals convicted as juveniles violates the Eighth Amendment's prohibition against cruel and unusual punishment).

In subsequent Eighth Amendment cases, the Court extended its concern about youth's insufficient culpability to include life without parole sentences. *Graham v. Florida*, 560 U.S. 48, 82, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (holding that imposing life without parole sentences on

juveniles convicted of non-homicide offenses is unconstitutional); *Miller v. Alabama*, 567 U.S. 460, 465, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (holding that mandatory life without parole sentences for juveniles convicted of homicide are unconstitutional). In striking down the death penalty and limiting life without parole sentences for juveniles, the Supreme Court emphasized that “[b]ecause juveniles have diminished culpability and greater prospects for reform, . . . they are less deserving of the most serious punishments.” *Miller*, 567 U.S. at 471. Without consideration of youth, “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” *Graham*, 560 U.S. at 76 (2010). Thus, a life without parole sentence will be unconstitutional if it “precludes consideration of” an adolescent’s “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” *Miller*, 567 U.S. at 477.

This Court has explicitly accepted the scientific findings underpinning *Roper*, *Graham*, and *Miller* and interpreted Washington’s Constitution to provide greater protection than the Eighth Amendment. *See State v. Bassett*, 192 Wn.2d 67, 78, 428 P.3d 343 (2018). In *State v. O’Dell*, this Court disavowed prior cases and held that youthful characteristics can mitigate the sentences of defendants who are over 18 years old. 183 Wn.2d 680, 695, 358 P.3d 359 (2015) (“we now know that age may well mitigate

a defendant’s culpability, even if that defendant is over the age of 18”). Notably, this Court cited to the state legislature’s findings that “adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults. It is appropriate to take these differences into consideration when sentencing *juveniles tried as adults*.” *Id.* at 687, citing Laws of 2005, ch. 437, § 1 (emphasis in original). (“The legislature has determined that all defendants 18 and over are, in general, equally culpable for equivalent crimes. But it could not have considered the particular vulnerabilities—for example, impulsivity, poor judgment, and susceptibility to outside influences—of specific individuals. The trial court is in the best position to consider those factors”).

Most recently, this Court reaffirmed that a sentencing court must consider the mitigating factors of a defendant’s youth and has “the discretion to consider exceptional sentencing even where statutes would otherwise limit it.” *State v. Gilbert*, No. 95814-9, slip op. at 7 (Wash. Apr. 4, 2019) (*en banc*). This Court’s rulings requiring consideration of youth in sentencing cannot “be read as confined to, or excluding certain types of sentencing hearings as [this Court] held that the courts have discretion to impose downward sentences *regardless of how the juvenile got there*.” *Id.* at 7-8 (quoting *State v. Houston-Sconiers*, 188 Wn.2d 1, 9, 391 P.3d 409 (2017) (quotations omitted) (emphasis added). The Persistent Offender

Accountability Act (POAA) as applied to offenses committed by young adults¹ is in stark contrast to this jurisprudence.

B. According to Emerging Science, Brain Functions Relevant to the Characteristics of Youth Relied Upon by the U.S. Supreme Court in *Roper v. Simmons* and its Progeny are Still Developing in Older Adolescents and Young Adults

This Court has recognized that the legislature, when enacting mandatory sentencing laws such as the Sentencing Reform Act and the POAA, “did not have the benefit of the data underlying the decision in” *Roper*, *Graham*, and *Miller*. *O’Dell*, 183 Wn.2d at 691. The Supreme Court’s holdings in each of these cases were predicated on scientific research identifying three developmental differences between youth and adults: youth’s lack of maturity and impetuosity; youth’s susceptibility to outside influences, especially negative influences; and youth’s capacity for change. *See Montgomery v. Louisiana*, 136 S.Ct. 718, 733, L.Ed.2d 599 (2016) (quoting *Miller*, 567 U.S. at 471). These developmental characteristics make youth less culpable for their criminal behavior; their

¹ The POAA is colloquially referred to as the “three strikes” law because it applies to individuals who have been convicted of three qualifying serious offenses. Petitioner Anthony Moretti’s first “strike” was at age 20 in 2004. *Petition for Review* at 6 (filed Dec. 4, 2017). Petitioner Orr’s first “strike” was at age 19 and his second “strike” at age 21. *Supp. Br. of Petitioner Frederick Orr* at 1-2 (filed Mar. 25, 2019). Petitioner Hung Nguyen’s first strike was at age 20. *Petition for Review* at 4 (filed Feb. 12, 2018).

“conduct is not as morally reprehensible as that of an adult.” *Roper*, 543 U.S. at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion)).

1. *Research shows neurodevelopmental growth continues for young adults into their mid to late-twenties*

Prior to 2010, brain maturation research focused predominately on individuals under 18 years of age. This research proved crucial to the *Roper*, *Graham*, *Miller*, and *Houston-Sconiers* decisions. As this federal and state jurisprudence took shape, the research also continued. In the last decade, studies on brain maturation confirmed that the aspects of brain development that affect judgment and decision-making do not end when an adolescent turns 18 years old. That neurodevelopmental growth continues into a person’s mid to-late-twenties. See Christian Beaulieu & Catherine Lebel, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 27 J. Neuroscience 31 (2011); Adolf Pfefferbaum et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 0 to 85 Years) Measures with Atlas-Based Parcellation of MRI*, 65 NeuroImage 176, 176-193 (2013). One longitudinal study that tracked brain development of 5,000 children demonstrated that their brains were not fully mature until at least 25 years of age. Nico U. F. Dosenbach et al., *Prediction of Individual Brain Maturity*

Using fMRI, 329 Sci. 1358, 1358-59 (2010). There is now a large body of scientific research confirming that the characteristics relied upon by the Supreme Court in increasing constitutional protection for juveniles continue “far later than was previously thought,” and at least through age 21.

2. *Young adults, like adolescents, share hallmark characteristics that make them less culpable*

Young adults possess the same characteristics as adolescents that make them “less culpable” and “[w]hether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution” is diminished. *Roper*, 543 U.S. at 571. Specifically, “[y]oung adults are . . . more susceptible to peer pressure, less future-oriented and more volatile in emotionally charged settings.” Vincent Schiraldi & Bruce Western, *Why 21 year-old offenders should be tried in family court*, Wash. Post (Oct. 2, 2015), https://www.washingtonpost.com/opinions/time-to-raise-the-juvenile-age-limit/2015/10/02/948e317c-6862-11e5-9ef3fde182507eac_story.html?utm_term=.82fc4353830d.

Researchers have found specifically that two important parts of the brain develop at different times, leading to a “maturational imbalance” in middle to late adolescence. The part of the brain that causes adolescents to be sensation-seeking and reward-seeking develops – or kicks into high gear

– around the time of puberty. But the part of the brain that is responsible for self-control, regulating impulses, thinking ahead, evaluating the rewards and costs of a risky act, and resisting peer pressure is still undergoing dramatic change well into the mid-twenties. *See, e.g.*, Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. Rev. L. & Soc. Change 139, 163 (2016) (citing to research that found antisocial peer pressure was a highly significant predictor of reckless behavior in emerging adults 18 to 25); Alexander Weingard et al., *Effects of Anonymous Peer Observation on Adolescents' Preference for Immediate Rewards*, 17 Dev. Sci. 71 (2013) (finding that a propensity for risky behaviors, including “smoking cigarettes, binge drinking, driving recklessly, and committing theft,” exists into early adulthood past 18, because of a young adult’s “still maturing cognitive control system”); Kathryn Monahan et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 Crime & Just.: A Review of Research 577, 582 (2015) (finding that the development of the prefrontal cortex which plays an “important role” in regulating “impulse control,” decision-making, and pre-disposition towards “risk[y]” behavior, extends at least to 21); Shulman, E., Harden, K., Chein, J., & Steinberg, L., *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 (2015) (finding that male adolescents have greater levels of sensation-seeking and lower levels of impulse control than female adolescents, and that the development of impulse control in male adolescents is more gradual than in female adolescents). Brief for Am. Med. Ass'n & Am. Acad. Child & Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 19-20, *Miller v. Alabama*, 567 U.S. 460 (2012) (“[R]esponse inhibition, emotional regulation, planning and organization . . . continue to develop between adolescence and young adulthood.” (second alteration in original) (citations omitted)).

Research has also come to 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 circumstances. 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. Alexandra O. Cohen et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 Psychol. Sci. 549-562 (2016); Steinberg, L., Cauffman, E., Woolard, J., Graham, S., & Banich, M., *Are Adolescents Less Mature Than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “flip-flop,”* 64 Am. Psychol., 583-594 (2009); M. Rudolph et al., *At*

Risk of Being Risky: The Relationship Between “Brain Age” Under Emotional States and Risk Preference, 24 *Developmental Cognitive Neuroscience*, 93-106 (2017). In circumstances of “hot cognition,” the brain of an 18- to 21-year-old functions like that of a 16- or 17-year-old. *Id.*

Overall, young adults are more prone to risk-taking, acting in impulsive ways that likely influence their criminal conduct, and are not yet mature enough to anticipate the future consequences of their actions. *See* Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 *Fordham L. Rev.* 641, 644 (2016), Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 *Child Dev.* 28, 35 (2009). A POAA scheme that punishes people for criminal conduct from their young adult years inherently opposes *Roper* and its progeny.

C. The POAA Should Incorporate the Eighth Amendment’s Requirement for Individualized Sentencing

As set forth above, the presence of the hallmark characteristics relied upon by the Supreme Court in *Roper* and its progeny apply to young adults as well. The POAA’s mandatory sentencing scheme does not allow courts to administer individualized sentences or consider social science research about moral culpability for young adults.²

² There is a factual dispute about whether Petitioner Hung Van Nguyen has an intellectual disability that interferes with his ability to assist in his defense. *See Supp. Br. of*

Sentencing courts must consider mitigating circumstances such as the defendant's youthfulness. *Houston-Sconiers*, 188 Wn.2d at 9. This Court further expanded the reach of *Miller*, holding that "sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable [Sentencing Reform Act] ranges and/or sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there." *Id.* at 9. Furthermore, to comply with the Eighth Amendment, sentencing courts, "must address [] differences" between juveniles and adults in crafting an appropriate sentence. *Id.* at 9. *See also State v. Gilbert*, No. 95814-9, slip op. at 7 (Wash. Apr. 4, 2019) (*en banc*). (judges have "the discretion to consider exceptional sentencing even where statutes would otherwise limit it").

However, the POAA mandates that judges sentence "persistent offenders" to life in prison without the possibility of parole. RCW 9.94A.570. Essentially, individuals that commit three qualifying offenses, or "strikes," will receive a mandatory life sentence. In contrast, this Court has held that sentencing courts "must conduct an individualized hearing and take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" for

Petitioner Nguyen at 11 (filed Mar. 29, 2019). The POAA's mandatory nature does not allow a judge to consider intellectual capacity at the time of each offense.

juvenile offenders. *State v. Ramos*, 187 Wn.2d 420, 428, 387 P.3d 650 (2017) (internal quotations omitted). The POAA's mandatory scheme prevents sentencing judges from considering an individual's youth at the time of each qualifying offense.

In striking mandatory life without parole sentences for individuals under 18, the Supreme Court focused on the attendant characteristics of youth that separate them from their adult counterparts and the mandatory nature of the sentence which omitted such considerations. The Court emphasized that “[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it.” *Miller*, 567 U.S. at 476. Even when they commit heinous crimes, the Court has reaffirmed that a young offender is entitled to an individualized sentencing hearing prior to the imposition of life without parole because their age and its attendant characteristics weigh against the proportionality of the punishment. This individualized sentencing is necessary here to ensure the Petitioners are not improperly subjected to death by incarceration for convictions stemming from their young adulthood. Because young adults are also susceptible to outside pressures like juveniles, it is important for the courts to consider their home and family environments and the impact of familial and peer pressures on these young adults and their criminal activities at the time of

each qualifying POAA offense. Their continuing brain development—even until age 25—demonstrates that young adults are also capable of change and rehabilitation, and this capacity must be fully considered before predicate offenses from their youthful years result in an irrevocable life sentence.

The *Miller* Court required consideration of these characteristics of youth so a life without parole sentence is only given to the “rare juvenile offender whose crime reflects irreparable corruption.” 567 U.S. at 479-80. A mandatory sentencing scheme that establishes someone as permanently incorrigible, irreparably corrupt, or not amenable to rehabilitation based on offenses committed as young adults at a time when neurological development in key areas of the brain remains incomplete does not comport with overwhelming scientific research on adolescent development and the Supreme Court’s recognition of this science.

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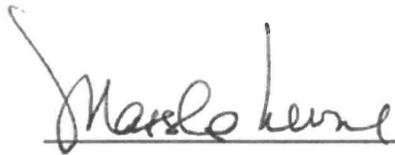
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V. CONCLUSION

For the foregoing reasons, this Court should find that Washington's POAA violates Article I, Section 14 of the Washington State Constitution.

Respectfully submitted this 19th day of April, 2019.



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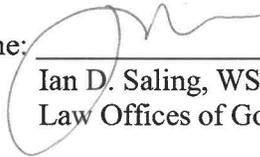
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CERTIFICATE OF SERVICE

I, Ian D. Saling, state that on the 19th Day of April, 2019, I caused the original **Amici Curiae Brief of Juvenile Law Center, Washington Association of Criminal Defense Lawyers, Washington Defender Association, and TeamChild, in Support of Appellants Moretti, Nguyen, and Orr** to be filed in the **Washington State Supreme Court** and a true copy of the same to be served all counsel of record via the Court's ECF system.

I certify under penalty of perjury of the laws of the State of Washington the foregoing is true and correct.

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