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, APPELLANT;
HUNG VAN NGUYEN, APPELLANT;
FREDERICK ORR, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

AMENDED SUPPLEMENTAL BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES

Federal Cases

Washington Cases

Constitutional Provisions

Statutes

Other Authorities

I. ISSUES PRESENTED

1. Does the *Miller* rationale underlying sentencing juveniles under the Eighth Amendment apply to adult offenders with prior adult strike offenses committed after age 18?

2. Does this record provide *any* evidence as to how the evolving science on juvenile brain development and maturity applies to Mr. Orr's prior violent convictions committed at age 19 and 21?

3. Is there a qualifying established class of adult offenders and a clear national consensus or demand to which the "juvenile brain" evolving science would require a "categorical bar analysis" under article I, section 14?

4. Should this Court adopt a categorical prohibition under article I, section 14, to sentencing a 41-year-old persistent offender to a life sentence who accumulated his prior strike offenses at ages 19 and 21?

II. STATEMENT OF THE CASE

Fredrick Orr was born April 8, 1974. CP 219. He was 41-years-old at the time of the current sentencing. Mr. Orr was convicted in the Spokane County Superior Court of second degree assault and first-degree burglary. CP 38, 180-81, 183-84. The jury found Mr. Orr used a deadly weapon during the commission of the offenses. CP 38. The State provided pretrial notice of a potential life sentence under the Persistent Offender

Accountability Act. CP 20. The court sentenced Mr. Orr to life without the possibility of parole because he had two prior convictions for most serious offenses. CP 218, 224. Mr. Orr's prior strike convictions consisted of a 1993 second degree robbery at age 19, and a 1995 first degree robbery at age 21. CP 216-17.

III. ARGUMENT

A. MR. ORR WAS SENTENCED AS A PERSISTENT OFFENDER AT AGE 41. USE OF MR ORR'S PRIOR STRIKE CONVICTIONS OBTAINED AFTER THE AGE OF MAJORITY DOES NOT RUN AFOUL OF THE EIGHTH AMENDMENT.

The Supreme Court recognized in *Roper v. Simmons*, 543 U.S. 551, 574, 125 S.Ct 1183, 161 L.Ed.2d 1 (2005),[1] that a line had to be drawn between childhood and adulthood under the Eighth Amendment, and chose to draw the line at age 18. Neither *Graham*[2] nor *Miller*[3] changed that dynamic. In Washington State, one attains the statutory age of majority at age 18. RCW 26.28.010; *In re Carson*, 84 Wn.2d 969, 972, 530 P.2d 331 (1975).

For adult offenders, the United States Supreme Court has found that a mandatory life sentence based upon a state recidivist statute is not cruel

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[1] The Court held unconstitutional the imposition of the death penalty upon individuals under age 18 at the time of the murder. 543 U.S. at 577.

[2] *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

[3] *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

and unusual punishment under the Eighth Amendment. *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). This Court has also held that the mandatory life sentence under the Persistent Offender Accountability Act (POAA) does not violate the Eighth Amendment when imposed on a defendant who committed all three strike offenses as an adult. *State v. Witherspoon*, 180 Wn.2d 875, 890, 329 P.3d 888 (2014).

Here, Mr. Orr, as a 41-year-old adult, falls on the adult side of the line under the Eighth Amendment, including his first two strike offenses committed as an adult at age 19 and 21. As he was over the age of majority when convicted of each strike offense, his Eighth Amendment claim fails under *Rummel, Miller*, and *Witherspoon*.

B. MR. ORR'S CONSTITUTIONAL CHALLENGE TO HIS SENTENCE AS A PERSISTENT OFFENDER DOES NOT WARRANT BROADER CONSIDERATION UNDER ARTICLE I, SECTION 14, OF THE STATE CONSTITUTION.

This Court has regularly held that the criteria set forth in *Gunwall*[4] must be addressed before it is appropriate to conduct an independent state constitutional analysis. *See State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). Only when these criteria weigh in favor of independent constitutional interpretation does a court have a principled basis for

[4] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

departing from federal precedent. *Gunwall*, 106 Wn.2d at 59-63.[5] While the state constitution may have been held to provide broader protection in one context, that holding does not necessitate a broader protection in all contexts. *See e.g.*, *State v. Bassett*, 192 Wn.2d 67, 79, 428 P.3d 343 (2018); *State v. Ramos*, 187 Wn.2d 420, 454, 387 P.3d 650 (2017), *as amended* (Feb. 22, 2017), *reconsideration denied* (Feb. 23, 2017), *cert. denied,* 138 S.Ct 467 (2017). Mr. Orr cannot establish that article I, section 14, is broader than the Eighth Amendment in this context.

1. The textural language of the state constitution.

Article I, section 14, of our state constitution provides, "[e]xcessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." At the time of ratification of our state constitution:

> [C]ruelty was generally understood to encompass two elements: (1) punishment beyond that which is necessary and (2) absence of mercy. One dictionary defined "cruel" to mean "hard-hearted," "harsh," or "severe." Etymological Dictionary of the English Language (Oxford 1883). In another "cruelty" was the "unnecessary infliction of pain...." Henry Campbell Black, A Dictionary of Law 305 (1891). Accord Noah Webster, An American Dictionary of the English Language (1862) ("Cruelty[:] .... giving unnecessary pain or distress to others."). …

State v. Rivers, 129 Wn.2d 697, 723-24, 921 P.2d 495 (1996).

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[5] The non-exclusive factors considered are "(1) the textual language, (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." 106 Wn.2d at 58.

Article I, section 14, like the Eighth Amendment, also forbids disproportionate sentencing in addition to certain modes of punishment. *State v. Manussier*, 129 Wn.2d 652, 676, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201 (1997).

2. Differences in the constitutional texts.

The Eighth Amendment bars cruel and unusual punishment while article I, section 14, bars cruel punishment. *Witherspoon*, 180 Wn.2d at 887. This Court has often found article I, section 14, provides greater protection than the Eighth Amendment. *See Bassett*, 192 Wn.2d at 79; *State v. Gregory*, 192 Wn.2d 1, 16 n. 6, 427 P.3d 621 (2018); *Ramos*, 187 Wn.2d at 453-54; *Witherspoon,* 180 Wn.2d at 887; *Rivers*, 129 Wn.2d at 712.

3. Constitutional history.

This Court observed in *State v. Dodd*, 120 Wn.2d 1, 21, 838 P.2d 86 (1992), that the constitutional history of article I, section 14, does not establish whether the drafters intended it to be interpreted more broadly than its federal counterpart.

4. Preexisting state law.

Article I, section 14, of the Washington State Constitution was adopted in 1889. Fourteen years later, in 1903, Washington passed its first felony habitual offender law, "providing for life imprisonment upon a subsequent conviction for any person convicted twice previously of any

felony or four prior convictions in which the intent to defraud was an element. Laws of 1903, ch. 86 (Rem.Ball.Code, §§ 2177-78)." *Manussier*, 129 Wn.2d at 688 (Madsen, J., dissenting); *see also State v. Gustafson*, 87 Wash. 613, 615, 152 P. 335 (1915). Shortly after the inception of the habitual offender statute, this Court remarked:

> The habitual criminal statute is a thing of modern creation, and, while there are many rules of law which may seem inconsistent with its purpose and the procedure adopted to compass it, it is nevertheless sound in principle and sustained by reason. Aside from the offender and his victim, there is always another party concerned in every crime committed-the state-and it does no violence to any constitutional guaranty for the state to rid itself of depravity when its efforts to reform have failed… It does not … inflict a cruel or unusual punishment, or impose a penalty for crimes committed outside of the state. *It merely provides an increased punishment for the last offense.*

State v. Le Pitre, 54 Wash. 166, 168, 103 P. 27 (1909) (citations omitted) (emphasis added).[6]

This Court has consistently upheld the constitutionality for the punishment of life in prison without the possibility of parole *for adults* under the POAA. *See e.g., Manussier*, 129 Wn.2d 652 (rejecting challenges based on substantive and procedural due process); *Rivers*, 129 Wn.2d 697 (rejecting challenges based on the prohibition of cruel and unusual punishment found in the state and federal constitutions); *State v. Thorne*,

[6] In *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980), the Court found that the imposition of a life sentence under the existing habitual offender statute for the commission of writing unauthorized checks less than $407 was disproportionate to the nature of the offense under article I, section 14. *Id.* at 401-02.

129 Wn.2d 736, 921 P.2d 514 (1996), *abrogated on other grounds*, *Blakely v. Washington*, 542 U.S. 296 (2004) (rejecting challenges based on bill of attainder, cruel and unusual punishment, separation of powers, and equal protection); *State v. Davis*, 133 Wn.2d 187, 943 P.2d 283 (1997) ("any challenge to the three strikes law based on the federal 'Guarantee Clause' would be frivolous"); *State v. Magers*, 164 Wn.2d 174, 193, 189 P.3d 126 (2008) (defendant's POAA sentence was not unconstitutional under either the federal or state constitutions applying the *Fain* factors); *see also Witherspoon*, 180 Wn.2d 875

The principle of stare decisis holds that this Court "will not reject [its] precedent unless it is both incorrect and harmful." *State v. Otton*, 185 Wn.2d 673, 688, 374 P.3d 1108 (2016). The "respect for precedent promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *City of Federal Way v. Koenig*, 167 Wn.2d 341, 347, 217 P.3d 1172 (2009). Mr. Orr cannot establish that *Magers, Witherspoon, Thorne, Rivers*, and *Manussier* were wrongly decided and harmful based upon this Court's long history of upholding life in prison without the possibility of parole for adult offenders.

5. Structural differences.

This factor will always direct the court to pursue an independent analysis. *Bassett*, 192 Wn.2d at 82.

6. State interest or local concern.

In 1993, Washington voters approved the "three strikes law," recodified under the POAA as RCW 9.94A.570[7] and RCW 9.94A.030(38). *See Manussier*, 129 Wn.2d at 659. The purpose of the three strikes initiative "includes deterrence of criminals who commit three 'most serious offenses' and the segregation of those criminals from the rest of society." *Thorne*, 129 Wn.2d at 775.

C. THE DEFENDANT'S SENTENCE WAS PROPORTIONATE TO THE CRIMES AND NOT "CRUEL" UNDER ARTICLE I, SECTION 14, OF THE STATE CONSTITUTION.

Witherspoon is dispositive regarding the application of the persistent offender statute, RCW 9.94A.570, to Mr. Orr's offenses under an "as applied" analysis under article I, section 14. In that respect, Mr. Orr fails to explain how his sentence offends the "evolving standards of decency" in comparison to the sentences in *Witherspoon, Manussier, Thorne, Rivers,* and *Fain*. It cannot be said that Mr. Orr's sentence is one of the "exceedingly rare" situations in which the sentence is "grossly

[7] RCW 9.94A.555 sets forth the public policy for the law.

disproportionate" to the crimes for which he was convicted and as a persistent offender. Mr. Orr's "as applied challenge" under article I, section 14, of the state constitution fails.

D. THERE IS NO RECOGNIZED CLASS TO WHICH MR. ORR CAN APPLY A CATEGORICAL CHALLENGE TO HIS SENTENCE. ASSUMING THERE IS AN OBVIOUS CLASS, HE CANNOT ESTABLISH HIS SENTENCE IS DISPROPORTIONATE BASED UPON JUVENILE BRAIN SCIENCE.

A categorical proportionality challenge requires a claim that a particular punishment is disproportionate for an entire class or group of offenders. *See Miller*, 567 U.S. at 470; *Graham*, 560 U.S. at 61; *Bassett*, 192 Wn.2d at 84. To create a categorical prohibition against the possibility of life without parole for adult offenders with young-yet-adult strike convictions, Mr. Orr must establish an overriding disparity between the *culpability of a class or group of "offenders*" and the severity of the punishment. *See Graham*, 560 U.S. at 67; *Bassett* 192 Wn.2d at 87.

Unlike the defendants in *Graham*, *Miller*, *Roper*, and *Bassett* – who belonged to a clear-cut category of offenders (juveniles), traditionally considered less culpable for criminal actions and, thus, less deserving of the harshest penalties than adults – there is nothing *distinguishable* or *identifiable* about the unlimited group of offenders to which Mr. Orr claims

to belong (*e.g.,* adult offenders with adult strike convictions) that would warrant special consideration and a categorical analysis.

For instance, it is unknown how many or what strike offenses would apply to a categorical analysis and at what age the prior strike offenses would have to be attained, or at what age there should be a cutoff for an offender, when attaining his or her third strike. By way of example, if an offender obtains a strike at age 25, age 35 and age 60, would he or she be included in such a categorical analysis, claiming the indiscretion of youth? Would there be a difference between an offender who has continually reoffended with many nonviolent, distinct convictions intermixed with his or her strike convictions (*e.g.,* between ages 18 and 50) and an offender who commits only three strike offenses at different ages throughout his or her life? There are too many uncertain variables which prevent Mr. Orr from being included in any recognizable group or class of offenders to which a categorical analysis would be appropriate.

If this Court determines that a categorical bar analysis should be used to analyze article I, section 14, it then examines a particular sentence through a three-step inquiry. First, the Court must determine whether there is a national consensus against imposing the particular sentence. *Bassett*, 192 Wn.2d at 83. Second, it applies its own independent judgment based on "the standards elaborated by controlling precedents and by the Court's own

understanding and interpretation of the cruel punishment provision's text, history, … and purpose." *Id.* Lastly, this Court looks to whether "the penological goals of retribution, deterrence, incapacitation, and rehabilitation are served by this sentence." *Id.* at 88.

1. There is no national consensus against Mr. Orr's sentence.

There is no data to suggest there is a national consensus against the recidivist sentencing practice here. An objective examination of other state legislative enactments indicates no national consensus against mandatorily sentencing adult offenders, with adult strike offenses past the age of majority, to life in prison. *See*, Attach A. Importantly, although in Washington, juvenile offenses do not count as strike offenses,[8] post-*Miller* federal and state courts have consistently rejected similar constitutional challenges when using "juvenile" convictions as strike offenses to increase an adult offender's punishment. *See*, Attach. B. Because there is a complete lack of any national consensus, or even a trend, against sentencing older adults, with prior strike offenses attained past the age of majority, this Court should reject a categorical proportionality challenge.

[8] *See State v. Saenz*, 175 Wn.2d 167, 173, 283 P.3d 1094 (2012); RCW 9.94A.030(34), RCW 9.94A.030(37).

2. This Court's independent judgment should weigh against finding this sentence is categorically barred under article I, section 14.

This Court has acknowledged an offender's age has ramifications for the Eighth Amendment, such that criminal procedure laws must take a defendant's youthfulness into account. *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017). As a result, "sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any *juvenile* defendant, even in the adult criminal justice system." *Id.* at 21 (emphasis added).

Similarly, in *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), the defendant barely turned 18 when he had sex with a 12–year–old girl. *Id.* at 683. *O'Dell* noted that youth may relate to a defendant's crime, and therefore "youth can ... amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range." *Id.* at 696. *O'Dell* held that trial courts "must be allowed to consider youth as a mitigating factor when imposing a sentence" on a youthful offender. *Id.*

Even if Mr. Orr claims to belong to an identifiable category of adult offenders, the science undergirding the *Miller, Bassett, Houston-Sconiers,* and *O'Dell* opinions, as applicable to juvenile offenders, is unavailing. The science in this area has been synthesized by law professor Elizabeth S. Scott and psychologist Laurence Steinberg, whose work was cited extensively by

the Supreme Court in *Roper*. Per Scott and Steinberg, social scientists recognize that juveniles achieve the ability to use adult reasoning by mid-adolescence, but lack the ability to properly assess risks and engage in adult-style self-control. Elizabeth S. Scott & Laurence Steinberg, RETHINKING JUVENILE JUSTICE 34 (2008); Elizabeth S. Scott & Laurence Steinberg, BLAMING YOUTH, 81 Tex. L. Rev. 799, 812-13 (2003). Research also suggests that teens are more responsive to peer pressure between childhood and early adolescence. "This susceptibility peaks around age 14 and declines slowly during the high school years." BLAMING YOUTH at 813-14. Furthermore, studies show, in general, there are "gradual but steady increases in individuals' capacity for self-direction throughout the adolescent years, with gains continuing through the final years in high school." *Id.* at 815. "Impulsivity, as a general trait, increases between middle adolescence and early adulthood and declines soon thereafter, as does sensation thinking." *Id.* at 815.

Similarly, adolescents and adults differ in their ability to regulate their own behavior and control their impulses. In general, studies show gradual but steady increases in the capacity for self-direction and self-

control through adolescence and into young adulthood.[9] Risk-taking and sensation-seeking peak around sixteen or seventeen and then decline in adulthood.[10] "Youths' ability to resist peer influences approaches that of adults in their late teens and early twenties." *Id.* at 291. Importantly, one commentator has suggested:

> Just as risk taking peaks during adolescence, studies that have been conducted in different historical epochs and in countries around the world have found that crime engagement peaks at about age seventeen (slightly younger for nonviolent crimes and slightly older for violent ones), and declines significantly thereafter. Longitudinal studies have shown that the majority of adolescents who commit crime desist as they mature into adulthood. Only a small percentage --generally between five and ten percent--become chronic offenders or continue offending during adulthood.

Elizabeth Cauffman, et. al., HOW DEVELOPMENTAL SCIENCE INFLUENCES JUVENILE JUSTICE REFORM, 8 UC Irvine L. Rev. 21, 26 (2018) (footnotes omitted).

Finally, brain structure and function (brain mapping) studies assert that there is still growth in parts of the brain associated with decision-making and judgment up to twenty-five years old. *See* Jay Giedd, BRAIN DEVELOPMENT, IX: HUMAN BRAIN GROWTH, 156 Am. J. Psychiatry 4

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[9] Laurence Steinberg et al., AGE DIFFERENCES IN SENSATION SEEKING AND IMPULSIVITY AS INDEXED BY BEHAVIOR AND SELF-REPORT: EVIDENCE FOR A DUAL SYSTEMS MODEL, 44 Developmental Psychol. 1764, 1774 (2008).

[10] Barry C. Feld, ADOLESCENT CRIMINAL RESPONSIBILITY, PROPORTIONALITY, AND SENTENCING POLICY: ROPER, GRAHAM, MILLER/JACKSON, AND THE YOUTH DISCOUNT, 31 Law & Ineq. 263, 286 (2013).

(1999); However, this theory has limitations. In 2009, one commentator noted:

> The most significant current limitation of developmental neuroscience is its inability to inform individual assessment. Imaging studies that show group trends in structural maturity--such as relative levels of myelination in prefrontal cortex--do not show that all individuals in the group perfectly reflect the trend. Normal brains follow a unique developmental path bounded roughly by the general trajectory; that is, while all humans will pass through the same basic stages of structural maturation at more or less the same stages of life, the precise timing and manner in which they do so will vary. Moreover, such variation cannot be detected or interpreted in any legally meaningful way. Neither structural nor functional imaging can determine whether any given individual has a "mature brain" in any respect, though imaging might reveal gross pathology. Researchers therefore consistently agree that developmental neuroscience cannot at present generate reliable predictions or findings about an individual's behavioral maturity

Terry A. Maroney,[11] THE FALSE PROMISE OF ADOLESCENT BRAIN SCIENCE IN JUVENILE JUSTICE, 85 Notre Dame L. Rev. 89, 146 (2009) (footnote citations omitted). In 2013, Professor Scott and a colleague also cautioned against the use of neuroscience to evaluate specific individuals:

> [T]he use of [neuroscience] research is also highly problematic on scientific grounds. So far, neuroscience research provides group data showing a developmental trajectory in brain structure and function during adolescence and into adulthood; however, the research does not currently allow us to move from that group data to measuring the neurobiological maturity of an individual adolescent because there is too much variability within age groups and across development (Dosenbach et al., 2010). Indeed, we do not currently have accurate behavioral measures of maturity. At some point, neuroscience and accompanying behavioral studies may

[11] Associate Professor, Vanderbilt University Law School.

> provide age norms against which an individual adolescent's brain development and functioning can be measured. However, today an expert who offers an opinion that a particular 14-year-old defendant has a mature or immature brain as compared with other 14-year olds (or "has the maturity of a 17-year-old") is exceeding the limits of science. Currently, the only legitimate use of adolescent brain research in individual cases is to provide decision makers with general descriptions of brain maturation.

Richard J. Bonnie & Elizabeth S. Scott, THE TEENAGE BRAIN: ADOLESCENT BRAIN RESEARCH AND THE LAW, Current Directions in Psychological Science (22)(2), 158-161 (Apr. 2013);[12] *See also* Paul S. Davies & Peter A. Alces, NEUROSCIENCE CHANGES MORE THAN YOU CAN THINK, 2017 U. Ill. J.L. Tech. & Pol'y 141, 155 (2017):

> We can look at a brain scan of a broad cross-section of adolescents and compare that with a brain scan of a broad cross-section of adults and see significant differences that might well justify substantial legal distinctions. But we neither know, nor even could know, where a particular adolescent is on the developmental curve.

In the present case, there is no information about Mr. Orr's personal history to determine whether the evolving science on juvenile maturity and brain development applies to his first two strike offenses. The record includes only basic information about defendant at sentencing. *See* RP 459-61. The record does not contain any evidence about how the evolving science on juvenile maturity and brain development, that helped form the basis for the *Miller* or *Bassett* decisions, applies to the defendant's specific facts and circumstances or similarly situated defendants, if any.

[12] Attach. C.

In that regard, the sentencing judges in Mr. Orr's two prior strike offenses could have taken "youth," if applicable, into consideration when determining the appropriate sentence for those crimes and provided, if necessary, the appropriate rehabilitation, when determining the proper sentence for those crimes. Furthermore, this is not a situation where the court failed to offer a "*juvenile defendant*" "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," or where a juvenile was "deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *See Graham,* 560 U.S. at 75, 79. Mr. Orr committed the instant offenses 20 years after his second strike conviction. He certainly had the opportunity and time for thought, reflection, growth, rehabilitation, and maturity during the 20-year time frame to reform and contemplate the risk and consequence of committing a third strike offense with the potential for life imprisonment, in the same manner as all other adult offenders, regardless of the age range of the particular offender. All things considered, Mr. Orr was not a young person who had previously led a law-abiding life and then made a one-time mistake. In 2011, one commentator discussed the adult brain:

> Contrary to its reputation as a slower, duller version of a youthful brain, it seems that the middle-aged mind not only maintains many of the abilities of youth but actually acquires some new ones. The adult brain seems to be capable of rewiring itself well into middle age, incorporating decades of experiences and behaviors. Research

> suggests, for example, the middle-aged mind is calmer, less neurotic and better able to sort through social situations. Some middle-agers even have improved cognitive abilities.

Melissa Lee Phillips, THE MIND AT MIDLIFE. American Psychological Association, Monitor on Psychology Vol. 42, No.4 (April 2011). Attach D.

Finally, unlike the defendants in *Miller*, *Roper, Graham*, and *Bassett,* which involved sentences for juvenile defendants, Mr. Orr is being punished for his *adult* conduct. Mr. Orr had an enhanced sentence for a crime he committed as an adult. A juvenile's lack of maturity, susceptibility to negative influences, and other like factors, cannot explain away Mr. Orr's decision to commit strike offenses past age forty. As to the factor identified by the U.S. Supreme Court as differentiating juvenile and adult offenders, the greater likelihood "that a minor's character deficiencies will be reformed," *Roper*, 543 U.S. at 570, cuts against Mr. Orr's argument.

Unlike defendants who receive severe penalties for juvenile offenses and are thus denied "a chance to demonstrate growth and maturity,"[13] Mr. Orr was given a significant opportunity to demonstrate rehabilitation over the twenty years since his second subsequent strike conviction. However, as an older adult, Mr. Orr elected to continue a course of illegal conduct.[14] Indeed, Mr. Orr faced an enhanced sentence based, only in part,

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[13] See *Graham*, 560 U.S. at 75. Attach D.

[14] Even if Mr. Orr relies on material outside the record and argues that he had mental and emotional impairments which resulted in a level of developmental

on acts he committed shortly after attaining the age of majority. He certainly had the opportunity to better understand and reflect on the consequences of his decision-making at age 41 and reform. As an older adult, it could well be that Mr. Orr had a firm unwillingness to accept responsibility for his prior strike offenses, criminal behavior, and the potential risk and consequence of a third strike.

3. Penological goals are served by this recidivist sentence.

This Court has previously determined, on more than one occasion, that "the purposes of the persistent offender law include deterrence of criminals who commit three 'most serious offenses' and the segregation of those criminals from the rest of society." *Witherspoon*, 180 Wn.2d at 888; *Thorne*, 129 Wn.2d at 775; c*f. Ewing v. California*, 538 U.S. 11, 29, 123 S.Ct. 1179, 1190, 155 L.Ed.2d 108 (2003); *see also Rummel*, 445 U.S. 263.

There is nothing in the record to suggest that Mr. Orr was not capable of rehabilitation or what steps he took toward rehabilitation after his first or second strike offenses, or between his second and third strike

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maturity equivalent to a juvenile at the time he committed his first two strike offenses, he was well into adulthood when he committed his third strike, the offense for which he was being punished. *See United States v. Reingold*, 731 F.3d 204, 215 (2d Cir. 2013) (even if the defendant was a "developmentally immature young adult" at the time of the crime, that assessment "hardly supports categorical rule analysis" in the absence of any consensus regarding the sentencing of immature adults); *United States v. Marshall*, 736 F.3d 492, 500 (6th Cir. 2013) (same); *United States v. Capps*, 716 F.3d 494, 499 (8th Cir. 2013) (same); *United States v. Cobler*, 748 F.3d 570, 581 (4th Cir. 2014) (same).

offenses. It is obvious Mr. Orr was not rehabilitated after serving those independent terms of imprisonment.

IV. CONCLUSION

This Court should affirm the court of appeals. This Court has consistently rejected proportionality and other constitutional challenges to the POAA when applied to adults. The defendant has not established the precedent in this area is incorrect and harmful. Similarly, there is no national consensus or an established class to which Mr. Orr fits, supporting his claim for a categorical analysis of his sentence under article I, section 14. Finally, this Court should not extend the rational underlying *Miller* and *Bassett* to Mr. Orr's recidivist sentence where it is not supported by the current scientific brain studies.

Respectfully submitted this 22 day of March, 2019.

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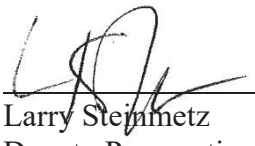

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ATTACHMENT A

STATEWIDE HABITUAL OFFENDER SENTENCING LAWS

State	Statute	Year	Sentencing
Alabama	§13A-5-9	2018	Conviction of a Class A felony: life imprisonment without parole with any three prior felony convictions; life imprisonment or not less than 99 years with any two prior felony convictions; life imprisonment or 15-99 years with any one prior felony conviction. Conviction of a Class B felony: life imprisonment with any three prior felony convictions; life imprisonment or 15-99 years with any two prior felony convictions. Conviction of a Class C felony: life imprisonment or 15-99 years with any three prior felony convictions.
Arizona	§13-706	2019	Mandatory life imprisonment on third conviction of a specified "serious offense" (possible parole after 25 years) or "violent or aggravated felony" (possible parole after 35 years).
Arkansas	§5-4-501	2018	Conviction of a Class Y felony: 10-60 years or life imprisonment with two or three prior felonies; life imprisonment or not less than 10 years with four or more felony convictions. Conviction of an unscheduled felony with life imprisonment as a possible punishment: life imprisonment or 10-50 years with two or more felony convictions.
California	§§667.7, 667.75	2018	Mandatory life sentence—with parole in twenty years—for third prison term for specified offenses; mandatory life without parole for fourth prison term for specified offenses.
Colorado	§18-1.3-801	2018	Life imprisonment for at least 40 years for "habitual offender" on third conviction for specified offenses.
Connecticut	§53a-40	2019	Life sentence may be imposed for "persistent dangerous felony offender" on third conviction and prison term for specified offenses.
Delaware	Title 11 §4214	2019	May impose life imprisonment after fourth felony conviction for "habitual offender"; mandatory life without parole for "habitual offender" after third conviction for specified felonies.

Attach. A-1

Statewide Habitual Offender Sentencing Laws
(Continued)

Florida	§775.084	2018	Mandatory life imprisonment for "habitual felony offender" on third specified felony conviction; mandatory life imprisonment with fifteen-year minimum for "habitual violent felony offender" on second specified felony conviction; mandatory life imprisonment for "three-time violent offender" and "violent career criminal."
Georgia	§17-10-7	2018	Mandatory life imprisonment without parole on second conviction for a "serious violent felony."
Hawaii	§§706-661, 706-662	2018	Mandatory life without parole on Class A felony conviction for "persistent offender" on third felony conviction.
Idaho	§19-2514	2018	Mandatory five year minimum, possible life imprisonment, on third felony conviction.
Indiana	§35-50-2-8	2018	A sequential habitual offender statute.
Kentucky	§532.080	2018	Twenty years to life for "persistent felony offender in the first degree" on third felony conviction for specified offenses; no parole for first ten years; persistent felony offenders defined as a person "who is more than twenty-one years of age."
Louisiana	§15:529.1	2018	Mandatory life imprisonment on third conviction for specified felonies.
Maryland	§14-101	2018	Mandatory life sentence without parole on fourth term of confinement resulting from four convictions for crimes of violence.
Massachusetts	Ch. 265, §23	2018	Any term of years up to life imprisonment for commission of second or subsequent sexual offenses with children.
Michigan	§769.12	2018	Maximum life imprisonment on fourth felony conviction if fourth conviction offense carries maximum punishment of five or more years.
Mississippi	§99-19-83	2019	Mandatory life imprisonment without parole on third felony conviction if one conviction is for a "crime of violence" and offender was sentenced and served more than one year for each prior felony.
Montana	§46-18-219	2017	Mandatory life w/out parole on second conviction of certain violent offense; or third conviction of certain offenses.
Nevada	§207.010	2017	Life imprisonment on fourth felony conviction.
New Mexico	§31-18-23	2018	Life imprisonment, subject to parole, on third violent felony conviction.
New York	§70.08	2019	Indeterminate life sentence for "persistent violent felony offender" on third conviction for specified

Attach. A-2

Statewide Habitual Offender Sentencing Laws
(Continued)

			felonies, with minimum sentences of at least 25 for certain sex offenses, and up to 25 yrs for other offenses.
North Carolina	§14-7.12	2018	Mandatory life imprisonment without parole for "violent habitual felon" on third violent felony conviction.
North Dakota	§12.1-32-09	2017	For a "habitual offender" - and various other listed types - up to life imprisonment if third felony conviction is for a Class A felony.
Pennsylvania	Title 42 §9715	2018	Mandatory life imprisonment on second homicide conviction.
South Carolina	§17-25-45	2018	Mandatory life imprisonment on third felony conviction for specified "violent crimes."
Tennessee	§40-35-120	2018	Mandatory life imprisonment without parole for "repeat violent offender" on third conviction for specified offenses.
Texas	§12.42	2017	On conviction of first-degree felony: life imprisonment or 15-99 years with one prior felony conviction. On conviction of felony of any degree: life imprisonment or 25-99 years with two prior felony convictions.
Utah	§§76-3-206, 76-3-207.7	2018	Mandatory life imprisonment without parole for capitol felony and life w/out parole or indeterminate term of 25 to life for 1st aggravated murder (offender 18 or older at time of crime for both).
Vermont	Title 13, §11	2018	Life imprisonment on fourth felony conviction.
Virginia	§§19.2-297.1, 18.2-248	2018	Mandatory life imprisonment on third conviction for an "act of violence"; up to life imprisonment for second or subsequent specific drug distribution offenses.
Washington	§9.94A.570	2018	Mandatory life sentence for "persistent offender" on third "most serious offense" conviction.
West Virginia	§61-11-18	2018	Mandatory life imprisonment without parole on second homicide conviction; mandatory life imprisonment on third conviction for offense "punishable by confinement in a penitentiary."
Wisconsin	§939.62	2018	Mandatory life imprisonment without parole for "persistent repeater" on third conviction for a "serious felony."
Wyoming	§6-10-201	2018	Mandatory life imprisonment on fourth felony conviction "for offenses committed after the person reached the age of eighteen (18) years of age."

Attach. A-3

ATTACHMENT B

CONSIDERATION OF JUVENILE OFFENSES FOR PURPOSES OF RECIDIVIST STATUTE

Case	Decision
United States v. Hunter, 735 F.3d 172, 174–76 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1908 (2014)	(post-*Miller*) Concluding sentencing enhancement based on defendant's juvenile convictions did not amount to cruel and unusual punishment because the defendant was not being punished for the crime he committed as a juvenile.
United States v. Hunter, 735 F.3d 172, 174–76 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1908 (2014)	(post-*Miller*) (same)
United States v. Shill, 740 F.3d 1347, 1356–57 (9th Cir. 2014)	(post-*Miller*) (same)
United States v. Edwards, 734 F.3d 850, 852–53 (9th Cir. 2013)	(post-*Miller*) (same)
United States v. Orona, 724 F.3d 1297, 1309–10 (10th Cir. 2013), *cert. denied*, 571 U.S. 1034 (2013)	(post-*Miller*) (same)
United States v. Hoffman, 710 F.3d 1228, 1231–33 (11th Cir. 2013)	(post-*Miller*) (same)
United States v. Orona, 724 F.3d 1297, 1309–10 (10th Cir. 2013), *cert. denied*, 571 U.S. 1034 (2013)	(post-*Miller*) (same)
United States v. Scott, 610 F.3d 1009, (8th Cir. 2010) *cert. denied*, 562 U.S. 1160 (2011)	(same)
United States v. Graham, 622 F.3d 445, 463 (6th Cir. 2010), *cert. denied*, 563 U.S. 1035 (2011)	(same)
United States v. Farley, 607 F.3d 1294, 1342 n. 34 (11th Cir.2010)	(same)
United States v. Salahuddin, 509 F.3d 858, 864 (7th Cir. 2007)	(same)
United States v. Mays, 466 F.3d 335, 339–40 (5th Cir. 2006) *cert. denied*, 549 U.S. 1234 (2007)	(same)
Commonwealth v. Baez, 480 Mass. 328, 329, 104 N.E.3d 646, 648 (2018)	*Miller* does not preclude using a juvenile offense as a predicate offense for enhancing an adult offender's incarceration under the Eighth Amendment.
State v. Green, 412 S.C. 65, 84, 770 S.E.2d 424, 434 (Ct. App. 2015)	The policy considerations of *Miller* were inapplicable to life imprisonment without parole for a second armed robbery conviction pursuant to a recidivist statute and the sentence was not cruel and unusual punishment for an adult defendant who committed his second offense as an adult but a juvenile when he committed his first.

Attach. B-1

Consideration of Juvenile Offenses for Purposes of Recidivist Statute (Continued)

Case	Decision
Com. v. Lawson, 2014 PA Super 68, 90 A.3d 1, 6, (2014)	*Miller* does not prohibit the use of a juvenile murder conviction to enhance an adult life sentence and does not constitute cruel and unusual punishment under either federal or state constitution.
But see State v. Hand, 149 Ohio St. 3d 94, 73 N.E.3d 448, 459 (2016)	A juvenile conviction cannot be used to enhance an adult conviction because there was no jury trial on the juvenile adjudication.

Attach. B-2

ATTACHMENT C

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The Teenage Brain: Adolescent Brain Research and the Law

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Abstract

In this article, we explore the emerging and potential influence of adolescent brain science on law and public policy. The primary importance of this research is in policy domains that implicate adolescent risk taking; these include drug and alcohol use, driver licensing, and criminal justice. We describe the emerging importance of brain science in the Supreme Court and other policy arenas. Finally, we argue that current research cannot contribute usefully to legal decisions about individual adolescents and should not be used in criminal trials at the present time, except to provide general developmental information.

Keywords

adolescence, law, neuroscience, juvenile justice, risk taking

In recent years, policymakers, the media, and the public have shown a great deal of interest in the expanding body of knowledge on adolescent brain development—an interest that reflects an expectation that accumulating knowledge about the structure and functioning of the developing teenage brain can usefully inform law and public policy (Wallis, 2004). In this article, we examine the relevance of developmental neuroscience to legal policies dealing with adolescents and discuss several applications. Specifically, we explain how developmental understanding of teenage risk taking and criminal activity can contribute to legal policies that protect adolescents during this distinct developmental period and that also promote the public interest. We emphasize, however, that current knowledge does not provide a scientific basis for evaluating the "maturity" of adolescents on an individual basis for legal purposes.

Adolescence in American Law

Although adolescence is recognized by developmentalists as a distinct stage separate from childhood and adulthood, the law typically does not adopt rules applicable specifically to adolescents. Instead, on various issues, lawmakers have tended to draw binary age boundaries between "minors," who are presumed to be vulnerable, dependent, and incompetent to make decisions, and adults, who are viewed as autonomous, responsible, and entitled to exercise legal rights and privileges (Scott, 2000). Although adolescents become legal adults for most purposes at 18 years of age (the "age of majority"), the threshold for defining adult status is not uniform. For example, driving privileges are extended to adolescents in many states at 16 years of age and the right to purchase alcohol at 21 years of age; in most states, youths 14 years of age (or even younger) can be tried as adults when charged with serious crimes. The statutory age for making health decisions (especially reproductive decisions and treatment of behavioral health disorders) has been set at 14 years in many states. Policies setting these age boundaries are based on many considerations, depending on the issue—administrative convenience, parental rights, child welfare, economic impact, and the public interest—as well as assumptions, often rooted primarily in conventional wisdom, about whether youths at a given age are sufficiently mature, as a class, to be treated as adults for the particular statutory purpose.

On most issues, the threshold of adult status is relatively settled and is not highly controversial; this may explain why brain science has not played much of a role (Woolard & Scott, 2009). In general, research indicating that substantial structural and functional changes in the brain occur during adolescence has reinforced a background supposition favoring protective policies until teenagers reach 18 years of age. This approach has been generally satisfactory, except to some youth advocates who favor extending adult rights and

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privileges to younger adolescents and who, therefore, are generally hostile to neuroscience input in the policy arena (Steinberg, 2009).

Linking Neuroscience Evidence to Youthful Risk Taking

Developmental neuroscience research that can be linked to youthful risk taking and offending is in a relatively early stage, and currently its relevance to the key policy issues is indirect. Nonetheless, the existing research on the timing of developments in brain structure and function is consistent with and supplements the larger body of behavioral research; this new research provides the basis for understanding why many adolescents become involved in risky activity and desist as they mature into adulthood (Casey, Getz, & Galvan, 2008; Steinberg, 2009).

It seems likely that asymmetries in the timing of development of different brain regions contribute to risk taking and immature judgment in adolescence. The research indicates that the prefrontal cortex matures gradually; maturation extends over the course of adolescence and into early adulthood. This region controls the brain's executive functions—advanced cognitive processes employed in planning, controlling impulses, and weighing the consequences of decisions before acting. Maturation in the connections between the prefrontal cortex and other regions of the brain also occurs gradually, resulting in improvement over time in impulse control and emotional regulation. In contrast, changes in the limbic system around puberty result in increases in emotional arousal and in reward and sensation seeking (including sensitivity to social stimuli; Chein, Albert, O'Brien, Uckert, & Steinberg, 2011; Steinberg, Cauffman, Woolard, Graham, & Banich, 2009). This gap between early increases in sensation seeking and later development of emotional and behavioral controls has been described by one scientist as "starting the engines without a skilled driver" (Dahl, 2001, p. 8), and it may shed light on much teenage risk taking and criminal activity. In short, the hypothesis, which is based on neurobiological research, is that teenagers are attracted to novel and risky activities, including criminal activity, particularly with peers, at a time when they lack the judgment to exercise self-control and to consider the future consequences of their behavior.

Neuroscience, Teen Alcohol Use, Driving, and Public Policy

Developmental research, accompanied by pertinent brain research, is playing an increasingly important role in shaping policies relating to adolescent risk taking—drug and alcohol use, the extension of driving privileges, and juvenile justice. Adolescent tendencies to experiment with intoxicating substances (at increasingly younger ages) and to get high (typically in groups) are paradigmatic examples of sensation seeking and risk taking. Moreover, age of onset and intensity of adolescent drinking are strongly predictive of problem drinking and alcohol use disorders in adulthood, and this trajectory may be attributable in part to the vulnerability of the adolescent brain. Extensive use of alcohol in adolescence may also have effects that increase the risk of severe and long-lasting addiction (Wong, Mill, & Fernandes, 2011; Yucel, Lubman, Solowij, & Brewer, 2007). (Similar accounts have been given for teenage use of tobacco, marijuana, and other drugs.) These findings argue for maintaining the 21-year-old drinking age and for intensifying efforts to prevent early onset of alcohol use (Bonnie & O'Connell, 2007).

Policymakers have paid increasing attention in recent years to the lethal mixture of teen driving at night accompanied by peers and alcohol. The result has been developmentally informed "graduated licensing" legislation that lengthens the process of obtaining a license and controls the circumstances under which teens are permitted to drive, gradually increasing their exposure to higher risk conditions (such as nighttime driving and driving with teen passengers). A recent National Research Council (NRC) report (NRC, 2007) noted in support of graduated licensing that adolescent capacity to exercise executive functions is "still under construction" during the initial years of driving and can be "overwhelmed by strong emotion, multi-tasking, sleep deprivation, and substance abuse" (p. 18). The report explained that deficits in judgment, impulse control, planning, and attention are magnified by extra passengers, music, cell phones, and other sources of stimulation or distraction (NRC, 2007). Some policy analysts have suggested that graduated licensing restrictions should apply to all initial license applicants younger than 21 years of age (Masten, Foss, & Marshall, 2011).

Neuroscience and Juvenile Justice Policy

Neuroscience has played an increasingly prominent role in juvenile crime policy because questions about whether and when adolescent offenders should be punished as adults have been hotly contested. In this section, we offer a brief historical review that clarifies this emerging role, and then we identify specific questions on which this research potentially can inform legal policy.

During most of the 20th century, the law assumed that juvenile crime was a product of immaturity and that young offenders should be dealt with in a separate justice system with a primary goal of rehabilitation. However, in the 1980s and 1990s, partly in response to increasing rates of violent juvenile crime, a wave of punitive law reforms swept the country. Supporters of tougher policies rejected altogether the idea that juveniles were different from adults in any way that was relevant to criminal responsibility or punishment (Scott & Steinberg, 2008). Legislatures enacted harsh laws that greatly expanded the category of youths subject to criminal

court jurisdiction. Use of confinement also increased in the juvenile system.

In the past decade, enthusiasm for harsh punishment of juveniles has waned somewhat, and lawmakers once again appear to accept the relevance of developmental differences to justice policy. This change is attributable to declining crime rates, convincing evidence that incarcerating juveniles increases recidivism, and concerns that imposing harsh adult sentences on teenagers violates basic principles of fairness. Increasingly, lawmakers and the public accept the idea that juvenile offenders should usually be subject to developmentally appropriate dispositions within the juvenile justice system and that those who are transferred to criminal court should receive more lenient sentences than their adult counterparts. In a new wave of law reform, legislatures and courts have moderated the tough laws adopted in the 1990s, keeping more adolescents in juvenile court and reducing the emphasis on long incarceration. The contemporary view, however, is not simply a revival of the traditional rehabilitative model based on naïve characterizations of juvenile offenders as children. Increasingly, policymakers have turned to developmental science, particularly neuroscience, to inform justice policy through a more sophisticated understanding of how dimensions of adolescent development affect juveniles' criminal activity as well as their response to justice-system interventions (Scott, in press).

Adolescent brain research has the potential to influence juvenile crime policy in two important ways. First, to the extent that neuroscience research provides evidence that immature brain functioning influences decision making and risk taking implicated in criminal behavior, it is relevant to the question of whether adolescents are less culpable than adults and deserve less punishment for similar offenses. Behavioral research has found that adolescents differ from adults in their greater propensity for risk taking and susceptibility to peer influence and their reduced capacity for self-regulation and for attending to future consequences. These characteristics diminish adolescents' responsibility to the extent that their decisions to offend are likely to be rooted in transient developmental processes rather than antisocial values or deficiencies in character (Scott & Steinberg, 2003; Steinberg & Scott, 2003). This argument for diminished responsibility is reinforced and strengthened to the extent that these well-demonstrated developmental characteristics are explained by normal and predictable neurobiological processes. This research can offer a powerful challenge to laws that classify juveniles charged with crimes as adults. Second, studies of changing brain structure and function over the course of adolescence reinforce arguments based on behavioral research that most adolescent crime is a product of the developmental influences described earlier, and thus most teenagers will "mature out" of their criminal tendencies. Generally, this perspective supports policies that keep youths in the juvenile justice system, where interventions can be tailored to promote healthy development and to reduce reoffending.

The Persuasive Impact of Adolescent Brain Research

Adolescent brain research has captured the attention of lawmakers in recent years and has been cited by courts, legislatures, and other officials to justify support for laws and policies that deal more leniently with adolescent offenders than with adults. For reasons that are not clear, this research seems to carry greater weight as "hard science" than the large body of behavioral research that it largely confirms.

Three recent Supreme Court opinions invoked developmental research in finding harsh adult sentences for juveniles to be unconstitutional under the Eighth Amendment prohibition of "cruel and unusual punishment." In each of these opinions, the court emphasized the reduced culpability of juveniles because of their developmental immaturity, pointing to adolescents' diminished decision-making capacity, their vulnerability to external pressures (including peer pressure), and their unformed characters. In *Roper v. Simmons* (2005), the court rejected the death penalty as a disproportionate sentence for a crime, relying heavily on behavioral research. Both *Graham v. Florida* (2010) and *Miller v. Alabama* (2012) also pointed to brain science in striking down sentences of life without parole for juveniles. This research provided evidence of "fundamental differences between juvenile and adolescent minds" in "parts of the brain involved in behavioral control" (*Miller v. Alabama*, p. 2464).

This invocation of developmental neuroscience evidence by our nation's highest court is a powerful signal of the potential importance of this research for legal regulation of juvenile crime. Moreover, the message that immature brain functioning contributes to teenage offending, making young offenders less culpable than adults and more likely to reform, has resonated with politicians, the media, and the public in recent years. Across the country, neuroscience research indicating that teenage brains differ from those of adults has been offered in support of a broad range of policies dealing more leniently with young offenders. For example, the Washington State Legislature in 2005 cited developmental brain research in abolishing mandatory minimum sentences for juveniles, as did Governor Bill Owens of Colorado in explaining his support for abolishing the application of a harsh sentencing statute to juveniles. In combination, behavioral and neurobiological research on adolescence have played an important role in advancing policies that recognize the immaturity of young offenders in responding to juvenile crime.

The Limits of Neuroscience

A recent study published in *Science* suggests that neuroscience evidence that does no more than describe the biological

underpinning of a behavioral diagnosis (psychopathy in this study) can have an influence (whether legitimate or not) on judges making decisions in individual criminal cases (Aspinwall, Brown, & Tabery, 2012). Not surprisingly, prosecutors and attorneys for juveniles increasingly seek to introduce neuroscience evidence in criminal trials—to demonstrate that the brain functioning of a particular juvenile facing criminal charges was or was not sufficiently mature to hold the youth responsible for his or her offense. This has largely been unsuccessful, often because courts have found it to be irrelevant to the legal issue at hand—such as whether the youth lacked criminal intent (Maroney, 2009). However, the use of this research is also highly problematic on scientific grounds. So far, neuroscience research provides group data showing a developmental trajectory in brain structure and function during adolescence and into adulthood; however, the research does not currently allow us to move from that group data to measuring the neurobiological maturity of an individual adolescent because there is too much variability within age groups and across development (Dosenbach et al., 2010). Indeed, we do not currently have accurate behavioral measures of maturity. At some point, neuroscience and accompanying behavioral studies may provide age norms against which an individual adolescent's brain development and functioning can be measured. However, today an expert who offers an opinion that a particular 14-year-old defendant has a mature or immature brain as compared with other 14-year-olds (or "has the maturity of a 17-year-old") is exceeding the limits of science. Currently, the only legitimate use of adolescent brain research in individual cases is to provide decision makers with general descriptions of brain maturation.

It is difficult to predict the extent to which developmental neuroscience research will inform legal policy and practice in the future. Legal policy toward adolescents will always be based on many considerations, of which developmental maturity is only one. Currently, the research is important primarily in domains of public policy relating to adolescent risk taking, particularly in juvenile justice policy, where it is invoked to support rehabilitative programs in juvenile courts and to challenge policies that subject juvenile offenders to the same punishment as their adult counterparts.

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ATTACHMENT D

COVER STORY

The mind at midlife

Longstanding beliefs say the adult brain is best in its youth, but research now suggests otherwise. The middle-aged mind preserves many of its youthful skills and even develops some new strengths.

By Melissa Lee Phillips
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Print version: page 38

Ask those who've entered the thick of middle age what they think about their mental capacities and you're likely to hear a slew of complaints — their brains don't work as quickly as they used to, they're distractable and unfocused, and they can never remember anyone's name.

While some of these complaints reflect real declines in brain function in our middle years, the deficiencies of a middle-aged brain have likely been overstated by anecdotal evidence and even by some scientific studies.

Contrary to its reputation as a slower, duller version of a youthful brain, it seems that the middle-aged mind not only maintains many of the abilities of youth but actually acquires some new ones. The adult brain seems to be capable of rewiring itself well into middle age, incorporating decades of experiences and behaviors. Research suggests, for example, the middle-aged mind is calmer, less neurotic and better able to sort through social situations. Some middle-agers even have improved cognitive abilities.

"There is an enduring potential for plasticity, reorganization and preservation of capacities," says cognitive neuroscientist Patricia Reuter-Lorenz, PhD, of the University of Michigan in Ann Arbor.

Researchers now have an unprecedented wealth of data on the aging brain from the Seattle Longitudinal Study, which has tracked the cognitive abilities of thousands of adults over the past 50 years. These results show that middle-aged adults perform better on four out of six cognitive tests than those same individuals did as young adults, says study leader Sherry Willis, PhD, of the University of Washington in Seattle.

While memorization skills (/topics/learning) and perceptual speed both start to decline in young adulthood, verbal abilities, spatial reasoning, simple math abilities and abstract reasoning skills all improve in middle age.

Cognitive skills in the aging brain have also been studied extensively in pilots and air-traffic controllers. Again, older pilots show declines in processing speed and memory capacity, but their overall performance seems to remain intact. In a study published in *Neurology* (Vol. 68, No. 9) in 2007, researchers tested pilots age 40 to 69 as they performed on flight simulators. Older pilots took longer to learn to use the simulators but did a better job than their younger colleagues at achieving their objective: avoiding collisions.

Many middle-aged people are convinced that they're just not as mentally skilled or even as intelligent as they used to be, Willis says. But it's possible that's an illusion arising from the aspects of cognition that do suffer in middle age.

"They may get the sense they're cognitively slow just because they're perceptually slow or slow with psychomotor skills," she says, when in reality their brains are performing most tasks remarkably well.

Changing strategies

Researchers used to believe that brain activity would slow down with aging so that older brains would show less activity overall than younger ones. But functional neuroimaging studies have overturned that assumption.

For example, psychologist Cheryl Grady, PhD, of the University of Toronto, and her colleagues have found that older adults use more of their brains than young adults to accomplish certain tasks. In a study published in the *Journal of Neuroscience* (Vol. 3, No. 2) in 1994, Grady reported that performing a face-matching task activates mainly the occipital visual areas in younger adults, but older adults use these areas as well as the prefrontal cortex. (Both groups of adults are equally skilled at the task.)

Several groups, including Grady's, have also found that older adults tend to use both brain hemispheres for tasks that only activate one hemisphere in younger adults. Younger adults show similar bilateralization of brain activity if the task is difficult enough, Reuter-Lorenz says, but older adults use both hemispheres at lower levels of difficulty.

Attach. D-1

The strategy seems to work. According to work published in *Neuroimage* (Vol. 17, No. 3) in 2002, the best-performing older adults are the most likely to show this bilateralization. Older adults who continue to use only one hemisphere don't perform as well.

Reuter-Lorenz finds these changes with age encouraging, as they show that the middle-aged brain is capable of altering how it does things in order to accomplish the task at hand. "Compensation through some brain mechanisms may make up for losses in others," she says.

Grady cautions that many studies on the middle-aged brain are preliminary, as this age group "hasn't been studied very much. It certainly hasn't been studied enough." Most functional imaging studies, for example, tend to recruit college students and retirees as study subjects, Grady says. Cognitive characteristics of in-between ages are often simply extrapolated from the two ends of the spectrum.

While a linear continuum may be accurate for many traits, it may not always be a valid assumption. Grady's own work on brain activation during memory tasks, for example, suggests that the middle-aged pattern does fall between those of a young adult and an elderly person.

For example, the amount of white matter in the brain, which forms the connections among nerve cells, seems to increase until age 40 or 50 and then falls off again. "So that suggests that there are some developmental changes that really don't hit their peak until somewhere in middle age," Grady says.

At least the glasses are rose-colored

Emotions and social interactions — even personality — may systematically change as people enter middle age. Many studies have found that people become calmer and less neurotic as they age. "There's a quieting of emotional storms," Reuter-Lorenz says.

Work by cognitive psychologist Mara Mather, PhD, of the University of Southern California in Los Angeles, has found that older adults tend to focus more on positive information and less on negative information than their younger counterparts. In 2004, she and her colleagues reported in *Psychological Science* (Vol. 15, No. 4) that the amygdala in older adults actually responds less to negative stimuli (such as unpleasant pictures) than it does in young adults. Starting around age 40, people also show a better memory for positive images than for negative ones, and this trend continues until at least age 80.

This "positivity effect" is seen even more strongly in people who are doing exceptionally well cognitively, Mather says, "so it doesn't seem to be something that just goes along with cognitive decline; it seems to be something that's an active process."

These findings fit with many self-reports from middle-aged and older individuals, Mather says. Older adults rank emotional stability and positive affect as more important than younger adults do, and they say that they're better at regulating their own emotions than they were in their youth.

Although scientifically analyzing such qualities as judgment and wisdom is considerably more difficult than measuring psychomotor speed or memory storage capacity, some researchers are trying to do just that. Research over the past several years has reported that middle-aged people are much more expert at many social interactions — such as judging the true intentions of other human beings — than are those either younger or older.

And work by David Laibson, PhD, at Harvard University, found that adults in midlife show better economic understanding and make better financial decisions than either younger or older adults. In fact, the average person's financial judgment seems to peak at 53.

Variability and influences

One of the middle-aged mind's most striking features may not be any one feature or ability, but rather the variation in cognitive skills that's found in this age group. Although differences in cognition obviously exist among individuals at all ages, these differences seem to increase in middle age.

For example, memory and attention frequently suffer in middle age, but some individuals' abilities actually improve in midlife. In Willis's Seattle study, most participants' ability to remember lists of words declined in middle age, but about 15 percent performed better on this task than they did as young adults.

"If you study a wide range of abilities, you begin to realize how very complex cognitive decline is and how many individual differences there are," Willis says.

This variation in behavioral performance is also reflected in expression of genes related to learning and memory. In a study published in *Nature* in 2004 (Vol. 429, No. 6,994), the brains of adults under age 40 consistently showed little damage and high levels of expression of these genes, while brains from those over 73 showed lots of damage and low gene expression. But in the middle-aged group, results varied widely. Some middle-aged brains were already shutting down, whereas others were indistinguishable from a 30-year-old brain.

"It's a very interesting and heterogeneous group," Grady says.

Attach. D-2

With more study of middle age in general — especially of those who seem to glide through those years with cognitive abilities intact or even improving — scientists hope to enable many more people to preserve cognitive health into old age.

So far, research suggests that remaining cognitively impressive with age comes from adopting certain behaviors as well as possessing some genetic luck, Willis says. For example, researchers have identified several gene variants that are risk factors for early memory problems. But people who show cognitive improvement in midlife also tend to be more physically, cognitively and socially active than those who don't fare as well.

"Instead of a crisis, middle age should be thought of as a time for a new form of self-investment," Reuter-Lorenz says. "This time of life brings so many new opportunities to invest in your own cognitive and physical resources, so you can buffer against the effects of older age."

Melissa Lee Phillips is a writer in Seattle.

Attach. D-3

Directory (11)

Manual/Handbook (11)

Psychology Subfield (11)

Survey/Survey Results (11)

Events (10)

Toolkit (10)

Bylaws (9)

Amicus Brief (6)

Bibliography (6)

Chart/Table/Figure (6)

Policy/Procedure (6)

Blog (5)

Conference Materials (5)

Guidelines (4)

News Responses (4)

Speech/Transcript/Script (4)

Summary (4)

Event Calendar (3)

Opinion/Editorial (3)

Presentation (3)

Database/Electronic Product (2)

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANTHONY ALLEN MORETTI, Appellant.	NO. 95263-9 COA No. 47868-4-II
STATE OF WASHINGTON, Respondent, v. HUNG VAN NGUYEN, Appellant.	Consolidated with: NO. 95510-7 COA No. 74962-5-I
STATE OF WASHINGTON, Respondent, v. FREDRICK ORR, Appellant.	And, NO. 96061-5 COA No. 34729-0-III **CERTIFICATE OF MAILING**

I certify under penalty of perjury under the laws of the State of Washington, that on March 22, 2019, I e-mailed a copy of the Amended Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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3/22/2019 Spokane, WA
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