NO. 97517-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

SEBASTIAN GREGG,

Respondent.

ANSWER TO AMICUS BRIEFS OF THE KOREMATSU CENTER FOR LAW AND EQUALITY AND THE JUVENILE LAW CENTER

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A. INTRODUCTION

Amicus briefs in support of Petitioner Gregg have been filed by The Korematsu Center For Law and Equality (hereinafter "Korematsu Center") and The Juvenile Law Center. This brief will respond to arguments made by both amici.

B. THERE IS NO CONSTITUTIONAL IMPERITIVE TO DIVEST LEGISLATURES OF ALL POWER TO DEFINE SENTENCING FOR JUVENILE OFFENDERS

Both amici argue that all juveniles should be presumed deserving of leniency when sentenced in adult court. Brief of Amicus Korematsu at 4-9; Brief of Amicus Juvenile Law Center at 2-13. They argue that because recent decisions of this Court give sentencing courts discretion to avoid mandatory life sentences, courts should likewise have discretion to impose any sentence deemed appropriate by the individual judge. These are essentially policy arguments thinly disguised as constitutional claims. Both the constitutional and the policy arguments should be rejected as a basis for declaring this statute unconstitutional.

Statutes are presumed constitutional and amici have the burden of proving that RCW 9.94A.535, which places the burden on an offender to prove a mitigated sentence is warranted, is unconstitutional beyond a reasonable doubt. State v. Hunley, 175 Wn.2d 901, 908, 287 P.3d 584

(2012). As this Court held under similar circumstances, an equity argument is a policy question for the legislature, unless there is a direct and firm constitutional basis for an appellate court to impose that policy. State v. Bacon, 190 Wn.2d 458, 467, 415 P.3d 207, 211 (2018) (holding that there was no constitutional basis to ban suspended sentences in juvenile court).

Amici's argument that superior court judges must have total discretion in sentencing juveniles would mean that there can be no binding legislative standards at all. The purposes of the Sentencing Reform Act would be meaningless. See RCW 9.94A.010(1)-(7). Proportionate and commensurate punishment that protects the public and reduces the risk of reoffending would become subservient to the individual judgments of hundreds of superior court judges around the state. A judge could impose 20 years, 10 years, 5 years, 2 years, or 30 days for a murder or other serious violent crime. An offender could receive a 20 year sentence from one judge while another offender on the same day just down the courthouse hallway receives a 5 year sentence, simply based on that individual judge's perception of what "children are different" means.

Such a radical divestment of legislative authority should be embraced only under clear constitutional authority. There is no such authority here. The Supreme Court and foreign decisions that amici rely

upon do not compel the conclusion that a legislature cannot set punishments for crimes committed by offenders under the age of 18. Rather, the cases they cite forbid only legislation that mandate death or life imprisonment. See, e.g., Commonwealth v. Batts, 640 Pa. 401, 471, 163 A.3d 410, 452 (2017).

The same is true in Washington. This Court commented in State v. Ramos[1] that it expected life sentences to be rare because most juveniles do not deserve a life sentence. But death and life sentences are categorically different. Twenty feet is not the same as a mile. Ramos did not hold, and no case cited by amici holds, that the Eighth Amendment divests legislatures of the power to exercise some measure of control over the sentencing of juveniles in adult court. Amici have thus established no constitutional basis to declare RCW 9.94A.535 unconstitutional as to juvenile offenders.

The links between age, brain development, and behavior are not so well understood or agreed upon as to justify taking from the legislature its prerogative to define crimes and punishments. And, there is no reason to conclude that judges exercising unfettered discretion would impose more

[1] State v. Ramos, 187 Wn.2d 420, 387 P.3d 650 (2017).

appropriate sentences than judges exercising discretion guided by legislation enacted by the peoples' representatives.

As carefully detailed in a recent review of juvenile justice innovations in Washington, the Washington legislature has for over two decades been at the forefront of evidence-based practices aimed at improving the juvenile justice system.

> The Washington State Legislature has significantly invested in reforms of the juvenile justice system over the last two decades. Central to these reforms is the promotion of rigorous research and the use of policies and programs based on research and evidence.
>
> At the same time, Washington has experienced significant shifts in the populations of court-involved youth. Overall, the number of court-involved youth has declined and the number of youth who recidivate has also declined.

Washington State Institute For Public Policy, Washington State's Juvenile Justice System: Evolution of Policies, Populations, and Practical Research, January, 2020.[2] The WSIPP review shows that the Washington Legislature has made significant gains in handling juvenile offenders in a manner that takes into account their intrinsic differences from adults. Where evidence-based studies suggest that alternatives to confinement are fruitful, Washington has pursued such alternatives. See Washington State Institute For Public Policy, Updated Inventory of Evidence-Based,

[2] Available at https://www.wsipp.wa.gov/ReportFile/1719/Wsipp_Washington-State-s-Juvenile-Justice-System-Evolution-of-Policies-Populations-and-Practical-Research_Report.pdf (last accessed January 31, 2020).

Research-Based, and Promising Practices: For Prevention and Intervention Services for Children and Juveniles in the Child Welfare, Juvenile Justice, and Mental Health Systems, December, 2019.[3]

Evidence-based policy depends on careful analysis of existing practices and experiments. It requires more than simple assertions that "children are different." Precisely how they are different from adults, and how they are different from each other, and what risks they pose based on age and conduct, are all highly significant considerations in determining appropriate punishment. The legislature should be permitted to continue its efforts to refine Washington's approach to juvenile justice based on evidence. The argument to divest it of that authority should be rejected.

C. CASE FORECAST COUNSEL DATA SHOW THAT JUDGES EXERCISE APPROPRIATE DISCRETION IN THE TINY FRACTION OF CASES WHERE JUVENILES COMMIT VIOLENT OFFENSES

The Korematsu Center claims that data from the Washington Case Forecast Council (CFC) show that in fiscal years 2018 and 2019 superior court judges imposed exceptional mitigated sentences in only one-quarter of all cases where a juvenile was "declined" and sentenced in adult court.

[3] Available at: https://www.wsipp.wa.gov/ReportFile/1713/Wsipp_Updated-Inventory-of-Evidence-Based-Research-Based-and-Promising-Practices-For-Prevention-and-Intervention-Services-for-Children-and-Juveniles-in-the-Child-Welfare-Juvenile-Justice-and-Mental-Health-Systems_Report.pdf (last accessed January 31, 2020).

Amicus Korematsu at 8-9.[4] They argue that after this Court's decision in State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), "most children are still subjected to adult equivalent sentencing," superior court judges impose too few exceptional mitigated sentences, and that a constitutional presumption in favor of leniency is required to ensure shorter sentences. Amicus Korematsu at 5. They conclude that courts are ignoring the fact that these youth are "children" and that this data "suggest[s] strongly that lower courts are struggling to conform their sentencing practices to the new constitutional requirements …". Id. at 9. The CFC data do not support these conclusions.

The data show that juveniles sentenced to adult-level sentences are a tiny fraction of both the over-all juvenile population and the over-all juvenile *offender* population. In fiscal year 2018, for example, juvenile offenders who were sentenced in adult court were 0.0086% of the overall population of juveniles in Washington.[5] Such offenders were 3.4 % of all

[4] As the Korematsu Center recognizes, such "declined" cases are only a subset of the juveniles sentenced in adult court. Many offenders are in adult court because that court has original jurisdiction or because the offender was previously declined from juvenile court and, thus, must remain in adult court for subsequent cases.

[5] According to the Juvenile Disposition Summary (FY 2018), the total juvenile population was 1,796,947 (p.6), 4,479 juvenile dispositions were entered (p. 6), only 1,574 dispositions were for felonies (p.9). The full CFC dataset is available from the CFC pursuant to their Data Transfer and Sharing Agreement. The King County Prosecuting Attorney's Office has a copy of that full data set. According to that data, 155 offenders sentenced in FY 2018 committed their crime as a juvenile. These offenders constitute about .0086 % of the total state juvenile population. Those offenders and about 3.46 % of all juveniles involved in the criminal justice system. That 3.4% committed the

juvenile *offenders* in the state. Id. Since so many youth with similarly undeveloped brains do not commit crimes, let alone violent crimes, committing serious violent crimes must not be a condition of being a juvenile. The fact that brain development may be a factor in some cases does not justify a presumption that it is the driving factor in every case, or even the majority of cases. Youth who commit serious crimes do so for a myriad of reasons, sometimes including their youth. This is a sound and rational basis for the legislature to avoid a presumption of mitigation.

Similarly, superior court judges faced with imposing sentence on this rare subset of the juvenile population will be appropriately influenced by the nature of the crime and the offender, including his prior history, but also by the plea agreements that are frequently struck.[6] It is not surprising that a mitigated sentence is imposed in only a quarter of the cases. In adult court, mitigated sentences are imposed in only 17.7% of cases. See Statistical Summary of Adult Felony Sentencing, at 33.

Thus, it is incorrect to conclude that superior courts are failing or refusing to exercise their discretion, they are simply exercising their discretion in a manner that is driven by the agreements between the

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worst crimes or had a significant history of committing serious crimes. See RCW 13.04.030(1).

[6] In fiscal year 2018, out of 155 offenders sentenced in adult court where their crime was committed as a juvenile, 143 pled guilty and only 12 were convicted following either a bench or a jury trial, a 92.26 % plea rate.

parties, the offenders' conduct, and, where appropriate, consideration for brain science. Where the universe of cases covers only violent and serious violent offenses often committed by repeat offenders, the balance of factors leads, reasonably, to standard range sentences in many cases.

Finally, this court has held that "not every juvenile homicide offender is automatically entitled to an exceptional sentence below the standard range…" and that the Eighth Amendment does not require a presumptive mitigated sentence. State v. Ramos, 187 Wn.2d 420, 434-37, 444-45, 387 P.3d 650 (2017). Ramos faced life without the possibility of parole—the highest penalty available for a juvenile offender. This Court also observed that a life sentence – constitutionally permitted only where the crime was not due to "transient immaturity" – would be "uncommon." State v. Ramos, 187 Wn.2d at 435. This observation does not mean that all juvenile offenders automatically deserve a mitigated sentence.

For these reasons, the limited data provided by The Korematsu Center does not compel the conclusion that judges impose too few mitigated sentences. Neither the data nor the reasoning show a need to adopt a presumption of leniency for juveniles sentenced in adult courts.

D. BRAIN SCIENCE DOES NOT SHOW THAT ALL JUVENILES ARE ENTITLED TO A MITIGATED SENTENCE

The Korematsu Center and Juvenile Law Center argue for ever-expanding judicial discretion at the expense of legislative involvement in defining sentencing law by repeatedly exhorting that "children are different." Children are certainly different. But a 13 year-old is not the same as a 17 year-old, and a person painting graffiti is not the same as a murderer. The observation that "children are different" only takes one so far in the journey to discern appropriate sentences, and it says nothing about who should decide those limits. In fact, the relationship between brain development and serious criminology remains ill-defined in scientific literature, so courts should be reluctant to expand constitutional directives on this basis.

Professor Lawrence Steinberg, for example, whose work is routinely cited by amici, recommends caution. He describes the link between adolescent brain differences and adolescent behavior as "sensible conjecture," noting that "few studies have linked changes in brain structure or function between adolescence and adulthood to changes in the legally relevant behaviours, especially as they play out in the real world." Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions About Adolescent's Criminal Culpability,* 14 Nature

Neuroscience 513, 517-18 (2013). In another publication, Professor Steinberg argues that assertions like those made in amici's brief "must be tempered … in view of the absence of direct evidence in humans that link the biology with the behavior. … [T]he fact that particular sets of neurobiological and behavioral changes occur concurrently in development can only be taken as a suggestion of a connection between them." Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Developmental Review 78, 92 (2008). See also Laurence Steinberg, *The Science of Adolescent Brain Development and Its Implications for Adolescent Rights and Responsibilities*, Human Rights and Adolescence, 59, 67 (J. Bhabha ed., 2014) ("Although there is a good degree of consensus about many of the ways in which the brain structure and function change during adolescence, it is less clear just how informative this work is about adolescent behavior."). It is simply impossible to extrapolate from generalized brain development studies to individualized decision-making required to impose a criminal sentence.[7]

[7] Bonnie & Scott, The Teenage Brain: Adolescent Brain Research and the Law, 22 Current Directions in Psychological Science 158, 161 (2013) ("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 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.")

Risky behavior is often proclaimed to be a hallmark of underdeveloped brains. But risky behavior seldom includes criminal conduct or violent criminal conduct. The fact that riskiness overlaps with criminality does not mean they are the same. There are differences in kind between the reckless driver, the underage drinker, and the person who shoots or rapes another. A greater propensity for recklessness does not necessarily equal reduced culpability, even if some behaviors can be characterized as both risky and criminal. As one commentator has observed, "Graham[8] suffers from the faulty premise that juveniles who commit heinous crimes are typical juveniles, and that they are categorically less culpable than young adult offenders." Craig S. Lerner, *Sentenced to Confusion: Miller v. Alabama and the Coming Wave of Eighth Amendment Cases*, 20 Geo. Mason L. Rev. 25, 26 (2012).

There is no research to suggest that juvenile carelessness and low-level delinquency are caused by the same biological or cultural impulses that trigger violence. In fact, although juvenile crime rates for overall crime tend to peak at age 17 and decline precipitously after that, the same cannot be said for violent young adults. See Moffitt,

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

Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psychol. Rev. 674, 675 (1993). The different peaks for different types of criminal behavior indicates an aggressive and antisocial subset of juvenile offenders will continue to reoffend if not held accountable. Id. at 675-78. See also Moffitt, *A Review of Research on the Taxonomy of Life-Course-Persistent Versus Adolescence-Limited Antisocial Behavior* 277, 292-93, in Taking Stock: The Status of Criminological Theory (F. Cullen, J. Wright & K. Blevins eds. 2006). This suggests that "delinquency conceals two distinct categories of individuals, each with a unique natural history and etiology." Moffitt (1993), at 674.

Other research suggests that mental health diagnosis or mental states like anger are not sound predictors of persistently violent behavior. More reliable evidence is the types of crimes a juvenile commits and the age at which he begins to commit such crimes. Vitacco, Caldwell, Van Rybroek, and Gabel, *Psychopathy and Behavioral Correlates of Victim Injury in Serious Juvenile Offenders*, 33 Aggressive Behavior 537, 541 (2007). The "life-course-persistent" offenders were three times more likely to be convicted of a violent offense before age 18 as the adolescence-limited group. Moffitt, *et al*, *Child hood-Onset Versus Adolescent-Onset Antisocial Conduct*

Problems in Males: Natural History from Ages 3 to 18 Years, 8 Dev. & Psychopathology 399, 400, 409-13 (1996).

There also are cross-cultural studies which suggest that deviant behavior is not tied wholly to brain development. These studies suggest that cultural influences may be as significant as biological ones. Preindustrial societies tend to treat teens more like adults and such societies see almost no increase in delinquent behavior among young males. See R. Epstein, *The Case Against Adolescence: Rediscovering the Adult in Every Teen* 81 (2007). The contrast between these societies and Western societies suggests that aberrant juvenile behavior is caused by a mix of biological and cultural influences. Treating teens like adults rather than like children might affect their behavior. R. Epstein, *The Myth of the Teen Brain*, Scientific American Mind 63 (April/May 2007). As one commentator has observed,

> the brains of late adolescents are almost certainly the same around the globe...but the rates of behaviors associated with immature adolescent brains, such as impulsive criminality, vary widely from place to place and from time to time. Monolithic brain explanation of complex behavior is almost always radically incomplete.

Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 Ohio St. J. Crim. L. 397, 398 (2006).

Other studies have shown that, perhaps contrary to expectations, mere biological development does not correspond to a decrease in dangerous behavior. Berns, Moore, & Capra, *Adolescent Engagement in Dangerous Behaviors Is Associated with Increased White Matter Maturity of Frontal Cortex*, 4 PloS ONE 9 ("individual variation remains the rule, and understanding why an individual adolescent engages in dangerous behaviors is complex and not solely a function of chronological age" and these findings "underscore[] the danger in overgeneralizing about the relationship of the adolescent brain to such behaviors.").[9] Thus, identifying the cause of violent criminal acts is not simply a matter of focusing on chronological age or alleged brain development. Nor can adolescent brain development explain character traits like meanness, cruelty, and sadism, or between mental disorders, anti-social personality disorders, and the like.

It is important to ask what role brain science should play in deciding appropriate punishment for any given offender. Punishment

[9] http://www.plosone.org/article/info:doi/10.1371/journal.pone.0006773 (last accessed on 10/3/2019).

is ordinarily considered a moral, normative, and policy-based question decided by the elected representatives in a legislative body. Brain science may certainly be relevant to such questions, but science is hardly capable of *answering* the question of what punishment a class of offenders *deserves*. Rather, science informs decision-making in light of society's concept of criminal responsibility. *Brain Overclaim Syndrome, supra,* at 398 ("To think sensibly about the relation of any other variable--whether that variable is biological, psychological, sociological, or astrological--to criminal responsibility first requires that one have an account of criminal responsibility."). Punishment is not meted out simply based on what a person "deserves" because of their brain development, or simply as a deterrent or to rehabilitate an offender, as recent court decisions seem to suggest.

Rather, there are equally valid goals of punishment which include incapacitation of dangerous offenders and just desserts—the belief that punishment is deserved based on the criminal conduct. The Sentencing Reform Act adopted a model of just desserts and rejected the failed rehabilitative models that preceded it. D. Boerner, *Sentencing in Washington* § 2.1 et seq. (The Purposes of the Sentencing Reform Act). Stiff punishment for particularly heinous acts serves as society's gesture of collective disapprobation. Thus, it is

simply not true that punishing a young offender with a long sentence serves no penological goals; it may well serve the goals of just desserts and incapacitation.

In any event, "the discovery that the brain ... played some causal role in the production of what is undeniably human action does not lead to any legal conclusions about responsibility. ... The criteria for responsibility are behavioral and normative, not empirically demonstrable states of the brain." Morse, *Brain Overclaim Syndrome*, at 405. Thus, if brain science cannot distinguish between a lack of brain development and other character traits or brain defects, and if it does not answer the question of who deserves what punishment, then it is not particularly useful in fashioning an appropriate punishment. A judge imposing sentence is forced to rely on traditional assessments of the defendant's behavior before, during, and after the crime.

> For the law, actions speak louder than images with very few exceptions. The law's criteria are behavioral—actions and mental states. If the finding of any test or measurement of behavior is contradicted by actual behavioral evidence, then we must believe the behavioral evidence because it is more direct and probative of the law's behavioral criteria. For example, if a criminal defendant behaves rationally in a wide variety of circumstances, the defendant is rational even if his or her brain appears structurally or functionally abnormal. In contrast, if the defendant is clearly psychotic, then a potentially legally-relevant rationality problem exists even if his brain looks normal.

Stephen J. Morse, *Neurohype and the Law: A Cautionary Tale, Public Law and Legal Theory Research Paper Series*, Research Paper No. 18-30.[10]

As the recent WSIPP report concludes, research on effective justice system interventions continues to evolve.

> Advances in data and methods allow researchers to now investigate what works for whom[.] New outcome evaluations would add valuable information about specific use of evidence-based programs and can help move beyond the one-size-fits-all policies of the past.

Washington State Institute for Public Policy, Washington State's Juvenile Justice System: Evolution of Policies, Populations, and Practical Research, at 34 (January, 2020). The legislature is equipped to commission studies, gather evidence, and hold hearings to discern the best way forward. Adopting a constitutional rule that presumes all juveniles sentenced in adult court deserve a mitigated sentence imposes a new straight jacket on legislative innovation that may not be justified by continuing research.

[10] Available at https://poseidon01.ssrn.com/delivery.php?ID=318115065115117125006079064003016087017069064045069066075089121069073012022123120018022103030104056120001028116087084002115091117022094008013003028020097112116024046085075003002067011020003114011094080095107079109090009103108119121031019107024095066&EXT=pdf (last accessed January 31, 2020).

E. CONCLUSION

There is no constitutional basis to claim that all juveniles sentenced in adult court should be presumed entitled to an exceptional mitigated sentence. Juveniles prosecuted in adult court have demonstrated by their actions a degree of culpability that merits serious punishment, and it is neither unconstitutional nor unreasonable for the legislature to demand that such juveniles prove that their youth rather than a myriad other factors caused them to commit their crimes. For these reasons, the State respectfully asks this Court to reject the arguments of amici.

DATED this 6th day of February, 2020.

Respectfully submitted,

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