No. 92605-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ZION D. HOUSTON-SCONIERS and TRESON LEE ROBERTS,

Petitioners

(Consolidated cases for trial and on appeal)

SHORTENED SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER TRESON ROBERTS

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1. Did the court of appeals err in extending the Court's holding in State v. Stewart[1] to hold that a person had the required "fear and apprehension" and in finding sufficient evidence?

2. Can a firearm enhancement be imposed for conspiracy without proof someone was "armed" for that crime?

3. Is the reasoning of Miller v. Alabama[2] applicable to cases other than those involving death or life without parole?

4. Does categorically treating all 16 and 17 year old juveniles who commit certain crimes as if they were equally as culpable as adults violate the Eighth Amendment and Article 1, § 14 and state and federal due process by providing no room for proportionality in consideration of the individual characteristics of the particular youth?

5. Does automatically treating all 16 and 17 year olds as if they were adults based upon the charged crime and then subjecting them to adult punishment as a result violate Miller's mandate that criminal justice systems must honor the distinctions between juveniles and adults and allow consideration of those distinctions for constitutionally proportional punishment?

6. Does operation of mandatory adult consecutive "flat-time" sentencing enhancements on a juvenile after automatic decline violate the mandates of Miller, the Eighth Amendment, Article 1, § 14 and state and federal due process?

7. Is In re Boot, 130 Wn.2d 553, 925 P.2d 560 (1996), no longer good law?

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[1]State v. Stewart, 73 Wn.2d 701, 440 P.2d 815 (1968).

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

B. OVERVIEW OF RELEVANT FACTS[3]

Petitioner Treson Roberts was convicted of second-degree assault, conspiracy to commit first-degree robbery and five counts of first-degree robbery, all with firearm enhancements. CP 283-88, 404-20. Roberts was 16 on Halloween 2012 when several groups of mostly teen trick-or-treaters, out past 9, were approached by several teens with masks on who demanded their candy and other items. It was alleged that Zyion Houston-Sconiers, co-Petitioner here, pointed a gun during the robberies and that Roberts was involved. Id. No one was hurt, not even one girl who walked away and did not give up her candy. The robbers ended up with about 96 pieces of candy, a cell phone and a devil mask. State v. Houston-Sconiers/Roberts, 191 Wn. App. 436, 365 P.3d 177 (2015).

Because of age and the charges the prosecutor chose, Roberts was tried in the adult division of superior court by automatic operation of RCW 13.04.030(1)(c)(v), the "auto-decline" statute. At sentencing, the court imposed an agreed recommendation of just the mandatory stacking flat-time sentencing enhancements which still totaled a term of 317 months, without any early release possible. CP 428-42; RP 2417-19.[4]

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[3]More detailed discussion of relevant facts is contained in the related arguments, *infra*.
[4]References to the trial court record are explained in appellant's opening brief at 4 n.1.

The court of appeals, Division Two, affirmed in a part-published opinion[5] and this Court granted review.

C. ARGUMENT

1. THE COURT SHOULD REVERSE AND DISMISS THE CONVICTION FOR SECOND-DEGREE ASSAULT

The conviction for second-degree assault of Auxalis Guice, the girl who walked away, was not supported by sufficient evidence and was based at least in part on an inference that a person *would necessarily* feel the required fear for that crime despite evidence to the contrary. Under state and federal due process, the state must bear the burden of proving every essential part of its case, beyond a reasonable doubt. City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992); In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). If the state fails to meet that burden, reversal and dismissal is required. tate v. Smith, 155 Wn.2d 496, 504-505, 120 P.3d 559 (2005); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Mr. Roberts was convicted of second-degree assault of Axsaulis Guice as an accomplice to Mr. Houston-Sconiers. See CP 283088; 404-20; RP 2372-77. Under RCW 9A.36.021(1)(c), to prove second-degree assault as charged, the prosecution had to show assault with a deadly

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[5]State v. Houston-Sconiers/Roberts, __ Wn. App. __, __ P.3d __ (2015 WL 7471791).

weapon.. To prove the crime, the state thus had to show specific intent to create in the victim fear and apprehension of harm and that Guice actually **experienced** such fear. See State v. Byrd, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995). Pursuant to RAP 10.1(g)(2)[6], Roberts hereby incorporates and adopts the arguments presented by co-Petitioner Houston-Sconiers about the insufficiency of the evidence.

Further, the Court should reject Division Two's extension of Stewart. The trial prosecutor argued that Guice "was definitely put in fear of bodily harm by Mr. Houston-Sconiers when that gun was pulled" and that the "intent was to scare her, but also implied a quasi-presumption that just pulling the gun was enough, saying that Houston-Sconiers "did that, intent, that assault, **by definition, by use of a firearm**, so she is a victim" of assault in the second degree. RP 2247-48 (emphasis added). The prosecutor did not discuss Guice's testimony about not really being scared Id.

In affirming, Division Two cited Stewart and declared, "[a]pprehension and fear experienced by a person at whom a gun is pointed may be inferred, unless he knows it to be unloaded." Houston-Sconiers, supra. Stewart, however, dealt with a different definition of

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[6]Under RAP 10.1(g)(2), a party in a consolidated case may "adopt by reference any part of the brief of another" party.

assault; "an attempt, with unlawful force, to inflict bodily injury upon another, accompanied by the apparent present ability to give effect to the attempt if not prevented." 73 Wn.2d at 705. The "gist" of that offense "is the intentional attack with a weapon which might cause" the required harm. Stewart, 73 Wn.2d at 705-706. While in Stewart, this Court found that particular means of committing assault did not require proving "a state of apprehension in the one assaulted," the Court also declared, in *dicta*, that a person who has a gun pointed at them generally may be inferred to have the required fear unless they know the gun is not loaded, *and* that the victim in Stewart had testified as to such fear, in any event. The court of appeals erred in relying on Stewart as if it established a presumption the required fear and apprehension for this type of assault exists even in the face of contrary evidence. There was insufficient evidence absent that erroneous application of Stewart and this Court should therefore reverse.

2. THE FIREARM ENHANCEMENT FOR THE CONSPIRACY SHOULD ALSO BE REVERSED

In addition, the firearm enhancement for the conspiracy conviction cannot be sustained. The conspiracy was a "meeting of the minds," and the prosecution presented no evidence that would support a finding of being "armed" for the purposes of that crime. Pursuant to RAP 10.1(g),

Roberts adopts and incorporates the arguments of Houston-Sconiers on this issue. In addition, Roberts submits, a firearm enhancement may only be imposed for a crime if, during the crime, the weapon is "easily accessible and readily available for use, either for offensive or defensive purposes." State v. Eckenrode, 159 Wn.2d 488, 492-93, 150 P.3d 1116 (2007). A person is not "armed," however, just because a gun is present. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993); State v. Schelin, 147 Wn.2d 562, 55 P.3d 632 (2002); State v. Johnson, 94 Wn. App. 882, 974 P.2d 855 (1999). The state must also prove "intent or willingness to use" the weapon during the *specific* crime. State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007).

The crime of conspiracy focuses not on the "specific criminal object" but instead "the conspiratorial agreement." State v. Bobic, 140 Wn.2d 250, 265, 996 P.2d 610 (2000)[7]. Guilt is established by the agreement even if that agreement never comes to fruition. State v. Varnell, 162 Wn.2d 165, 170, 170 P.3d 24 (2007). There is also a requirement of proof of a "substantial step," which can be extremely minor and need not itself be a crime. See State v. Dent, 123 Wn.2d 467,

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[7]A person commits conspiracy when, "with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement." RCW 9A.28.040(1).

475, 869 P.2d 392 (1994). This requirement exists simply to ensure that the State does not punish First Amendment speech or hyperbole without proof of actual intent to conspire. Id; see Yates v. United States, 354 U.S. 298, 334, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957).

Ultimately, the "gist" of conspiracy is the "confederation or combination of minds." Dent, 123 Wn.2d at 475. Here, the state imposed a firearm enhancement- and the court of appeals affirmed - based upon the *inference* that the conspiracy was committed while armed, because the crimes committed *after* the conspiracy but ostensibly as a result of that agreement involved a gun[8]. But due process requires that the prosecution must specifically prove every part of an enhancement. See State v. Eastmond, 129 Wn.2d 497, 503, 919 P.3d 577 (1996).[9] And it had to show that the defendant was armed for *the conspiracy* in order for the firearm enhancement for that crime to be imposed for that crime. See Johnson, 94 Wn. App. at 887. This Court should strike the enhancement.

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[8] The prosecutor argued that the criminal conspiracy must have been formed prior to the commission of the robberies, because there was a "concert of action" in those crimes. RP 2247. The prosecutor then argued that evidence proved the existence of individual and overall conspiracy, and that a gun was involved in the later crimes. RP 2247-49.

[9] The definition of what is required to prove someone "armed" has admittedly evolved over time, from just the requirement that a gun be "easily accessible and readily available for offensive or defensive purposes," to a requirement that there also be a "nexus" between the defendant, the weapon and the crime, to adding another requirement that there must be proof the defendant had the intent to use the weapon in furtherance of the crime. Compare, Valdobinos, 122 Wn.2d at 282 (applying "easily accessible" test); with Schelin, 147 Wn.2d at 563-64) (adding "nexus" evaluation); with Brown, supra (adding the "intent to use" test).

3. CATEGORICAL "AUTOMATIC DECLINE" OF JUVENILES IS NO LONGER CONSTITUTIONAL

At the time of the crimes, Mr. Roberts was 16 years old. CP 17-22. He was tried in adult court and subjected to adult mandatory stacking "flat-time" sentencing enhancements based upon the operation of RCW 13.04.030(1)(c)(v)(A), our state's "automatic decline" law. This Court has previously upheld the law as constitutional against challenges including due process and cruel and "cruel and unusual" punishment. See Boot, supra. But Boot, decided in 1996, is no longer good law, and our system of "automatic decline" no longer constitutional in light of state and federal due process, 8th Amendment and Article 1, § 14.

a. Law and science have developed

Juvenile courts were created after our state and the first in Washington was established in1905, "in response to a wider reform movement focused on treating and rehabilitating juveniles instead of subjecting them to the harsh procedures, penalties and jail conditions of adult courts." See State v. Saenz, 175 Wn.2d 167, 172, 283 P.3d 1094 (2012). The new courts no longer looked at crime and punishment; instead, "[t]he child was to be 'treated' and 'rehabilitated.'" State v. Rice,

98 Wn.2d 384, 389, 655 P.2d 1145 (1982)[10]. This focused remained until 1977, when the Juvenile Justice Act shifted the focus from juvenile courts as service providers to "instruments for administering justice in light of the realities of juvenile criminality." Id. Even with the shift, however, the goal of rehabilitation remained, with a purpose of the Act including creation of "a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders." RCW 13.40.010(2).

Until 1994, under that system, children in this state were automatically tried and sentenced in the juvenile courts, unless and until that court "declined" jurisdiction. Boot, 130 Wn.2d at 562-63; see State v. Posey, 161 Wn.2d 638, 643, 167 P.3d 560 (2007). At a "decline" hearing, the judge was required to consider factors such as the nature of the crime and its severity but also factors relevant to the specific offender, such as his maturity and level of "sophistication," his living situation, his history, emotional development. State v. Williams, 75 Wn.2d 604, 453 P.2d 418 (1969); Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). These "Kent factors" exist as a matter of due process for

[10]Some procedural protections were added in light of In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1969), which afforded juveniles some measure of due process, but the concept of the state as *parens patriae* generally remained until in 1977. Saenz, 175 Wn.2d at 172-73.

discretionary transfers and are codified in our state at RCW 13.40.110. See Kent, 383 U.S. at 546-47;[11] State v. Holland, 98 Wn.2d 507, 515, 656 P.2d 1056 (1983).

In the 1990s, national fears were ignited over so-called juvenile "superpredators" as the media warned of "tens of thousands of severely morally impoverished juvenile super predators" about to burst onto society in a huge crime wave. See, "Superpredators Arrive," Newsweek, Jan. 21, 1996.[12] Like others, our state enacted the "automatic decline" law, RCW 13.04.030(1)(e)(v)(A), under which children who are charged with a "serious violent offense" committed at age 16 or 17 are categorically deemed "adults," tried and sentenced as such. See Saenz, 175 Wn.2d at 174 n. 1. In Boot, this Court upheld this statute as constitutional under both the prohibitions against cruel and unusual punishment and due process mandates of proportionality, unconvinced

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[11]The eight factors are 1) the seriousness of the offense to the community and whether community protection requires decline, 2) if the offense was committed in "an aggressive, violent, premeditated, or wilful manner," 3) if it was against persons instead of property, 4) the "prosecutive merit" of the complain, 5) whether there are other defendants who are adults and it is desirable to try them all together, 6) the juveniles "sophistication and maturity," determined by looking at home, environment, situation, "emotional attitude" and living patterns, 7) the juvenile's record/previous history and 8) likelihood of "reasonable rehabilitation" of the juvenile in relation to prospects for adequate protection of the public. Kent, 383 U.S. at 566-67.

[12]*Available at* http://www.newsweek.com/superpredators-arrive-176848. The proponent of this theory, John Dilulio, a former Princeton professor, has since conceded that his prediction was wrong. See Lara A. Bazelon, *Note: Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. LAW REV. 159 (2000).

that the concept of lesser culpability for juvenile applied outside a capital case. 130 Wn.2d at 571-72.

Since Boot, there has been a sea change in understanding of neurological development of youth which casts a wide net in implication. See, Perry L. Moriarty, *Miller v. Alabama and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 933 (2015). Starting in Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), the U.S. Supreme Court has recognized and expanded the significance and application of this research. 543 U.S. at 569. In Roper, the Court recognized the very significant differences which directly affect a youth's culpability even for the most heinous crime. Youth suffer "a lack of maturity and an underdeveloped sense of responsibility," the evidence showed, which can "often result in impetuous and ill-considered actions and decisions." 543 U.S. at 569. Further, the Court found, youth are more vulnerable to susceptible to the negative influence of others - the famous "peer pressure" - because of development, not a permanent lack of character. 543 U.S. at 569. The Court concluded that, developmentally, "the character of a juvenile is not as well formed as that of an adult," the traits of youth are "more transitory" and "less fixed," and the result is that even juveniles who kill cannot be said with confidence to be either as culpable or incorrigible as an adult who committed a similar crime.

Roper, 543 U.S. at 569. The Court examined the goals of the punishment in question - of retribution and deterrence - and concluded that those goals were not served by imposing the death penalty for *any* crime committed when under 18, as a categorical matter under the Eighth Amendment prohibition against "cruel and unusual" punishment. Id.

Roper overturned one of the cases on which Boot fundamentally relied, Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), abrogated, Roper, 543 U.S. at 569-70; see Boot, 130 Wn.2d at 571. For both the 8th Amendment and due process, Boot rejected the idea that defendant's actual culpability and "ability to make reasoned adult judgments about the consequences of one's acts" was even a required consideration. Boot, 130 Wn.2d at 571. Roper rejected that theory.[13] Notably, by the time Roper was decided, the author of the "superpredator" theory had recanted it. See Elizabeth Becker, "*As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets,*" New York Times (Feb. 9, 2001).[14] And since Roper, our nation's highest court has continued to rely on the significant differences in culpability and reformability of youth in various areas of the law, expanding its application beyond the limited,

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[13]In 2005 the Legislature cited Roper in eliminating mandatory minimum sentences for some youths tried as adults, recognizing the difference between juveniles and children but limiting its recognition of the significance of adolescent brains and youth to exclude "auto-decline." Laws of 2005, ch. 437, §§ 1, 2 and 3(a).

[14]*Available at* http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators--bush-aide-has-regrets.html?pagewanted=print&src-pm.

isolated realm of capital crimes. See Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2011). In Graham, the Court applied "proportionality" and found it categorically unconstitutional as disproportional under the 8th Amendment for any juvenile who committed any crime short of homicide to receive a sentence of life without parole. Graham, 560 U.S. at 68-69. Graham also settled that the "[t]he age of the offender and the nature of the crime each" must be considered in deciding whether the Eighth Amendment has been violated. 560 U.S. at 68-69. The Graham Court detailed the relative brain functioning and lack of maturity of juveniles as compared to adults, finding that juveniles were "more capable of change" and their criminal behavior more likely to be evidence of "transient immaturity" of youth than adults, reaffirming Roper as supported even further by new developments. Graham, 560 U.S. at 68-69; see Alexandra O. Cohen & B. J. Casey, *Rewiring Juvenile Justice: The Intersection of Developmental Neuroscience and Legal Policy*, 18 TRENDS IN COG. SCI. 63 (Feb. 2014).

The Graham Court was concerned about drawing a "clear line" about the differences between adult and juvenile offenders, noting that even experts had trouble deciding which very few juvenile offenders were so incorrigible that they should be treated as adults and punished as such. Graham, 560 U.S. at 78. While "not absolved of responsibility for his

actions," a juvenile's limited culpability" mitigated against the harshest penalties, the Court found, presaging application of its new understanding of the "mitigating qualities of youth" and its logical impact in other areas of our criminal justice system by holding that "criminal procedure laws that fail to take the defendants' youthfulness into account at all would be flawed." 560 U.S. at 76.

And the Court has recognized the impact of the fundamental differences of youth beyond the limited 8th Amendment realm. See J.D.B. v. North Carolina, 564 U.S. __, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). In J.D.B., the Court cited Graham and the mitigating factors of youth in determining whether a youth would have felt he was not "free to leave," as contrasted with a normal adult, in light of the differentiating characteristics of youth" such as the inherent susceptibility to peer pressure and inability to foresee results. 131 S. Ct. at 2397. In holding that courts must examine how a situation would appear to a juvenile given those unique limits and traits, the Court rejected the state's effort to limit the application of Graham. Indeed, the Court held, *failing* to require such examination would be "to ignore the very real differences between children and adults," and, further, "to deny children the full scope of the procedural safeguards" to which they were entitled when in custody. 131 S. Ct. at 2405-2406.

By 2012, when the Court issued Miller v. Alabama, the support for these distinctions was even clearer and even more experts were informing the Court on how "[a]dolescents' behavior immaturity mirrors the anatomical immaturity of their brains" in ways not previously understood. See Miller v. Alabama, 132 S. Ct. at 2464-66. Citing youth's "diminished culpability and greater prospects for reform" and how it mitigated against the justifications of "retribution" and "deterrence" served by imposition of a sentence of life without parole for homicide, the Court found unconstitutional all automatic imposition of such a sentence for offenders who were juveniles at the time of the crime. Miller, 132 S. Ct. at 2465. Retribution relates to blameworthiness which is minimized due to the immaturity, recklessness and impetuosity of youth, the Court found, and there was limited deterrent effect because of a youth's developmental inability to consider potential punishment in advance. Id.

Notably, in Miller, unlike here, there was a "decline" hearing where a juvenile court had examined the Kent factors and decided to transfer the case to adult court. 132 S. Ct at 2463. The Miller Court was unswayed that this sufficed, noting that the transfer resulted in *automatic* imposition of the adult mandatory sentence on the offender without any consideration of the mitigating factors of his youth. Id. By definition, the

Court found, such automatic imposition of the sentence was not proportional to the offender and the offense. 132 S. Ct. at 2463.

By the time of Miller, there was new information about structures such as the limbic system and the prefrontal cortex, both portions of the brain directly relevant to criminal culpability. See, e.g., Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents,* 38 AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1 (1999); B.J. Casey & Kristina Caudle, *The Teenage Brain: Self Control,* 22(2) CURRENT DIRECT. IN PSYCH. SCI. 82, 84 (2013).[15] This further confirmation of the previous overwhelming evidence led the Court to affirm the expansive potential impact in our system, noting, "the distinctive (and transitory) mental traits and environmental vulnerabilities" of youth are not "crime-specific." Miller, 132 S. Ct. at 2465.

Thus, with J.D.B. and Miller the Court made it plain that consideration of the mitigating factors of youth in our criminal justice

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[15]The limbic system includes the amygdala and is associated with the "fight or flight" response and other emotional motivation functions, while the prefrontal cortex controls "executive functions" such as emotional regulation, impulse control, ability to assess risk, predictive ability for future outcomes, ability to withstand external pressure, ability to foresee consequences and other parts of the neurological system which modulates impulsivity and other behavioral impacts. See, Elizabeth Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions,* 2 NATURE NEUROSCI. 859, 860-61 (1999); Sarah Durston et al, *Anatomical MRI of the Developing Human Brain: What Have We Learned,* 40 AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012 (2001).

systems expands beyond not only the death penalty context or even the context of sentencing but beyond.[16]

Below, Division Two held that the reasoning of Miller did not apply outside of cases involving life without the possibility of parole. But J.D.B. had already set that theory to rest by applying that reasoning and the relevant evidence regarding youth to a non-sentencing context even before Miller was decided. See J.D.B., 131 S. Ct. at 2405. Other states have rejected a narrow reading of this line of cases. See, e.g., Henry v. State, 175 So.2d 675 (Fla. 2015); State v. Lyle, 854 N.W.2d 378, 399 (Iowa 2013); State v. Ragland, 836 N.W.2d 107 (Iowa 2013). As has this Court. See State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015).

In O'Dell, this Court reconsidered mandates of our state's adult sentencing scheme and reversed longstanding practice considering youth as irrelevant to sentencing for crimes committed by adults. 183 Wn.2d at 683. Notably, in O'Dell, the Court reversed its previous belief that it was "'absurd' to believe that youth could mitigate culpability,'" the very

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[16]Courts across the country have grappled with and applied Miller, some narrowly but some seeing a bigger picture of the mitigating qualities of youth. See, e.g., State v. Boston, 363 P.3d 453 (Nev. 2015); State v. Null, 836 N.W. 2d 41 (Iowa 2013). This Court has pending such a dispute. Compare, State v. Ramos, 189 Wn. App. 431, 357 P.3d 680 (2015), review granted, __ Wn.2d __ (2016), with, State v. Ronquillo,190 Wn. App.765, 361 P.3d 779 (2015). Most recently, the U.S. Supreme Court held that Miller "announced a substantive rule of constitutional law" which applies retroactively - thus overturning the strictly limited views of many states and federal courts. Montgomery v. Louisiana, __ U.S. __, 193 L. Ed. 2d 599, 136 S. Ct. 718 (2016).

doctrine underlying this Court's decision in Boot. O'Dell, 183 Wn.2d at 694-95; see Boot, 130 Wn.2d at 571-72. The "advances of scientific literature" which led this Court to conclude that, "in light of what we know today about adolescents' cognitive and emotional development," youth could mitigate culpability for a person who is *older* than 18 logically extends even further to those who are *younger* and even less mature, like Mr. Roberts, who was 16 at the time of the crimes.

b. Automatic transfer now violates prohibitions against cruel and cruel and unusual punishment

This Court should hold that the automatic "decline" statute is no longer constitutional, nor was the sentence in this case. Both the Eighth Amendment and Article 1, §14, prohibit "cruel" punishment but our clause is more broad and does not require the punishment be "unusual." See State v. Morin, 100 Wn. App. 25, 29, 995 P.2d 113 (2000). Our state's analysis has been described in the past as asking if the punishment was "grossly disproportionate" based on whether it was "clearly arbitrary and shocking to the sense of justice." See State v. Fain, 94 Wn.2d 387, 397, 617 P.2d 720 (1980). But the Fain standard was adopted to provide *greater* protection than the federal Eighth Amendment law provides. See id.. And Fain has yet to be updated by this Court in light of Roper and its progeny.

This Court should thus apply a modified Fain analysis. Fain requires only consideration of 1) the nature of the offense, 2) the legislative purpose behind the statute, 3) the punishment imposed for the same offense in other jurisdictions and 4) the punishment imposed for other offenses here. Fain, 94 Wn.2d at 397. The Fain analysis does not require looking at the mitigating factors of youth and their effect on the proportionality of automatically treating a child as an adult and then imposing mandatory sentences meant for adults on juveniles. Applying that modified analysis here, first, the nature of the offenses (1) were serious but no one was hurt. And Mr. Roberts was convicted as an accomplice, whose culpability is already diminished even without the mitigating factors of his transient youth. It is also significant that the prosecution exercised its discretion to charge the crimes as seriously as it did, with first-degree levels and an enhancement for every crime, where a second-degree crime would have kept the case in juvenile court.. See, e.g., State v. Knippling, 166 Wn.2d 93, 206 P.3d 332 (2009). No injuries occurred, yet Mr. Roberts is serving flat time of 26 years in prison for his part in what occurred that Halloween night.

Second, the "legislative purposes" of automatically treating children as adults and creating mandatory stacking firearm enhancements (2) do not justify automatically treating juveniles as adults and subjecting

them to automatic imposition of adult sentencing schemes. Miller established that the rationales of deterrence and retribution are not well served by imposing categorical sentences on juveniles. Miller, 132 U.S. at 2468.[17] Further, studies now show that transfer of juveniles to adult court not only does not deter but in fact *increases* juvenile violence and recidivism, in relation to offenders who are not transferred. See A. McGowan, R. Hahn et al, *Effects on Violence of Laws and Policies Facilitating The Transfer of Juveniles From The Juvenile Justice System To The Adult Justice System: A Systematic Review*, 32 AM. J. PREV. MED. 7-28 (2007). The nonpartisan Washington State Institute for Public Policy has reached the same conclusion. Elizabeth Drake, *The Effectiveness of Declining Juvenile Court Jurisdiction of Youthful Offenders* (2013) (Washington State Institute of Public Policy).[18] The automatic result of that automatic "decline" is automatic imposition of adult enhancements.

The factors of the punishment imposed in other jurisdictions for the same offense and that imposed here (3), (4) similarly fail to support the sentence of 26 years flat time here for minimal loss of property and no

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[17]There is also a very serious question about whether mandatory penalties serve their purposes at all. See Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUSTICE 94 (2009).
[18]*available at*, http://www.wsipp.wa.gov/ReportFile/1544/WSIPP.

injury at all. The same conduct could have been charged as second-degree robberies. See, Knippling, supra. And given that 25 years is now deemed an appropriate sentence for a juvenile convicted of *aggravated murder* in this state, *see* RCW 10.95.030(3) (2015), 26 years here where no one was hurt is shockingly disproportionate.

Automatically treating a child as an adult and subjecting them to adult criminal punishment is no longer consistent with fundamental standards of decency as reflected in international legal norms. The U.S. Supreme Court's reliance on such standards in deciding Eighth Amendment questions is longstanding. See, Weems v. United States, 217 U.S. 349, 54 L. Ed. 793, 30 S. Ct. 544 (1910); see also, Trop v. Dulles, 356 U.S. 86, 100, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1953). These norms were significant in Roper, where the Court noted our country's isolation in "a world that has turned its face" against sending non-homicide offenders to die in prison. Roper, 543 U.S. at 569-70. And Graham cited the U.N. Convention on the Rights of the Child (CRC) as establishing evolving standards of decency. Graham, 560 U.S. at 81.[19]

This Court's decision, too, should consider those fundamental norms. CRC Article 37(b) provides that children should be treated as such

[19]The Court did so while recognizing that Somalia, South Sudan and the United States stand alonein failing to ratify it, although the U.S. is a signatory. Graham, 560 U.S. at 81.

even in criminal justice matters, and should only be imprisoned "as a measure of last resort and for the shortest appropriate period of time." Further, the U.N. General Assembly has issued "Rules for the Protection of Juveniles Deprived of Their Liberty," which similarly declared that juveniles should be handled outside of the adult criminal justice system and any sanction imposed "should be determined by the judicial authority" and should not preclude the possibility of early release, as our state's mandatory flat-time sentencing enhancement here does. G.A. Res. 45/113 (Dec. 14, 1990), Annex 2, U.N. Doc. A/RES/45/113. And in Europe, the majority of countries have a maximum sentence for a juvenile of ten years, with a possible increase to 15 in cases of extremely serious crime. See Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Life on the Brink?* 23 FED. SENT'G REP. 39 (2010). The U.S. is isolated in its uniquely harsh sentences for children as well as its "auto-decline" laws. The great weight of international authority does not support automatically treating a child like an adult and putting him through the adult court system, let alone sentencing him as an adult as an operation of statute.

Mr. Roberts was a 16-year old African-American teen when the conduct occurred. He was never in possession of the gun. No one was hurt. And he will not be released from prison for 26 years flat time, and for which he will be on "community custody" and thus subject to return to

prison until the day he dies. If he survives it, by the time he leaves prison he will be 42, with serious violent felonies on his record.

Neither the "automatic decline" of Roberts to adult court nor the automatic imposition of statutorily mandated adult stacking sentence enhancements was constitutional under either the Eighth Amendment or our more protective constitution. Even though the independent state constitutional grounds was not detailed below, where, as here, the issue is of grave public importance and its consideration will serve the interests of judicial economy, this Court has the discretion to address it and has done so in the past. See, e.g., Int'l. Ass'n. of Fire Fighters, Local 46 v. City of Everett, 146 Wn.2d 29, 36-37, 42 Wn.2d 1265 (2002). Given the gravity of the issues and the fact that amicus raised them in its support to the Petitions for Review, even to the extent the issues were not fully discussed below, this Court should exercise its discretion to address them.

c. Automatic transfer now violates due process

Boot summarily rejected the question of whether automatic decline violates due process by dismissing the idea of any difference between youth and adults. 130 Wn.2d at 562-63. But Roper and its progeny rejected that idea. See Roper, 542 U.S. at 569; J.D.B., 131 S. Ct. at 2404. And in J.D.B., the Court found the differences between adults and juveniles relevant *outside* the context of sentencing, when those

differences could affect the procedure and rights involved. See J.D.B., 131 S. Ct. at 2404-2405. Thus, the U.S. Supreme Court has already done what this Court did in O'Dell - applied the findings of science and development relied on in Roper and its progeny to a situation wholly outside the sentencing sphere. The Court should do the same here and hold that automatically treating a juvenile as if they were equally as culpable as an adult and transferring them to the adult system runs afoul of state and federal due process law.[20]

The creation of juvenile courts did not divest superior courts of "jurisdiction," but proceedings in juvenile courts are cloaked with "numerous protections" not present in adult court. See Saenz, 175 Wn.2d. at 178-79; see Dutil v. State, 93 Wn.2d 84, 90, 606 P.2d 269 (1980). The juvenile system is meant for "the 'special needs and limitations'" of youth-which is why there is a due process requirement of independent determination of Kent factors before non-discretionary decline occurs. Saenz, 175 Wn.2d at 178; RCW 13.40.110. In Boot, our auto-decline law, RCW 13.04.030(1)(e)(v)(A), was found constitutional because there was no recognition that youth could or did affect a person's actual culpability and thus proportionality. See Boot, 130 Wn.2d at 562-63. But

[20]And again, this Court should exercise its discretion to address the state constitutional issue. See, Int'l. Ass'n 146 Wn.2d 29 at 36-37.

this Court has since recognized, in Saenz, that the differences between juvenile and superior courts are important because of the relative immaturity of juveniles. 175 Wn.2d at 172-73. Juvenile courts maintain the possibility of rehabilitation and require the kind of individualized consideration of youth that Roper, Miller and J.D.B. have held are constitutionally essential. See, e.g., State v. S.J.C., 183 Wn.2d 408, 352 P.3d 749 (2015). The automatic decline statute removes all discretion and proportionality from our state's scheme, in violation of fundamental principles of due process. It deprives defendants who are 16 or 17 of the benefits of a juvenile court process based on the crime charged - and thus the prosecutor's discretion - without requiring *any* consideration of the mitigating factors of youth made plain. Further, as with the 8th Amendment analysis, any potential "punishment" or "deterrent" purposes underlying automatic decline have since been disproved.

D. CONCLUSION

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

DATED this 8th day of September, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/ELECTRONIC MAIL

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

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DATED this 7th day of September, 2016.

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September 7, 2016

To the Court and Counsel,

re: State v. Treson Roberts (consolidated), No. 92605-1

Attached please find the supplemental brief of Petitioner Roberts for filing, shortened as per the Court's Order.

Thank you!

Sincerely,

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