Supreme Court No. 93376-6
Court of Appeals No. 47229-5-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEAN ALLEN THOMPSON,

MEMORANDUM OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WASHINGTON DEFENDER ASSOCIATION, AND COLUMBIA LEGAL SERVICES IN SUPPORT OF PETITION FOR REVIEW

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I. INTERESTS OF *AMICI CURIAE*

The interests of *Amici* are set forth in the accompanying Motion.

II. ISSUE TO BE ADDRESSED BY *AMICI*

Does the paradigm shift of modern neurological research into youth brain development and the integration of that science into Eighth Amendment jurisprudence call for this Court's guidance in updating Wash. Const. art. I, section 14 analysis to allow for consideration of youth at the time of prior convictions as a mitigating factor?

III. STATEMENT OF THE CASE[1]

In 2015, Sean Allen Thompson was sentenced to life in prison without the possibility of parole under RCW 9.94A.570, the Persistent Offender Accountability Act (POAA), also known as Washington's "Three Strikes" law. Mr. Thompson's first strike was a guilty plea at age 20 as an accomplice to his brother's second-degree robbery, for which he served 6 months in jail. His second strike was second-degree assault at age 22, for which he served 12 months in jail. At age 30, he got into a drunken fight with a longtime friend over a shared romantic interest. The jury rejected self-defense, and convicted him of second-degree assault. Under the POAA, the trial court believed it had no discretion to consider Thompson's youthfulness at the time of his earlier convictions, nor any

[1] The facts are based on the prior briefing of the parties.

other mitigating factor. It sentenced him to life without possibility of parole. A divided Court of Appeals panel affirmed the sentence. Chief Judge Bjorgen dissented: "If, consistently with *Witherspoon*, article I, section 14 is more protective than the Eighth Amendment, then it should be interpreted parallel to *O'Dell* to require consideration of an offender's youth during the years in which the scientific studies tell us the characteristics of youth may persist."[2]

IV. ARGUMENT

Recent neurological research into brain development has greatly reshaped the constitutional analysis of sentencing consequences for a youth's offense. Better understanding of brain development has led courts to recognize the factors that mitigate a young offender's culpability for a crime. The United States Supreme Court has incorporated this brain science into Eighth Amendment jurisprudence, in holding that a sentence of life without possibility of parole cannot be imposed without considering the effect of brain development on a youthful offender. *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *Montgomery v. Louisiana*, ___U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

[2] *State v. Thompson*, No. 47229-5-II, slip op. at 12 (June 14, 2016) (Bjorgen, C.J. dissenting).

This Court has also recognized the legal relevance of recent developments in brain science to the sentencing consequences for a youthful offender. *See State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). The Court has acknowledged the evidence demonstrating that brain development continues beyond age 18: "The brain isn't fully mature at . . . 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car." *Id.* at 692 n.5 (quoting *MIT Young Adult Development Project: Brain Changes*, Mass. Inst. Of Tech., http://hrweb.mit.edu/worklife/youngadult/brain.html (last visited Sept. 8, 2016)).

This Court has consistently held that Wash. Const. art. I, section 14, which states that "[e]xcessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted," is more protective than the Eighth Amendment. *See State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980); *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014). However, since at the time of *Fain*, the scientific evidence on young adult brain development was not yet available, the analysis the Court adopted in *Fain* to assess a sentence's proportionality excluded consideration of an offender's personal characteristics such as age and brain development.[3]

[3] Courts consider the four *Fain* factors when determining whether a sentence is proportional: "(1) the nature of the offense, (2) the legislative purpose behind the statue, (3) the punishment the defendant would have received in other jurisdictions, and (4) the

This case poses the question of whether, consistent with art. I, section 14, a sentencing court may be completely precluded from considering the mitigating characteristics of youth when the law mandates the most severe sentence short of death. The recent and evolving science and law on brain development in the context of young adult sentencing consequences, gives this Court a unique opportunity to provide needed guidance on an important issue of constitutional law, one where the public has a significant interest in reconciling the law with the scientific developments. For the same reasons, the lower court's opinion conflicts with rulings like *O'Dell*. Thus, the case merits review under RAP 13.4(b).

A. The Court Should Grant Review Because There Is an Important Public Interest in Enforcing "Evolving Standards of Decency" and Allowing Sentencing Courts to Consider the Mitigating Role of Youth, even when Considering the Sentencing Consequences of Convictions as a Young Adult, Under the Cruel Punishment Clause in Light of Scientific Findings About Brain Development

The Supreme Court recognized in *Hall v. Florida* that:

> The Eighth Amendment is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice. . . . To enforce the Constitution's protection of human dignity, this Court looks to the evolving standards of decency that mark the progress of a maturing society. . . . The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be

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punishment meted out for other offenses in the same jurisdiction." *Witherspoon*, 180 Wn.2d at 887.

> to transmit the Constitution so that its precepts and guarantees retain their meaning and force.

___ U.S. ___, 134 S. Ct. 1986, 1992, 188 L. Ed. 2d 1007 (2014) (internal quotation marks and citations omitted).

We now know the more primitive regions of the brain develop before those responsible for executive control. This uneven development results in greater recklessness and impulsive behavior by young adults. The limbic system affects emotional processes and impulses.[4] The prefrontal cortex controls the "executive function" such as emotional regulation, impulse control, risk assessment, and the ability to evaluate future consequences.[5] The prefrontal cortex is responsible for curtailing impulsive urges triggered by the amygdala and other part of the limbic system.[6] The limbic system develops earlier than the prefrontal cortex;[7] therefore, until the brain reaches full maturity, young people's behavior is heavily affected by the limbic system.[8] As a result, young people are less

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[4] Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents* (Mar. 1999), available at, https://www.researchgate.net/profile/Ronald_Steingard/publication/13338512_Functional_magnetic_resonance_imaging_of_facial_affect_recognition_in_children_and_adolescents/links/02e7e514fcaafd8964000000.pdf.

[5] Elizabeth Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci. 859, 860 (1999).

[6] B.J. Casey & Kristina Caudle, *The Teenage Brain: Self Control*, 22(2) Current Direct. in Psych. Sci., 84 (2013).

[7] Alexandra O. Cohen & B.J. Casey, *Rewiring Juvenile Justice: The Intersection of Developmental Neuroscience and Legal Policy*, 18 Trends in Cog. Sci. 63, 63 (Feb. 2014).

[8] *Id.* at 64.

able to regulate their emotions, identify consequences, and resist the impulse for immediate gratification. *Graham*, *Miller*, and *Montgomery*, *supra*.

When this Court established the *Fain* factors in 1980 neither the Court not the public had the benefit of modern scientific knowledge about the impact of brain development on behavior. However, in the intervening years researchers have discovered that brains do not fully mature until well into a person's *twenties*, and that this immaturity has significant effects on individuals' behavior. In light of this improved understanding of youth and brain development, the courts have become increasingly concerned with extremely severe punishment of young offenders because sentences that confine a person until they die are incompatible with the presumption of redemption that accompanies the lesser culpability and greater capacity for rehabilitation of young people. *See Graham*, *Miller*, and *Montgomery*, *supra*.

Society's evolving standards of decency for the Eighth Amendment apply with equal or greater force to art. I, section 14 of the Washington Constitution. This Court's guidance is needed on whether and how the *Fain* factors allow consideration of the effects of delayed brain development in mitigation of a youthful defendant's culpability. As the dissenting judge here explained, the constitutional doctrine of cruel

punishment must be "informed by advancing neurological and psychological knowledge, as well as ascending standards of decency."[9] The improved scientific knowledge about the effect of brain development on the behavior of young adults has not previously been considered by this Court in the context presented by this case. Therefore, this petition presents an issue of substantial public interest warranting Supreme Court review under RAP 13.4(b)(4), in addition to raising important constitutional issues as discussed above and below.

B. Failure to Consider the Defendant's Youth at the Time of Prior "Strikes" Violates the Cruel Punishment Clause and Conflicts with More Recent Precedent like *O'Dell*

As noted above, this Court has consistently held the Washington cruel punishment clause is "more protective than its federal counterpart," the Eighth Amendment. *Fain*, *supra*; *see also Witherspoon*, 180 Wn.2d at 887. However, since *Fain* was handed down in 1980, the U.S. Supreme Court has held that, under the Eighth Amendment, a sentence must be proportional not only to the crime, but to the defendant as well, particularly where youth may play a mitigating role in sentencing. *Roper v. Simmons*, 543 U.S. 551, 571, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (invalidating the death penalty for defendants younger than 18 years age, explaining that a defendant's youth may diminish the

[9] *Thompson*, slip op. at 11 (Bjorgen, C.J. dissenting).

defendant's culpability); *Graham*, 560 U.S. at 60, 82 (proportionality depends upon both the nature of the offense and the characteristics of the offender; invalidating life without possibility of parole for juveniles who commit non-homicide crimes); *Miller*, 132 S. Ct. at 2469 (holding that imposing a mandatory life sentence on a juvenile defendant violated the Eighth Amendment because the mandatory sentence failed to take into account the defendant's youth); *accord*, *Montgomery*, 136 S. Ct. at 733-34.

It is time for this Court to reconcile the discrepancy between the Eighth Amendment proportionality test and the cruel punishment *Fain* analysis by updating the *Fain* analysis to allow consideration of youth. The case law cited above demonstrates that there truly has been a paradigm shift in the brain science regarding youth as well as the legal consideration of it as part of proportionality analysis. But if *Fain* and art. I, section 14 analysis preclude consideration of youth, the state constitutional provision will be rendered less protective than the Eighth Amendment with respect to a defendant's mitigating characteristics. This discrepancy in protection goes against this Court's consistent position that the Article I, section 14 offers greater protection than the Eighth Amendment. There are ample reasons for the Court to re-examine *Fain* in light of *Roper* and its progeny. Resolving the discrepancy between the

Fain factors and evolving Eighth Amendment doctrine constitutes a substantial question of constitutional law justifying review. RAP 13.4(b)(3).

Review is also justified under RAP 13.4(b)(1) because, as the dissenting judge discussed, the ruling below conflicts with this Court's reasoning in *O'Dell*. In *O'Dell*, 183 Wn.2d at 698-99, the Court ruled that youth can mitigate criminal culpability and support consideration of a sentence below the standard range. *O'Dell* repudiated prior precedent, recognizing that the modern scientific research on brain development discussed above "establish[es] a clear connection between youth and decreased moral culpability for criminal conduct." *Id.* at 695. Significantly, the Court did not limit consideration of youth to defendants under age 18 but held that youth may mitigate a defendant's culpability "even if that defendant is over the age of 18." *Id.* The *O'Dell* Court found that the legislature could not have meaningfully considered youth when it established the sentencing range because it did not have the benefit of modern neurological research at the time. *Id.* at 691-92.

While the POAA purports to preclude consideration of any individualized mitigation, in order to construe it in compliance with the state Constitution it may be necessary to allow consideration of youth as was done in *O'Dell*. The POAA was enacted in 1993, at a time when

there was no more knowledge of brain development science and its impact on a youth's criminal culpability than the Legislature had in adopting the law at issue in *O'Dell*. This Court can bring the law into compliance with the evolving brain science and the state Constitution as well as resolve the conflict with *O'Dell* by granting review. As part of aligning cruel punishment analysis with the scientific and legal paradigm shift that has occurred, the Court should, at a minimum, allow trial courts imposing life imprisonment without parole sentences under the POAA the discretion to consider youth as a mitigating factor if it is relevant to prior strikes.

V. CONCLUSION

This case presents a significant issue impacting the public interest, important constitutional requirements, and conflict with precedent. Review is authorized under three different grounds under RAP 13.4(b) and should be granted.

DATED this 9th day of September 2016.

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