

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of J.C.N.-V., A Youth.

STATE OF OREGON,

Petitioner-Respondent,
Respondent on Review,

v.

J.C.N.-V.,

Appellant,
Petitioner on Review.

Washington County Circuit Court
Case No. J090600

Petition Number 05J090600

CA 147958

SC S063111

AMENDED BRIEF ON THE MERITS OF AMICUS CURIAE

OREGON JUSTICE RESOURCE CENTER

Review of the decision of the Court of Appeals
On appeal from a judgment
of the Circuit Court for WASHINGTON County
Honorable James Lee Fun, Jr., Judge

Opinion Filed: January 22, 2015
Author of Opinion: Sercombe, J., joined by Haselton, C.J., and Armstrong,
Duncan, Nakamoto, DeVore, Tookey, Garrett, and Flynn, JJ.
Dissenting: Egan, J., joined by Ortega, J.

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BRIEF ON THE MERITS OF AMICI CURIAE OREGON JUSTICE RESOURCE CENTER

INTRODUCTION

The Oregon Justice Resource Center (OJRC) is a non-profit organization founded in 2011 and centered in Portland, Oregon. OJRC works to “dismantle systemic discrimination in the administration of justice by promoting civil rights and enhancing the quality of legal representation to traditionally underserved communities.” OJRC Mission Statement, www.ojrc.info/mission-statement. The OJRC Amicus Committee comprises Oregon attorneys from multiple disciplines and law students from Lewis & Clark Law School.

Amicus curiae wishes to be heard by this court because the case presents a fundamental question regarding the fair administration of juvenile justice for young adolescents. In 2014, over 8,000 Oregon youths were referred to the juvenile justice system in Oregon for “criminal” activity. More than half were 15 years old or younger. Juvenile Justice Information System, *Data & Evaluation Reports, Total Referrals, Statewide (2014)*, http://www.oregon.gov/oya/reports/jjis/2014/statewide_youthreferrals_2014.pdf. For this large population of at-risk children, it is critically important that the laws that make them eligible for prosecution and punishment as adults accurately reflect the developmental differences that make adolescents, especially young adolescents, categorically less blameworthy and more amenable to successful rehabilitation than adults.

SUMMARY OF ARGUMENT

ORS 419C.352 prohibits the juvenile court from waiving its jurisdiction over young adolescents (ages 12 through 14) unless “at the time of the alleged offense,” the child “was of sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved.” The issue in this case is whether that provision allows a 13-year-old boy to be criminally prosecuted and punished as an adult without a finding that he had above-average sophistication and maturity to allow him a more adult-like understanding of the nature and consequences of his criminal conduct. OJRC supports the petitioner’s proposed construction of the statute: ORS 419C.352 only permits waiver of the presumptive jurisdiction of the juvenile court in exceptional cases where the state establishes that the child’s adult-like characteristics and degree of culpability justify adult punishment and prosecution.

The adult criminal justice system and the juvenile justice system serve fundamentally different purposes that properly account for the physiological differences between young people and adults. The juvenile system serves a rehabilitative purpose, recognizing that youth are both less blameworthy due to their developing minds and less fixed in criminality and, therefore, more capable of reform. By contrast, the adult criminal system is primarily retributive and serves to punish. Indeed, the adult system is not designed to accommodate the unique

features of youth, and, consequently, youth fare worse in the criminal system than adults do.

Waiving juvenile jurisdiction is a punitive action because it moves the child from a justice system focused on rehabilitation to a system focused on retribution and punishment. But punishing young adolescents as adults serves no legitimate penological purpose when the child does not have adult-like sophistication and maturity that make the child similarly culpable to an adult. Accordingly, young adolescents should not be transferred to the punitive adult system of criminal prosecution without a determination that advanced development warrants a focus on punishment rather than rehabilitation. The stricter interpretation of the ORS 419C.352 waiver standard advocated by petitioner is not only more faithful to the text and history of the statute than the Court of Appeals' interpretation, it also avoids the substantial constitutional question raised by permitting punishment that serves no legitimate penological purpose.

ARGUMENT

I. The juvenile justice system and the adult criminal justice system are designed to serve different purposes commensurate with the different levels of culpability between adults and juveniles.

A. The primary purpose of an adult criminal prosecution is the imposition of punishment for culpable wrongdoing.

An adult criminal prosecution is a law enforcement proceeding aimed at punishing individuals responsible for serious wrongdoing. *See Brown v.*

Multnomah County Dist. Court, 280 Or 95, 110, 570 P2d 52 (1977) (applying multi-factor test to determine that traffic proceeding against first offenders for driving while under the influence of intoxicants carried “the punitive traits that characterize a criminal prosecution”). Criminal culpability typically requires a showing of bad intent, or *mens rea*. *Elonis v. United States*, 575 US ___, 135 S Ct 2001 (June 1, 2015) (noting “the deep and early” understanding in American law that criminal liability “does not turn solely on the results of an act without considering the defendant’s mental state); *see also State v. Lhasawa*, 334 Or 543, 558-59, 55 P3d 477 (2002) (including “scienter” in test for determining whether civil exclusion for prostitution constituted a “criminal punishment” implicating double jeopardy). Historical forms of punishment include imprisonment, fines, corporal punishment, and other “form[s] of detriment, restraint, or deprivation intended primarily to deter the offender and others from committing future criminal acts.” *State v. MacNab*, 334 Or 469, 478-79, 51 P3d 1249 (2002) (citing William Blackstone, 4 *Commentaries on the Laws of England* *370 (1769)). The modern justifications for criminal punishment that have been recognized as legitimate are retribution, deterrence, incapacitation, and rehabilitation. *Graham v. Florida*, 560 US 48, 71, 130 S Ct 2011, 176 L Ed 2d 825 (2010) (citing *Ewing v. California*, 538 US 11, 25, 123 S Ct 1179, 155 L Ed 2d 108 (2003)). A sentence

imposed without a legitimate penological justification is “by its nature disproportionate to the offense,” and thus unconstitutional. *Id.*

B. The juvenile court system differs from the adult system of criminal prosecution because of the recognition that “children are different” in terms of criminal culpability and the need for punishment.

The different juvenile justice and adult justice systems stem from the commonly understood fact that children are different. *See Roper v. Simmons*, 543 US 551, 569-70, 125 S Ct 1183, 161 L Ed 2d 1 (2005) (explaining why a juvenile “cannot with reliability be classified among the worst offenders”). The differences between adults and children result in a special status in society for youth that includes significant restrictions on their civil rights and privileges:

“Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination * * * including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their freedom, to the control of their parents or guardians.”

Vernonia School District v. Acton, 515 US 646, 654, 115 S Ct 2386, 132 L Ed 2d 564 (1995); *see also* Pet Conf Br on the Merits, 36-37 (identifying many such restrictions). A child, unlike an adult, has a right not to liberty, but to custody. *In re Gault*, 387 US 1, 17, 87 S Ct 1428, 18 L Ed 2d 527 (1967). Juveniles’ limited rights and privileges stem from their peculiar vulnerability, their inability to make critical decisions in an informed, mature manner, and the importance of the

parental role in child rearing. *Bellotti v. Baird*, 443 US 622, 634, 99 S Ct 3035, 61 L Ed 2d 797 (1979).

Because of children's special status, the state may function as *parens patrie*. *Gault*, 387 US at 17. This common law doctrine involves the power and duty of the state to act as sovereign and guardian over juveniles outside the protection of their parents. *Black's Law Dictionary* 1221 (9th ed 2009); *Shaftsbury v. Shaftsbury*, 25 Eng Rep 121 (Ch 1725). Under the *parens patrie* doctrine, the juvenile court has a different relationship with young people accused of wrongdoing than does a criminal court with a criminal defendant:

“The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge.”

Kent v. United States, 383 US 541, 554-55, 86 S Ct 1045, 16 L Ed 2d 84 (1966).

The system of having specialized courts for children comports with the long recognized fact that children's lack of maturity makes them less culpable for wrongdoing than adults. *Eddings v. Oklahoma*, 455 US 104, 115-16, 102 S Ct 869, 71 L Ed 2d 1 (1982) (“Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.”); *see also* 4 William Blackstone's Commentaries 23 (“But by the law, as it now stands, and has stood since the time of Edward the

third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment.”).

Oregon’s juvenile court model is consistent with these over-arching principles. From the creation of Oregon’s first juvenile court in 1907 to the present, “juvenile justice in Oregon has been based primarily on a ‘rehabilitation’ model, rather than on a ‘due process’ or ‘crime control’ model.” *State ex rel. Juvenile Dep’t of Klamath Cnty. v. Reynolds*, 317 Or 560, 567, 857 P2d 842 (1993). In Oregon, an adjudication of delinquency in juvenile court is not a “criminal prosecution.” *Id.* at 563.

The Supreme Court in *Roper* recognized three areas in which juveniles’ incomplete development reduces their criminal culpability: immature judgment, susceptibility to negative peer influences, and more transitional, less fixed, identities. 543 US at 569. The Court considered those differences a matter of common knowledge (“as any parent knows”). *Id.* But research by developmental psychologists has given substance to the Court’s intuition.

Research has shown that juveniles are more influenced by emotions than adults. Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 *Law & Ineq* 263, 281 (2013). As a result, they are less able to make responsible

decisions spontaneously in stressful, or “hot,” situations. *Id.* Additionally, adolescents perceive risks differently than adults in numerous ways. They underestimate the severity and likelihood of risks, they focus more on gains than losses, and they emphasize immediate outcomes. *Id.* at 284. Changes related to puberty also lead adolescents to have a greater “appetite for risk,” meaning that they crave sensation and excitement more so than adults. *Id.* at 286.

Meanwhile, the part of the brain used for reasoning, planning, and decision-making does not fully develop until late adolescence or adulthood. *Id.* at 288. The rapid increase in the “pleasure-seeking and emotional reward responses,” combined with the slower development of the system for self-control, results in impulsive conduct and poor judgment. *Id.* at 289-90. Younger adolescents in particular are more impulsive than their older peers. *Id.* at 284-85.

Experts have noted that focusing on a young person’s capacity for thinking and reasoning “minimizes the importance of noncognitive, psychosocial variables that influence the decision-making process” such as those set out above. Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychological Factors in Adolescent Decision Making*, 20 *Law & Hum Behav* 249, 250 (1996). Basic information processing and logical reasoning are developed by age 16. Feld, 31 *Law & Ineq* at 282 n 87. But the ability to reason does not necessarily include the ability to exercise mature judgment: “Although sixteen-year

olds exhibit cognitive abilities comparable with adults, their ability to make adult-quality decisions or exercise self-control does not emerge for several more years.”

Id. at 282.

Research has also confirmed the Supreme Court’s conclusion that youth are more susceptible to negative peer influences. That is why juveniles engage in riskier behavior when they are in groups than when they are alone, and juveniles commit crimes in groups to a greater extent than adults. *Id.* at 290-91; *see also* ORS 807.122(1)(a) (restricting young drivers from having juvenile passengers during first year after obtaining license).

Because of these differences, youthful misconduct is less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults.” *Graham*, 560 US at 68. That is one reason why clinicians do not diagnose minors with antisocial personality disorder. *Roper*, 543 US at 573 (noting that even experts cannot differentiate between the vast majority of juvenile offenders who have the capacity to change and the “rare juvenile offender whose crime reflects irreparable corruption”); *see also Graham*, 560 US at 68 (“No recent data provide reason to reconsider the Court’s observations in *Roper* about the nature of juveniles.”). The juvenile justice system is designed to provide a delinquent youth with the necessary services to develop into a successful adult: to identify risky situations, control impulsive behavior, and exercise mature judgment. In this

sense, the juvenile court stands in stark contrast to the criminal courts, which exist for the purpose of punishing the transgressions of fully developed adult.

II. Prosecuting children as adults increases recidivism, subjects children to negative collateral consequences, including the stigma of a felony conviction, and disproportionately affects racial minorities.

The decision to transfer a child from the rehabilitative model of juvenile court to the punitive model of the adult justice system has “profound consequences,” including exponentially longer periods of incarceration, greater risk of suffering trauma, reduced access to rehabilitative programs, and unsurprisingly, a greater risk of recidivism. Janet Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 Tex Tech L Rev 29, 33-34 (2013). For those and other reasons, the National Research Council concluded in 2014 that “[y]outh transferred to the adult criminal justice system fare worse than those that remain in the juvenile justice system.” National Research Council, Committee on Causes and Consequences of High Rates of Incarceration, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 172 (2014).

A. Waiving juveniles to adult court increases recidivism.

The adult criminal justice system is ineffective at rehabilitating juvenile offenders. In general, studies have shown higher recidivism rates for children prosecuted as adults compared to similarly situated children in the juvenile justice

system. See Donna Bishop & Charles Frazier, *Consequences of Transfer, The Changing Borders of Juvenile Justice* 227, 246-48 (2000).

For example, a task force created by the Centers for Disease Control and Prevention (CDC) found that young people transferred from the juvenile court system into adult court are approximately 34 percent more likely to be rearrested for violent or other crimes than those who remain in the juvenile system. CDC, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System, in Morbidity and Mortality Weekly Report* (Nov 30, 2007), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>. The task force compared recidivism rates of children charged with comparable offenses and criminal histories. *Id.* In that way, the study accounted for the perception that waived youth are prosecuted as adults because of the severity of the charged crime or the extent of their past misconduct. *Id.* Even with that control in place, the task force concluded that prosecuting children as adults is “counterproductive to reducing juvenile violence and enhancing public safety.” *Id.* See also Donna Bishop *et al.*, *The Transfer of Juveniles to Criminal Court: Does it Make a Difference?*, 42 *Crime and Delinquency* 171, 183 (1996) (finding that “transfer actually aggravated short-term recidivism.”).

In 2013, the Washington State Institute for Public Policy evaluated a Washington statute mandating waiver of certain juveniles to adult court. Elizabeth Drake, *The Effectiveness of Declining Juvenile Court Jurisdiction of Youth*, Olympia: Washington State Institute for Public Policy (WSIPP), 6-7 (Dec 2013). The study found that children who were prosecuted in adult court were more likely to reoffend than youth who were treated in Washington’s juvenile justice system. *Id.* The study noted that an “ideal research setting” would permit it to randomly assign participants to groups. *Id.* Because state laws made such a study impossible, researchers instead used “statistical controls to compare the recidivism rates of youthful offenders” before and after a 1994 law mandating waiver in certain cases. *Id.* at 4. Taking into account the juveniles’ criminal histories, age, race, and gender, the researchers designed a comparison group of offenders who would have been subject to the mandatory waiver law, had they committed their offenses after the law’s effective date. *Id.* at 5. The study targeted three types of recidivism: (1) violent felony convictions, (2) all felony convictions, including violent felony convictions, (3) and total recidivism, including all misdemeanor and felony convictions. *Id.* at 6. Children prosecuted as adults demonstrated higher recidivism rates in all three recidivism categories.¹ *Id.*

¹ The researchers in the Washington study estimated that, in 2013,

B. The waiver decision comes with significant collateral consequences for children, including inadequate procedural protections, drastically increased sentences, and felony convictions.

Once waived to adult court, children face unique challenges that the adult criminal system is unequipped to address. In *Graham*, the Court recognized that juvenile development impairs a child’s ability to meaningfully participate in the adult criminal justice system:

“[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understanding of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions [and] impair the quality of a juvenile defendant’s representation.”

560 US at 77. “Developmental differences impair youths’ ability to communicate with counsel, to concentrate, to provide information about the crime, to recognize exculpatory facts, and to make legal decisions.” Feld, 31 Law & Ineq at 300.

Washington’s mandatory waiver law cost taxpayers \$72,585 per child transferred to adult court. Drake, WSIPP at 11. Further, the findings regarding the increase in recidivism due to waiver “indicate that the increase in recidivism costs is \$2,168 to taxpayers and \$8,071 to crime victims per offender—a total of \$10,239 in costs per offender.” *Id.*

Youth are also more likely than adults to make false confessions, which, as the Court recognized, critically undermines the reliability of the criminal proceedings against them. *Id.* at 301. One study of wrongful incarcerations estimates that children are more than three times likely than adults to confess to crimes that they did not commit. *Id.* at 301 n 197. Another study estimates that police elicit one-third of all false confessions from offenders under the age of 18. *Id.*

Children transferred to adult court receive longer and more severe sentences than children who remain in juvenile system. *Id.* at 269. In Oregon, children tried as adults are generally subject to mandatory minimum sentencing laws like Measure 11. ORS 137.707. Undocumented children tried as adults may be deported upon conviction, regardless of their age. *Morasch v. Immigration and Naturalization Service*, 363 F2d 30 (9th Cir 1966).

Finally, children who are prosecuted as adults face diminished opportunities upon release. Hofacket, 34 Tex Tech L Rev at 174. When a child is transferred to adult court, his or her rights are limited to those afforded to adults. Therefore, children who are found delinquent inside the juvenile system leave with juvenile adjudications, not felony convictions, on their record. *Id.* The American Bar Association estimates that juveniles convicted in the adult criminal justice system face over 38,000 consequences. Christopher Gowen et al., *The ABA's Approach to*

Juvenile Justice Reform: Education, Eviction, and Employment: The Collateral Consequences of Juvenile Adjudications, 188 Duke Forum for Law & Social Change 187, 188 (2011). Those consequences include restricted voting rights² (a right the juvenile was too young to exercise before incarceration), diminished employment opportunities, exclusions from military service, exclusions from public housing, and difficulty reenrolling in secondary education or being admitted to college. *Id.*; Peerman *et al.*, *Capital City Correction*, at 17. In general, children have a more difficult time transitioning out of an institutional setting and face increased challenges upon release, including an increased likelihood of reoffending. *Id.*

C. Waiver laws disproportionately impact racial minorities.

The negative consequences of transferring juveniles to adult court fall most heavily on racial minorities. “Racial stereotypes taint culpability assessments, reduce the mitigating value of youthfulness for children of color, and contribute to disproportionate numbers of minority youths tried and sentenced as adults.” Feld, 31 *Law & Ineq* at 269-70. With determinations of guilt and sentencing decisions

² Oregon law provides for the restoration of voting rights upon release from prison. ORS 137.281. Forty-eight states impose some restriction on voting due to a criminal conviction. American Civil Liberties Union, *State Criminal Re-enfranchisement Laws (Map)*, available at <https://www.aclu.org/map/state-criminal-re-enfranchisement-laws-map>.

similarly skewed by implicit bias against racial minorities, the impact is cumulative.

Young people of color are disproportionately transferred to adult court.

Melissa Sickmund & Charles Puzzanchera, *Juvenile Offenders and Victims: 2014 National Report* 174 (2014) available at <http://www.ojjdp.gov/ojstatbb/nr2014/>

(“For most of the period from 1985 to 2010, the likelihood of waiver was greater for black youth than for white youth, regardless of offense category.”).

Comprehensive research of the impact of race in the waiver determination establishes “significant race effects after controlling for a number of important legal and extra-legal determinants of sentencing.” Rebecca Howell & Tonya Spicer Hutto, *Sentencing Convicted Juvenile Felony Offenders in the Adult Court: The Direct Effects of Race*, 30 *Behavioral Sciences and the Law* 782-799 (2012).

Specifically, African-American youth are nearly four times as likely as white youth to be arrested for person offenses. Neelum Arya & Ian Augarten, *Critical Condition: African-American Youth in the Justice System* 19 (2008) available at <http://www.campaignforyouthjustice.org/documents/AfricanAmericanBrief.pdf>.

For property and drug offenses, African American youth are twice as likely as white youth to be arrested. *Id.* Once arrested, African American youth are more likely to be transferred to adult court than white youth, *id.* at 18, and they are 40 percent more likely to be tried as an adult for a drug crime than white youth. *Id.* at

22. Latino youth are 43 percent more likely to be waived to adult court and 40 percent more likely to be admitted to adult prison than white youth. Neelum Arya, *et al.*, *America's Invisible Children: Latino Youth and the Failure of Justice* 6 (2009), available at http://www.campaignforyouthjustice.org/documents/Latino_Brief.pdf. Similarly, Native-American youth are 1.5 times more likely to be waived into the adult criminal system than white youth. Neelum Arya & Addie Rolnick, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems* 8 (2008), available at http://www.campaignforyouthjustice.org/documents/CFYJPB_TangledJustice.pdf.

Oregon is no exception. The Oregon Youth Authority (OYA) estimates that although youth of color comprise roughly 25 percent of Oregon's juvenile population, 36 percent of all referrals to OYA are youth of color. Oregon Youth Authority, *Total Referrals in 2012*, available at http://www.oregon.gov/oia/reports/jjis/2012/2012_youth_referrals.pdf. Thirty-six percent of youth convicted under Measure 11 are youth of color. *Id.*

Those findings correspond with widely reported research regarding the mass incarceration of people of color. In her landmark book, *The New Jim Crow*, Michelle Alexander concluded, "No other country in the world imprisons so many of its racial or ethnic minorities." Michelle Alexander, *The New Jim Crow* 6 (rev

ed 2012). Specifically, in our nation's capital, "it is estimated that three out of four black men (and nearly all those in the poorest neighborhoods) can expect to serve time in prison." *Id.* Similar rates of incarceration of people of color exist in communities across the nation. *Id.* "The United States imprisons a larger percentage of its black population than South Africa did at the height of apartheid." *Id.* With regard to juveniles, Alexander notes that "youth of color are more likely to be arrested, detained, formally charged, transferred to adult court, and confined to secure residential facilities than their white counterparts." *Id.* at 118. And among juveniles who have never been sent to a juvenile facility, African-American juveniles are more than six times as likely as white youth to be sent to prison *for identical crimes.* *Id.* At bottom, waiver laws are discriminatory in application. It follows from the disproportionate waiver of juveniles of color to adult court that youth of color experience the harmful consequences of waiver at greater rates than white youth. That reality must be acknowledged when interpreting Oregon's waiver statutes.

III. Waiving juveniles into adult court impacts a youth's constitutional rights.

Because youth are less-culpable than adult offenders, allowing average 13-year-old to be prosecuted and punished as an adult would violate the constitutional prohibition against cruel and unusual punishment. But this court need not reach the ultimate constitutional question because, by adopting petitioner's rule, this

court would interpret ORS 419C.349(3) in light of relevant constitutional principles. *State v. Stoneman*, 323 Or 536, 540 n 5, 920 P2d 535 (1996) (When interpreting a statute, this court should “give [it] such an interpretation as will avoid constitutional invalidity.”).

Both the state and federal constitutions prohibit cruel and unusual punishment.³ Under the Oregon Constitution, a punishment violates Article I, section 16, when it “shock[s] the moral sense of all reasonable men as to what is right and proper under the circumstances.” *Sustar v. County Court of Marion County*, 101 Or 657, 662, 201 P 445 (1921). Similarly, the Eighth Amendment draws its meaning from “the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 US 86, 101, 78 S Ct 590, 2 L Ed 2d 630 (1958). In determining whether a punishment practice is unconstitutional under the Eighth Amendment, the court first examines whether there is community consensus regarding the punishment practice, and second, the court determines whether, in its own judgment, the punishment practice is unconstitutionally cruel and unusual. *Graham*, 560 US at 61. Critically, both Article I, section 16, of the

³ The Eighth Amendment provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Article I, section 16, provides, in part, “Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.”

Oregon Constitution and the Eighth Amendment of the United States Constitution require some inquiry into the culpability of the offender. *See State v.*

Rodriguez/Buck, 347 Or 46, 66-67, 219 P3d 659 (2009) (inquiring into the criminal history of the offender to determine whether punishment shocks the moral sense and is unconstitutional); *Graham*, 560 US at 68 (discussing culpability of offender in applying the evolving standards of decency test).

Because the waiver decision transfers a youth from the non-punitive juvenile court to the punitive criminal court, it is a decision affecting punishment that falls within the ambit of constitutional protections against cruel and unusual punishment. Although courts have not expressly held that waiver is a punishment, the punitive nature of waiver has been *implicitly* recognized for decades. In *Kent*, the only Supreme Court case to address juvenile transfer to adult court, the Supreme Court noted that it is “clear beyond dispute that the waiver of [juvenile court] jurisdiction is a ‘critically important’ action” because “[juvenile court] jurisdiction confers special rights and immunities.” 383 US at 556. Those rights and immunities include “protect[ion] against consequences of adult conviction[.]” *Id.* *Kent* held that when the state seeks to transfer a youth into an adult court, the youth is entitled to procedural due process, including full investigation, access to the youth’s files, access to counsel, and a fair hearing. *Id.* at 561-62.

Kent's holding that a youth's waiver to adult court triggers adverse consequences sufficient to require procedural due process protections strongly suggests that waiver itself is a punitive decision. *See id.* at 557 (youth entitled to due process and assistance of counsel "*considering particularly* that the decision as to waiver of jurisdiction and transfer for the matter to the District Court was potentially as important to petitioner as the difference between five years confinement and a death sentence" (emphasis added)). *See also* Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 La L Rev 99, 138-140 (2010) (waiver into adult court is punishment because of "the lifelong stigma of an adult court conviction, which may be accompanied by lifelong restrictions in voting or access to other governmental privileges * * * even short term sentences to adult prison will forever alter the trajectory of a young person's life because of the way in which the child's adolescent development is compromised.").

If waiver from a rehabilitative system to a punitive system is a punishment practice, then the state and federal constitutions require that it must be proportioned to the culpability of the offender as well as the severity of the offense. *See Rodriguez/Buck*, 347 Or at 66-67 (inquiring into the criminal history of the offender to determine whether punishment shocks the moral sense and is unconstitutional); *Graham*, 560 US at 68 (discussing culpability of offender in

applying the evolving standards of decency test). And, critically, any punishment practice must “serve legitimate penological goals” in order to pass constitutional muster. *Id.* at 67.

In recent years, the United States Supreme Court has had occasion to explore the limits of punishment for juvenile offenders. In so doing, the Court has articulated that, just as “death is different” in kind from other punishments, “children are different” in kind from adult criminal offenders. *Miller v. Alabama*, 567 US ___, 132 S Ct 2455, 2470, 183 L Ed 2d 407 (2012); *see also Graham*, 560 US at 68. Thus a punishment practice must be tailored to the culpability of the offender such that it is justified under the accepted rationales for punishment. Yet, *none* of the traditional theories of punishment (rehabilitation, deterrence, incapacitation, or retribution) justifies an interpretation of the waiver statute that authorizes the criminal justice system to prosecute and sentence a 13-year-old of average development for a child in the same manner as a person who has reached adulthood. Accordingly, waiver into adult court must be limited to those juveniles who possess adult-like levels of sophistication and maturity in order to conform with constitutional demands.

Waiving an average 13-year-old into adult court is not supported by the rehabilitative theory of punishment. The adult criminal justice system is not set up to, and has proven unable to, effectively rehabilitate adolescents. Ultimately (and

unsurprisingly), research establishes that the juvenile justice system, which was created to rehabilitate youth, is better than the adult justice system at actually rehabilitating youth.

The theory of deterrence also does not support the waiver at issue in this case. In general, waiving juveniles to adult court does not deter other young people from committing crimes. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, *Juvenile Justice Bulletin* 2 (Aug 2008), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf> (citing research indicating that lower standards for transfer “have little or no general deterrent effect on youth, meaning they do not prevent youth from engaging in criminal behavior”). Deterrence as a justification for punishment requires a rational actor; the offender must be able to make a rational choice to act or not act based on a consequence that he or she is actually aware of. Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 *Oxford J of Legal Stud* 173, 174 (2004).

But “[a]s compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’” *Graham*, 560 US at 68 (citing *Roper*, 543 US at 569-70). The higher recidivism rates for youths incarcerated at adult prisons are

telling in that regard: despite first-hand knowledge that they could be tried as adults if they commit a particular act, they nonetheless commit the act. Bishop & Frazier at 227. Only those youths with above-average sophistication and maturity, who have developed sufficiently to make rational choices based on long-term consequences rather than impulsive decisions based on immediate pressures, might actually be deterred by the prospect of waiver. It follows that only those youths should be prosecuted as adults.

For similar reasons, incapacitation as a theory of punishment does not justify the waiver of ordinary 13-year-olds into adult court. Incapacitation is related to recidivism: “Recidivism is a serious risk to public safety, and so incapacitation is an important goal.” *Graham*, 560 US at 72. But waiving juveniles into the adult criminal justice system does not make juveniles less dangerous; it increases their chances of violent recidivism. Adding to their dangerousness, youth in the adult criminal justice system are less likely to receive treatment and services. As the Court noted in *Graham*, “the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.” 560 US at 74.

Finally, retribution is not a legitimate reason to punish children. *Graham*, 560 US at 72. “Society is entitled to impose severe sanctions * * * to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense.” *Id.* But “[t]he heart of the retribution rationale is that a criminal

sentence must be directly related to the personal culpability of the criminal offender.” *Tison v. Arizona*, 481 US 137, 149, 107 S Ct 1676, 95 L Ed 2d 127 (1987); *Penry v. Lynaugh*, 492 US 300, 319, 109 S Ct 2934, 106 L Ed 2d 256 (1989) (same). Children are necessarily less culpable than adults because they lack the same development that permits rational decision-making, moral reasoning, and impulse control. And any retributive effect of the waiver decision is also fatally undermined by the disproportionate waiver of youth of color, suggesting that the punitive rationale is based on improper consideration informed by implicit biases. Accordingly, retribution is not a valid rationale for punishing children unless the child demonstrates culpability akin to that of an adult. *See Roper*, 543 US at 571 (“Whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult.”).

In this case, the Court of Appeals interpretation of ORS 419C.352 to make average 13-year-olds eligible for adult prosecution and punishment virtually ensures that many children will be subjected to unconstitutional punishment that serves no legitimate purpose of rehabilitation, incapacitation, deterrence, or retribution. By contrast, petitioner’s proposed construction of the statute requires that the youth have “adult-like” qualities in order to suffer adult punishments. Punishment of a youth who possesses adult-like sophistication and maturity is

potentially supported by the four acceptable theories of punishment because of that youth's increased personal culpability.

CONCLUSION

For the foregoing reasons, *amicus* urges this court to adopt petitioner's proposed statutory construction and reverse the decision of the Court of Appeals.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 5,642 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

s/Sara F. Werboff

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 13, 2015, I filed the original of this *AMENDED BRIEF ON THE MERITS OF AMICUS CURIAE OREGON JUSTICE RESOURCE CENTER* with the State Court Administrator by the eFiling system.

I further certify that on August 13, 2015, I served a copy of the *AMENDED BRIEF ON THE MERITS OF AMICUS CURIAE OREGON JUSTICE RESOURCE CENTER* on the following parties by electronic service via the eFiling system:

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