

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 No. J090600  Petition No. 05J090600  CA A147958  S063111
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BRIEF OF *AMICI CURIAE*:

Juvenile Law Center; American Probation And Parole Association; The Barton Child Law and Policy Center; The Campaign for The Fair Sentencing of Youth; Campaign for Youth Justice; Center on Children and Families; Michele Deitch; Fight for Lifers West, Inc.; Kristin Henning; Justice Policy Institute; Louisiana Center For Children’s Rights; Mental Health America of Oregon; National Association of Criminal Defense Lawyers; National Center For Youth Law; National Juvenile Defender Center; National Juvenile Justice Network; Pacific Juvenile Defender Center; Rutgers-Camden School of Law, Children’s Justice Clinic; Southern Poverty Law Center; Youth Law Center; Youth M.O.V.E. Oregon

Filed in Support of Appellant, Petitioner on Review

[*Amici Curiae* intend to file a brief on the merits if review is allowed]

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Petition for Review of the decision of the Court of Appeals on Appeal from a  
Judgment of the Circuit Court for Washington County  
Honorable FUN, JAMES L., JR., Judge

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

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## I. INTRODUCTION

This case is one of national importance. Juvenile Law Center – a leading national organization for advocacy on behalf of youth in the juvenile and criminal justice systems – is joined as *amicus curiae* by a broad array of organizations and individuals that provide public policy analysis and support, legal scholarship, and advocacy in courts on important national issues of juvenile justice, all urging this Court to grant the petition for review.

The Court of Appeals decision, if left to stand unexamined on review, will have serious repercussions not just in Oregon but potentially beyond. Conversely, the petition for review, if granted, presents this Court with the opportunity to participate meaningfully in both the state and national development of the law and to address the fundamental differences between children and adults who commit crimes in the critical context of waiver of children into the adult criminal justice system. *See Kent v. United States*, 383 US 541, 546 (1966) (finding that transfer is a critically important action determining vital statutory rights of the juvenile).

The Oregon legislature sought to erect a high statutory bar to considering a child aged 12-14 (in grade school or middle school, here age 13) mature enough for trial in adult court. The Court of Appeals decision effectively eliminates that threshold by setting the statutory bar for “sufficient sophistication and maturity” so low that virtually all cases will cross it, even though the legislative history



discloses that the legislature had exactly the opposite intent. In so doing, the Court of Appeals used a plain-meaning construct and improperly ignored the body of developmental science that should have been applied in context to interpret the statutory ‘term of art’ at issue here. The court also inappropriately used the test for adult criminal insanity as statutory context to interpret the test for juvenile waiver. Finally, the court took no account of the profound constitutional concerns raised by its interpretation. Indeed, the ‘avoidance canon’ of statutory interpretation should have led the court to incorporate the developmental science into the statutory definition, rather than ignore it.

**II. OREGON LAW REQUIRES CONSIDERATION OF ADOLESCENT DEVELOPMENT AS A COMPONENT OF THE “SOPHISTICATED AND MATURITY” PROVISION OF THE WAIVER STATUTE.**

Oregon law supports the grant of this petition for review because (1) this statute employs a term of art that must be interpreted in light of evolving science and research; (2) that science and research provides important statutory context but was ignored by the Court of Appeals majority decision; (3) the legislative history of the Oregon waiver statute supports a high bar whereby only exceptional cases of 12 – 14 year olds are to be transferred to adult court, whereas the Court of Appeals decision effectively eliminates that threshold in virtually all cases; and (4) in light of United States Supreme Court constitutional case law regarding juveniles, the canon of avoidance compels consideration of evolving principles of adolescent development in the interpretation of “sophistication and maturity.”

**A. The Waiver Statute Employs a Term of Art and Must be Interpreted in Light of Evolving Science on Adolescent Sophistication and Maturity**

The meaning of the statutory term “sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved,” has evolved in the decades since ORS 419C.349 was first enacted. This Court has long recognized that the legislature can and does adopt certain terms of art with the intent that they will be defined by evolving outside sources, such as usage in the context of an industry or learned profession.<sup>1</sup>

In *Tharp v. Psychiatric Security Review Board*, 338 Or 413, 423 (2005), for example, this Court held that “the terms ‘mental disease or defect,’ and ‘personality disorder,’ although they consist of common individual words, are not terms ‘of common usage’ that we must interpret according to their ‘plain, natural, and ordinary meaning’ [...] and it would be futile to treat them as such.” Instead these words were “terms of art” used in professional disciplines and their application had specific legal consequences. *Id.* Although the interpretive exercise often looks to sources contemporaneous with a statute’s enactment, “[a]n exception to that approach arises when the legislature uses technical

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<sup>1</sup> See, e.g., *Comcast Corp. v. Dep’t of Revenue*, 356 Or 282, 300 (2014) (“terms of art, or technical terms, must be taken according to the acceptance of the learned in each art, trade, and science”) (quoting William Blackstone, 1 Commentaries on the Laws of England 59 (1765)).

terminology—so-called ‘terms of art’—drawn from a specialized trade or field.” *Comcast Corp v. Dep’t of Revenue*, 356 Or 282, 295-96 (2014).

The Court of Appeals decision’s interpretation of “sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved,” improperly used a plain-meaning paradigm of interpretation, *State v. J.C.N.-V.*, 268 Or App 505, 522 (2015), whereas these terms have evolved since first set forth by the U.S. Supreme Court in 1966 in *Kent v. United States*, 383 US at 567 (citing as one factor in the transfer analysis “[t]he sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living”). Accordingly, this Court must look to current research relevant to understanding how the term of art, “sophistication and maturity, ” should be applied to juveniles subject to waiver.

Modern psychological research supports a comprehensive consideration of adolescent development as part of the “sophistication and maturity” provision of ORS 419C.349(3). Psychologists recognize that youth develop different types of maturity at different rates. For example, youth might have mature cognitive capacities but limited emotional maturity, or they might have developed the ability to identify alternative choices but be limited in their ability to perceive the long-term consequences of each alternative. Consequently, experts in the forensic assessment of juvenile defendants recommend that evaluators describe an individual youth’s development across several different dimensions. Thomas

Grisso, *Clinicians' Transfer Evaluations: How Well Can They Assist Judicial Discretion*, 71 La L Rev 157 (2010).

Psychologists conducting transfer evaluations typically focus on three components of sophistication-maturity: autonomy, cognitive capacities, and emotional maturity. See Randall T. Salekin & Ross D. Grimes, *Clinical Forensic Evaluations for Juvenile Transfer to Adult Criminal Court*, in *Learning Forensic Assessment* 314 (Rebecca Jackson, ed. 2008). Autonomy concerns a youth's development of identity, self-reliance, and ability to make decisions; cognitive capacities include understanding of behavioral norms, awareness of the wrongfulness of crimes, ability to identify alternatives, and anticipation of short- and long-term consequences in decision making; and emotional maturity relates to a youth's ability to delay gratification, self-regulate emotions, and control his or her impulses. Randall T. Salekin et al., *Juvenile Transfer to Adult Courts: A Look at the Prototypes for Dangerousness, Sophistication-Maturity, and Amenability to Treatment Through a Legal Lens*, 8 Psychol Pub Pol'y & L 373, 390-91 (2002). This comprehensive approach to assessing youth sophistication and maturity allows experts to identify the factors most relevant when youth are presented with a decision, including "the nature and degree of youths' planning and foresight, their behavioral intentions, their understanding of societal norms and morals, and their decision-making patterns." Anne-Marie R. Iselin et al.,

*Maturity in Adolescent and Young Adult Maturity: The Role of Cognitive Control*, 33 Law & Hum Behav 455 (2009).

Context also plays a crucial role in transfer evaluations, as it affects the way in which youth can display their autonomy, cognitive capacity, and emotional maturity, or lack thereof. *See* Salekin & Grimes, *supra* at 327 (describing a model of maturity that includes youths' "developmental status, the environment in which they currently live, any potential psychopathology, and the context or situation in which they make decisions"). Distinguishing between "hot" and "cold" decision-making contexts is key: "cold" refers to decision making in non-emotional situations and allows for more cognitive consideration and rational thought, while "hot" refers to situations where emotions run high and peers are present. Given the increased value of peer approval as a reward for adolescents, "hot" contexts often result in an overreliance on socio-emotional processing that cannot be regulated because of youths' still-developing executive functioning abilities. *See* Sarah-Jayne Blakemore & Trevor W. Robbins, *Decision-making in the adolescent brain*, 15 Nature Neuroscience 1184 (2012).

This in-depth treatment of a youth's sophistication and maturity is in contrast to psychologists' assessments of criminal capacity in adults, which tend to focus on mental health and cognitive capacities rather than emotional capacity (*e.g.*, whether the individual is suffering from a mental illness or disorder, knows right from wrong, or has the ability to conform conduct to the law). *See* Alan M.

Goldstein et al., *Evaluation of Criminal Responsibility*, in *Handbook of Psychology Volume 11: Forensic Psychology* (pp. 381-406) (Alan M. Goldstein & Irving B. Weiner, eds. 2012). The Court of Appeals decision's contextual reliance on the test for adult criminal insanity to interpret a juvenile waiver statute was thus a profound error.

Here, the Court of Appeals concluded that consideration of a youth's "sophistication and maturity to appreciate the nature and quality of the conduct involved," was simply a question of "whether [the youth] could appreciate what he was doing in a *physical* sense and that those actions were wrong or would likely have criminal consequences." J.C.N.-V. at 1049 (emphasis added). Because a determination of adult criminal responsibility and an evaluation of a juvenile's maturity are markedly and qualitatively different analyses, reducing the consideration of an adolescent's "sophistication" and "maturity" to simplistic physical terms ignores the complexity of the analysis understood by psychologists and experts in the adolescent development field.

**B. Statutory Context, Including Developmental Science and Research, Supports an Entirely Different Interpretation than the Court of Appeals Majority Decision Provides**

In addition to the points concerning developmental science and research in the preceding section, the scientific context for interpreting the statutory term of art further highlights the fundamental fallacies of the Court of Appeals decision's narrow and mechanical threshold inquiry. Research on adolescence underscores

that only in exceptional circumstances will a youth under 14 be sufficiently mature to be tried in adult court. Adolescence is a time of transition and progressive adjustment. Faced with adult circumstances and decisions, most youth are incapable of the cognizance and maturity characteristic of adults because their brains are still developing.

Research on the degree to which adolescents, and particularly younger adolescents, are able to meet standards of adult adjudicative competence is instructive. A landmark study investigating adolescents' and young adults' ability to understand and participate in legal proceedings found, on average, youth under 15 were less able to understand and reason about trial-related matters than older adolescents. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 *Law & Hum Behav* 333, 343-46, 350 (2003). Measuring youths' competence in other legal contexts produced similar results. *See, e.g.*, Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 *Cal L Rev* 1134 (1980) (finding youth under 15 demonstrated poorer understanding of their rights than older adolescents and adults). Another study revealed approximately 80% of youth under 16 were classified as "impaired" compared to adult standards of adjudicative competence. Of these youth, juvenile offenders 13 and under demonstrated significantly higher rates of impairment than both 14- to 15-year olds and 16- to 17-year-olds. Jodi L. Viljoen et al., *Adjudicative*

*Competence and Comprehension of Miranda Rights in Adolescents Defendants: A Comparison of Legal Standards*, 25 Behav Sci & L 1 (2007).

As a result of these findings, legal and psychological experts agree “youths below age 16 are significantly more likely than adults to have deficiencies in capacities necessary for competent participation in criminal proceedings, and that, below age 14, the risk is substantial.” Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 NC L Rev 793, 811 (2005). While the issue in the present case is not adjudicative competence, these studies underscore the significant decision-making impairments of younger adolescents.

*Amici* agree with Petitioner that as used in the statute at issue, “‘nature’ and ‘quality’ are words that refer to the essential character of the conduct” and to “the child’s intellectual and emotional capacity to understand the full range of the consequences of his or her act, including its effect on the victim.” *See* Petition for Review at 17 -18. Yet, by concentrating on a narrow, physical understanding of the criminal act and ignoring settled principles of adolescent development that speak to children’s limitations in these very areas, the Court of Appeals’ interpretation of ORS 419C.349(3) produces the unsupportable result that virtually all 12-14-year-olds could be transferred to adult court.



### C. **The Legislative History of Oregon’s Waiver Statutes Does Not Support Waiver in This Case**

The Oregon legislature structured its waiver provisions to recognize differences between young adolescents, older adolescents, and adults. Although the jurisdiction of Oregon’s juvenile court may extend until a child is 25, *see* ORS 419C.005, the legislature has created separate statutory vehicles to adult court for (1) youth aged 12–14, (2) youth aged 15–17, and (3) youth age 18 and older, specifically to account for youth’s progressive development:

“[w]e cannot persist in totally defining juveniles by an arbitrary age limit, ignoring the fact that maturation is a gradual process and that some 14 and 15-year-olds may well understand the serious nature of the violent crime they have committed while others may not.”

Testimony, Senate Committee on Judiciary, SB 414, Apr. 25, 1985 (statement of Sen. Nancy Ryles).

The legislative history of ORS 419C.349 demonstrates that the legislature intended for the transfer of a 12-to-14-year-old youth to adult court to occur only in rare, exceptional circumstances. *See* Or Laws 1995, ch 422, § 78; ORS 419C.352. Indeed, legislative debate surrounding the 1985 amendments to the Oregon statutory waiver criteria make clear that legislators and experts alike intended that the grounds for waiver should result in only a small number of youth transferred to adult criminal court each year. *See State v. J.C.N.-V.*, 268 Or App at 555 (providing history). However, the Court of Appeals decision’s narrow and mechanical interpretation of the statute effectively obviates the statutory

threshold requirement and thereby thwarts the legislative intent of ORS 419C.349(3) to protect children who are “truly immature and should not be treated as an adult,” *see* House Floor Debate, June 18, 1985, Reel 25, Track II (statement of Rep. Jim Hill).

**D. Oregon’s Avoidance Canon Obliges the Court to Reject the Court of Appeals Interpretation of the Waiver Statute, Which Violates Due Process**

Oregon courts apply the doctrine of constitutional avoidance, or the ‘avoidance canon,’ when interpreting statutes. *Interpreting Oregon Law*, §4.8 (Hon. Jack Landau, ed., 2009). When a court must choose between more than one plausible interpretation of a statute – when one is constitutional and one potentially is unconstitutional – the court assumes that the legislature intended to avoid the potentially unconstitutional interpretation. *Id.*; *State v. Kitzman*, 323 Or 589, 602 (1996).

Relying on scientifically-proven distinctions between teenagers and adults, the United States Supreme Court has repeatedly held that juvenile offenders are entitled to enhanced constitutional and procedural protections. *See Miller v. Alabama*, 132 S Ct 2455, 2470 (2012) (holding that mandatory sentence of life without possibility of parole for minors violates the Eighth Amendment); *J.D.B. v. North Carolina*, 131 S Ct 2394, 2403 (2011) (holding that age is a significant factor in determining whether a youth is “in custody” for *Miranda* purposes); *Graham v. Florida*, 560 US 48 (2010) (ruling that imposition of life without

possibility of parole for non-homicide crimes violates the Eighth Amendment); *Roper v. Simmons*, 543 US 551, 575 (2005) (holding that imposition of the death penalty on minors violates the Eighth Amendment). The Court of Appeals decision's exceedingly narrow interpretation of ORS 419C.349(3), which effectively eliminates these considerations from the threshold waiver inquiry and decision, raises serious federal constitutional concerns. Avoidance of those significant constitutional concerns leads to the interpretive conclusion that "sophistication and maturity" should not be given the Court of Appeals decision's exceedingly narrow and mechanical interpretation, and that relevant developmental science must therefore be taken into account.

- 1. U.S. Supreme Court Precedent Requires Objective Consideration of a Child's Age When Interpreting His or Her Mindset in Criminal Contexts**

In the more than twenty years since Oregon's waiver statute was passed, United States constitutional law has recognized advances in social science and neurological research which prove that a youth's age "is far more than a chronological fact" and that adolescent development is relevant to an understanding of juveniles' mindset, judgment, decision-making capabilities, and criminal culpability. *See J.D.B. v. North Carolina*, 131 S Ct at 2403 (citations and internal quotations omitted); *see also* Kathryn C. Monahan et al., *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood*, 45 Dev Psychol 1654 (2009). The United States Supreme Court has

translated conclusive science on the progressive maturation of the adolescent brain into procedural rights and protections that must be extended to all juveniles in legal proceedings involving issues of criminal law.

The Supreme Court has relied on recent neuroscience research confirming that the parts of the brain controlling higher-order functions such as reasoning, judgment, and inhibitory control are the last to develop, and do not fully mature until individuals are out of their teens. *See Miller v. Alabama*, 32 S Ct at 2464; *Graham v. Florida*, 560 US at 68. At the same time, the limbic system, which governs emotions, is highly active during adolescence. Thus, researchers suggest that adolescents differ from both children and adults because of an imbalance in developing brain systems: one highly active system involved in socio-emotional processes leading to emotional volatility, and another immature system involved in cognitive and behavioral control. *See, e.g. Nitin Gogtay et al., Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS NAT'L ACAD SCI 8174, 8177 (2004).

The Supreme Court also has relied on developmental research highlighting the unique effect of peer influence on juveniles. *Miller v. Alabama*, 132 S Ct at 2458, 2464, 2468; *Graham v. Florida*, 560 US at 68, 92; *Roper v. Simmons*, 543 US at 569. In the presence of other youth, and particularly older youth, an adolescent may make a spur-of-the-moment decision to participate in criminal activity, perhaps out of fear of social rejection or loss in social status if he refuses.

See Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 *The Future of Children* 15, 22 (2008) [hereinafter Scott & Steinberg, *Adolescent Development*]. Thus, adolescents who engage in crimes make different cost-benefit analyses than adults: participating in criminal activity may be driven more by pressures, impulses, and emotion than an assessment of risk to themselves or others. This is particularly evident in the instant case, where J.C.N.-V. participated at the urging of a much older adult who had preplanned the robbery and homicide.

Finally, the cases underscore that adolescents' risk assessment and decision-making capacities also differ from those of adults in measurable ways.<sup>2</sup> *Miller v. Alabama*, 132 S Ct at 2464-65; *Graham v. Florida*, 560 at 71-72. "Considerable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices[.]" both because of their lack of experience and their immature capacity to process information. Scott and Steinberg, *Adolescent Development* at 20. Adolescents are less likely to perceive risks, are less risk-averse than adults, and lack future orientation. *See id.* at 21. As a result, adolescents are less likely to

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<sup>2</sup> For an overview of how brain development influences adolescent decision making, see Sarah-Jayne Blakemore's TED Talk, *The Mysterious Workings of the Adolescent Brain*, available at [http://www.ted.com/talks/sarah\\_jayne\\_blakemore\\_the\\_mysterious\\_workings\\_of\\_the\\_adolescent\\_brain.html](http://www.ted.com/talks/sarah_jayne_blakemore_the_mysterious_workings_of_the_adolescent_brain.html).

think through, or assign appropriate weight to, long-term consequences, especially when faced with the immediate prospect of short-term rewards. Scott and Steinberg, *Adolescent Development*, at 20; *Graham*, 560 US at 78. Because adolescents' brain development results in difficulty thinking realistically about what may result from their actions, adolescent offenders involved in criminal offenses often do not make the mature decisions we expect of adults.

In light of these key distinctions, the Supreme Court has therefore held that age must be taken into account when young people face the death penalty or some life-without-parole sentences. Importantly, the Court has also concluded that a child's age must be considered in the *Miranda* determination. *See J.D.B. v. North Carolina*, 131 S Ct at 2404. In *J.D.B.*, the Court explained that youth "lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them..." *see id.* at 2397. Similar to the studies on adolescents' relative adjudicative competence, the opinion noted the "absurdity" of trying to apply the perspective of a reasonable adult to understand the mindset of a 13-year-old special education student when he was removed from his seventh-grade classroom. According to the Court, "[n]either officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances," *id.* By extending unique protections to juveniles outside of the sentencing context, *J.D.B.* made clear the broad relevance

of developmental research to criminal procedure. Like the custodial analysis at issue in *J.D.B.*, it would be ‘absurd’ for a court to attempt to reasonably evaluate a juvenile’s “sophistication and maturity to appreciate the nature and quality of the conduct involved,” including any potential long-term or criminal consequences arising from this conduct, in any particular circumstances without accounting for the child’s age and developmental immaturity.

Yet, by applying an adult insanity standard, the Court of Appeals does just this, making the child’s age irrelevant to the inquiry. By reducing the analysis of ORS 419C.349 to whether a youth “could appreciate what he was doing in a *physical* sense and that those actions were wrong or would likely have criminal consequences,” *see J.C.N.-V.* at 507 (emphasis added), the Court of Appeals fails to give benefit or protection to *J.C.N.-V.* and other children like him based on the reality of their developmental status.

**2. Due Process Requires an Individualized Determination of the Child’s Culpability at the Waiver Hearing Because of the Liberty Interest and Potential Harm at Stake**

Nearly 50 years ago, the U.S. Supreme Court held that transfer from juvenile court to adult criminal court imposes a significant deprivation of liberty and therefore merits protection under the Due Process Clause of the Fourteenth Amendment. *Kent v. United States*, 383 US at 546 (finding that transfer is a “critically important action determining vitally important statutory rights of the juvenile). In juvenile court, the young person gets the benefit of a system

designed to rehabilitate, educate, and guide, *see, e.g., State ex rel Juvenile Dept. of Klamath County v. Reynolds*, 317 Or 560, 563 (1993) (so recognizing), whereas in the adult criminal justice system the young person faces the severe harms of incarceration with adults.<sup>3</sup> *Kent* made clear that transfer to adult court must provide due process protections commensurate with the critical nature of the proceedings. 383 US at 554.

In discussing the District of Columbia’s transfer statute, the *Kent* Court held that to be constitutional the juvenile court’s latitude to waive a youth “assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a ‘full investigation.’” *Kent v. United States*, 383 US at 553 (citing *Green v. United States*, 308 F2d 303 (DC App 1962)), noting that a valid waiver “requires a judgment in each case based on an ‘inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case.’”).

More recently, *J.D.B.* recognized in the context of law enforcement interrogations that due process must conform to the emerging science regarding

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<sup>3</sup> There is a voluminous amount of professional literature that attests to this, which a brief on the merits would provide in greater detail. *See, e.g.,* Campaign for Youth Justice, *The Consequences Aren’t Minor: The Impact of Trying Youth as Adults and Strategies for Reform* 6-7 (2007).



the developmental immaturity of youth, consistent with its earlier holdings in *Roper* and *Graham*. See *J.D.B. v. North Carolina*, 131 S Ct at 2403. Most recently, the Supreme Court’s decision in *Miller* established a requirement of individualized decision-making in cases of mandatory life without parole under the Eighth Amendment – likewise compelled by the science on adolescent development. Collectively, these cases inform what is constitutionally required in the application of adult rule of law and procedure to children. See, e.g., *Miller*, 132 S Ct at 2467 (striking as unconstitutional mandatory life without parole sentences for juveniles because “[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it.”); *Graham v. Florida*, 560 US at 76 (noting (“[a]n offender’s age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed,” in declaring sentences of juvenile life without parole for non-homicide offenses unconstitutional).

The *Miller* Court’s emphasis on individualized decision-making is instructive here. According to *Miller*, failing to provide an individualized determination for a youth precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually

extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. *Miller*, 132 US at 2468 (citations omitted).<sup>4</sup> These considerations about the context of the offense, the background of the offender, and other factors that take into account a young person’s developmental status are equally relevant in the context of transfer here.<sup>5</sup>

The State argued below that ORS 419C.349(4) presents an opportunity for the circuit court to review the juvenile’s individual circumstances. That provision requires the court to consider “the previous history of the youth,” ORS 419C.349(4)(d), defined as the “prior treatment efforts and out-of-home

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<sup>4</sup> Thus, in the companion case to *Miller*, *Jackson v. Hobbs*, the opinion looked to Jackson’s family background and immersion in violence, and the fact that he only found out that his friend was carrying a gun on the way to the video store where the murder ultimately took place, as factors that “could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point.” *See Miller*, 132 US at 2468.

<sup>5</sup> Consistent with the reasoning of the dissent in this case, that “the majority’s reading ignores the fact that the legislature . . . was focused on creating a system for individualized consideration of a youth’s developmental capabilities,” see *State v. J.C.N.-V.*, 268 Or App at 553, other jurisdictions have taken an individualized approach to assessing the sophistication and maturity of a juvenile. *See, e.g. Moon v. State*, 451 NW 3d 28, 51 n 87 (Tex Crim App 2014) (*Kent* requires an “individualized assessment of the propriety of waiver of juvenile jurisdiction[,]” which includes an “inquiry into the mental ability and maturity of the juvenile to determine whether he appreciates the nature and effect of his voluntary actions and whether they were right or wrong.” (Internal quotation omitted.))

placements,” ORS 419C.349(4)(d)(A), and “the physical, emotional and mental health of the youth,” ORS 419C.349(4)(d)(B). That provision, however, does not allow for full contemplation of all the factors – autonomy, cognitive capacities, and emotional maturity -- that comprise a sophistication and maturity analysis, as discussed in Sections II A and B above. By focusing exclusively on prior treatment efforts, placements, and the physical, emotional and mental health of the youth, the provision does not allow consideration of multiple aspects of sophistication and maturity, including the individual environment that surrounds the youth, the extent of the youth’s participation in the conduct, nor the way familial and peer pressures may have affected him. *Cf. Miller* 132 US at 2468. Neither does ORS 419C.349(4) allow for consideration of any of the significant developmental gaps between juveniles and adults, detailed herein, that the Supreme Court has recognized as constitutionally relevant.

If the juvenile court had employed an individualized analysis of 13-year-old J.C.N.-V.’s development and circumstances, it likely would have looked beyond simply his cognitive capacities, and his apparent mindset after the crime, toward his emotional maturity (*e.g.*, impulse control, self-regulation) and his autonomy, including the way “familial and peer pressures may have affected him.” *See Miller*, 132 US at 2468. The court also would have considered the “hot,” socio-emotional context of the immediate situation, where J.C.N.-V. was encouraged by a 20-year-old adult to participate in a pre-planned robbery and

murder. It would have been informed by the testimony of the State psychologist that J.C.N.-V. had “not yet developed an internal locus of control, is influenced and led by older youth[s]” and “has a hard time delaying gratification, favoring a more immediate payoff.” *State v. J.C.N.-V.*, 268 Or App at 511. United States Supreme Court case law supports such a full and individualized analysis of key developmental differences between children and adults. However, this level of analysis is foreclosed by the Court of Appeals’ narrow and mechanical interpretation of ORS 419C.349(3).

### III. CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court grant the petition for review to re-examine the interpretation of ORS 419C.349(3).

Respectfully submitted this 30th day of April, 2015.

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I certify that (1) this brief complies with the word-count limitation ORAP 5.05(2)(B) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 4,921 words.

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Respectfully submitted this 30th day of April, 2015.

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I hereby certify that on April 30, 2015, I caused to be electronically filed the foregoing BRIEF OF *AMICI CURIAE* with the Supreme Court Administrator through the eFiling system and served on the parties or attorneys for parties identified herein, in the manner and on the date set forth below:

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