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SUPREME COURT

No. 2008AP001139

**CLERK OF SUPREME COURT
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

OMER NINHAM,

Defendant-Appellant-Petitioner.

On Petition for Review of a Wisconsin Court of Appeals Decision
Affirming a Brown County Circuit Court Order Denying a Wis. Stat.
§ 974.06 Motion, the Honorable J.D. McKay, Presiding

**NON-PARTY BRIEF OF THE WISCONSIN PSYCHIATRIC
ASSOCIATION AND THE
WISCONSIN PSYCHOLOGICAL ASSOCIATION**

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INTRODUCTION

In *Roper v. Simmons*, the United States Supreme Court held that the Eighth Amendment prohibits sentencing a juvenile offender to death. 543 U.S. 551 (2005). Last term, the Court held in *Graham v. Florida* that the Eighth Amendment also prohibits sentencing a juvenile to life in prison without the possibility of parole for a non-homicide crime. 130 S. Ct. 2011 (2010).

In so ruling, *Roper* and *Graham* relied upon the constitutionally material physiological and psychological differences between juveniles and adults. *Roper*, 543 U.S. at 569-75; *Graham*, 130 S. Ct. at 2026-27. The Court emphasized that juveniles have “[a] lack of maturity and an underdeveloped sense of responsibility,” that juveniles are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and that “the character of a juvenile is not as well formed.” *Roper*, 543 U.S. at 569-70; *see also Graham*, 130 S. Ct. at 2026.

Recognizing the fundamental differences between adults and juveniles, the

Court held that juveniles are less culpable and less deserving of the most severe punishments. *Roper*, 543 U.S. at 569; *Graham*, 130 S. Ct. at 2026. The Court also acknowledged that “a greater possibility exists that a minor’s character deficiencies will be reformed.” *Graham*, 130 S. Ct. at 2026-27 (quoting *Roper*, 543 U.S. at 570).

The Wisconsin Psychological Association and the Wisconsin Psychiatric Association submit this brief to show that scientific research in psychology and psychiatry continues to support *Roper*’s and *Graham*’s observations regarding the nature of juveniles. Psychological and social research, as well as research in brain development, establish that juveniles have a lesser capacity for mature judgment, that juveniles are more vulnerable to negative external influences, and that a juvenile’s future character and conduct cannot be reliably or accurately predicted.¹

¹ See, e.g., Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1015 (2003); Margo Gardner & Laurence Stienberg, *Peer Influence on Risk-*

This science supports treating adolescents differently from adults with respect to sentencing, and the same justifications for prohibiting sentences of death for juvenile homicide offenders and prohibiting sentences of life imprisonment without parole for juvenile non-homicide offenders justify prohibiting a sentence of life imprisonment without parole in this case.

ARGUMENT

I. Juveniles Have a Lesser Capacity for Mature Judgment.

A. Developmental Psychology and Social Science Research Show That Juveniles Have a Lesser Capacity for Mature Judgment.

Scientific studies have established that juveniles are less capable than adults of mature judgment and, as a result, are more likely to engage in risky, even criminal, behavior.² Juveniles have less capacity for

taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study, 41 *Developmental Psychol.* 625, 632 (2005); Thomas Grisso, *Double Jeopardy: Adolescent Offenders with Mental Disorders* 64–66 (2004).

² Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 16 *Ann. Rev. Clinical Psychol.* 47,

mature judgment because they tend to place too much emphasis on perceived short-term benefits of their activities relative to the risks of those activities.³ They are also less likely to be able to foresee and take into account the consequences of their behavior.⁴ And they are more impulsive than adults and are less able to exercise self-control.⁵ Juveniles' limited ability to restrain their impulses and control their behavior results in a greater likelihood of antisocial behavior and acts of poor

57-61 (2009) [hereinafter *Adolescent Development*]; see also Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 *Developmental Psychol.* 193, 194 (2010).

³ *Adolescent Development*, *supra* note 2, at 57-58; Cauffman et al., *supra* note 2, at 194; B.J. Casey et al., *The Adolescent Brain*, 28 *Developmental Rev.* 62, 65 (2008).

⁴ Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 *Behav. Sci. & L.* 741, 748-49, 754 & tbl. 4 (2000) [hereinafter *(Im)maturity of Judgment*].

⁵ *Adolescent Development*, *supra* note 2; Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 *Developmental Psychol.* 1764, 1774-76 (2008); *(Im)maturity of Judgment*, *supra* note 4, at 748, 754 & tbl. 4.

judgment than found in typical adults.⁶ This is particularly true of fourteen-year-olds because, as scientific studies have shown, the most dramatic shift, on average, in a maturing person's tendency to consider alternative viewpoints, deliberate, and control impulses occurs at or *after* the age of fourteen.⁷

B. Brain Development Research Demonstrates That Juvenile Brains Are Not Fully Formed.

Consistent with juveniles' demonstrated psychosocial immaturity, recent neuroscience research shows that juvenile brains are not yet fully developed.⁸ Physiological research regarding adolescent brain maturation suggests that "brain systems responsible for

⁶ *(Im)maturity of Judgment*, *supra* note 4, at 742-43.

⁷ *Id.* at 756; Caufmann, et al., *supra* note 2, at 204-05.

⁸ Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. Adolescent Health 216, 216-18 (2009); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174, 8177 (2004); B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 Biological Psychol. 241, 243 (2000).

logical reasoning and basic information processing mature earlier than those that undergird more advanced executive functions and the coordination of affect and cognition necessary for psychosocial maturity.”⁹

Research shows that the amygdala, the brain’s emotional center and the portion of the brain most closely associated with and responsible for impulsive behavior and negative emotions,¹⁰ exerts greater control in juvenile brains than in those of the average adult.¹¹ The amygdala evolved to detect danger and respond quickly to potential threats.¹² As neuroscientists have explained, “[a] society of individuals with the active

⁹ Laurence Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop,”* 64 *Am. Psychologist* 583, 592 (2009).

¹⁰ Laurence Steinberg, *Age Differences in Future Orientation and Delay Discounting*, 80 *Child Development* 28, 40 (2009) [hereinafter *Future Orientation*]; Elkhonon Goldberg, *The New Executive Brain: Frontal Lobes in a Complex World* 175 (Oxford Univ. Press 2009).

¹¹ *Future Orientation*, *supra* note 10, at 40.

¹² Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 *J. Am. Acad. Child & Adolescent Psychiatry* 195, 195-96 (1999).

amygdala unrestrained by the anterior cingulate cortex would constantly be at each other's throats."¹³ Because the amygdala is more predominant in the brains of juveniles than in those of the average adult, emotion often predominates in the context of juvenile behavior.¹⁴

Higher-order cognitive functions, in contrast, are principally the work of the brain's frontal lobes and particularly the prefrontal cortex.¹⁵ These functions include information processing, high reasoning and perception, decision-making, risk assessment, evaluation of consequences, rewards and punishments for actions, inhibitions and impulse control, and moral judgments.¹⁶

¹³ Goldberg, *supra* note 10, at 175.

¹⁴ *Id.* at 117, 175; *Future Orientation*, *supra* note 10, at 40-41.

¹⁵ Johnson et al., *supra* note 8, at 217; Eveline A. Crone et al., *Neurocognitive Development of Relational Reasoning*, 12 *Developmental Sci.* 55, 56 (2009); Silvia A. Bunge et al., *Immature Frontal Lobe Contributions to Cognitive Control in Children: Evidence from fMRI*, 33 *Neuron* 301, 301 (2002).

¹⁶ Johnson et al., *supra* note 8, at 217; Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 *Brain* 2189, 2198–2200 (2000); Judge Moll et al., *Frontopolar and*

Frontal lobe impairment is known to result in failures in strategic thinking and risk-management, and in deficient decision-making about one's long-term best interests.¹⁷ The frontal lobes are also essential to emotional control and impulse restraint,¹⁸ serving to check the amygdala's transmissions that generate emotional and impulsive behavior.¹⁹ Thus, fully developed and properly functioning frontal lobes play a critical role in a person's capacity to be a rational moral actor, capable of mature decision-making.

Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects, 59 *Arq Neurosiquiatr* 657, 661-63 (2001).

¹⁷ *Future Orientation*, *supra* note 10, at 40; Goldberg, *supra* note 10, at 179.

¹⁸ Johnson et al., *supra* note 8, at 217-18; Casey et al., *Structural and Functional Brain Development*, *supra* note 8, at 245-46.

¹⁹ See Gargi Talukder, *Decision-Making Is Still a Work in Progress for Teenagers*, report dated July 2000, available at <http://brainconnection.positscience.com/topics/?main=news-in-rev/teen-frontal> (last visited Dec. 13, 2010); L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 *Neurosci. & Biobehav. Revs.* 417, 440 (2000).

Yet, research shows that the prefrontal cortex is one of the last regions of the brain to mature.²⁰ At least two distinct brain maturation processes, pruning and myelination, continue through and beyond adolescence in the prefrontal cortex.²¹ The pruning of the brain's gray matter—a process in which synapses are pared away—results in the stronger neural connections found in mature brains.²² Pruning improves the brain's traffic system and overall decision-making.²³ In the prefrontal cortex, the region

²⁰ Gogtay et al., *supra* note 8, at 8177.

²¹ Neir Eshel et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 *Neuropsychologica* 1270, 1270 (2007).

²² Jay N. Giedd et al., *Anatomical Brain Magnetic Resonance Imaging of Typically Developing Children and Adolescents*, 48 *J. Am. Child & Adolescent Psychiatry* 465, 469 (2009); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-taking*, 28 *Developmental Rev.* 78, 93-96 (2008); Gogtay et al., *supra* note 8, at 8175; Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 *J. Am. Acad. Child & Adolescent Psychiatry* 1012, 1014 (2001); Casey et al., *Structural and Functional Brain Development*, *supra* note 8, at 242–43.

²³ Casey et al., *Structural and Functional Brain Development*, *supra* note 8, at 241.

of the brain containing those neural pathways that are most vital to regulating behavior, controlling impulses, and facilitating moral reasoning, pruning occurs nearly last—well after the ages of 13 or 14.²⁴

Myelination—a second important brain maturation process—also occurs later in the frontal lobes than almost any other region.²⁵ During myelination, an insulating substance called myelin coats the brain’s axons, which are neural fibers carrying information via electrical impulses.²⁶ The myelin insulation improves neural signal transmission.²⁷ The progress of myelination is indicative of brain maturity level as measured by information processing speed and communication quality.²⁸ Brain development research has

²⁴ Gogtay et al., *supra* note 8, at 8177.

²⁵ Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 *Nature Neuroscience* 859, 859-60 (1999).

²⁶ Zoltan Nagy et al., *Maturation of White Matter Is Associated With the Development of Cognitive Functions During Childhood*, 16 *J. Cognitive Neurosci.* 1227, 1230–32 (2004).

²⁷ *Id.*

²⁸ *Id.* at 1231-32; Sowell et al., *supra* note 25, at 859.

confirmed that myelination continues into the third decade of life, and occurs latest in the frontal lobes.²⁹

Both behavioral science and neuroscience, therefore, show that important aspects of brain maturation remain incomplete during adolescence, and that the frontal lobes, critically needed to control impulses and emotions and to make mature, considered decisions, are not fully developed in typical fourteen-year-olds.

II. Juveniles Are More Vulnerable to Negative External Influences.

Because of their developmental immaturity, juveniles tend to be more susceptible than adults to negative influences in the environment.³⁰ This is particularly true for juveniles at or near the age of 14, because research has shown both that this age is the peak of peer-influence susceptibility and that the ability to resist

²⁹ Sowell et al., *supra* note 25, at 859.

³⁰ Gardner & Stienberg, *supra* note 1, 625-26 (2005); see generally Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, in *Youth on Trial* 371, 371-94 (Thomas Grisso & Robert G. Schwartz eds., Univ. of Chicago Press 2000).

peer pressure develops over time, most significantly between the ages of 14 and 18.³¹

The lesser ability of juveniles to resist peer influence affects their judgment and behavior both directly and indirectly.³² Juveniles often are influenced by direct peer pressure, such as when juveniles are coerced to take risks that they would likely avoid during other stages of life.³³ Additionally, a desire for peer approval, and a fear of rejection, tends to affect a juvenile's choices even without direct coercion.³⁴ In large part, these facts of juvenile life underlie a central difference between those committing adolescent crimes and those who commit crimes later in life.³⁵

³¹ See Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 *Developmental Psychol.* 1531, 1538, 1540 (2007).

³² Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *Psychol. Rev.* 674, 686 (1993).

³³ See *id.*; Fagan, *supra* note 30, at 376-80.

³⁴ Moffitt, *supra* note 32, at 686; see also Gardner & Steinberg, *supra* note 1, at 625-26.

³⁵ Steinberg & Scott, *supra* note 1, 1015 (2003); see also Franklin E. Zimring, *Penal Proportionality for the Young Offender*, in *Youth on Trial* 271, 277-83

III. Juveniles' Unformed Identity Makes It Less Likely That Their Offenses Evince a Fixed Bad Character and More Likely That They Will Reform.

During adolescence, a person's personality and character undergo significant evolution.³⁶ Numerous studies document that each of the five fundamental personality traits do not begin to stabilize until late adolescence.³⁷ Studies show that average levels of emotional stability increase steadily from middle to late adolescence, and the personality trait of conscientiousness significantly increases over time, including through college age.³⁸ This research indicates

(Thomas Grisso & Robert G. Schwartz eds., Univ. of Chicago Press 2000).

³⁶ Theo A. Klimstra et al., *Maturation of Personality in Adolescence*, 96 J. Personality & Social Psychol. 898, 906-08 (2009); Steinberg & Scott, *supra* note 1, at 1015; Robert R. McCrae, et al., *Nature Over Nurture: Temperament, Personality and Life Span Development*, 78 J. Personality & Soc. Psychol. 173, 177-84 (2000).

³⁷ Klimstra et al., *supra* note 36, at 899, 908; McCrae et al., *supra* note 36, at 183-84.

³⁸ Steinberg & Scott, *supra* note 1, at 1015; Daniel M. Blonigen, *Explaining the Relationship Between Age and Crime: Contributions from the Developmental Literature on Personality*, 30 Clinical Psychol. Rev. 89, 91-94 (2010).

that not only do personality traits tend to change through adolescence, they generally change in a socially positive direction. Thus, measurement of an adolescent's profile of personality traits at any given point in time is a scientifically poor indicator of future criminal behavior.

Further, the theory that traits are stable predictors of criminal or violent behavior has not been supported; rather, they are currently seen as dynamic constructs with particular normative changes during emerging adulthood.³⁹ And broad personality traits that are most associated with violent or criminal behavior have been shown to be those most susceptible to positive maturational forces.⁴⁰

Modern behavioral science has shown that “the vast majority of adolescents who engage in criminal or delinquent behavior

³⁹ Daniel M. Blonigen, *supra* note 38, at 91.

⁴⁰ Blonigen, *supra* note 38, at 93-94; *see also* Michael F. Caldwell et al., *Are Violent Delinquents Worth Treating? A Cost-Benefit Analysis*, 43 *J. Res. in Crime & Delinquency* 148, 162-65 (2006).

desist from crime as they mature”⁴¹ and there is no reliable way to determine which delinquent juveniles will continue acting in criminal, antisocial ways after reaching adulthood and which will not.⁴² Juveniles who will continue as criminal offenders and those who will not can often exhibit identical adolescent behavior.⁴³ For this reason, psychiatrists generally refuse to diagnose antisocial personality disorder, which is also known as psychopathy or sociopathy, in persons under the age of eighteen.⁴⁴ *Roper* found this scientific fact significant in applying the Eighth Amendment: “It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile

⁴¹ Steinberg & Scott, *supra* note 1, at 1015; *see also* Moffitt, *supra* note 32, at 685–86.

⁴² Grisso, *supra* note 1, at 64–66.

⁴³ *See id.* at 65-66.

⁴⁴ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 701–06 (4th ed. rev. 2000), *cited in Roper*, 543 U.S. at 573 (2005).

offender whose crime reflects irreparable corruption.” 543 U.S. at 573.

Thus, a juvenile’s crime—regardless of how horrific—is at best a poor indicator of entrenched antisocial character. Volumes of scientific study show that a determination as to whether a juvenile’s developing character is beyond rehabilitation is demonstrably unsound: “The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” *Id.* at 570.

Like a sentence of death, a sentence of imprisonment for life without the possibility of parole entails the certainty of society’s abandonment. *Graham*, 130 S. Ct. at 2027. “The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable.” *Id.* The State condemns a juvenile sentenced to life without parole to die in prison devoid of any opportunity to prove during adulthood that, having matured physically and

psychologically, he poses no risk to society. Especially because of the inability to assess character pathology and dangerousness reliably before the age of 18, it offends the Eighth Amendment principles announced in *Roper* and *Graham* to deprive a juvenile offender of a meaningful opportunity to demonstrate, after he reaches the age of 18, that he has matured and is fit to reenter society.

CONCLUSION

Well-accepted psychology and psychiatry studies, including those upon which *Roper* and *Graham* relied in holding that juveniles cannot be deprived of their liberty irretrievably, require that the judgment sentencing Omer Ninham to life imprisonment without parole be vacated.

Respectfully submitted this 15th day of December, 2010.

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,949 words.

Dated this 15th day of December, 2010.

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RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 15th day of December, 2010, I caused 23 copies of the Non-party Brief of the Wisconsin Psychiatric Association and the Wisconsin Psychological Association to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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