

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

CONFIDENTIAL BRIEF ON THE MERITS 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; Children’s Law Center of Massachusetts; 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

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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Armstrong, Duncan, Nakamoto, DeVore, Tookey, Garrett,
and Flynn
Dissenting Judges: Egan, J., joined by Ortega, J.

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TABLE OF CONTENTS

- I. INTRODUCTION AND SUMMARY OF ARGUMENT.....1
- II. “SOPHISTICATION AND MATURITY” IS A TERM OF ART THAT MUST BE INTERPRETED IN LIGHT OF SCIENTIFIC RESEARCH ON ADOLESCENT DEVELOPMENT.....4
 - A. “SOPHISTICATION AND MATURITY” IS A TERM OF ART5
 - B. ESTABLISHED DEVELOPMENTAL AND SCIENTIFIC RESEARCH ILLUSTRATE THE COMPLEX AND TECHNICAL NATURE OF THE “SOPHISTICATION AND MATURITY” ANALYSIS7
- III. THE OREGON LEGISLATURE’S INTENT TO LIMIT WAIVER OF OFFENDERS AS YOUNG AS J.C.N.-V. IS SUPPORTED BY RESEARCH ON ADOLESCENT DEVELOPMENT AS WELL AS THE ADVERSE EXPERIENCE OF YOUTHS IN THE ADULT CRIMINAL JUSTICE SYSTEM.....13
 - A. PREVAILING RESEARCH ON ADOLESCENT DEVELOPMENT SUPPORTS THE LEGISLATURE’S INTENT THAT CHILDREN BE TRANSFERRED TO ADULT COURT ONLY IN EXCEPTIONAL CASES14
 - B. THE LEGISLATURE INTENDED TO PRESERVE THE REHABILITATIVE BENEFITS OF THE JUVENILE JUSTICE SYSTEM FOR THE VAST MAJORITY OF YOUTH, WHO LACK THE MATURITY AND SOPHISTICATION OF ADULTS17
 - C. SENTENCING AND INCARCERATING A CHILD AS IF HE WERE AN ADULT CONTRAVENES THE LEGISLATURE’S GOAL OF REHABILITATING JUVENILE OFFENDERS20
- IV. OREGON’S AVOIDANCE CANON OBLIGES THE COURT TO REJECT THE COURT OF APPEALS’ INTERPRETATION OF THE WAIVER STATUTE.....25
 - A. IN FAILING TO TAKE ADOLESCENT DEVELOPMENT INTO ACCOUNT IN ASSESSING J.C.N.-V.’S SOPHISTICATION AND MATURITY, THE COURT OF APPEALS’ DECISION IS AT ODDS WITH RECENT U.S. SUPREME COURT PRECEDENT25
 - B. DUE PROCESS REQUIRES A PROPER INDIVIDUALIZED DETERMINATION OF THE CHILD’S CULPABILITY AT THE WAIVER HEARING29

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Comcast Corp v. Dep’t of Revenue</i> , 356 Or 282, 337 P3d 768 (2014)	5
<i>Graham v. Florida</i> , 560 US 48, 130 S Ct 2011, 176 L Ed 2d 825 (2011)	<i>passim</i>
<i>Hills v. Pierce</i> , 113 Or 386, 231 P 652 (1925)	18
<i>J.D.B. v. North Carolina</i> , 564 US __, 131 S Ct 2394, 180 L Ed 2d 310 (2011)	<i>passim</i>
<i>Kent v. United States</i> , 383 US 541, 86 S Ct 1045, 16 L Ed 2d 84 (1966).....	<i>passim</i>
<i>Miller v. Alabama</i> , 567 US __, 132 S Ct 2455, 183 L Ed 2d 407 (2012)	<i>passim</i>
<i>Moon v. State</i> , 451 SW 3d 28, 51 n 87 (Tex Crim App 2014)	31
<i>Roper v. Simmons</i> , 543 US 551, 125 S Ct 1183, 161 L Ed 2d 1 (2005).....	<i>passim</i>
<i>State v. Dunn</i> , 53 Or 304, 99 P 278 (1909)	18
<i>State v. Eisen</i> , 53 Or 297, 99 P 282 (1909)	18
<i>State v. Gullings</i> , 244 Or 173, 416 P2d 311 (1966)	18
<i>State v. J.C.N.-V.</i> , 268 Or App 505, 342 P3d 1046 (2015)	<i>passim</i>
<i>State v. Kitzman</i> , 323 Or 589, 920 P2d 134 (1996)	25

<i>State v. Stoneman</i> , 323 Or 536, 920 P2d 535 (1996)	25
<i>State ex rel. Juvenile Department v. Reynolds</i> , 317 Or 560, 857 P2d 842 (1993)	18, 29
<i>Tharp v. Psychiatric Sec. Review Bd.</i> , 338 Or 413, 110 P3d 103 (2005)	4

Statutes

Oregon Revised Statutes

137.124(5).....	21
419C.001	17
419C.005	19
419C.349	13
419C.349(3)	<i>passim</i>
419C.349(4)	3, 32, 33
419C.352	12, 14, 19
420A.200.....	21

Legislative History

Testimony, Senate Committee on Judiciary, SB 414, April 25, 1985, Ex. F	14
Testimony, Senate Committee on Judiciary, SB 414, April 25, 1985, Ex. G	7
Testimony, Senate Committee on Judiciary, SB 414, April 25, 1985, Ex. I.....	7, 14
Tape Recording, House Floor Debate, June 18, 1985, Reel 25, Track II	13
Testimony, Senate Judiciary Subcommittee on Juvenile Justice, SB 1, February 13, 1995, Ex. C (Governor’s Juvenile Justice Task Force Subcommittee No. 1, Report on Implementation of Ballot Measures Section VI (C) “Raising the Age Jurisdiction of the Juvenile Court and Department of Youth Authority”)	19

Other Authorities

- Alan M. Goldstein et al., *Evaluation of Criminal Responsibility*, in 11 HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY 381-406 (Alan M. Goldstein and Irving B. Weiner eds., 2012)12
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- Anne-Marie R. Iselin et al., *Maturity in Adolescent and Young Adult Maturity: The Role of Cognitive Control*, 33 L & Hum Behav 455 (2009)10
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- Campaign for Youth Justice, *Misguided Measures: The Outcomes and Impacts of Measure 11 on Oregon’s Youth* 54 (2011), http://www.campaignforyouthjustice.org/documents/Misguided_Measures_July_2011.pdf.....24
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- Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 Harv CR-CLL Rev 507 (1995)7
- Children’s Law Center, *Falling Through the Cracks: A New Look at Ohio Youth in the Adult Criminal Justice System*, 1 (2012), http://www.campaignforyouthjustice.org/documents/FR_OH_0512.pdf20
- Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing Amenability to Treatment Concept*, 10 J Contemp Legal Issues 299 (1999)6

David S. Tanenhaus, <i>The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Conception</i> , in A CENTURY OF JUVENILE JUSTICE 42 (Rosenheim, Zimring, Tanenhaus, and Dohrn, eds., 2002)	17
Debra R. Chen and Randall T. Salekin, <i>Transfer to Adult Court: Enhancing Clinical Forensic Evaluations and Informing Policy</i> , in HANDBOOK OF JUVENILE FORENSIC PSYCHOLOGY AND PSYCHIATRY 114 (Elena L. Grigorenko ed., 2012).....	9
Edward P. Mulvey and Carol A. Schubert, <i>Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court</i> (2012), http://www.ojjdp.gov/pubs/232932.pdf	20
Elizabeth S. Scott and Laurence Steinberg, <i>Adolescent Development and the Regulation of Youth Crime</i> , 18 <i>The Future of Children</i> 15 (2008).....	14
Elizabeth S. Scott and Thomas Grisso, <i>Developmental Incompetence, Due Process, and Juvenile Justice Policy</i> , 83 <i>NC L Rev</i> 793 (2005).....	15
Franklin E. Zimring, <i>American Juvenile Justice</i> (2005).....	17
Jason J. Washburn et al., <i>Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court</i> , 59 <i>Psychiatric Services</i> 965 (2008).....	20
Jodi L. Viljoen et al., <i>Adjudicative Competence and Comprehension of Miranda Rights</i> , 25 <i>Behav Sci & L</i> 1 (2007).....	15
Juvenile Justice and Delinquency Prevention, <i>Statistical Briefing Book</i> , http://www.ojjdp.gov/ojstatbb/structure_process/qa04106.asp?qaDate=2013 (last visited Aug 6, 2015).....	19
Kathryn C. Monahan et al., <i>Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood</i> , 45 <i>Dev Psychol</i> 1654 (2009)	25

Laurence Steinberg and Elizabeth S. Scott, <i>Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty</i> , American Psychologist 1011 (2003)	16
Liz Ryan, <i>Youth in Adult Courts</i> , Campaign for Youth Justice (2012).....	23
Lonn Lanza-Kaduce et al., <i>Juvenile Transfer to Criminal Court Study: Final Report</i> (2002)	23
Marty Beyer, <i>Experts for Juveniles At Risk of Adult Sentences in MORE THAN MEETS THE EYE: RETHINKING ASSESSMENT COMPETENCY AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICE</i> (P. Puritz, A. Capozello & W. Shang eds., 2002)	21
Melissa Sickmund, <i>Juveniles in Corrections</i> , U.S. Department of Justice, Juvenile Offenders and Victims National Report Series Bulletin (2004)	22
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Nitin Gogtay et al., <i>Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood</i> , 101 Proceedings Nat'l Acad Sci 8174 (2004)	27
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Randall T. Salekin, Kimberly M. Price et al, <i>Evaluation for Disposition and Transfer of Juvenile Offenders</i> , in FORENSIC ASSESSMENTS IN CRIMINAL AND CIVIL LAW: A HANDBOOK FOR LAWYERS (2013)	8

Randall T. Salekin et al., <i>Juvenile Transfer to Adult Courts: A Look at the Prototypes for Dangerousness, Sophistication-Maturity, and Amenability to Treatment Through a Legal Lens</i> , 8 Psychol Pub Pol’y & L 373 (2002).....	10
Randall T. Salekin and Ross D. Grimes, <i>Clinical Forensic Evaluations for Juvenile Transfer to Adult Criminal Court</i> , in LEARNING FORENSIC ASSESSMENT (1st ed 2007).....	9
Randall T. Salekin & Ross D. Grimes, <i>Clinical Forensic Evaluations for Juvenile Transfer to Adult Criminal Court</i> , in LEARNING FORENSIC ASSESSMENT (Rebecca Jackson ed., 2008)	9, 11
Richard E. Redding, <i>Juvenile Transfer Laws: An Effective Deterrent to Delinquency?</i> , <i>Juvenile Justice Bulletin</i> 7 (2008)	22
Sarah-Jayne Blakemore and Trevor W. Robbins, <i>Decision-Making in the Adolescent Brain</i> , 15 <i>Nature Neuroscience</i> 1184 (2012)	11
Sarah-Jayne Blakemore's TED Talk, <i>The Mysterious Workings of the Adolescent Brain</i> (2012), http://www.ted.com/talks/sarah_jayne_blakemore_the_mysterious_workings_of_the_adolescent_brain	27
Thomas Grisso, <i>Clinicians’ Transfer Evaluations: How Well Can They Assist Judicial Discretion</i> , 71 <i>La L Rev</i> 157 (2010).....	9
Thomas Grisso et al., <i>Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants</i> , 27 <i>L & Hum Behav</i> 333 (2003).....	15
Thomas Grisso, <i>Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis</i> , 68 <i>Cal L Rev</i> 1134 (1980).....	15
Vincent Schiraldi and Jason Zeidenberg, <i>The Risks Juveniles Face When They Are Incarcerated With Adults</i> , <i>Justice Policy Institute</i> 1 (1997)	22

Washington Coalition for the Just Treatment of Youth, A
*Reexamination of Youth Involvement in Adult Criminal Justice
System in Washington: Implications of New Findings about
Juvenile Recidivism and Adolescent Brain Development* (2009),
("Reexamination of Youth Involvement in Adult Criminal Justice
System in Washington").....23

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus curiae Juvenile Law Center, the nation's oldest public interest law firm for children and a leading advocate for youth in the juvenile and criminal justice systems, submits this brief in support of Petitioner J.C.N.-V. Juvenile Law Center is joined by 21 other organizations and individuals that provide public policy analysis and support, legal scholarship, and advocacy on important state and national issues of juvenile justice. *Amici curiae* will focus on the applicability of current scientific research to the determination of a child's "sophistication and maturity" before prosecution as an adult under Oregon law; the benefits of the rehabilitative juvenile justice system for young offenders; and the documented harms associated with the incarceration of children in adult correctional facilities.

J.C.N.-V. was a 13 year-old child who was tried, convicted and sentenced as an adult to life imprisonment with a 30-year minimum sentence for assisting a 20 year-old adult in a robbery/murder. Under Oregon law, a child in this circumstance may also be subject to incarceration as an adult at age 16. The fundamental question presented here is whether Oregon may waive a 13 year-old child into the adult criminal justice system without reference to prevailing behavioral and neurological research in making the statutory threshold determination whether a child "at the time

of the alleged offense was of sufficient *sophistication and maturity* to appreciate the nature and quality of the conduct involved.”¹ ORS 419C.349(3) (emphasis added).

Although this question is one of Oregon statutory interpretation, this Court’s ruling will likely inform the current national discourse regarding the circumstances under which children may be transferred into the adult criminal justice system, particularly in the 43 other states that have juvenile waiver laws that likewise require consideration of the child’s “sophistication and maturity” before transfer.

Amici curiae respectfully submit that the phrase “sufficient sophistication and maturity” in ORS 419C.349(3) is a ‘term of art,’ whose interpretation must be informed by current research in the field of juvenile justice and adolescent psychology. Interpreting the statute consistent with that research and applying Petitioner’s proposed rule of law will also ensure that the statute conforms to the legislature’s intent: to ensure that children will be treated as children, that they will be given the full benefit of a juvenile justice system committed to their rehabilitation, and that they will be spared the often irreversible harms that come from sentencing and incarcerating children as adults.

In ORS 419C.349(3), the legislature sought to erect a high bar for prosecution of children aged 12-14 (in grade school or middle school, here age 13) by requiring

¹ The statutory term quoted above is referred to variously throughout the brief as “sufficient sophistication and maturity” or “sophistication and maturity.”

a finding that the child is sophisticated and mature enough for trial and sentencing in adult court and ultimately for incarceration with adults. Moreover, this statutory threshold demarks a line in the sand between legislative authority and judicial authority; only when a case crosses that line does a court then have discretion and authority to order waiver after considering the additional factors set out in ORS 419C.349(4). The Court of Appeals' decision has effectively eliminated the statutory bar by adopting an interpretation of "sufficient sophistication and maturity" that lets virtually all cases slip under it, while the legislative history reveals the opposite legislative intent.

The juvenile waiver statute should not be interpreted by referencing a test for adult criminal insanity. Moreover, the Court of Appeals' interpretation incorrectly used a plain-meaning construct, thus ignoring the developmental science that would have properly informed interpretation of the statutory term of art at issue here. Finally, the Court of Appeals' interpretation took no account of the federal constitutional concerns raised by its interpretation of the law such that the child's age effectively becomes irrelevant to the "sufficient sophistication and maturity" determination. Indeed, the 'avoidance canon' of statutory interpretation should lead this Court to incorporate adolescent developmental science into the statutory definition of "sufficient sophistication and maturity," rather than ignore it.

Amici believe that the conclusion reached by the Court of Appeals majority, if affirmed, will have serious repercussions not just in Oregon but potentially beyond. This case presents this Court with the opportunity to remedy that error and to advance the development of the law in the area of transfer and waiver by addressing the fundamental differences between children and adults who commit criminal acts. *See Kent v. United States*, 383 US 541, 546, 86 S Ct 1045, 16 L Ed 2d 84 (1966) (finding that transfer is a critically important action determining vital statutory rights of the juvenile).

II. “SOPHISTICATION AND MATURITY” IS A TERM OF ART THAT MUST BE INTERPRETED IN LIGHT OF SCIENTIFIC RESEARCH ON ADOLESCENT DEVELOPMENT

This Court has long recognized that the legislature can and does adopt certain terms with the intent that they will be defined by evolving outside sources, such as usage in the context of an industry or learned profession.² In *Tharp v. Psychiatric Sec. Review Bd.*, 338 Or 413, 423, 110 P3d 103 (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

² *See, e.g., Comcast Corp v. Dep’t of Revenue*, 356 Or 282, 300, 337 P3d 768 (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)).

be futile to treat them as such.” Instead, those words were “terms of art” used in professional disciplines and their application had specific legal consequences. *Id.*

Moreover, 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 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, 337 P3d 768 (2014).

A. “Sophistication and Maturity” is a Term of Art

The Court of Appeals interpreted “sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved,” according to a plain-meaning paradigm, *State v. J.C.N.-V.*, 268 Or App 505, 522, 342 P3d 1046 (2015), when the phrase actually contains specialized terms that should be defined with reference to the evolving science in the field of adolescent psychology. Accordingly, this Court must look to current research to understand how the term of art “sophistication and maturity” should be applied to juveniles, especially juveniles as young as *J.C.N.-V.*, who are subject to waiver.

In *Kent*, the United States Supreme Court held that a juvenile court could not waive a case to the adult system without “procedural regularity... to satisfy the basic requirements of due process and fairness....” 383 US at 553. The Court appended to its opinion a policy memorandum developed by the juvenile court judge for the

District of Columbia, which included a set of factors for consideration in the transfer decision, including “[t]he sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.” *Id.* at 567. Since *Kent*, the majority of states have included a “sophistication and maturity” prong in their transfer statutes and judicial decisions. Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing Amenability to Treatment Concept*, 10 J Contemp Legal Issues 299, 320 (1999).

The legislative history of Oregon’s 1985 adoption of the “sufficient sophistication and maturity” threshold determination makes clear that the legislature chose to incorporate that statutory term from its usage in *Kent*. *See* Testimony, House Judiciary Committee, Subcommittee 1, SB 414, May 30, 1985, Ex A-1 (statement of Senator Nancy Ryles) (referring to *Kent*); Tape Recording, House Floor Debate, June 18, 1985, Reel 25, Track II (statement of Representative Jim Hill) (“this criteria was taken from the U.S. Supreme Court case of *Kent v. United States*.”). In the two decades after *Kent* and before 1985, the term had been widely used not only in other state laws but also in the professional fields of adolescent development, where well-accepted psychological testing had been developed and geared specifically to make that determination. Indeed, as is detailed in the Petitioner’s Brief on the Merits (at pages 3-11), three expert witnesses testified in the circuit court based upon this well-established testing as well as evolving

adolescent development research to determine whether J.C.N.-V. possessed “sufficient sophistication and maturity” to be prosecuted in the adult criminal justice system.

B. Established Developmental and Scientific Research Illustrate the Complex and Technical Nature of the “Sophistication and Maturity” Analysis

National scholars who have considered the “sophistication and maturity” language assert that the purpose of this threshold determination was to guide judges in identifying “certain youth, ‘described as chronic, serious, violent, sophisticated, mature or persistent [who] were thought to be out of the purview of the rehabilitative-oriented juvenile court.’” Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 Harv CR-CLL Rev 507, 525-26 (1995) (internal citations omitted). The legislative history of Oregon’s transfer statute reveals similar goals. *See, e.g.*, Testimony, Senate Committee on Judiciary, SB 414, April 25, 1985, Ex. G (statement of Keith Meisenheimer, Multnomah County District Attorney’s Office) (“My support for lowering the age of potential remand * * * centers on my belief that there are some 14 or 15 year-old juveniles who, by reason of advanced maturity, sociopathic character, past record of failure in juvenile court programs, established history of criminal conduct, large size, independence of parental or other adult authority or influence, etc., are dangerous to the community and are not amenable to significant rehabilitation in juvenile programs.”); *see also Id.*, Ex. I (statement of Paul Lenarduzzi (the Director

of the Lane County Juvenile Department) (noting that a juvenile who is “pathologically dangerous” can be transferred to the adult system to serve the balance of his or her sentence).³

Accordingly, because many states have included “sophistication and maturity” as a relevant factor in the transfer decision since *Kent*, forensic psychologists have developed guidelines on how to conduct such assessments to ensure that the assessments reflect current knowledge. See Anne-Marie R. Leistico and Randall T. Salekin, *Testing the Reliability and Validity of the Risk, Sophistication-Maturity, and Treatment Amenability Instrument (RST-i): An Assessment Tool for Juvenile Offenders*, 2 Int’l J Forensic Mental Health 101, 117, 102-03 (2003) (describing how psychologists developed a set of guidelines for juvenile assessments “using the information cited in *Kent*,” including three core psychological constructs that are relevant to the assessment of juveniles facing transfer, including: risk, sophistication-maturity, and treatment amenability).⁴

³ The United States Supreme Court has recognized the error that would be inherent in conflating seriousness of the offense with sophistication and maturity. See *Roper v. Simmons*, 543 US 551, 570, 125 S Ct 1183, 161 L Ed 2d 1 (2005) (“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”); see also *Graham v. Florida*, 560 US 48, 50, 130 S Ct 2011, 176 L Ed 2d 825 (2011); *Miller v. Alabama*, 567 US ___, 132 S Ct 2455, 2471, 183 L Ed 2d 407 (2012).

⁴ See also Randall T. Salekin, Kimberly M. Price et al., *Evaluation for Disposition and Transfer of Juvenile Offenders*, in FORENSIC ASSESSMENTS IN

Researchers and scholars agree that psychological assessments of “sophistication and maturity” depend on a comprehensive and nuanced understanding of adolescent development. Psychologists recognize that youth “mature” at different rates and that maturity may also depend upon context and circumstances. 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 incapable or 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, 184 (2010).

CRIMINAL AND CIVIL LAW: A HANDBOOK FOR LAWYERS 255 (2013) (relating sophistication and maturity to legally relevant factors like juveniles’ culpability and their ability to plan and commit crimes); Randall T. Salekin and Ross D. Grimes, *Clinical Forensic Evaluations for Juvenile Transfer to Adult Criminal Court*, in LEARNING FORENSIC ASSESSMENT 313-46 (1st ed 2007) (emphasizing the need for contextual analyses of youth’s intelligence and maturity when assessing sophistication and maturity, and the need to keep up-to-date with advances in the research); Debra R. Chen and Randall T. Salekin, *Transfer to Adult Court: Enhancing Clinical Forensic Evaluations and Informing Policy*, in HANDBOOK OF JUVENILE FORENSIC PSYCHOLOGY AND PSYCHIATRY 114 (Elena L. Grigorenko ed., 2012) (suggesting that a juvenile’s emotional state and psychosocial development is an important part of the complex sophistication and maturity analysis).

Psychologists evaluating youth for transfer – including the state’s own expert here, *see* Sebastian Report at 12-13 – typically focus on three components of sophistication and 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 *L & Hum Behav* 455, 466 (2009).

Context also plays a crucial role in transfer evaluations, as it affects the way in which youth demonstrate their autonomy, cognitive capacity, and emotional maturity. *See* Salekin and Grimes, *Clinical Forensic Evaluations for Juvenile Transfer to Adult Criminal Court* 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. (Dr. Nagel’s expert testimony here referenced this crucial distinction, TR 516-17.) Given the increased value adolescents place on peer approval, “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 and Trevor W. Robbins, *Decision-Making in the Adolescent Brain*, 15 *Nature Neuroscience* 1184 (2012).

This distinction between “hot” and “cold” decision-making is crucial to the interpretation and application of ORS 419C.349(3), which specifies that the court must consider the sophistication and maturity of the youth “at the time of the alleged offense.” The offenses that place 12-14-year-olds within the jurisdiction of ORS

419C.352 – murder, aggravated murder, rape in the first degree, sodomy in the first degree and unlawful sexual penetration in the first degree – are likely to involve situations where “emotions run high” and, as in the instant case, are also likely to involve peers. Consequently, how minors process the social and emotional context of such situations is central to the “sophistication and maturity” analysis in the waiver decision.

Notably, this in-depth treatment of a youth’s sophistication and maturity is in contrast to psychologists’ assessment of criminal capacity in adults, which tends 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 11 HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY 381-406 (Alan M. Goldstein and Irving B. Weiner eds., 2012).

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.*, 268 Or App at 1049 (emphasis added). Because a determination of adult criminal responsibility and an evaluation of a

juvenile's maturity are qualitatively different analyses, reducing the consideration of an adolescent's "sophistication" and "maturity" to participation in the physical act and knowing right from wrong ignores the complexity of the analysis as prescribed by psychologists and experts in the field of adolescent psychology. Moreover, it ignores the "hot" context – "at the time of the alleged offense" - which the statute requires the court to consider. Ultimately, this superficial analysis thwarts the legislative intent of ORS 419C.349(3) to protect those children who are "truly immature and should not be treated as an adult." Tape Recording, House Floor Debate, June 18, 1985, Reel 25, Track II (statement of Representative Jim Hill).

III. THE OREGON LEGISLATURE'S INTENT TO LIMIT WAIVER OF OFFENDERS AS YOUNG AS J.C.N.-V. IS SUPPORTED BY RESEARCH ON ADOLESCENT DEVELOPMENT AS WELL AS THE ADVERSE EXPERIENCE OF YOUTHS IN THE ADULT CRIMINAL JUSTICE SYSTEM

Oregon's juvenile justice system serves the specific developmental, social and educational needs of juvenile offenders up to age 25. Because of the treatment and rehabilitative benefits that the juvenile system provides the youth under its jurisdiction, the Oregon legislature limited the waiver of youth from this system to adult court to those rare cases where the juvenile justice system could not adequately serve the individual subject to waiver.

The legislative history of ORS 419C.349 demonstrates this legislative intent. The legislative debate concerning the 1985 amendments to Oregon's waiver statute criteria shows that legislators and experts alike intended that only a very small

number of youth be transferred to adult criminal court each year. *See* Testimony, Senate Committee on Judiciary, SB 414, April 25, 1985, Ex. F (statement of Jewell Goddard) (“Although I am convinced there are but a limited number of youth who would be appropriate for remand to adult court, there are exceptional cases where our current juvenile system is inadequate to meet the challenges and problem they present.”); *see also Id.* at Ex. I (statement of Paul Lenarduzzi) (explaining that “there are enough safeguards in the proposed bill that * * * only a handful of 14 or 15 year olds will be remanded under this bill.”).

A. Prevailing Research on Adolescent Development Supports The Legislature’s Intent that Children be Transferred to Adult Court Only in Exceptional Cases

Adolescent development research underscores that only the exceptional youth under 14 is sufficiently mature to be tried in adult court. Adolescence is a time of developmental transition; most youth lack the cognitive understanding and maturity characteristic of adults because their brains are still developing. Brain imaging techniques reveal that the areas of the brain associated with impulse control, judgment, and the rational integration of cognitive, social, and emotional information do not fully mature until early adulthood. *See* Elizabeth S. Scott and Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 *The Future of Children* 15, 22-23 (2008).

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 L & 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, 1155 (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 aged 13 and under – like J.C.N.-V. – 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*, 25 Behav Sci & L 1, 11 (2007). As a result of these findings, legal and psychological experts agree that "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 and 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 and developmental immaturity of the vast majority of younger adolescents.

Importantly, juvenile offenders are also uniquely capable of change, and the majority of youth desist from further offending as they mature into adulthood. When given a chance, most youth become productive and law-abiding citizens, even without any interventions. As youth grow, their self-management skills, long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward likewise improve. *See* Laurence Steinberg and Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, *American Psychologist* 1011 (2003). As a result, “[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled.” *Id.* at 1014.

The Court of Appeals’ test focuses on just the child’s physical participation in the criminal act and the ability to know right from wrong, as a proxy for the youth having sufficient sophistication and maturity to appreciate the essential character of the conduct and the intellectual and emotional capacity to understand the full consequences of the act, including its effect on the victim. By effectively ignoring settled principles of adolescent development, the Court of Appeals’ interpretation of

ORS 419C.349(3) produces the unintended result that virtually all, rather than the exceptional few, 12-14-year-olds could be transferred to adult court.

B. The Legislature Intended to Preserve the Rehabilitative Benefits of the Juvenile Justice System for the Vast Majority of Youth, Who Lack the Maturity and Sophistication of Adults

The juvenile court was created on the premise that young people can outgrow their offending behavior and develop into successful adults if they are provided with rehabilitative services and protected from the harsh consequences of the adult system. *See* Franklin E. Zimring, *American Juvenile Justice* 35-39 (2005); *see also* David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Conception*, in *A CENTURY OF JUVENILE JUSTICE* 42-69 (Rosenheim, Zimring, Tanenhaus, and Dohrn, eds., 2002). Oregon has long embraced this rehabilitative focus. In Oregon, the core purpose of the juvenile justice system is “to protect the public and reduce juvenile delinquency” through providing “a continuum of services that emphasize prevention of further criminal activity by the use of early and certain sanctions, reformation and rehabilitation programs and swift and decisive intervention in delinquent behavior.” ORS 419C.001. This Court has noted Oregon’s continued commitment to the rehabilitative purposes of the juvenile justice system, holding that:

Without exception, this court's cases support the conclusion that the Oregon juvenile justice system always has been focused on the rehabilitation of delinquent youth.

State ex rel. Juvenile Department v. Reynolds, 317 Or 560, 568, 857 P2d 842 (1993); *see also*, *State v. Gullings*, 244 Or 173, 177, 416 P2d 311 (1966) (juvenile court salvages and guides rather than punishes); *Hills v. Pierce*, 113 Or 386, 390-91, 231 P 652 (1925) (the purpose of juvenile court is not to convict or punish but to protect); *State v. Dunn*, 53 Or 304, 308-09, 99 P 278 (1909) (juvenile court treats delinquent children not as criminals, but as wards to be protected); *State v. Eisen*, 53 Or 297, 301, 99 P 282 (1909) (general purpose of juvenile code is not to punish but to reform).

Indeed, the legislative history of the Oregon transfer law underscores the importance of rehabilitation in the current juvenile system. Mr. Meisenheimer emphasized the danger of “subjecting the other juveniles” in the juvenile justice system to “an individual who is hardened and may be undermining the very reason we established a separate system,” and underscored his commitment to the viability of the juvenile court and the importance of the juvenile system’s rehabilitative goals. Testimony, Senate Committee on Judiciary, SB 414, April 25, 1985, Ex. G (statement of Keith Meisenheimer).⁵

⁵ To meet these rehabilitative goals, the Oregon Youth Authority (“OYA”) works through a multidisciplinary team, including the youth, parent/guardian, and OYA staff to develop a case plan that identifies and builds upon “each youth’s strengths, risk factors, and treatment needs.” Oregon Youth Authority, Frequently Asked Questions, <http://www.oregon.gov/oya/pages/faq.aspx> (last visited Aug 6, 2015). The team may also include medical staff, mental health staff, treatment staff, school, staff, mentors, or others to help support the youth reach their treatment goals.

Oregon’s commitment to the rehabilitation of youth is further evidenced in its statutes on extended jurisdiction. Oregon is one of only seven states that have chosen to provide extended jurisdiction to youth beyond age 24, allowing the juvenile court to retain jurisdiction even when a young person requires extra time for rehabilitation.⁶ Office of Juvenile Justice and Delinquency Prevention, *Statistical Briefing Book*, http://www.ojjdp.gov/ojstatbb/structure_process/qa04106.asp?qaDate=2013 (last visited Aug 6, 2015); *see also* ORS 419C.005. Expanding the small number of 12-to-14-year-olds the legislature intended to be waived to adult court under ORS 419C.352 would flout the purpose of Oregon’s extended juvenile court jurisdiction.

Id. The Youth Authority relies on evidence-based programs, uses cognitive behavioral and social learning approaches, focuses on treatment that is matched to the needs and abilities of youth, and plans not only for the young person’s time in a secure setting, but also for their reintegration, including providing ongoing support in home communities when necessary. Oregon Youth Authority, *Principles of Effective Intervention*, http://www.oregon.gov/oya/pages/sb267_effective_intervention.aspx (last visited Aug 6, 2015).

⁶ The Oregon legislature voted to extend juvenile court jurisdiction until age 25 “in appropriate cases,” because “in light of data indicating that recidivist behavior occurs most frequently [between age 21 and 25], it simply makes no sense to follow an ironclad ‘release at 21’ rule.” Testimony, Senate Judiciary Subcommittee on Juvenile Justice, SB 1, February 13, 1995, Ex. C (Governor’s Juvenile Justice Task Force Subcommittee No. 1, Report on Implementation of Ballot Measures Section VI (C) “Raising the Age Jurisdiction of the Juvenile Court and Department of Youth Authority”).

C. Sentencing and Incarcerating a Child as if He Were an Adult Contravenes the Legislature's Goal of Rehabilitating Juvenile Offenders

Oregon's commitment to keeping most young offenders in juvenile court and providing them with rehabilitative programming is supported by research, which shows that young people fare much better in juvenile placement than in adult facilities. Youth prosecuted as adults are 34% more likely to recidivate than youth tried in juvenile court for similar offenses. *Falling Through the Cracks: A New Look at Ohio Youth in the Adult Criminal Justice System*, Children's Law Center, Inc. 1 (2012), available at http://www.campaignforyouthjustice.org/documents/FR_OH_0512.pdf ("Falling Through the Cracks"); see also Jason J. Washburn et al., *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 *Psychiatric Services* 965, 972 (2008) ("Available evidence indicates that transferred youths reoffend more quickly and are more likely to engage in violent crimes after release than youths processed in the juvenile justice system" (internal citations omitted)). Indeed, studies consistently show that juveniles criminally prosecuted and incarcerated in an adult facility have the same or higher recidivism rates as adults. See Edward P. Mulvey and Carol A. Schubert, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court* 7 (2012), available at <http://www.ojjdp.gov/pubs/232932.pdf>.

Not only does transferring children to adult court undermine the rehabilitative purpose of the juvenile system, it also creates significant risk of harm to both children and the community. In *Kent v. United States*, the Supreme Court recognized that transfer to an adult facility has the potential to impose “tremendous consequences” on children. 383 US at 545 (finding that in juvenile court, the young person gets the benefit of a system designed to rehabilitate, educate, and guide, whereas in the adult criminal justice system the young person faces the severe harms of incarceration with adults. *Id.* at 554); *see also* The Campaign for Youth Justice, *The Consequences Aren’t Minor: The Impact of Trying Youth as Adults and Strategies for Reform* 6-7 (2007), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/07-03_c4yjconsequences_jj.pdf (“*The Consequences Aren’t Minor*”).

In Oregon, a child who is convicted and sentenced as an adult must be in the custody of the Oregon Youth Authority until age 16, at which point the child may be transferred into an adult correctional facility in the custody of the Department of Corrections; OYA also may retain custody until a youth offender is 25. *See* ORS 137.124(5)(a)(B), (5)(b); ORS 420A.200. Because children in adult facilities may be incarcerated with older and more physically developed inmates, they are at high risk for physical and sexual violence. *See* Marty Beyer, *Experts for Juveniles At Risk of Adult Sentences in MORE THAN MEETS THE EYE: RETHINKING ASSESSMENT*

COMPETENCY AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICE 18 (P. Puritz, A. Capozello & W. Shang eds., 2002). Often the youngest members of the prison population face physical and sexual abuse and even death. *See The Consequences Aren't Minor* at 7. Youth in adult facilities are five times more likely to be sexually assaulted while incarcerated and two times more likely to be assaulted with a weapon than are youth in the juvenile justice system. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, *Juvenile Justice Bulletin* 7 (2008). According to the U.S. Department of Justice's Bureau of Statistics, in 2006, 13 percent of inmate-on-inmate sexual assault victims in adult jails were children under 18, although such children were only about one percent of the total population in adult jails. Allen J. Beck et al., *Sexual Violence Reported by Correctional Authorities, 2006*, U.S. Department of Justice, Bureau of Justice Statistics: Special Report 35 (2007); Melissa Sickmund, *Juveniles in Corrections*, U.S. Department of Justice, Juvenile Offenders and Victims National Report Series Bulletin 18 (2004). Because data on rape and assault of children in adult prisons are often limited to children's self-reports, researchers estimate that the actual rates may be much higher. Vincent Schiraldi and Jason Zeidenberg, *The Risks Juveniles Face When They Are Incarcerated With Adults*, Justice Policy Institute 1-2 (1997).

Children incarcerated in adult facilities are also eight to thirty-six times more likely to commit suicide than children in juvenile facilities. Neelum Arya, *Jailing*

Juveniles: The Dangers of Incarcerating Youths in Adult Jails in America, Campaign for Youth Justice, 4 (2007); *The Consequences Aren't Minor* at 44. Further, nearly one-quarter of suicide attempts occur on the first or second day of adult incarceration, making even a short period of adult incarceration potentially life-threatening. Washington Coalition for the Just Treatment of Youth, *A Reexamination of Youth Involvement in Adult Criminal Justice System in Washington: Implications of New Findings about Juvenile Recidivism and Adolescent Brain Development*, 7 (2009) (“*Reexamination of Youth Involvement in Adult Criminal Justice System in Washington*”).

Children incarcerated in adult prisons frequently do not attend school or receive educational services. According to the U.S. Department of Justice, forty percent of adult jails do not have any educational services for incarcerated youth. *Reexamination of Youth Involvement in the Adult Criminal Justice System in Washington* at 8. Additionally, despite the high prevalence of learning disorders and other disabilities among children tried as adults, only eleven percent of adult prisons nationwide report providing special education services. Liz Ryan, *Youth in Adult Courts*, Campaign for Youth Justice, 8 (2012). They are also frequently deprived of vocational programming and life skills development. Lonn Lanza-Kaduce et al., *Juvenile Transfer to Criminal Court Study: Final Report*, 9, 30 (2002).

Adult facilities also lack sufficient services to address the mental health needs of children. Researchers estimate that children in adult facilities have rates of psychiatric disorders two to three times those of incarcerated adults. The lack of developmentally-appropriate mental health programming in adult facilities compounds these needs. Washburn et al., 59 *Psychiatric Services* at 968-70; *The Consequences Aren't Minor* at 7.

Furthermore, adult facilities fail to meet the physical needs of adolescents. Because adult facilities are designed to house adults rather than children, they are less equipped to provide adolescents with adequate nutrition, dental and vision care, and physical activity. Arya, *Jailing Juveniles: The Dangers of Incarcerating Youths in Adult Jails in America* at 6-7. Accordingly, researchers report that “many youth in adult jails sleep in excess of 15 hours a day and do not receive adequate nutrition or exercise.” *The Consequences Aren't Minor* at 7.

In contrast, Oregon's juvenile facilities are uniquely equipped to meet youths' needs and best “able to provide interventions and education that work best for their future.” See Campaign for Youth Justice, *Misguided Measures: The Outcomes and Impacts of Measure 11 on Oregon's Youth* 54 (2011), available at http://www.campaignforyouthjustice.org/documents/Misguided_Measures_July_2011.pdf (“*Misguided Measures*”) (quoting Deschutes County Community Justice Director, Ken Hales).

IV. OREGON'S AVOIDANCE CANON OBLIGES THE COURT TO REJECT THE COURT OF APPEALS' INTERPRETATION OF THE WAIVER STATUTE

Oregon courts apply the doctrine of constitutional avoidance, or the “avoidance canon,” when interpreting statutes. *See, e.g., State v. Stoneman*, 323 Or 536, 540 n 5, 920 P2d 535 (1996). When a court must choose between more than one plausible interpretation of a statute, one of which may be unconstitutional, the court assumes that the legislature intended to avoid the potentially unconstitutional interpretation. *State v. Kitzman*, 323 Or 589, 602, 920 P2d 134 (1996). The Court of Appeals’ ruling is at odds with United States Supreme Court case law which requires consideration of a child’s age and related characteristics when assessing his mindset in criminal contexts.

A. In Failing to Take Adolescent Development into Account in Assessing J.C.N.-V.’s Sophistication and Maturity, the Court of Appeals’ Decision is at Odds With Recent U.S. Supreme Court Precedent

In the three decades since Oregon first passed the waiver statute, the United States Supreme Court has recognized advances in scientific 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’ judgment, decision-making capabilities, vulnerability to peer pressure *and criminal culpability*. *See J.D.B. v. North Carolina*, 564 US ___, 131 S Ct 2394, 2403, 180 L Ed 2d 310 (2011) (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 Supreme Court has relied upon this behavioral and neuroscientific research in determining the procedural rights and protections that juveniles must receive in the justice system: The Court has banned the execution of juvenile offenders and required that age and its related characteristics must be taken into account when young people face life without parole sentences. See *Roper v. Simmons*, 543 US 551, 569-70, 125 S Ct 1183, 161 L Ed 2d 1 (2005); *Graham v. Florida*, 560 US 48, 130 S Ct 2011, 17 L Ed 2d (2011); *Miller v. Alabama*, 567 US ___, 32 S Ct 2455, 2463-64, 183 L Ed 2d 407 (2012). A child's age also must be considered in the *Miranda* determination. See *J.D.B.*, 131 S Ct at 2404. The Court of Appeals' decision's failure to take adolescent development into account in addressing J.C.N.-V.'s "sophistication and maturity" effectively ignored this recent United States Supreme Court jurisprudence.

The Supreme Court cases have noted recent neuroscience research confirming that the frontal lobe of the brain, which controls higher-order functions such as reasoning, judgment, and inhibitory control, are the last to develop and do not fully mature until individuals are in their early- to mid- 20s. 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 cases also rely on developmental research highlighting the unique effect of peer influence on juveniles. *Miller*, 132 S Ct at 2458; *Graham*, 560 US at 68; *Roper*, 543 US at 569. In the presence of other youth, and particularly older youth, an adolescent may make an impulsive decision to participate in criminal activity, perhaps out of fear of social rejection or loss in social status if he refuses. *See* Scott and Steinberg, 18 *The Future of Children* at 22. Thus, adolescents who engage in crimes make different cost-benefit analyses than adults: participating in criminal activity may be driven more by peer pressures, impulsivity and emotion than a reasoned assessment of risk to themselves or others. This is 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.⁷ *Miller*, 132

⁷ 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* (2012),

S Ct at 2464-65; *Graham*, 560 US 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, 18 *The Future of Children* 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 think through, or assign appropriate weight to, long-term consequences, especially when faced with the immediate prospect of short-term rewards. *Id.* 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 *J.D.B.*, the United States Supreme Court explained that youth “lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them * * *.” *See* 131 S Ct at 2397. The opinion noted the “absurdity” of assuming that a 13-year-old would view the world from the perspective of a reasonable adult. *See id.* at 2405. It would be similarly absurd for a

http://www.ted.com/talks/sarah_jayne_blakemore_the_mysterious_workings_of_the_adolescent_brain.

court to evaluate a juvenile’s “sophistication and maturity to appreciate the nature and quality of the conduct involved” without accounting for the child’s age and developmental *immaturity*. Youth’s developmental characteristics, found relevant in other related criminal law contexts, are equally relevant to the determination of whether they are amenable to treatment in the juvenile system. By applying an adult insanity standard focused on whether the youth “could appreciate what he was doing in a physical sense,” *J.C.N.-V.*, 268 Or App at 507, the Court of Appeals’ decision stripped developmental factors from the inquiry.

B. Due Process Requires a Proper Individualized Determination of the Child’s Culpability at the Waiver Hearing

Nearly 50 years ago, in its review of the District of Columbia transfer statute, 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*, 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 at 567-68 (so recognizing), whereas in the adult criminal justice system the young person faces the severe harms associated with incarceration with adults. *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 transfer proceeding requires "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*, 383 US at 553 (citing *Green v. United States*, 308 F2d 303 (DC Cir 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 police interrogations that due process must conform to the emerging science regarding the developmental immaturity of youth, noting the Court's earlier holdings in *Roper* and *Graham*. See *J.D.B.*, 131 S Ct at 2403. *J.D.B.* was followed by *Miller*, establishing a requirement of individualized decision-making in cases where juveniles face life-without-parole sentences under the Eighth Amendment – likewise compelled by adolescent development research. These recent rulings by the U.S. Supreme Court inform what is constitutionally required in the application of criminal 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*, 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 for juvenile culpability 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. *Miller*, 132 US at 2468 (citations omitted). These research findings are equally relevant in the context of transfer decisions which turn on a finding of “sophistication and maturity.”⁸

⁸ As the dissent below remarked, “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 *J.C.N.-V.*, 268 Or App at 553. Similarly, other jurisdictions have taken an individualized approach to assessing the sophistication and maturity of a juvenile. See, e.g., *Moon v. State*, 451 SW 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).

If the juvenile court had undertaken a proper individualized analysis of 13-year-old J.C.N.-V.'s development and circumstances as contemplated by *Miller*, it would have looked beyond simply his cognitive capacities, and would have considered his emotional maturity (*e.g.*, impulse control, self-regulation) and his autonomy, including the way “familial and peer pressures may have affected him.” *See id.* 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.” *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, which was foreclosed by the Court of Appeals’ narrow interpretation of ORS 419C.349(3).

The State argued below that ORS 419C.349(4) does present an opportunity for the circuit court to review the juvenile’s individual circumstances even if ORS 419C.349(3) does not. However, that provision focuses on the match between the youth’s needs and the services available in the system at the time of trial, rather than the youths’ developmental status and its resulting effect on his conduct at the time

of the offense, as contemplated by a proper interpretation of ORS 419C.349(3). ORS 419C.349(4)(d) requires the court to consider “the previous history of the youth,” defined as the “prior treatment efforts and out-of-home placements,” ORS 419C.349(4)(d)(A), and “the physical, emotional and mental health of the youth,” ORS 419C.349(4)(d)(B). It does not allow for full contemplation of all the *developmental factors* – autonomy, cognitive capacities, and emotional maturity – that comprise a sophistication and maturity analysis. *Cf. Miller*, 132 US at 2468. ORS 419C.349(4) also fails to 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.

As detailed above, the narrow test fashioned by the Court of Appeals majority’s decision wrongly focused on components analogous to an insanity defense rather than the constitutionally-mandated inquiry into the child’s developmental capacity or impairments. The canon of avoidance requires that even if the Court of Appeals’ test were one permissible interpretation of the statute (which it is not), this Court must nonetheless presume that the legislature did not intend to adopt a law with such serious potential constitutional defects and that another reasonable alternative interpretation – Petitioner’s proposed rule of law – is required.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court reject the Court of Appeals' interpretation of ORS 419C.349(3) and adopt the rule of law proposed by Petitioner.

Respectfully submitted this 10th day of August, 2015.

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE
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Brief Length

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 7,828 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).

Respectfully submitted this 10th day of August, 2015.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 10, 2015, I caused to be electronically filed the foregoing CONFIDENTIAL BRIEF ON THE MERITS 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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