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Division II
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NO. 52535-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRUCE BENNETT,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAMANIA COUNTY

The Honorable Randall C. Krog, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. ASSIGNMENT OF ERROR.....	1
Issue Presented on Appeal.....	1
B. STATEMENT OF THE CASE.....	1
Youth Mitigation.....	1
C. ARGUMENT.....	2
1. THE TRIAL COURT ERRED BY CATEGORICALLY DETERMING THAT A 23 YEAR OLD DID NOT HAVE A JUVENILE BRAIN AND ACCORDINGLY YOUTH COULD NOT BE A MITIGATING FACTOR IN SENTENCING	2
D. CONCLUSION.....	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. O'Dell,
183 Wn.2d 680, 358 P.3d 359 (2015) 2, 3, 4, 5

State v. Ritchie,
126 Wn.2d 388, 894 P.2d 1308 (1995) 4

State v. Scott,
72 Wn. App. 207, 866 P.2d 1258 (1993)..... 4

FEDERAL CASES

Graham v. Florida,
560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) 4

Miller v. Alabama,
567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) 4

Roper v. Simmons, 5
43 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) 4

RULES, STATUTES, AND OTHERS

Jay N. Giedd, S
Structural Magnetic Resonance Imaging of the Adolescent Brain,
1021 ANN. N.Y. ACAD. SCI. 77 (2004) 3

MIT Young Adult Development Project: Brain Changes,
MASS. INST. OF TECH.,
<http://hrweb.mit.edu/worklife/youngadult/brain.html> (last visited Aug.
4, 2015)..... 3

Terry A. Mahoney,
The False Promise of Adolescent Brain Science in Juvenile Justice,
85 Notre Dame L.Rev. 89 (2009)..... 3

A. ASSIGNMENT OF ERROR

1. The trial court erred by categorically determining that youth was not a mitigating sentencing factor for a 23 year old.

Issue Presented on Appeal

1. Did the trial court err by categorically determining that youth was not a mitigating sentencing factor for a 23 year old, when neuroscience has established that a juvenile brain is not fully developed until 26 years old?

B. STATEMENT OF THE CASE

Youth Mitigation

Bennett was convicted of murder when he was 23 years old. CP 12-13, 75-87. During his resentencing hearing, Bennett argued that he was 23 years old when he committed the crime and was the only man in the house and afraid for the safety of his family. RP 44. On many occasions Bennett's aunt had called the police for protection against Fowler, the deceased, but always to no avail. RP 44-45.

When Bennett committed his crime, "Mr. Fowler was actually beating my aunt in our kitchen and he was slamming her around by

her hair in the kitchen, telling her he's gonna break her jaw and nobody was doing nothing to help." RP 45. Bennett was the only man in the house and felt responsible for protecting his aunt, his mother, his niece, his sister and his two daughters. RP 45.

The court ruled that the "O'Dell factors" did not apply to a 23 year old the same way they applied to an 18 year old. RP 48-50. The court did not consider Bennett's youth, but simply re-imposed the same sentence. CP 12-13; 35-38.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY CATEGORICALLY DETERMINING THAT A 23 YEAR OLD DID NOT HAVE A JUVENILE BRAIN AND ACCORDINGLY YOUTH COULD NOT BE A MITIGATING FACTOR IN SENTENCING.

The resentencing court below categorically decided that a 23 year old brain could not be considered a youthful brain for sentencing mitigation. RP 49-50. This was error. "The brain isn't fully mature at ... 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car." *State v. O'Dell*, 183 Wn.2d 680, 692, n. 5, 358 P.3d 359 (2015) (quoting, Terry A. Mahoney, *The False Promise of*

Adolescent Brain Science in Juvenile Justice, 85 Notre Dame L.Rev. 89, 152 & n. 252 (2009) (collecting studies); (quoting MIT Young Adult Development Project: Brain Changes, MASS. INST. OF TECH., <http://hrweb.mit.edu/worklife/youngadult/brain.html> (last visited Aug. 4, 2015))).

Magnetic imaging establishes that, “[t]he dorsal lateral prefrontal cortex, important for controlling impulses, is among the latest brain regions to mature without reaching adult dimensions”. *O’Dell*, 183 Wn.2d at 692, n. 5, (quoting Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 ANN. N.Y. ACAD. SCI. 77 (2004)). “Until full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their **late twenties and beyond.**” *O’Dell*, 183 Wn.2d at 692 (emphasis added) (citing with approval, the summary of juvenile brain science by Br. of Amici Curiae in Supp. of Appellant at 9–10).

These studies establish that before a person reaches their late twenties, the younger person does not have the same ability as an older person to assess risk and consequences, to control

impulses and emotions, to withstand against peer pressure, and in general, to control behavior. *O'Dell*, 183 Wn.2d at 692.

In *O'Dell*, the Court reiterated that *Miller*, *Roper* and *Graham*, fully recognized that neurological differences make younger offenders “*in general*, less culpable for their crimes: “the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences[;] ... [b]ecause ‘the heart of the retribution rationale’ relates to an offender’s blameworthiness, ‘the case for retribution is not as strong with a minor as with an adult.’ ” *O'Dell*, 183 Wn.2d at 692-93 (citing *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 2458, 2465, 183 L.Ed.2d 407 (2012), (*internal quotation marks omitted*) (*fifth alteration in original*) (quoting *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) and citing *Roper v. Simmons*, 543 U.S. 551, 571, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005))).

In *O'Dell*, the court rejected the opinion in *State v. Scott*, 72 Wn. App. 207, 218-19, 866 P.2d 1258 (1993), *aff'd*, *State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995) where in the court held it was “absurd” to consider youth as a factor in mitigation in a murder case. *O'Dell*, 183 Wn.2d at 695. Rather, the Court in *O'Dell*, held

that it was an abuse of discretion for a sentencing court to refuse to consider youth as a mitigating factor in sentencing, which required remand for a new sentencing hearing. *O'Dell*, 183 Wn.2d at 697.

According to neuroscience, when Bennett was 23 years old and committed the crime in this case, his brain like *O'Dell's* was not a fully developed adult brain, and similar to *O'Dell*, the sentencing court was required to consider Bennett's youth as a factor in culpability to the extent that at age 23 he may not have been able to fully assess risk and consequences, to control impulses and emotions, to withstand against peer pressure, and in general to control his behavior. *O'Dell*, 183 Wn.2d at 692-93.

The trial court here, acknowledged *O'Dell*, but nonetheless decided that Bennett's age was not a consideration for mitigation because he was 23 years old rather than a teenager. RP 48-50. This was error because the Court in *O'Dell*, accepted that a brain is not fully developed until a person reaches their late twenties which means that a sentencing court "must" consider youth as a mitigating factor in sentencing for any defendant who is less than in their late twenties. *O'Dell*, 183 Wn.2d at 696.

Even though the defendant in *O'Dell* was just over the age of

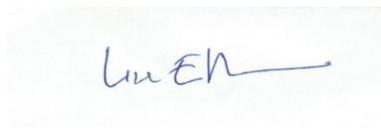
18, the court did not limit its holding to defendants just over the age of 18, but rather applied the science available and the decisions of the United States Supreme Court to require consideration of youth to defendants who had not reached their late twenties. *O'Dell*, 183 Wn.2d at 692-93. Here, as in *O'Dell*, the resentencing court abused its discretion by refusing to consider his youth as mitigation. *O'Dell*, 183 Wn.2d at 697. This court should remand for resentencing.

D. CONCLUSION

Mr. Bennett respectfully requests this Court reverse Bennett's sentence and remand for a new sentencing hearing to consider his youth at the time of the commission of the crime as a mitigating factor.

DATED this 6th day of December 2018.

Respectfully submitted,

A rectangular box containing a handwritten signature in blue ink that reads "Lise Ellner".

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Skamania County Prosecutor's Office kick@co.skamania.wa.us and Bruce Bennett/DOC#990306, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed on December 6, 2018. Service was made by electronically to the prosecutor and Bruce Bennett by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

Signature

LAW OFFICES OF LISE ELLNER

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