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No. 53188-7-II
(Consolidated Case No. 53198-4-II)

**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Brandon English,

Appellant, and

Calvin Quichocho,

Appellant.

Brief of Appellant Brandon English

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1. Introduction

In recent years, the United States Supreme Court has recognized that youthful defendants are different from adults, requiring different sentencing considerations based on mitigating factors of youth. The Washington Supreme Court has followed and expanded on these cases.

Under *State v. O'Dell*, trial courts have discretion to consider an exceptional sentence downward when an adult defendant demonstrates mitigating factors of youth. Under *State v. Houston-Sconiers*, a trial court's discretion includes reducing sentencing enhancements when juvenile defendants demonstrate mitigating factors of youth. This case sits squarely at the intersection of these two cases.

Where both cases require trial courts to engage in case-by-case analysis of the mitigating factors of youth, there is no principled reason to make a bright-line distinction between juveniles who demonstrate the factors and youthful adult defendants who demonstrate the exact same factors. The principles that underlie *O'Dell* and *Houston-Sconiers* should apply to any defendant, juvenile or adult, who demonstrates the mitigating factors of youth. This Court should reverse and remand for the trial court to exercise its discretion to consider reducing the firearm enhancements.

2. Assignments of Error

Assignments of Error

1. The trial court abused its discretion when it erroneously determined that it did not have discretion to reduce the firearm enhancements as part of its exceptional sentence downward on account of the mitigating qualities of youth.

Issues Pertaining to Assignments of Error

1. Under *State v. O'Dell*, trial courts have discretion to consider an exceptional sentence downward when an adult defendant demonstrates mitigating factors of youth. Under *State v. Houston-Sconiers*, a trial court's discretion extends to reducing sentencing enhancements when juvenile defendants demonstrate mitigating factors of youth. English, age 20 at the time of the crime, nevertheless demonstrated mitigating factors of youth. Did the trial court have discretion to reduce the firearm enhancements as part of its exceptional sentence downward?

3. Statement of the Case

3.1 English was found guilty of multiple crimes from an incident in December 2013, when he was 20 years old.

This Court described the basic facts of the underlying crime in its unpublished opinion in the previous appeal:

On December 4, [2013, John] Lujan, [Brandon] English, and Calvin Quichocho met to carry out the robbery. [Austin] Bondy and Brittany Horn were waiting in [Colby] Haugen's apartment while Haugen was at work. When there was a knock at the door, Bondy opened it to find Lujan, English,

and Quichocho. After asking to purchase marijuana, Quichocho drew a revolver and ordered Bondy to give them money. Quichocho ordered Lujan to tie up Bondy and Horn, and Lujan complied by wrapping a cord around their wrists. Bondy and Horn were then put into the bedroom closet and ordered to stay there or they would be killed. Lujan, English, and Quichocho took Haugen's marijuana, Xbox gaming system, iPod, video games, and change jar; Bondy's wallet; and Horn's purse and phone.

State v. English, No. 46921-9-II, at *2 (Mar. 21, 2017). At the time of the incident, English was 20 years old. CP 50.

English and Quichocho were each convicted of two counts of first degree robbery, two counts of first degree kidnapping, and two counts of second degree assault, all while armed with a firearm. *English I*, at *1. English was sentenced to 456 months of total confinement, which included 240 consecutive months of firearm enhancements. CP 4.

3.2 After the conviction was affirmed on appeal, English moved for resentencing, seeking an exceptional sentence downward based on factors of youthfulness.

On appeal, English argued, among other things, that the assault charges should be vacated because they merged with the kidnapping charges. *English I*, at *10. The State conceded the point, and this Court agreed. *Id.*

On remand, English asked the superior court to vacate not only the assault convictions but the entire judgment and

sentence and to set a resentencing hearing to consider an exceptional sentence downward based on factors of youthfulness. CP 48-58. The trial court exercised its discretion to re-open the issue in light of *State v. O'Dell*, which had been decided after the original sentencing but before the appeal was final. RP 34.

3.3 At resentencing, English presented extensive testimony in support of his argument that his youthfulness and mental impairments reduced his culpability, justifying an exceptional sentence downward.

English submitted a sentencing memorandum with attachments totaling hundreds of pages relating to the generally accepted science on youthfulness and to evaluations of English's mental health and maturity at the time of the crime. CP 144-416. As a boy, English suffered from mental health issues, developmental delays, and an abusive home. CP 144-45. As he grew, he was consistently two years behind in his mental development. CP 156. At the time of the crime, even though he was 20 years old, English's maturity and psychosocial development was much more like a mid-stage adolescent than an adult. CP 415. "He would have been expected to have the level of impulsiveness, poor decision making, difficulty in anticipating consequences, and lack of judgment associated with that age [about 16 years old]." CP 415.

English's documentation included a declaration from Dr. Laurence Steinberg, discussing the current science. CP 369-87. Dr. Steinberg noted, "Many of the same immaturities that characterize the brains of individuals younger than 18, and that have been found to mitigate their criminal culpability, are characteristic of the brains of individuals between 18 and 21. ... For this reason, it is inappropriate to assign the same degree of culpability to criminal acts committed at this age to that which would be assigned to the behavior of a fully mature and responsible adult." CP 385. "There is no scientific evidence to suggest that a meaningful psychological or neurobiological distinction can be drawn between individuals who are nearly 18 years old and those who are between 18 and 21." CP 387.

3.4 The trial court considered the youthfulness factors and imposed an exceptional sentence downward on the standard range but refused to reduce the firearm enhancements or run them concurrently.

The trial court considered the evidence presented and found that "Mr. English's youth impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." RP 217-18; CP 508. The trial court concluded that this was a substantial and compelling factor justifying a sentence below the standard range. RP 218; CP 508.

However, the trial court concluded that it did not have discretion to reduce the four, consecutive firearm enhancements. RP 214-15. The trial court read *State v. Houston-Sconiers* as permitting a trial court to reduce firearm enhancements only for juvenile defendants, not for youthful adults. RP 214-15; CP 507.

The trial court sentenced English to 360 months of total confinement, including 240 months of firearm enhancements. CP 495-96. This was a reduction of about eight years from the original sentence. RP 220.

4. Argument

4.1 The trial court abused its discretion by misinterpreting the scope of its discretion to reduce the four, consecutive firearm enhancements on account of English's youthfulness.

The United States Constitution and the Washington State Constitution both require that criminal sentences for both juveniles and adults must be proportional to the offense and the offender. *E.g., Graham v. Florida*, 560 U.S. 48, 59, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. *Roper v. Simmons*, 543 U.S. 551, 560, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

The Washington Constitution provides, “Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.” Wash. Const. art. 1, § 14. The Washington Constitution is more protective of individual rights at sentencing than the Eighth Amendment, particularly when dealing with youthful defendants. *State v. Bassett*, 192 Wn.2d 67, 82, 428 P.3d 343 (2018).

In analyzing a sentence under these constitutional provisions, “courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society.” *Graham v. Florida*, 560 U.S. 48, 58, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). “This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.” *Id.*

The standards applicable to sentencing of youthful defendants, both juveniles and adults, have been evolving over recent years. These evolving standards are embodied in U.S. Supreme Court precedent such as *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham*, 560 U.S. 48 (2010); and *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The evolution has continued in Washington through decisions of our state Supreme Court such as *State v.*

O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015); and *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). Reading these cases together demonstrates that trial courts must have discretion to reduce firearm enhancements or run them concurrently as an exceptional sentence downward on account of factors of youthfulness, even for youthful adult offenders.

Firearm enhancements are mandated under RCW 9.94A.533(3). The statute provides that firearm enhancements are “added to the standard sentence range.” *Id.* The enhanced portion of the standard range sentence is “mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions.” *Id.*

A sentencing court may impose a sentence outside the standard sentence range for an offense if it finds “that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. A defendant’s youthfulness is a mitigating factor that may justify an exceptional sentence below statutory sentencing guidelines, even when the defendant is a legal adult. *O'Dell*, 183 Wn.2d at 688–89.

Although courts have held that a judge’s discretion to impose an exceptional sentence downward does not extend to sentence enhancements, *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), that authority has been significantly eroded

based on the constitutional principles discussed above, *e.g.*, *Houston-Sconiers*, 188 Wn.2d at 25-26.

Here, the evolving standards and applicable science on youthfulness, as set forth in *O'Dell* and *Houston-Sconiers* require that trial courts have the discretion to reduce firearm enhancements as an exceptional sentence downward when a youthful adult defendant successfully demonstrates that such a sentence is warranted by mitigating factors of youth. The trial court here abused its discretion when it concluded that it did not have discretion to reduce the firearm enhancements.

4.1.1 Standard of Review

Sentencing decisions are generally reviewed for abuse of discretion. A trial court abuses its discretion when it fails to consider a mitigating factor on the mistaken belief it is barred from such consideration. *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015). Interpretation of the proper constitutional standard is a question of law reviewed de novo. *State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015). Statutory interpretation is also reviewed de novo. *State v. Scott*, 190 Wn.2d 586, 591, 416 P.3d 1182 (2018).

Where an appellate court cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option, remand is the proper

remedy. *In Re Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007).

4.1.2 Evolving standards of decency illustrated in recent case law point inexorably to trial courts having discretion to reduce sentence enhancements for youthful adult defendants.

The standards applicable to sentencing of youthful defendants, both juveniles and adults, have been evolving over recent years. The arc of these cases points inexorably toward a constitutional requirement that trial courts must have discretion to reduce sentence enhancements on a case-by-case basis for youthful adult defendants who demonstrate mitigating factors of youth.

In *Roper v. Simmons*, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the United States Supreme Court held it unconstitutional to impose the death penalty on a juvenile defendant who was under 18 years of age at the time of the crime. The Court noted that juvenile offenders are often less culpable because of their tendency toward impetuosity, susceptibility, and potential for rehabilitation. *Id.* at 569-70.

In *Graham v. Florida*, 560 U.S. 48, 74, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), the Court extended a similar, bright-line, categorical prohibition against sentencing juveniles to life without chance of parole in non-homicide cases. In doing so, the

Court emphasized, “under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes.” *Id.* at 59. The Court re-emphasized the lesson of *Roper*, that “because juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed.” *Id.* at 68. The Court reasoned,

No recent data provide reason to reconsider the Court’s observations in *Roper* about the nature of juveniles. As petitioner’s amici point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. **For example, parts of the brain involved in behavior control continue to mature through late adolescence.** Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of “irretrievably depraved character” than are the actions of adults. It remains true that from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.

Id. at 68 (emphasis added, citations omitted).

In *Miller v. Alabama*, 567 U.S. 460, 465, 132 S. Ct. 2455, 2460, 183 L. Ed. 2d 407 (2012), the Court held that mandatory

life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on “cruel and unusual punishments.” In doing so, the Court again reiterated the lessons of *Roper* and *Graham* about the mitigating qualities of youth. *Id.* at 471.

Our decisions rested not only on common sense—on what “any parent knows”—but on science and social science as well. In *Roper*, we cited studies showing that “[o]nly a relatively small proportion of adolescents” who engage in illegal activity “develop entrenched patterns of problem behavior.” And in *Graham*, we noted that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”—for example, in “parts of the brain involved in behavior control.” We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child’s “moral culpability” and enhanced the prospect that, as the years go by and neurological development occurs, his “deficiencies will be reformed.”

Roper and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because “[t]he 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.” Nor can deterrence do the work in this context, because “the same characteristics that render juveniles less culpable than adults—their immaturity,

recklessness, and impetuosity—make them less likely to consider potential punishment.

Miller, 567 U.S. at 471–73 (citations omitted).

The *Miller* court further noted that “youth is more than a chronological fact.” *Miller*, 567 U.S. at 476. The Court described “youth” as a “condition of life when a person may be most susceptible to influence and to psychological damage.” *Id.* “Just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability.” *Id.*

The Washington Supreme Court took these lessons to heart in *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). Despite a provision of the statute governing exceptional sentences that seemed to indicate that youth was not a mitigating factor justifying an exceptional sentence downward, the court held, based on the mitigating factors of youth illustrated in *Roper*, *Graham*, and *Miller*, “that a defendant’s youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is.” *Id.* at 698-99.

It is especially significant that the *O'Dell* court specifically applied these principles not just to juveniles but to

adult defendants who demonstrate mitigating factors of youth. The court recognized, as did the *Miller* court and as did English's expert witnesses in this case, that the mitigating factors of youth are often present in individuals 18 to 21 years of age. *See, e.g.*, CP 385. Rather than drawing an arbitrary bright-line at age 18, the *O'Dell* court required a case-by-case analysis for each defendant. Where the defendant's culpability is lessened by mitigating factors of youth, the trial court must have discretion to consider an exceptional sentence downward. Without such discretion, a standard range sentence could be unconstitutionally disproportionate to the offender's culpability.

Two years later, in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), the court held, based on the same principles, that trial courts must always have discretion to reduce sentence enhancements for juvenile defendants who demonstrate mitigating qualities of youth. In addition to allowing trial courts to reduce sentencing enhancements, the court emphasized that trial courts must always consider mitigating factors of youth when sentencing juvenile defendants.

O'Dell involved a defendant who was just over 18 at the time of the crime but did not address sentence enhancements. *Houston-Sconiers* dealt with sentence enhancements but only involved juvenile defendants. This case sits directly at the intersection of *O'Dell* and *Houston-Sconiers*.

Houston-Sconiers gives trial courts discretion to reduce sentence enhancements on account of mitigating factors of youth, as a constitutional mandate. *O'Dell*, and *Miller* before it, recognize that the mitigating factors of youth are not limited to a bright-line category of “juveniles” under 18 years of age. Rather, those mitigating factors are often present in individuals aged 18 to 21 or even older. Under *O'Dell*, the constitutional mandate to consider, on a case-by-case basis, the mitigating factors of youth, applies not only to juveniles but to youthful adults who can demonstrate that those mitigating factors are present.

There is no principled reason to allow trial courts to reduce sentence enhancements for juveniles based on mitigating factors but not for youthful adults who demonstrate those same mitigating factors. *Houston-Sconiers* requires trial courts to undertake this analysis and exercise this discretion on a case-by-case basis. Youthful adults should be entitled to the same case-by-case analysis. There is no reason to categorically exclude youthful adults over 18 who exhibit the exact same mitigating factors as a juvenile under 18.

Under the constitutional framework established in *O'Dell* and *Houston-Sconiers*, the trial court had discretion to consider reducing the firearm enhancements in this case as part of the court's exceptional sentence downward, where English had

successfully demonstrated that even though he was 20 years old at the time of the crime, his culpability was lessened because of the mitigating factors of youth.

5. Conclusion

Under the constitutional requirements set forth in *O'Dell* and *Houston-Sconiers*, the trial court misunderstood its discretion to reduce the firearm enhancements or run them concurrently as part of its exceptional sentence downward. This Court should reverse and remand for resentencing, in which the trial court can properly exercise its discretion.

Respectfully submitted this 13th day of September, 2019.

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I certify, under penalty of perjury under the laws of the State of Washington, that on September 13, 2019 (after 5pm), I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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