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Court of Appeals
Division II
State of Washington
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NO. 53188-7-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CALVIN QUICHOCHO,

Appellant, and

BRANDON ENGLISH

Appellant.

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

REPLY BRIEF OF APPELLANT QUICHOCHO

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A. ARGUMENT IN REPLY

In their opening briefs Calvin Quichocho and co-appellant Brandon English both argue that the ability to consider and impose a mitigated sentence regarding sentencing enhancements is promulgated in ***State v. O'Dell*** and ***State v. Houston-Sconiers***, *infra*, and that the same set of mitigation factors available to juvenile offenders is applicable to youthful adult offenders in the context of both base sentences and enhancements, and that the trial court abused its discretion by failing to exercise its authority to reduce sentencing enhancements. The State, in its response, argues a clear distinction exists between youthful adult offenders and juveniles.

In reply, Quichocho notes that a growing body of case law addresses treating young adults in the criminal justice system less severely than older adults because of evidence showing brain development and maturation continue until the mid-twenties. Based on developmental science, the Supreme Court has now repeatedly held that "children are different" and thus enjoy constitutional protections against the most severe punishment. ***Miller v. Alabama***, 567 U.S. 460, 481, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The Court in ***Miller*** declined to prohibit juvenile life without parole categorically, and instead prohibiting the application of statutes which make life without parole mandatory for children, requiring

states to give weighty consideration to a child's youth as mitigation before imposing that severe sentence.

The Court focused these repeated holdings on children under 18, drawing a line at that age in ***Roper v. Simmons***, 543 U.S. 551, 574, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The Supreme Court's reliance on developmental research begs the question of why treat only children under 18 differently. Since ***Roper***, experts have begun questioning the line drawn at age 18, especially in light of research showing that the brain continues to develop—including in particular portions of the brain that affect executive function and decision-making capabilities--until age 25. Courts have begun to consider the implications of ***Roper***'s acknowledgement that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," [***Roper v. Simmons***, 543 U.S. 551, 574 (2005)] and the developmental and neurological science showing that the factors which ***Roper*** found applicable to children also apply to young adults.

In the wake of the Court's prior opinions, ***Roper*** pushed the age line up from 16 to 18. ***Roper***, 543 U.S. 551, 574 (2005); ***Thompson v. Oklahoma***, 487 U.S. 815, 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (drawing the line at age 16). In doing so the Court's opinion "speaks in the language and with the authority of the developmental psychologists

whose writings are the only sources cited for all three of the differences identified." Emily Buss, What the Law Should (and Should Not) Learn from Child Development Research, 38 Hofstra L. Rev. 13, 36 (2009).

Case law reflects the fact that a developing body of research supports the idea that young adults deserve less severe and more rehabilitative punishment than older adults. Developmental literature has convinced many scholars that young adults are have more in common with and are more similar to juveniles than to adults, and that purposes of punishment apply with "lesser or no force to youthful offenders." Samantha Buckingham, Reducing Incarceration for Youthful Offenders with a Developmental Approach to Sentencing, 46 Loy. L.A. L. Rev. 801, 847-49 (2013). The result of research recognizes the reduced "gravamen" of turning 18, and that it "no longer marks the assumption of mature adult roles." Elizabeth S. Scott et al, Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy, 85 Fordham L. Rev. 641, 647 (2016).

Accordingly, young adults have a claim that their developmental status means that the best policy is to sentence them differently than older adults, a fact at least partially recognized in ***O'Dell***. Psychologists have suggested that the years between 18 and 25 are not full adulthood, but "emerging adulthood" asserts that "identity development continues

through the late teens and the twenties." Jeffrey Jensen Arnett, Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties, 55 Am. Psychologist 469, 469 (2000).

State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), of course, is a bellwether case demonstrating application of youthfulness as a mitigating factor. In ***O'Dell***, the defendant was convicted of second degree rape of a child, committed 10 days after his 18th birthday. *Id.* at 683-84. At sentencing, the defendant requested an exceptional sentence below the standard range. *Id.* at 685. He argued that he was still in high school, that he would have received a significantly lower sentence in the juvenile system, and that research showed that juveniles are more susceptible to negative influences and impulsive behavior. *Id.* The trial court acknowledged the argument but ruled that it could not consider age as a mitigating circumstance. *Id.* at 685-86.

The Supreme Court noted that research showed "a clear connection between youth and decreased moral culpability for criminal conduct." *Id.* at 695. Citing the ***Roper*** line of cases' conclusion that youth have diminished culpability and ***Roper***'s reasoning that youthful features do not disappear at age 18, the ***O'Dell*** Court concluded that age could sometimes mitigate culpability and justify a sentence below state guidelines, but did not however, address sentencing enhancements. *Id* at 696.

The Court applied similar principles pursuant to the Eighth Amendment in ***State v. Houston-Sconiers***, 188 Wn.2d 1, 391 P.3d 409 (2017). ***Houston-Sconiers*** involved enhancements in the context of offenders under the age of 18. In ***Houston-Sconiers***, the defendants were juveniles who had carried a gun while stealing candy from Halloween trick-or-treaters. *Id.* at 9-11. They both were convicted of multiple counts of robbery plus multiple firearm sentence enhancements. *Id.* at 12. The trial court imposed no incarceration on the underlying crimes but believed that the law compelled the imposition of mandatory consecutive sentences for the firearm enhancements. *Id.* at 12-13. The Court noted that the trial court had no opportunity to exercise discretion regarding the appropriateness of the sentence enhancements. *Id.* at 8. The Court stated that the trial court was required to consider a juvenile defendant's youth in sentencing, even for statutorily mandated sentences. *Id.* at 8-9, 21. The court stated that to comply with the Eighth Amendment, courts must address the differences between children and adults by exercising "discretion to consider the mitigating qualities of youth." *Id.* at 19.

The cases follow a clear trend toward seeking to treat a larger group of young adult offenders as a distinct category. The reasoning that has led to a sea change in state courts regarding treatment of youthful adult offenders points toward an adoption of sentencing options previously

reserved for juvenile offenders. Several jurisdictions, including Georgia, Michigan, South Carolina, and West Virginia, have youthful offender statutes, which mitigate sentences for certain crimes up to age 25, and, similar to the juvenile justice system, shield young adult offenders from some of the collateral consequences of adult convictions and provide a range of rehabilitative services.[1] Colorado [Colo. Rev. Stat. § 18-1.3-407.5 (2013)] and Vermont have expanded their youthful offender statutes to include more young adult. Vermont, in an application of the ***Roper*** line of cases, has expanded juvenile court jurisdiction to include those 18 and older.[2]

This short synopsis is presented in reply to the argument of the State that the trial court correctly concluded that it did not have the discretion to order the firearm enhancements to be served concurrently. Brief of Respondent at 7-11. Quichocho submits that the case by case analysis promulgated in ***O'Dell*** and ***Houston-Sconiers*** regarding application of mitigation factors should be applied to youthful adult offenders in cases involving enhancements. The body of science supporting the expansion some aspects of the juvenile justice system to

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[1] Ga. Code Ann. § 42-7-1 to -9 (West 2018); Mich. Comp. Law § 762.11-.13 (West 2018); S.C. Code Ann. § 24-19-5 to - 160 (West 2018); W. Va. Code § 25-4-1 to -12 (West 2018).

[2] Vermont will expand juvenile court jurisdiction to include 18-year-olds in 2020 and 19-year-olds in 2022. Vt. Stat. Ann. § 5201(d))

youthful adult offenders makes clear that there is no scientifically sound basis to view a defendant's eighteenth birthday as demarcation of adulthood. The aspects and traits of youth recognized by ***Houston-Sconiers*** are simply not extinguished and made irrelevant in the context of sentencing enhancements by the fact that the defendant has turned eighteen. The thrust of the research briefly discussed above is that the traits recognized in juveniles extend into early adulthood, and that state courts are increasingly recognizing that fact. Accordingly, it is unknown if the trial court would have reached a similar sentencing decision regarding the consecutive enhancements in this case if had been aware of its discretion to do so. Accordingly, this Court should reverse and remand for resentencing with the direction that the court must exercise its discretion to reduce the previously-imposed firearm enhancements.

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B. CONCLUSION

For the reasons stated herein, and in the opening brief, Calvin Quichocho respectfully requests this Court to reverse and remand to the trial court for re-sentencing in conjunction with consideration of mitigation factors to reduce the firearm enhancements.

DATED: December 27, 2019.

Respectfully submitted,
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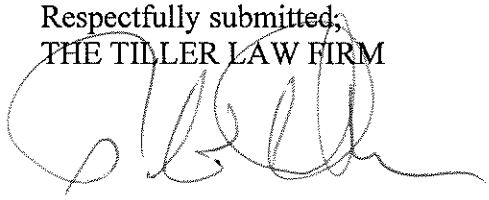

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CERTIFICATE

I certify that I sent by JIS a copy of the Reply Brief of Petitioner to Clerk of Court of Appeals and to Rachael Rogers, Deputy Prosecuting Attorney, and mailed copies, postage prepaid on December 27, 2019, to appellant, Calvin Quichocho:

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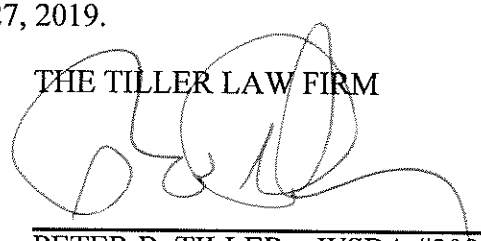

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