FILED
Court of Appeals
Division II
State of Washington
11/18/2019 8:58 AM

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

In re Personal Restraint Petition of ANDREW KENNEDY, Petitioner.	NO. 533600 REPLY IN SUPPORT OF PERSONAL RESTRAINT PETITION

A. ARGUMENT

The State makes two arguments in its *Response*: (1) the scientific consensus that late adolescents share the same characteristics that have previously been recognized as reducing the culpability of juveniles is not newly discovered; and (2) Kennedy's proffered evidence regarding the deficits associated with brain development conflicts with the facts found at the bench trial.

Kennedy's Petition Relies on Newly Available Evidence

Kennedy complied with the PRP requirements and submitted a sworn statement. Dr. Steinberg's declaration states "the notion that brain maturation continues into late adolescence became widely accepted among neuroscientists by 2015. This contemporary view of brain development as ongoing at least until age 21 stands in marked contrast to the view held by scientists as recently as 15 years ago." Steinberg at ¶ 17.

The State submitted no contesting declaration.

As a result, its *Response* fails to meet the baseline requirement to contest facts. See *In re Rice*, 118 Wash. 2d 876, 886, 828 P.2d 1086, 1093 (1992) ("In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence.").

Instead, the State simply points to several published articles regarding late adolescent brain development that pre-date any consensus and argues that Kennedy was compelled to act at the earliest possible date, a position directly at odds with caselaw.

If Kennedy had acted too early, the evidence would have been rejected. "The trial court's gatekeeper role under *Frye* involves by design a conservative approach, requiring careful assessment of the general acceptance of the theory and methodology of novel science, thus helping to ensure, among other things, that "pseudoscience" is kept out of the courtroom. *State v. Copeland*, 130 Wash. 2d 244, 259, 922 P.2d 1304, 1314 (1996). See also L. Timothy Perrin, *Expert Witness Testimony: Back to the Future,* 29 U. Rich. L. Rev. 1389, 1405 (1995) (noting that *Frye*'s "general acceptance test ... focused on a single inquiry: whether the theory or technique used by the expert had gained general acceptance in the relevant scientific community.").

Likewise, prior to *O'Dell*, reviewing courts rejected claims involving the mitigating qualities of youth—even for juveniles—because no scientific proof supported those contentions embracing the reasoning that it is "absurd" to believe that youth could mitigate culpability, and explaining that youth alone could not be a nonstatutory mitigating factor under the SRA because "[t]he age of the defendant does not relate to the crime or the previous record of the defendant." *State v. Ha'mim*, 132 Wash. 2d 834, 847, 940 P.2d 633, 639 (1997), *abrogated by State v. O'Dell*, 183 Wash. 2d 680, 358 P.3d 359 (2015). When the Washington Supreme Court "made that sweeping conclusion, it did not have the benefit of the studies underlying *Miller*, *Roper*, and *Graham*—studies that establish a clear connection between youth and decreased moral culpability for criminal conduct. *State v. O'Dell*, 183 Wash.2d 680, 695, 358 P.3d 359, 366 (2015). Of course, *Miller*, *Roper*, and *Graham*, all involve juveniles. The scientific support for the contention that late adolescents share the same deficits in judgment as their juvenile counterparts did not come until after those cases were decided—in 2015, according to Dr. Steinberg.

The State's argument puts criminal defendants in an untenable position: if they rely on scientific discoveries at the earliest opportunity the evidence is inadmissible, but if they wait for a consensus then they face a time bar. Moreover, reading the State's argument together with the

caselaw, if Kennedy had raised the issue at the time of sentencing, it would have been rejected as unsupported.

This Court should reject the State's argument.

Mr. Kennedy's New Evidence Diminishes His Culpability

The State's second argument misses the point. Mr. Kennedy's mitigation is not intended to negate any of the elements of the crime, as found by the judge's bench trial findings. Instead, Kennedy's proffer follows the now legally accepted proposition that "age may well mitigate a defendant's culpability, even if that defendant is over the age of 18." *O'Dell,* 183 Wash.2d at 695. Put another way, Kennedy's sentencing mitigation is largely focused not on whether he formed intent or acted badly previously, but whether there are factors associated with his still-developing brain that diminish the quality of that intent. The State paints with too broad of a brush and misses the nuance.

Like their juvenile counterparts, late adolescents are less likely to:

- think before they act
- pause to consider the consequences of their actions
- change their dangerous or inappropriate behaviors

These brain differences don't mean that emerging adults can't make good decisions or tell the difference between right and wrong. It also doesn't mean that they shouldn't be held responsible for their actions.

However, these differences reduce their culpability.

The Washington Supreme Court accepted this proposition in *O'Dell*:

> These studies reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure. As amici Washington Defender Association *et al*. put it, "[u]ntil 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." Br. of Amici Curiae in Supp. of Appellant at 9–10. In *Miller*, *Roper*, and *Graham*, the Court recognized that these neurological differences make young 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.' " *Miller*, 132 S.Ct. at 2458, 2465 (internal quotation marks omitted) (fifth alteration in original) quoting *Graham*, 560 U.S. at 71, 130 S.Ct. 2011 and citing *Roper*, 543 U.S. at 571, 125 S.Ct. 1183).

O'Dell, 183 Wash.2d at 692–93. "It is precisely these differences that might justify a trial court's finding that youth diminished a defendant's culpability." *Id.*

Mr. Kennedy's declaration acknowledges his responsibility for the homicide, explaining that he "suddenly lost control of my emotions and seriously hurt" the child-victim, who later died. *Kennedy* at ¶ 2. Dr. Steinberg's declaration notes that as a "result of neurobiological immaturity, young people, even those past the age of majority, continue to demonstrate difficulties" in "exercising self-restraint" and "controlling impulses." *Steinberg* at ¶ 31.

None of the trial judge's findings of fact, which include sentencing facts related only to the aggravator, embrace or undermine the above facts.

This is not surprising. No evidence was presented regarding Kennedy's mitigating qualities of youth and, in any event, no scientific consensus was available at the time. Indeed, the controlling statement from caselaw at the time was the observation—now repudiated—that murder was not a "common teenage vice." *State v. Scott*, 72 Wash.App. 207, 218–19, 866 P.2d 1258 (1993), *aff'd, State v. Ritchie*, 126 Wash.2d 388, 894 P.2d 1308 (1995). The "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472. That rule applies to late adolescents. It is no longer "absurd" to suggest that youth diminishes culpability because there is a "clear connection between youth and decreased moral culpability for criminal conduct." *O'Dell*, 183 Wn.2d at 695.

In addition to the mitigating evidence relating to the diminished quality of Kennedy's ability to make sound judgments, none of the evidence previously presented at trial negates the new evidence regarding Kennedy's rehabilitative potential—the third of the factors designated in *Miller*.

Moreover, like with the issue of newly available evidence, the State does not present any declarations in support of its argument.

And, while a new sentencing court can certainly consider facts from the trial in its consideration of the weight of the mitigating evidence now available to Kennedy, the consideration and weighing of that evidence is the key. As a reviewing court, this Court only determines whether a new sentencing hearing should be ordered, not what should happen at that hearing.

In *O'Dell*, the Washington Supreme Court found the trial court's "failure to exercise discretion is itself an abuse of discretion subject to reversal." 183 Wash.2d at 697. Newly available evidence puts Mr. Kennedy's case is a new light. He seeks a new sentencing hearing where the trial court can exercise its discretion as guided by that new evidence.

D. CONCLUSION

Prior to the recent research on neurodevelopment focusing on late adolescents, claims that lack of mature judgment and impulsiveness based on youth were viewed as bordering "on the absurd." *Scott*, 72 Wn. App. at 218. Since that time, the law has not changed (*Matter of Light-Roth,* 191 Wash. 2d 328, 422 P.3d 444 (2018)), but advances in science have resulted in the repudiation of that factual statement.

Mr. Kennedy's PRP rests on those newly available facts. The factual contentions in his PRP are supported by sworn statements which contain competent and admissible evidence.

The State contests many of Kennedy's facts, but fails in its burden. Kennedy's new evidence is not patently unreliable and is not directly contradicted by any of the trial court's findings.

This Court should grant Mr. Kennedy's PRP and remand for resentencing. In the alternative, this Court should remand for an evidentiary hearing.

DATED this 18th day of November 2019.

Respectfully Submitted:

/s/Jeffrey Erwin Ellis
Jeffrey E. Ellis, WSBA #17139
Attorney for Mr. Kennedy
Law Office of Alsept & Ellis
621 SW Morrison St. Ste 1025
Portland, OR 97205
503.222.9830 (o)
JeffreyErwinEllis@gmail.com

ALSEPT & ELLIS

November 18, 2019 - 8:58 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53360-0
Appellate Court Case Title:	Personal Restraint Petition of Andrew Steven Kennedy
Superior Court Case Number:	04-1-01203-9

The following documents have been uploaded:

- 533600_Personal_Restraint_Petition_20191118085815D2246204_0414.pdf
  This File Contains:
  Personal Restraint Petition - Reply to Response to PRP/PSP
  The Original File Name was KennedyAReply.pdf

A copy of the uploaded files will be sent to:

- appeals@co.cowlitz.wa.us
- pheland@co.cowlitz.wa.us

Comments:

Sender Name: jeffrey ellis - Email: jeffreyerwinellis@gmail.com
Address:
621 SW MORRISON ST STE 1025
PORTLAND, OR, 97205-3813
Phone: 503-222-9830

Note: The Filing Id is 20191118085815D2246204