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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
Respondent,	)	
	)	NO. 35766-0-III
v.	)	
	)	Douglas County Superior
ROBERT SPENCER CUFF,	)	Court No. 17-1-00047-1
Petitioner/Appellant	)	
	)	

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RESPONDENT'S BRIEF

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
A. INTRODUCTION.....	1
B. IDENTITY OF RESPONDENT.....	1
C. ASSIGNMENT OF ERROR.....	2
D. STATEMENT OF THE CASE.....	2
E. AUTHORITY AND DISCUSSION.....	5
1. The trial court did not abuse its discretion because the sentencing court properly considered the mitigating qualities of Appellant's youth at an individualized sentencing hearing.....	5
a. Standard of Review.....	5
b. The "factors" considered must be those that are relevant and applicable to the issues before the trial court.....	8
c. The evidence before the trial court did not support a mitigated sentence based upon youth.....	8
F. CONCLUSION.....	12

## TABLE OF AUTHORITIES

### Supreme Court Cases

*Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d. 407 (2012).....6,8,9,10

### Washington State Supreme Court Cases

*In the Matter of the Personal Restraint of Kevin Light-Roth* No. 94950-6, Washington State Supreme Court, Filed August 2, 2018.12

*State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017)..6,8,9

*State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359, (2015).....6,8,9,11

*State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).....6

*State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002).....7,9,10

*State v. Ha'mim* 132 Wn.2d 834, 846 940 P.2d 633 (1997).....11

*State v. Ritchie*, 126 Wn.2d 388,391, 894 P.2d 1308 (1995).....7,11

*State v. Gaines*, 122 Wn.2d 502, 509, 859 P.2d 36 (1993).....7

### Washington State Appellate Court Cases

*State v. Garcia–Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).....5,7

*State v. Scott*, 72 Wn. App. 207, 219, 866 P.2d 1258 (1993).....11

### Constitutional Provisions

U.S. Const. Amend. VIII.....6

U.S. Const. Amend. XIV.....6

Washington Statutes

RCW 9.94A.535.....	6
RCW 9.94A.585(1).....	7

## A INTRODUCTION

On December 6, 2017, the Honorable John Hotchkiss sentenced Appellant Robert Spencer Cuff for his convictions for three (3) counts of Child Molestation in the First Degree, one (1) count of Child Molestation in the Second Degree, and one (1) count of Communication with a Minor for Immoral Purposes. The issue before this Court is whether the Honorable Judge Hotchkiss abused his discretion in imposing a standard range sentence after a full sentencing hearing and consideration of the Appellant's youth. The State requests the Court affirm the sentence; as the trial court did not abuse its discretion in the consideration of Appellant's request for an exceptional sentence below the standard range; the trial court properly considered the Appellant's youth in the context of mitigation at sentencing. The State agrees that the community custody conditions 1,3,4,5,7,8,9,10, and 12 should be stricken from the Judgement and Sentence.

## B. IDENTITY OF RESPONDENT

Respondent is the State of Washington, by and through Steven M. Clem, Douglas County Prosecuting Attorney, and his deputy, Julia E. Hartnell.

### C. ASSIGNMENT OF ERROR

Respondent, State of Washington, assigns no errors to this matter and responds only to the issues presented by Appellant.

### C. STATEMENT OF THE CASE

On September 25, 2017, Appellant entered a negotiated plea of guilty to three (3) counts of Child Molestation in the First Degree, one (1) count of Child Molestation in the Second Degree, and one (1) count of Communication with a Minor for Immoral Purposes. In exchange, the State agreed to dismiss the special allegation that the Defendant's conduct was a part of a pattern of abuse, did not seek an exceptional sentence based upon said pattern, and dismiss Count 5, Cyberstalking. CP 7-25

Appellant's sentencing hearing was held on December 6, 2017. At that hearing, E.C. (02/04/2003) read her victim impact statement. During her statement, E.C. described that during the formative years of her life, she was repeatedly sexually abused by Appellant, her cousin Robert Spencer Cuff (03/25/1996). RP 37<sup>1</sup>, CP 91. E.C. described eight (8) years of abuse by the Appellant. RP 37. She described Appellant sexually abusing her every time

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<sup>1</sup> All citations to the Report of Proceedings indicate the volume including the sentencing hearing on 12/06/2017

their families would get together for holidays, birthdays, or weekends. RP 37. E.C. described Appellant first molesting her when she was six (6) years of age RP 42. The sexual abuse continued through E.C.'s childhood and took the form of the defendant licking and touching E.C.'s vagina, squeezing her breasts, and making E.C. use her hand to masturbate his penis all while E.C. was between the ages of 8 and 11 years of age (2012-2014). CP 91-93; RP 37.

Appellant went to technical school in Arizona and the abuse of E.C. ceased while he lost access to her. CP 154. In August of 2016, Appellant returned to the State of Washington, and resumed abusing E.C., by grabbing her breasts and buttocks. CP 93. In December of 2016, E.C., at age 13 came forward and disclosed the abuse by Appellant. When E.C. came forward, she provided law enforcement with proof of Appellant's abuse of her, copies of the SnapChat messages that he had sent her of pictures of his erect penis, with words of sexually explicit intent superimposed. RP 104, CP 61-65.

During the sentencing hearing the victim E.C. and her Mother, J.C. detailed how the years of abuse had impacted E.C., how the Appellant's actions had split their family, and how E.C. had

suffered. RP 31-47. E.C. has severe Post Traumatic Stress Disorder (PTSD), which causes her to be afraid all the time and have panic attacks. RP 32. E.C. described not being able to have a normal relationship with her Father and Brother because of Appellant's abuse. RP 32 33. E.C. described not being able to get through a school day without flashbacks and having to withdraw from school to be home schooled due to her PTSD from Appellant's abuse. RP 33.

While Appellant was abusing E.C., he graduated from high school and became an Eagle Scout. CP 154. Further, Appellant then left the state to attend technical school, and secured a well-paying full-time job as a diesel mechanic. CP 154. He was surrounded by supportive family and was able to achieve things that few others are capable of. CP 154.

At his sentencing, Appellant called expert witnesses Dr. Packard and Mr. Kahn to testify. Appellant also provided the Court with letters of support detailing his connection to his family and community. CP 154. After hearing all of the evidence presented, and reviewing all of the reports, the Court ruled that the age of the Defendant did not have a significant impact on his criminal act, and denied his request for a mitigated sentence downward, and

sentenced Appellant to 149 months, the low end of the Standard Range. RP 104

E. AUTHORITY AND DISCUSSION

1. The trial court did not abuse its discretion because the sentencing court properly considered the mitigating qualities of Appellant's youth at an individualized sentencing hearing.

a. Standard of Review

The issue before the Court is whether the trial court abused its discretion in declining to grant Appellant's request for an exceptional low sentence based upon his youth. "[W]here a defendant has requested an exceptional sentence below the standard range: review is limited to circumstances where the court has refused to exercise its discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). Under such circumstances, it is the trial court's refusal to exercise discretion that is appealable, not the sentence. *Id.* In analyzing for an abuse of discretion, the trial court's determination is given great deference: as long as the trial Court's decision is not manifestly unreasonable, resting on facts unsupported in the record, or applying the wrong legal standard it

will be upheld. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

Recent cases have brought to fore the need for individualized consideration of a Defendant's youth at sentencing. *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d. 407 (2012); *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359, (2015); *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). All of these cases stand for a similar proposition, that a sentencing Court must have the discretion to consider the mitigating factors of youth when determining the appropriate sentence. *Miller* 567 U.S. at 483; *O'Dell*, 358 P.3d at 363; *Houston-Sconiers*, 391 P.3d at 421. The constitutional violation is tied not to the punishment itself but to the mandatory nature of the punishment. U.S. Const. Amends, VIII, XIV; *Miller* at 483.

The discretion that the trial court may exercise because of an offender's youth extends only to the consideration of said youth as mitigation and does not mandate a particular result, "...age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence." *O'Dell*, 358 P.3d at 363 (2015). The basis for the mitigated sentence must still satisfy RCW 9.94A.535, and "to support an exceptional sentence a factor must

relate to the crime and make it less egregious.” *State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). Sentences within the standard range are not subject to appeal RCW 9 94A 585(1) Departures from the sentencing guideline require substantial and compelling reasons justifying an exceptional sentence. *State v. Ritchie*, 126 Wn.2d 388,391, 894 P.2d 1308 (1995). “It is a requirement of all exceptional reduced sentencing that “any reasons relied on for deviating from the standard range must ‘distinguish the defendant’s crime from others in the same category.’ ”” *State v. Fowler*, 145 Wn.2d 400, 405, 38 P.3d 335 (2002) (quoting *State v. Gaines*, 122 Wn.2d 502, 509, 859 P.2d 36 (1993)).

When a sentencing Court properly considers mitigation and elects not to provide the relief requested there is no abuse of discretion. *Garcia–Martinez*, 88 Wn. App. at 330. A trial court refuses to exercise its discretion when it takes a position that it would never impose a sentence below the standard range. *Id.* For example, a trial court relies on an impermissible basis when declining to impose an exceptional sentence down if it takes a position that no drug dealer should ever get an exceptional sentence down, or refuses to consider the request for an

exceptional sentence down because of the Defendant's race, sex, or religion. *Id.*

In *Miller*, *O'Dell*, and *Houston-Sconiers*, the statutory scheme effectively tied the hands of the sentencing judge from imposing alternative or lesser sentences. *Miller*, 567 U.S. at 478; *O'Dell*, 358 P.3d at 361; *Houston-Sconiers*, 391 P.3d at 414. That issue is not present in the instant case. Appellant had a full hearing, presenting both written evidence and expert witnesses to the Court. RP 49-95. The trial court properly considered the Appellant's youth, exercised its discretion, and in so doing fulfilled the requirements of *O'Dell*, *Houston-Sconiers*, and *Miller*. *Miller*, 567 U.S. at 478; *O'Dell*, 358 P.3d at 363; *Houston-Sconiers*, 391 P.3d at 421.

b. The "factors" considered must be those that are relevant and applicable to the issues before the trial court.

There is nothing impermissible about the exercise of discretion by the trial court in the instant case. Appellant argues that the trial court improperly declined to exercise its discretion because the trial court did not announce specific findings for each of the potential factors justifying mitigation identified in *Miller*. 567 U.S. at 478. This is incorrect, as the trial court applied the proper

legal standard when determining whether to grant an exceptional sentence, whether the youth of the defendant lends itself to mitigation of the crime. *Fowler*, 145 Wn.2d at 405. The factors outlined in *Miller* are a non-definitive, non-exhaustive list. 567 U.S. at 478. They are provided to illustrate some of the factors that may be considered by a sentencing court with regards to how the youth of the defendant may mitigate the crime. *Id.* at 478-479. The thrust of that consideration is that the sentencing must be individualized to the particular issues of the Defendant. *Id.*

This individualized consideration is why there is minimal discussion in the record of the Defendant's 'brutal and dysfunctional' home life, his level of involvement in the 'homicide', how familial and peer pressures may have affected his offense behavior, and his inability to deal with police and assist in his own defense. *Id.* The key issue in *Miller*, *O'Dell*, and *Houston-Sconiers* is the discretion of the sentencing court, not a rote recipe of factors. *Miller*, 567 U.S. at 478; *O'Dell*, 358 P.3d at 363; *Houston-Sconiers*, 391 P.3d at 421. "Our decision does not categorically bar a penalty for a class of offenders or type of crime—as for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentence follow a certain process—considering an offender's youth and attendant

characteristics—before imposing a particular penalty.” *Miller v. Alabama*, 567 U.S. at 483

c. The evidence before the trial court did not support a mitigated sentence based on youth.

The trial court properly considered the Appellant's youth because it considered all of the information presented and found that it did not mitigate the seriousness of Appellant's conduct or reduce his culpability. *Fowler*, 145 Wn.2d at 405; CP 154. The trial court in both its oral and written findings reflected on all of the evidence presented and the fact that the Court had to consider many things and that the decision was not easy. RP 102. The trial court indicated that he considered the victim, the rehabilitation of the defendant, and the things that the defendant did in his life outside of his abuse of E.C. RP 103. The trial court discussed the testimony of Mr. Kahn and Dr. Packard, as well as the blame that the Defendant placed upon the victim in his evaluations and treatments. CP 155-157. The trial court provided a detailed summary of Appellant's life course outside of his offenses. CP 154. The Court also reflected that the wrongfulness of his conduct should have been readily apparent to the then sixteen year old Appellant with an eight year old victim. RP 103. The Appellant's

experts and arguments focused on impulsivity and on Appellant not understanding the nature and consequences of his actions. RP 95-101.

The trial court rightly rejected these arguments, in part because of the Defendant's own statements to Mr. Kahn that he asked a then eight (8) year old E.C. to put his penis in her mouth, convinced her to do it, that she wanted to stop and that he told her not to tell. CP 130. This account clearly demonstrates that the Appellant knew and appreciated the wrongfulness of his actions. Similar to the Defendants in *Ha'mim* and *Scott*, the facts before the Court did not support a finding that the youth of Appellant prevented him from appreciating the wrongfulness of his conduct or exercising prudent judgment. *State v. Ha'mim* 132 Wn.2d 834, 846 940 P.2d 633 (1997) *State v. Scott*, 72 Wn. App. 207, 219, 866 P.2d 1258 (1993), aff'd sub no, *State v. Ritchie*, 126 Wn.2d. 388, 894P.2d 1308 (1995). *O'Dell's* holding continues the general propositions of *Ha'mim* and *Scott* that "age is not a per se mitigating factor" but that it could be a mitigating factor to show that a Defendant did not appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law was significantly impaired. *O'Dell*, 183 Wn.2d at 695-96;

*Ha'mim*, 132 Wn.2d at 846-847; *In the Matter of the Personal Restraint of Kevin Light-Roth* No. 94950-6, Washington State Supreme Court, Filed August 2, 2018. The trial court properly applied this standard to the facts. The evidence showed that Appellant could appreciate the wrongfulness of his actions and conform his conduct, because Appellant's conduct was longstanding, utilized secrecy and manipulation, and demonstrated an understanding that it was wrong. CP 156-157.

F. CONCLUSION

Based on the foregoing facts and authorities, the State respectfully requests this court to uphold the trial court's sentence, strike the community custody conditions and dismiss the appeal.

Respectfully submitted this  
17<sup>th</sup> day of August 2018.



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**August 17, 2018 - 9:04 AM**

**Transmittal Information**

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