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NO. 37141-7-III

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

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL LAUDERDALE,
Appellant.

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

The Honorable Kristin M. Ferrera, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The resentencing court abused its discretion by incorrectly believing it did not have the discretion to consider a different sentence after dismissing one count of felony murder.

2. Counsel was ineffective for arguing the resentencing court that did not have the discretion to consider a different sentence after dismissing one of two murder charges where the trial court deemed the hearing a “resentencing, and that would include all the procedures of resentencing.” RP 26

3. The Court abused discretion by re-imposing the same sentence without considering Lauderdale’s youth as a mitigating factor.

Issues Presented on Appeal

1. Did the resentencing court abuse its discretion by incorrectly believing it did not have the discretion to consider a different sentence after dismissing one count of felony murder where Lauderdale’s youth, age 19, was never considered as mitigation?

2. Was Counsel ineffective for arguing the resentencing

court that did not have the discretion to consider a different sentence after dismissing one of two murder charges where trial court deemed the hearing a resentencing, and Lauderdale's youth was never considered as mitigation?

3. Did the Court abuse discretion by re-imposing the same sentence without considering Lauderdale's youth as a mitigating factor?

B. STATEMENT OF THE CASE

Mr. Lauderdale was 19 years old when charged with committing murder in the first degree. CP 115-120. He was originally sentenced to life without the possibility of parole. Supp. CP '101' (Judgment and Sentence February 7, 1995). Twenty three years later, the court granted Lauderdale's motion to dismiss one of the two murder convictions on double jeopardy grounds. CP 115-20; RP 54 (August 5, 2019).

Over the state's objections, the court granted Lauderdale's motion for a resentencing hearing rather than for correcting a clerical error. RP 25 (May 30, 2019). Counsel for Lauderdale argued the matter was set for a resentencing where the court must

examine the sentence anew, but focused on only permitting Lauderdale to allocute a second time. RP 23-24 (September 5, 2019).

On September 5, 2019, the state argued that the court did not have any discretion to reconsider the sentence for the remaining counts because “*You're limited to this one sentence that's available under the law, and you are not allowed to argue any other sentence.*” RP 20-21 (September 5, 2019) (Italics in original).

During the resentencing hearing, counsel for Lauderdale stated the court did not have the discretion to consider another sentence for the remaining aggravated murder charge because the only sentence available was life without the possibility parole. RP 40 (September 19, 2019).

And I think there is only one sentence in this case available at this point, your Honor, which is life without parole, so we're in agreement with that, your Honor.

RP 40.

The court ordered a resentencing ruling that Lauderdale “is entitled to resentencing, and that would include all the procedures of resentencing.” RP 26 (September 5, 2019).

During resentencing the victim's family and friends addressed the court, and Lauderdale allocuted. RP 34-45 (September 19, 2019). After Lauderdale allocated, the court apologized to the family for having to go through a second sentencing. RP 45-46. The court ruled the only available sentence was life without the possibility of parole. RP 27.

Lauderdale's attorney did not argue for an exceptional sentence below the standard range based on Lauderdale's youth at the time the crime was committed. However, during the initial sentencing hearing in 1995, Lauderdale submitted a motion for appointment of a psychiatrist/psychologist. Supp. CP (motion for appointment of a psychiatrist/psychologist October 3, 1994) (original index CP 18-19 March 27, 1995).

Lauderdale also submitted a sentencing memorandum explaining the depth and breadth of the abuse Lauderdale suffered at the hands of his father and step-father, including kidnapping, physical and sexual abuse at a young age 5-15. Supp. CP (Defendant's Sentencing Memorandum February 6, 1995). In conclusion, the sentencing memorandum "urge[d] the court to take into consideration as mitigation...his youthful age". Id.

The forensic expert who evaluated Lauderdale for competency also explained that Lauderdale was sexually abused by his stepfather beginning at age 11 or 12 and began abusing drugs shortly thereafter. Supp. CP (Forensic & Clinical Psychology Evaluation March 9, 1995).

Lauderdale also moved to reverse the aggravated murder based on the state's trial memorandum in which the Chelan County Coroner, Dr. Gerald Rappe determined that the victim could have been raped after death because there was no injury to the rectal or anal area. Supp. CP (State's Trial memorandum January 12, 1995). Mr. Lauderdale filed a personal restraint petition (COA # 367444-III) before sentencing in the current matter and this Court consolidated that matter with this case and provided that no further briefing would be permitted and no appointment of counsel.

Ruling under #367444 consolidating prp with COA#371417 (NOA is the anchor). No further filings for the prp given the prp was ready for review and all briefing was already submitted. Michael Lauderdale remains pro se in the prp.

(ACORDS entry January 27, 2020).

The resentencing court did not believe it had the discretion to resentence Lauderdale and transferred the question on the

sufficiency of the evidence regarding the rape to this court as a personal restraint petition. RP 18-25 (September 5, 2019); CP 88. The court re-imposed life without the possibility of parole after dismissing one of the two murder charges. The court did not exercise its discretion on any matters. RP 27-28, 40.

This timely appeal follows. Supp. CP (Notice of Appeal October 10, 2019)

C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO EXERCISE ITS DISCRETION TO CONSIDER YOUTH AS A MITIGATING FACTOR UNDER *MILLER* AND BY MISAPPLYING THE LAW

a. Abuse of Discretion to Fail to Exercise Discretion.

The sentencing court abused its discretion by failing to understand its obligation to exercise its authority to consider youth as a mitigating factor. This Court reviews discretionary decisions for abuse of discretion. *Jewell v. City of Kirkland*, 50 Wn. App. 813, 818, 750 P.2d 1307 (1988).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable

reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). “A trial court errs when ‘it refuses categorically to impose an exceptional sentence below the standard range under any circumstances’ or when it operates under the ‘mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.’” *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997); *State v. Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007)). The failure to exercise discretion is an abuse of discretion. *Bowcutt v. Delta North Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999).

Under *Miller v. Alabama*, 567 U.S. 460, 471 (2012), “sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant” and “must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.” *State v. Bassett*, 192 Wn.2d 67, 97-98, 428 P.3d 343 (2018) (quoting *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017) (citing *Miller*, 567 U.S. at 480)).

In Lauderdale's case, the trial court's mistaken belief that it did not have discretion was an abuse of discretion exacerbated by defense counsel not requesting mitigation. Id1.

b. Eighth Amendment and Wash. Const. art I, § 14, Require Consideration of Youth as a Mitigating Factor For Youthful Offenders.

The trial court may impose an exceptional sentence below the standard range if it finds mitigating circumstances by a preponderance of the evidence. RCW 9.94A.535(1). In *State v. O'Dell*, 183 Wn.2d 680, 690-91, 358 P.3d 359 (2015), the Supreme Court held that 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.

This is so because "children are constitutionally different

1 There are 2 unpublished cases in which this Division Two did not consider counsel ineffective for failing to raise a *Miller* fix during resentencing and further held the court did not abuse its discretion during for failing to *sua sponte* consider a *Miller*-fix, and counsel was not ineffective for failing to seek an exceptional downward sentence. These cases do not have any precedential value and are not dispositive. *State v. Wuco*, Division Two Unpublished, 8 Wn. App. 2d 1073 (2019) (even if court misunderstood it had discretion to impose exceptional downward on firearm enhancements, record did not support concluding court would have done so); *State v. Avalos*, Division Two 1 Wn. App. 2d 1022 (2017) (counsel did not seek exceptional downward for multiple firearm enhancements based on youth. Held: counsel not ineffective and court did not abuse discretion for failing to understand it could exercise discretion based on youth-age 19)

from adults for purposes of sentencing.” *Miller*, 567 U.S. at 471; *Roper v. Simmons*, 543 U.S. 551, 574, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The Supreme Court requires sentencing courts “to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Miller*, 567 U.S. at 480.

The Eighth Amendment requires trial courts to exercise this discretion at the time of sentencing whether the youth is sentenced in juvenile or adult court and whether the transfer to adult court is discretionary or mandatory, because the Eighth Amendment bars imposition of life without parole sentence on juvenile offenders. *Houston-Sconiers*, 188 Wn.2d at 20 (citing *Miller*, 183 U.S. at 467; *Roper*, 543 U.S. at 557).

Likewise, art. I, § 14, “prohibits sentencing juveniles to life without the possibility of parole, rendering RCW 10.95.030(a)(ii) unconstitutional.” *Bassett*, 192 Wn.2d at 77.

Legally a child becomes an adult at age 18, but scientifically, a juvenile does not become an adult with a mature brain until his mid-twenties. *Miller*, 567 U.S. at 471-72, n.5; *Roper*, 543 U.S. at 574. “The qualities that distinguish juveniles from adults do not

disappear when an individual turns 18.” *Roper*, 543 U.S. at 574 (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage”). See Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003).

A nineteen year old is an adolescent, not medically an adult. *Paediatr Child Health*. 2003 Nov; 8 (9): 577.doi: 10.1093/pch/8.9.577 “Adolescence begins with the onset of physiologically normal puberty, and ends when an adult identity and behaviour [sic] are accepted. This period of development corresponds roughly to the period between the ages of 10 and 19 years, which is consistent with the World Health Organization’s definition of adolescence.” *Paediatr Child Health*. 2003 Nov; 8(9): 577.doi: 10.1093/pch/8.9.577

“The rational part of a teen’s brain isn’t fully developed and won’t be until age 25 or so.” <https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentID=1&ContentID=3051>. Brain maturation during adolescence

occurs between ages 10-24. Journal List Neuropsychiatr Dis Treatv. 9; 2013 PMC3621648, by, Mariam Arain, Maliha Haque, Lina Johal, Puja Mathur, Wynand Nel, Afsha Rais, Ranbir Sandhu, and Sushil Sharma.

In *Roper*, the Court recognized that “[d]rawing the line at 18 years of age” was subject to objection. *Id.* Nevertheless, the Court determined contrary to science that “a line must be drawn.” *Id.* The Court settled on eighteen because at the time, “[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood.” *Id.* The Court in *Graham*, also relied on but failed to follow developments in social science demonstrating that a person does not mature into adulthood until his mid-twenties

“[I]f the neurological research and social science on which *Miller* was based conclude that cognitive abilities are not fully developed until around age twenty-five, it may be arbitrary and inconsistent to choose age eighteen as the age after which a defendant may be subject to mandatory life without parole.” Kevin J. Holt, *The Inbetweeners: Standardizing Juvenileness and Recognizing Emerging Adulthood for Sentencing Purposes After Miller*, 92 Wash. U. L. Rev. 1393, 1396 (2015). “The distinction of adulthood beginning at age eighteen is arguably based on no more than traditional and outdated norms.” *Id.* “The Court’s Eighth Amendment jurisprudence and cognitive science articulated in *Miller* and its forebears may necessitate legal recognition of a stage of life between adolescence

and adulthood often called ‘emerging adulthood,’ during which defendants should be entitled to further special consideration under the Eighth Amendment.” *Id.* See also Alexandra O. Cohen, et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 Temp. L. Rev. 769 (2016).

In *Graham*, the U.S. Supreme Court acknowledged 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.” *Miller*, 567 U.S. at 471-72 (quoting *Graham*, 560 U.S. at 68.)

The Court 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.” *Miller*, 567 U.S. at 472 (quoting *Roper*, 543 U.S., at 570).

The Court in *Miller* repeatedly focused on the notion that the character traits of adolescents are “more transitory and less fixed.” *Miller*, 567 U.S. at 471. Children by definition lack maturity and responsibility; thus, they are more likely to act with “recklessness, impulsivity, and needless risk-taking.” *Id.* (internal quotation

omitted).

Due to the innate characteristics of adolescents at large, there is a “great difficulty...of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Miller*, 567 U.S. at 479 (internal quotation omitted).

In fact, the Court stated, “incorrigibility is inconsistent with youth.” *Miller*, 567 U.S. at 473. Emphasizing the potential for reform present in all youth, the Court discussed the mitigating qualities of youth and noted “[i]t is a time of immaturity, irresponsibility, ‘impetuosity[,] and recklessness.’” *Id.* at 476 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1982)).

Youth “have diminished culpability and greater prospects for reform,” and therefore, “they are less deserving of the most severe punishments.” *Miller*, 567 U.S. at 471 (quoting *Graham v. Florida*, 560 U.S. at 68 (2010)). “[T]he distinctive attributes of youth diminish penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” *Miller*, 567 U.S. at 472. As a result, “[a]n offender’s age is relevant to the

Eighth Amendment.” *Miller*, 567 U.S. at 473 (citing *Graham*, 560 U.S. at 76). In light of the relevance to the ban on cruel and unusual punishment, “imposition of a state’s most severe penalties on juvenile offenders cannot proceed as though they were not children.” *Miller*, 567 U.S. at 474.

In *O’Dell*, the Supreme Court reversed the trial court’s failure to meaningfully consider youth as a possible mitigating circumstance despite the defendant being 18 years old. *O’Dell*, 183 Wn.2d at 691-92. “[W]hen the legislature enacted RCW 9.94A.030(34), it did not have the benefit of psychological and neurological studies showing that the “ ‘parts of the brain involved in behavior control’ ” continue to develop well into a person’s 20s.” *O’Dell*, 183 Wn.2d at 691-92. A 19-year old is still a youth.

The sentencing court and Court of Appeals in Lauderdale’s case, based their decisions not to consider youth on the mistaken reliance on *Ha’ mim* which prohibited considering whether youth diminished O’Dell’s capacity to appreciate the wrongfulness of his conduct or conform that conduct to the requirements of the law. *O’Dell*, 183 Wn.2d at 697.

The sentencing courts duty to exercise discretion applies to

all youth and does not end when a child legally becomes an adult, because brain development does not coincide with the legal labelling of a child as an adult. *Roper*, 543 U.S. at 574; *O'Dell*, 183 Wn.2d at 695. This duty applies to Lauderdale and all youth sentenced to life without the possibility of parole. *Miller*, 567 U.S. at 480; *Bassett*, 192 Wn.2d at 89; *Houston-Sconiers*, 188 Wn.2d 1, at 34; *O'Dell*, 183 Wn.2d at 690-91.

When a court resentences a defendant who committed the crime as a youth, even when older than eighteen, the court must necessarily exercise its discretion unless the matter only involves a ministerial correction. *O'Dell*, 183 Wn.2d at 695. Here the sentencing court determined that the resentencing was not a clerical matter but rather Lauderdale “is entitled to resentencing, and that would include all the procedures of resentencing.” RP 26 (September 5, 2019).

During this hearing, the court mistakenly believed it did not have the discretion to consider a mitigated sentence. RP 27. (May 30, 2019/September 2019); RP 40. This was an abuse of discretion compounded by defense counsel also mistakenly arguing to the court that it did not have the discretion to consider a mitigated

sentence. RP 40 (May 30, 2019/September 2019). *McFarland*, 189 Wn.2d at 52.

In *McFarland*, the Supreme Court addressed both ineffective assistance of counsel and abuse of discretion for failing to exercise discretion. The Court considered the sentencing court's authority to exercise discretion not to impose consecutive sentences for firearm enhancements. Relying on *Mulholland*, the Court , recognized that "notwithstanding the mandatory language of RCW 9.94A.589(1)(b), 'a sentencing court may order that multiple sentences for *serious violent offenses* run concurrently as an exceptional sentence if it finds there are mitigating factors justifying such a sentence'" *McFarland*, 189 Wn.2d at 53 (quoting *Mulholland*, 161 Wn.2d at 327-28 (emphasis added by *McFarland*)).

In *McFarland*, defense counsel mistakenly believed the sentencing court did not have the discretion to run the firearm enhancements concurrently, and subsequently did not request an exceptional sentence, and the sentencing court did not consider an exceptional sentence, mistakenly believing that it did not have the discretion to do so. *McFarland*, 189 Wn.2d at 50-51.

The Supreme Court reversed the Court of Appeals holding

that that the sentencing court did not commit error and that defense counsel's performance was not deficient, to instead hold that McFarland should be resentenced **because the sentencing court erroneously believed it could not impose concurrent sentences, and the record demonstrates that it might have done so had it recognized its discretion under RCW 9.94A.535,** despite counsel's mistaken position. And further *McFarland* did not have to establish counsel was ineffective to obtain relief from the court's abuse of discretion. *McFarland*, 189 Wn.2d at 56.

The Court's reasoning centered on the need for a "just resolution" despite defense counsel's failure to understand or argue for mitigation. *McFarland*, 189 Wn.2d at 57; *Mulholland*, 162 Wn.2d at 326.

In *Mulholland* too, defense counsel only argued same criminal conduct, but did not argue for concurrent sentences. The Court held that the trial court's failure to understand its discretion "constitutes a 'fundamental defect.' resulting in a miscarriage of justice". *McFarland*, 189 Wn.2d at 58; *Mulholland*, 162 Wn.2d at 332. The Court did not address ineffective assistance of counsel but analyzed the case as an issue of whether: (1) the court had

discretion to impose concurrent sentences for separate serious violent offenses as an exceptional sentence; and (2) if it does possess such discretion, was the failure of the sentencing court to recognize that it had such discretion a basis for granting Mulholland's PRP?

The reasoning regarding discretion in *McFarland* and *Mulholland* applies equally to Lauderdale's case. "Consistent with the SRA, a court 'may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence'". *Id* (quoting RCW 9.94A.535).

This means that even without a request, the sentencing court must understand that it is authorized to exercise its discretion. *Id.* *Mulholland*, 161 Wn.2d at 333. This reasoning applies to considering youth as mitigation. *O'Dell*, 183 Wn.2d at 695 (citing *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (the trial court's failure to consider an exceptional sentence authorized by statute is reversible error)). The Court in *O'Dell*, held that "[t]his failure to exercise discretion is itself an abuse of discretion subject to reversal. *Id*

Just as in *Mulholland* and *McFarland*, defense counsel's failure to request a mitigated sentence, and the sentencing court's mistaken belief that it did not have the discretion to entertain a mitigated sentence, resulted in a fundamental defect. *McFarland*, 189 Wn.2d at 58; *Mulholland*, 162 Wn.2d at 332. The remedy is to remand for resentencing because in Lauderdale's case as in *Mulholland* and *McFarland*, the trial court may have considered an exceptional sentence if it had understood that such a sentence was available. *McFarland*, 189 Wn.2d at 58.

2. APPELLANT DENIED
CONSTITUTIONAL RIGHT TO
EFFECTIVE ASSISTANCE OF
COUNSEL BY COUNSEL'S
FAILURE TO ARGUE FOR
MILLER-FIX AND FOR
MISTAKENLY ARGUING
SENTENCING COURT DID NOT
HAVE DISCRETION AT
RESENTENCING

An accused person has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). An attorney has "the duty to research the relevant law." *Id.* An

unreasonable failure to do so constitutes deficient performance. *Id.*, at 868.

Here, defense counsel erroneously told the court that “I think there is only one sentence in this case available at this point, your Honor, which is life without parole, so we're in agreement with that, your Honor.” RP 40. Although likely true at the time of the original sentencing in 1995, the U.S. Supreme Court in *Miller* decided in 2012 that a life sentence without the possibility of parole for a youthful offender, violated the Eighth Amendment. *Miller*, 567 U.S. at 474, 480; *Roper*, 543 U.S. at 574; *O'Dell*, 183 Wn.2d at 695-96. In 2015, this Court in *O'Dell*, recognized that a youthful offender includes a 19 year old. *O'Dell*, 183 Wn.2d at 696.

At the time of the resentencing hearing in 2019, the Supreme Court had decided years earlier that an adult offender's youthfulness can justify an exceptional sentence downward. *O'Dell*, 183 Wn.2d at 696. Defense counsel did not argue or cite any authority in support of a mitigated sentence to avoid a cruel and unusual sentence for Lauderdale, despite the U.S. Supreme Court and our Supreme Court mandating that sentencing courts consider youth when deciding to impose a sentence of life without the

possibility of parole. *Miller*, 567 U.S. at 460; *O'Dell*, 183 Wn.2d at 685-698.

Instead of researching the current law on sentencing youth, defense counsel mistakenly believed the sentencing court lacked the discretion to consider mitigation. RP 40. Counsel's failure: (1) to recognize the court's discretion; (2) to cite available authority in support of youth as a mitigating factor; and (3) to argue for a mitigated sentence based on youth amounted to deficient performance. *Kyllo*, 166 Wn.2d at 862, 868.

Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Kyllo*, 166 Wn.2d at 868. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

In *McFarland*, the Supreme Court reversed the trial court for failing to exercise discretion where the record "suggests at least the possibility that the sentencing court would have considered imposing" a mitigated sentence. *McFarland*, 189 Wn.2d at 58.

Here, the record reveals that the sentencing court firmly believed that it did not have any discretion to sentence Lauderdale to a term other than life without the possibility of parole, but nothing suggests the judge would have refused to consider a request for a mitigated sentence based on youth, had counsel properly made such a request. RP 27; CP 82-85. In fact, under *Miller* and *O'Dell*, the sentencing court was required to consider youth as a mitigating factor, and the record suggests the court would have considered imposing a mitigated sentence had it understood it had the discretion to consider such a sentence. *Miller*, 567 U.S. at 480; *O'Dell*, 183 Wn.2d at 690, 696-99.

Counsel's failure to make the proper argument deprived the court of its opportunity to exercise its discretion. Confidence in the outcome is undermined. *Thomas*, 109 Wn.2d at 226. Lauderdale's sentence must be vacated and the case remanded for a new sentencing hearing. *Id.* Upon resentencing, the trial court must consider whether Lauderdale's youth justifies ordering a mitigated sentence less than life without the possibility of parole. *O'Dell*, 183 Wn.2d at 696-699; *Mulholland*, 161 Wn.2d at 327-328.

D. CONCLUSION

For the reasons discussed herein, Michael Lauderdale respectfully requests this Court reverse his sentence and remand for a new sentencing hearing to address youth as a mitigating factor.

DATED this 25th day of March 2020.

Respectfully submitted,



LISE ELLNER, WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Chelan County Prosecutor's Office prosecuting.attorney@co.chelan.wa.us and Michael Lauderdale/DOC#731480, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001 a true copy of the document to which this certificate is affixed on March 25, 2020. Service was made by electronically to the prosecutor and Michael Lauderdale by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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