69942-3

69942-3

No. 69942-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SEAN O'DELL,

Appellant.

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

A. ASSIGNMENTS OF ERROR

1. The trial court deprived Sean O'Dell of his right to present a defense in violation of the Sixth and Fourteenth Amendments.

2. The trial court deprived Sean O'Dell of his right to present a defense in violation of the Article I, section 22.

3. The trial court erred in failing to consider proper mitigating factors.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutions guarantee a person the right to present a defense. This includes the right to have the jury instructed on the defendant's theory of the case. Pursuant to RCW 9A.44.040(3)(b), it is a defense if based on a statement by the victim relating to age a person reasonably believes the alleged victim is at least 14. Here, based on statements by the alleged victim regarding her age, Sean O'Dell reasonably believed she was 14 year old. Indeed, during the first trial the court instructed the jury on the defense. Following a hung jury, the court refused to instruct the jury on the defense despite the presentation of the same evidence in both trials. Did the court deny Sean O'Dell his right to present defense in violation of the Sixth and Fourteenth Amendments and Article I, section 22?

2. A court errs when it erroneously believes it is categorically barred from imposing a sentence outside the standard range. Here, the trial court concluded it could not consider youth as a mitigating factor in support of an exceptional sentence. Recent decisions of the United States Supreme Court, however, make clear that because of the attendant immaturity youth necessarily alters culpability for an offense. Did the trial court err in refusing to consider youth as a mitigating factor?

C. STATEMENT OF THE CASE

One day, Sean O'Dell met with two other adolescents, his neighbor B.A. and her friend A.J.N. 1/16/13 RP 253-55. Sean was a mere 10 days past his eighteenth birthday. 1/18/13 RP 536. The three drank wine, and Sean commented to A.J.N. "you look too young to be drinking." 1/18/13 RP 542. A.J.N. responded "I get that a lot." *Id.* Based upon A.J.N.'s response he believed she was older than 14.

That evening, A.J.N. called Sean and arranged to meet him outside his home. The two returned alone to the same place they had met previously and had sex. 1/16/13 RP 268, 270.

The following morning A.J.N. told her mother about the prior evening. 1/18/13 RP 376. Her mother called Sean, and for the first time he learned A.J.N. was 12½. 1/18/13 RP 549.

The State charged Sean with one count of rape of a child in the second degree. CP 114.

At trial, and without objection, the court instructed the jury on the affirmative defense contained in RCW 9A.44.040, that it was a defense to the charge if based on statements by A.J.N., Sean reasonably believed she was older than 14. CP 104. The jury was unable to reach a verdict and the court declared a mistrial. 11/9/12 RP 542-43.

At a second jury trial, the trial court refused to instruct the jury on the affirmative defense. 1/18/13 RP 609. The second jury convicted Sean. CP 62.

At sentencing, pointing to recent Supreme Court cases holding that youth and immaturity alter a person's culpability for a crime, Sean asked the court to impose a mitigated exceptional sentence. CP 36-43. Concluding it was prohibited from considering youth as a mitigating factor, the court denied the request for an exceptional sentence. 3/6/13 RP 73-74.

D. ARGUMENT

1. The trial court denied Sean O'Dell his right to present a defense.

a. The state and federal constitutions guarantee an individual the right to present a defense.

The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to meaningful opportunity to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (citations and internal quotations omitted). Article I, § 22 of the Washington Constitution provides a similar guarantee. *State v. Maupin,* 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." *Washington v. Texas,* 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Chambers v. Mississippi,* 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973);

Consistent with these rights, a defendant is entitled to have the jury instructed on his theory of the case where it is supported by the law and evidence. *State v. May,* 100 Wn. App. 478, 482, 997 P.2d 956, *review denied,* 142 Wn.2d 1004 (2000). "In evaluating whether the evidence is sufficient to support such a jury instruction, the trial court

must interpret the evidence most strongly in favor of the defendant."

State v. Ginn, 128 Wn. App. 872, 878-79, 117 P.3d 1155 (2005).

b. The court denied Sean O'Dell the right to present a defense.

RCW 9A.44.040 provides in relevant part:

> . . . .
> (2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.
> (3) The defense afforded by subsection (2) of this section requires that for the following defendants, the reasonable belief be as indicated:
> . . . .
> (b) For a defendant charged with rape of a child in the second degree, that the victim was at least fourteen, or was less than thirty-six months younger than the defendant . . . .

Consistent with the statute, in the first trial, the trial court instructed the jury:

> It is not a defense to the charge of Rape of a Child in the Second Degree that at the time of the acts the defendant did not know the age of A.J.N. (dob 10/17/1999) or that the defendant believed her to be older.

> It is, however, a defense to the charge of Rape of a Child in the Second Degree that at the time of the acts the defendant reasonable believed that A.J.N. (dob 10/17/1999) was at least fourteen years of age, or was less than thirty-six months younger than the defendant based upon declarations as to age by A.J.N. (dob 10/17/1999).
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to the charge Rape of a Child in the Second Degree.

CP 104.

During the second trial, however, the court refused to provide the instruction to the jury, concluding the defense failed to present sufficient evidence to warrant the instruction. Specifically the court reasoned that the term "declarations as to age by the alleged victim" required an affirmative and explicit misstatement of age by A.J.N. 1/18/13 RP 608.

In support of its decision, the trial court relied upon *State v. Bennett*, 36 Wn. App. 176, 672 P.2d 772 (1983). 1/18/13 RP 608-09. But the court read far too much into *Bennett*. In that case, the court held only that "declarations" did not include "behavior, appearance, and general demeanor." *Id.* at 182. *Bennett* did not limit the instruction to

cases in which the alleged victim affirmatively misstated his or her age. It only required that the defense point to the words from the victim, not just nonverbal conduct, regarding age. *Id.* at 181-82.

The plain terms of the statute do not so limit the defense. The statute does not require an affirmative misstatement. In fact, the term "misstatement" does not appear in the statute at all. Instead, the plain language requires nothing more than a statement relating to age. Sean O'Dell presented such evidence. He testified he was drinking with two other adolescents – A.J.N. and B.A. He commented to A.J.N. "you look too young to be drinking." 1/18/13 RP 537. She responded "I get that a lot." *Id.* That is a statement by A.J.N. regarding her age. The foundation for the defense was met.

"The jury, not the judge, must weigh the proof and evaluate the witnesses' credibility." *Ginn*, 128 Wn. App. at 879. Thus, the court must look at the evidence in the light most favorable to the defendant in deciding whether the foundation has been met. *Id.* at 878-79. It does not matter that A.J.N. testified that she expressly stated her age. Other witnesses testified she did not. In the light most favorable to the defense, A.J.N. did not state her actual age but instead made statements that implied she was older.

The trial court deprived Sean of his right to present a defense.

c. The trial court's error requires reversal.

A constitutional error requires reversal unless the State can establish beyond a reasonable doubt the error "did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *United States v. Neder*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The State cannot meet that burden here.

The first jury instructed on the statutory defense could not reach a verdict. The second jury hearing the same evidence but without an instruction on the defense found Sean guilty. Clearly that the court's the failure to instruct on the defense was the critical difference.

This Court should reverse the conviction.

2. The trial court failed to meaningfully consider Sean O'Dell's request for an exceptional sentence.

Generally, a standard range sentence may not be appealed. RCW 9.94A.585(1). That statute, however, does not place an absolute prohibition on the right of appeal. Instead, the statute only precludes review of challenges to the amount of time imposed when the time is within the standard range. *State v. McGill,* 112 Wn. App. 95, 99, 47 P.3d 173 (2002). A defendant, however, may challenge the procedure

by which a sentence within the standard range is imposed. *State v. Mail,* 121 Wn.2d 707, 712-13, 854 P.2d 1042 (1993). When a defendant has requested a mitigated exceptional sentence, review is available where the court refused to exercise discretion or 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), *review denied,* 136 Wn.2d 1002 (1998).

A court refuses to exercise its discretion if it categorically refuses to impose an exceptional sentence downward under any circumstances. *Id.* A court relies on an impermissible basis if it does not consider the request because of the defendant's race, sex, religion, or other characterization, such as a drug dealer. *Id.* "While no defendant is entitled to an exceptional sentence below the standard range, every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative considered." *State v. Grayson,* 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (emphasis in original).

Here the trial court categorically refused to consider youth and immaturity as mitigating factors, concluding it was barred from doing so. 3/6/13 RP 74. The Washington Supreme Court has concluded "the age of the defendant does not relate to the crime or the previous record of

the defendant." *State v. Ha'mim*, 132 Wn.2d 834, 847, 940 P.2d 633 (1997). But since *Ha'mim* was decided, courts have recognized youth does alter the nature of the crime and thus relates directly to the crime.

> [Y]outh is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuousness, and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage. And its signature qualities are all transient.

Miller v. Alabama, _ U.S. _, 132 S. Ct. 2455, 2467, 183 L. Ed. 2d 407 (2012) (internal quotations, citations and brackets omitted). Based upon this recognition that juveniles are both categorically less culpable and more amenable to rehabilitation, they must be treated differently by the justice system. *See Id.* (barring sentence of life without possibility of parole for homicide for juveniles); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (barring sentence of life without possibility of parole for nonhomicide for juveniles); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed.2d 1 (2005) (death penalty unconstitutional as applied to juveniles).

In each case, the Court recognized juveniles "have a lack of maturity and an underdeveloped sense of responsibility," they are "more vulnerable or susceptible to negative influences," and "their characters are not as well formed" as those of adults. *Miller*, 132 S. Ct. at 2467; *Graham*,

130 S. Ct. at 2026 (citing *Roper*, 543 U.S. at 569-70). Because of the fundamental distinction between children and adults, the imposition of the same punishment on both classes ultimately results in a harsher punishment for the child. *Miller*, 132 S. Ct. at 2468. Punishment schemes that equate juvenile and adult offenses "miss[] too much." *Id.* Yet, that is precisely the conclusion reached in *Ha'mim*. Accordingly, *Ha'mim* is inconsistent with the Supreme Court's more recent decisions as well as the scientific evidence on which they are based. "An offender's age, we made clear in *Graham*, is relevant to the Eighth Amendment, and so "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Miller*, 132 S. Ct. at 2466 (Internal quotations and citations omitted).

The reasoning of *Miller*, *Graham*, and *Roper* has force beyond a person's eighteenth birthday. Those decisions "rested not only on common sense—on what 'any parent knows'—but on science and social science as well." *Miller*, 132 S. Ct. at 2464. "Any parent" knows that their child's eighteenth birthday does not in itself impart the child with the maturity of an adult. The simplest illustration of the continuing lack of maturity and impulse control beyond the age of 18 comes from corporate behavior. Adults as old as 24 are either unable to rent a car or can only do so at much higher costs and under stricter conditions than those over 25.

www.dollar.com/en/Car_Rental_Information/Main/Rent_a_Car_Under_25.aspx. For much of the same reasons, automobile insurance rates of young adults are also much higher than for older persons. http://www.esurance.com/car-insurance-info/teen-driver-insurance-faq. Where money is at stake corporations recognize the attendant lack of maturity extends beyond a person's eighteenth birthday.

The effects of age on culpability recognized by the Supreme Court are not mitigated by the passing of one's eighteenth birthday. Thus, in a case such as this where the crime occurred a mere 10 days after Sean O'Dell turned 18, the trial court could properly consider his youth as a basis for a mitigated sentence. This court should remand to permit the court to do so. *Grayson,* 154 Wn.2d at 342 (citing *Garcia-Martinez,* 88 Wn. App. at 330).

E. CONCLUSION

For the reasons above this Court should reverse Sean O'Dell's conviction and sentence.

Respectfully submitted this 22nd day of August, 2013.

GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. SEAN O'DELL, Appellant.	)))))))))	NO. 69942-3-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ISLAND COUNTY PROSECUTOR'S OFFICE P.O. BOX 5000 COUPEVILLE, WA 98239	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] SEAN O'DELL 363646 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF AUGUST, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711