No. 90337-9
Court of Appeals No. 69942-3-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEAN O'DELL,

Petitioner.

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

PETITION FOR REVIEW

GREGORY C. LINK
Attorney for Petitioner

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner Sean O'Dell asks this Court to accept review of the opinion of the Court of Appeals in 69942-3-I

B. OPINION BELOW

The Court of Appeals concluded that trial courts are categorically barred from considering an offender's youth as a basis for a mitigated sentence. The court also opined that the statutory defense in RCW 9A.44.040(3)(b) is limited to circumstances where there is evidence of an "explicit assertion by the victim as to her age," although the statute itself does not contain such a limitation.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. 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?

2. 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?

D. 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.

E. ARGUMENT

1. A categorical bar on the consideration of youth alone as a mitigating factor at sentencing is contrary to multiple decision of the United States Supreme Court.

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. This Court has previously held "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 and young offenders "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 youthful and adult offenders "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 well 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.

A categorical ban on the consideration of youth as a mitigating factor at sentencing is contrary to decisions of the United States Supreme Court and resents a substantial constitutional issue. This Court should grant review under RAP 3.4

2. The trial court denied Sean O'Dell his 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).

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.

The Court of Appeals affirmed that decision. Opinion at 4-5. Both the Court of Appeals and trial court relied upon *State v. Bennett*, 36 Wn. App. 176, 672 P.2d 772 (1983). 1/18/13 RP 608-09. But each reads 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.

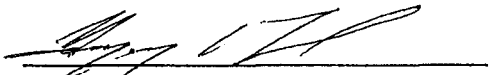
The first jury, instructed on the statutory defense, could not reach a verdict. The second jury hearing the same evidence but without an instruction on the defense found Sean guilty. Clearly that the court's the failure to instruct on the defense was the critical difference.

In affirming that outcome, the opinion reads terms into the plain language of 9A.44.040. And by doing so, the court affirms the trial court's actions which deprived Sean of his right to present a defense. The opinion presents a substantial constitutional issue warranting review under RAP 13.4.

F. CONCLUSION

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

Respectfully submitted this 27th day of May, 2014.



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

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
TDD: (206) 587-5505

April 28, 2014

Washington Appellate Project
1511 Third Avenue
Suite 701
Seattle, WA, 98101
wapofficemail@washapp.org

Gregory Charles Link
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle, WA, 98101-3635
greg@washapp.org

Island Co Prosecuting Atty
7th & Main Sts
P O Box 5000
Coupeville, WA, 98239-5000
ICPAO_webmaster@co.island.wa.us

David Carman
PO Box 5000
Coupeville, WA, 98239-5000
d.carman@co.island.wa.us

CASE #: 69942-3-I
State of Washington, Respondent v. Sean Thompson O'Dell, Appellant

Island County, Cause No. 12-1-00111-2

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Affirmed."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure
c: The Honorable Vickie Churchill
Sean Thompson O'Dell

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

STATE OF WASHINGTON, Respondent, v. SEAN THOMPSON O'DELL, Appellant.	)	No. 69942-3-I UNPUBLISHED OPINION FILED: April 28, 2014

VERELLEN, A.C.J. — Sean O'Dell appeals from his judgment and sentence for second degree rape of a child. O'Dell first asserts that the trial court erred by precluding him from arguing that he believed the victim to be older than 12 based on her purported statement that she had been told that she looks too young to drink alcohol "a lot." Although it is an affirmative defense that the defendant reasonably believed the victim was older based upon declarations as to age by the alleged victim, the lone remark O'Dell relied on was a declaration about the victim's youthful appearance, not about her age. The defense was not available based on the evidence adduced at trial. O'Dell's second argument, that the trial court erred by not considering his age of 18 as a basis for a departure downward from the standard sentencing range, is also contrary to controlling authority. In State v. Ha'mim, our Supreme Court held that "age alone" may

not be "used as a factor to impose an exceptional sentence outside of the standard range for the crime."[1] We affirm.

FACTS

Ten days after his 18th birthday, Sean O'Dell met up with his 12-year-old victim, who had snuck out of her grandmother's house late on a Sunday night. O'Dell and the 12-year-old girl originally planned to meet their mutual friend, a 13-year-old girl, to "hang out" and talk. The 13-year old sent a text message indicating that she was unable to leave the house because her grandmother was still awake. O'Dell and the 12-year-old walked to a secluded spot in the woods nearby the house to wait for their friend to join them. The two sat on a towel to keep dry, as the forest floor was wet with rain. O'Dell then held her down, pulled down her pants and underwear, and raped her. The two walked home separately. The victim went to bed in her clothes.

The next morning, her mother came to pick her up from her grandmother's and found her uncharacteristically withdrawn and angry. When her mother demanded to know what was wrong, she told her mother about the rape.

Her mother took her to the sheriff's department, where she reported the crime, then to a hospital in Everett, where she underwent a comprehensive sexual assault evaluation. Biological materials collected during the examination matched DNA[2] samples taken from O'Dell after his arrest.

The Island County prosecutor charged O'Dell with second degree rape of a child. The case was twice tried to a jury, the jury being unable to reach a verdict after the first

---

[1] 132 Wn.2d 834, 846, 940 P.2d 633 (1997).

[2] Deoxyribonucleic acid.

trial. The second jury convicted O'Dell as charged, and he was given a standard range sentence of 95 months.

O'Dell appeals.

ANALYSIS

Jury Instruction

O'Dell first asserts that the trial court erred by refusing to give a jury instruction regarding an affirmative defense to the charge of second degree rape of a child. We disagree.

An accused person has a right to present a defense, under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 22 of the Washington Constitution.[3] 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.[4] "[I]n 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."[5] Even under this lenient standard, O'Dell failed to identify evidence supporting the instruction he requested.

RCW 9A.44.030(2) provides in general that in any rape prosecution "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." However, the statute also provides, as an exception,

---

[3] Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

[4] State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000).

[5] State v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005).

> [t]hat 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.[6]

In declining to give the instruction O'Dell requested, the trial court properly relied upon State v. Bennett.[7] In Bennett, Division Two of this court rejected the argument that declarations as to age by the victim "can consist of her behavior, appearance and general demeanor."[8] The Bennett court held that the affirmative defense did not apply in circumstances where neither victim told a defendant how old she was before they were raped, and that

> [a] reading of RCW 9A.44.030(2) makes it clear that something more positive is intended. Without the proviso, the statute states that it is no defense that a defendant believes the victim to be older. The rather generalized, nonassertive manifestations of appearance, behavior and demeanor are precisely the type of conduct giving rise to such a belief. *The proviso then gives protection to the person who, in good faith, acts upon some kind of explicit assertion from the victim. Here, there was no such explicit assertion from either victim*; the statutory defense was not available to Bennett. The proposed jury instruction was properly refused.[9]

O'Dell argues that the trial court misinterpreted Bennett and that his testimony regarding a single remark his victim made entitled him to assert the affirmative defense. Specifically, O'Dell testified that the victim and their mutual friend were drinking alcohol

---

[6] RCW 9A.44.030(2)-(3).

[7] 36 Wn. App. 176, 181, 672 P.2d 772 (1983).

[8] Id.

[9] Id. at 181-82 (emphasis added) (footnote omitted).

and that he commented that she "seemed too young to be drinking," to which she replied, "I get that a lot."[10] O'Dell asserts that this was a statement by the victim regarding her age, and accordingly, the foundation for the defense was met under the Bennett requirement that he acted upon an explicit assertion from the victim.

O'Dell's argument turns on whether the victim's remark was a "declaration as to age." But only O'Dell's statement that she appeared "young to be drinking" made an express reference to the victim's age, and O'Dell's own remarks are plainly not relevant to the statutory defense.

The only relevant statement by the victim was "I get that a lot." These words in context are not an explicit assertion by the victim as to her age. Literally, the words "I get that a lot" convey only that other people have said similar things to her "a lot." The equivocal answer conveys no information about the victim's actual age. "I get that a lot" may imply that the victim heard that statement "a lot," either because she is in fact young or she appears to be young. But O'Dell provides no analysis explaining how the words "I get that a lot" convey that the victim was older than she appeared to be. Based on the arguments before us, we decline to hold that the victim's remark was a declaration as to age by the alleged victim as the statute requires. Even assuming that it was a declaration as to age, the victim's words are inadequate to provide a basis for O'Dell to reasonably believe that she was at least 14 or less than 36 months younger than him as the statute also requires.

The trial court did not abuse its discretion in finding an insufficient factual basis for O'Dell's claimed affirmative defense.

---

[10] Report of Proceedings (Jan. 18, 2013) at 542.

Sentencing

O'Dell asserts that the trial court abused its discretion by refusing to consider his age as a basis for an exceptional sentence downward from the standard range. We disagree.

In determining an appropriate sentence, a court may not consider any element that does not relate to the crime or the previous record of the defendant.[11] Our Supreme Court held in Ha'mim:

> We decline to hold that age alone may be used as a factor to impose an exceptional sentence outside of the standard range for the crime.
>
> The SRA [Sentencing Reform Act of 1981] does not list age as a statutory mitigating factor. The Act does include a factor for which age could be relevant. RCW 9.94A.390 provides a nonexclusive list of illustrative factors a court may consider when imposing an exceptional sentence and includes as a mitigating factor that the defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law was significantly impaired. RCW 9.94A.390(1)(e). However, no such finding was made in Ha'mim's case. There is no evidence in the record that the Defendant's capacity to appreciate the wrongfulness of her conduct or to conform it to the requirements of the law were in any way impaired.[12]

O'Dell fails to establish any evidentiary basis for a departure from the standard range. Like O'Dell, the defendant in Ha'mim, who was 18 when she committed her crimes, sought an exceptional sentence below her standard sentence range based on her youth.[13] The Ha'mim trial court granted the exceptional sentence, but the sentence

---

[11] RCW 9.94A.340.

[12] Ha'mim, 132 Wn.2d at 846.

[13] Id. at 837.

was overturned on appeal because age alone is not a "substantial and compelling" reason for imposing an exceptional sentence.[14]

Following the United States Supreme Court's decision in Roper v. Simmons,[15] our legislature found that "adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults. It is appropriate to take these differences into consideration *when sentencing juveniles tried as adults*," and amended RCW 9.94A.540 prospectively.[16] But this exception does not apply to O'Dell, who was an adult and not a juvenile tried as an adult. The trial court correctly declined to impose an exceptional sentence.

Affirmed.

WE CONCUR:

[14] Id. at 847.

[15] 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

[16] LAWS OF 2005, ch. 437, § 1 (emphasis added); see also LAWS OF 2005, ch. 437, § 2 (mandatory minimum terms of RCW 9.94A.540(1) "shall not be applied in sentencing of juveniles tried as adults pursuant to RCW 13.04.030(1)(e)(i)").

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69942-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent David Carman, DPA
Island County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 28, 2014