

**FILED**

OCT 30, 2015

Court of Appeals  
Division III  
State of Washington

No. 326951

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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State of Washington, Respondent

v.

Oscar Alfred Alden, Appellant

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RESPONSE TO SUPPLEMENTAL BRIEF OF APPELLANT

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## **I. STATEMENT OF THE SUPPLEMENTAL ISSUE**

Should this court remand the case for re-sentencing to address Alden's age when Alden failed to raise the issue at sentencing?

## **II. SUPPLEMENTAL STATEMENT OF THE CASE**

At the time Alden committed the crime of Murder in the Second Degree, he was nearly 24 years old (based on the testimony that he was 25 years old at the time of trial—a little over one year after the crime occurred). RP 1058.

During his trial and sentencing, substantial evidence of Alden's maturity and adulthood was introduced. Alden himself testified that he'd recently acquired a concealed pistol license as well as purchased a new gun. RP 1060. A number of persons testified about Alden and how he was a successful student who they had witnessed grow up and mature. RP 1534-37. They also testified that Alden was only a couple classes shy of obtaining his degree from Seattle Pacific University with the goal of becoming a doctor. RP 1534, 1552.

At the sentencing hearing, Alden did not raise the issue that his age or youth at the time the crime was committed may be a mitigating factor for sentencing purposes. RP 1563.

### III. ARGUMENT

A. Alden did not preserve the issue of age as a mitigating factor for appeal because he failed to raise it at sentencing.

In general, “a party must raise an issue at trial to preserve the issue for appeal, unless the party can show the presence of a ‘manifest error affecting a constitutional right.’” *State v. Fenwick*, 64 Wn. App. 392, 398, 264 P.3d 284 (2011) (quoting *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011)); RAP 2.5(a). The purpose of this rule is to encourage the efficient use of judicial resources. *Robinson* at 304. Issue preservation serves this purpose by ensuring that the trial court has an opportunity to correct any errors. *Id.* Permitting appeal of all unraised issues undermines the trial process and results in unnecessary appeals and wasteful use of resources. *Id.*

However there is a narrow class of cases where issue preservation would be counterproductive to the goal of judicial efficiency. In *In re St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (2011), the Washington Supreme Court held that new rules on constitutional interpretation must be applied retroactively to criminal cases that were not final. The holding in *St. Pierre*, which adopted federal retroactivity analysis, was subsequently synthesized with the rule of issue preservation in *Robinson*. The Washington Supreme Court in *Robinson* held that the principles of issue

preservation do not apply in the limited situation where the following four conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation. *Robinson* at 305.

A defendant's age and associated maturity and development level may be used as a mitigating factor to support an exceptional sentence. *State v. O'dell*, 183 Wn.2d 680, \_\_\_ P.3d \_\_\_ (2015). This is not a new rule; this mitigating factor has been known and available to defendants for nearly 30 years. In *State v. Rupe*, 108 Wn.2d 734, 765, 743, P.2d 210 (1987), the Washington Supreme Court held that a defendant who was 27 years old, "was not so young as to constitute a significant mitigating factor"; the court implies by this language that the age of a younger defendant may be used as a mitigating factor. In *State v. Ha'mim*, 132 Wn.2d 834, 846, 940 P.2d 633 (1997), the Washington Supreme Court held that although age alone cannot be used to support an exceptional sentence, age may nevertheless be considered as a mitigating factor when coupled with additional evidence of a defendant's capacity to appreciate the wrongfulness of his conduct.

The State acknowledges that the holding in *O'dell* modified the prior holding in *Ha'mim* but not to the extent that Alden asserts. In *O'dell*, the court reaffirmed *Ha'mim* by holding that “age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence.” *O'dell*, Slip Opinion at 17-19. However based on new scientific evidence, the court in *O'dell* revised *Ha'mim*, holding “that [youth] is far more likely to diminish a defendant’s culpability than this court implied in *Ha'mim*.” *O'dell*, Slip Opinion at 17-19.

In the present case, due to Alden’s failure to raise the issue at sentencing, issue preservation now prevents him from raising the issue of age as a mitigating factor. The issue of what constitutes a mitigating factor is an issue of statutory interpretation (of the Sentencing Reform Act). It is not an issue of constitutional interpretation, and neither *O'dell* nor *Ha'mim* ever suggests it is anything but an issue of statutory interpretation. Therefore, Alden fails to meet the first part of the *Robinson* test allowing an exception to issue preservation. Although Alden cites to *St. Pierre* to support retroactivity, the holding is limited to changes in constitutional interpretation, and subsequent cases support this reading. See e.g., *In re Personal Restraint of Grasso*, 151 Wn.2d 1, 12, 84 P.3d 859 (2004) (*St. Pierre* applies retroactivity in a case “to the extent that [it] is based on constitutional principles”); *In re Haghghi*, 167 Wn. App. 712,

723-24, 276 P.3d 311 (2012) (*St. Pierre* applied federal retroactivity analysis to state constitutional questions).

Even if *O'dell* was addressing an issue of constitutional interpretation, issue preservation nevertheless applies because *O'dell* did not create a “new rule.” In essence, the court in *O'dell* merely noted that a defendant’s age is more relevant to culpability than it had previously stated in *Ha'mim*. However youthfulness as a mitigating factor is not a “new rule” for purposes of retroactivity and it was clearly available (to assert) at the time Alden was sentenced.

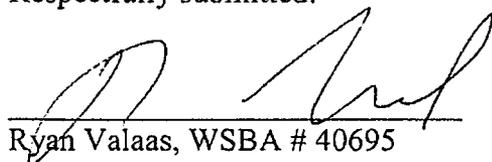
Because Alden failed to argue, at sentencing, that his age (and related culpability) at the time of the crime was a mitigating factor, he failed to preserve it for appeal. Therefore, this Court should decline to hear it.

#### **IV. CONCLUSION**

Based on the foregoing analysis, Alden’s failure to preserve the age issue should now bar him from raising it for the first time on appeal. Nothing prohibited Alden from raising the potential mitigating factor of his age and youthfulness at sentencing; the mitigating factor was available at the time of Alden’s sentencing, and he failed to raise it. His appeal should be denied.

DATED: 10/29/2015

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'Ryan Valaas', written over a horizontal line.

Ryan Valaas, WSBA # 40695  
Deputy Prosecuting Attorney

