

No. 75129-8-I

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I**

In re the Personal Restraint Petition of

KEVIN LIGHT-ROTH,

Petitioner.

FILED
Nov 14, 2016
Court of Appeals
Division I
State of Washington

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

Jeffrey Erwin Ellis #17139
Attorney for Mr. Light-Roth
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
503.222.9830 (o)
JeffreyErwinEllis@gmail.com

A. INTRODUCTION

Kevin Light-Roth argues that he is entitled to a new sentencing hearing because the law has changed and now recognizes that youth are different, both constitutionally and statutorily speaking. The State argues that Light-Roth's PRP is both untimely and successive—that the law has always recognized youth as relevant to certain mitigating circumstances. The State then argues that even if the law has changed, that Light-Roth is not entitled to application of the new law because he failed to argue for an exceptional sentence at a time when the law made that sentence unavailable.

"That's some catch, that Catch-22," he observed.

"It's the best there is," Doc Daneeka agreed.

Heller, Joseph, *Catch 22*, p. 46 (1961).

In this reply, Light-Roth shows that the law has changed and that the change in the law is material to his sentence. The change in the law does not mandate a different sentence and does not restrict the State's ability to argue what it perceives to be the aggravating aspects of the crime, but it guarantees an individualized consideration of Light-Roth's youth and empowers the sentencing judge to impose an exceptionally lenient sentence if it finds such a sentence is justified.

B. ARGUMENT

Introduction

This PRP raises the question of whether this Court's recent decision in *State v. O'Dell*, 183 Wash.2d 680, 358 P.3d 359 (2015), announced a new rule that applies retroactively. It also raises the secondary issue of whether the emerging constitutional doctrine that "children are different" applies to Light-Roth.¹

The Exceptional Sentence Law Has Changed

To determine whether *State v. O'Dell* changes the law, it is important to determine what the law was regarding whether youth was considered relevant to any mitigating circumstance prior to *O'Dell*. The Washington Supreme Court explained the applicable law in *State v. Law*, 154 Wash.2d 85, 110 P.3d 717 (2005).

Law involved the State's appeal from an exceptionally lenient sentence. The Supreme Court reversed that sentence, after comprehensively explaining the law regarding when exceptionally lenient sentences was and was not available, focusing on the earlier decision in *State v. Ha'mim*, 132 Wash.2d 834, 840, 940 P.2d 633 (1997). *Law* begins:

Our case law on this subject is well-established. We have held that the SRA establishes a two-part test to determine if a sentencing departure is justified as a matter of law.

In determining whether a factor legally supports departure from the standard sentence range, this Court employs a two-part test: first, a

¹ The State argues that RCW 10.73.140 bars this Court from considering this collateral attack because petitioner has previously filed a PRP, but then appears to concede that the good cause inquiry turns on whether there has been a change in the law.

trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range; second, the asserted aggravating or mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.

154 Wash.2d at 95, quoting *Ha'mim*, 132 Wash.2d at 840. *Law* continued:

Our cases have applied RCW 9.94A.340 to prohibit exceptional sentences based on factors personal in nature to a particular defendant.

154 Wash. 2d at 97. The Supreme Court then explained its holding in *Ha'mim*:

There, the defendant was 18 years old with no previous police contacts when she took part in the armed robbery of a beauty salon. *Ha'mim*, 132 Wash.2d at 836–37, 940 P.2d 633. The trial court, relying on the defendant's “youth” and “lack of [any] prior contact[] with the police,” imposed an exceptional sentence of 31 months, departing downwards from the standard range of 55–65 months. *Id.* at 837–38, 940 P.2d 633. **On review, this court rejected the use of age as a mitigating factor.** *Id.* at 846, 940 P.2d 633. In doing so, this court relied on RCW 9.94A.340 in concluding that “[t]he age of the defendant does not relate to the crime or the previous record of the defendant.” *Id.* at 847, 940 P.2d 633. Thus, we held that this personal factor was not a substantial and compelling reason to impose an exceptional sentence.

154 Wash. 2d at 97–98 (emphasis added). The *Law* court concluded:

In sum, this court has consistently interpreted the SRA to require mitigating and aggravating factors to relate to the crime and distinguish it from others in the same category.

Id. at 98.

Youth was regarded as not “related to the crime” because neuroscience had not enlightened us about the developing brain. Even when it did, this Nation’s courts were understandably cautious in applying that new science to the law.

The Washington Supreme Court has previously held a “significant change in the law” requires that the law, not counsels’ understanding of the law on an unsettled question, has changed. *State v. Miller*, 185 Wash. 2d 111, 116, 371 P.3d 528, 530 (2016).

Light-Roth makes a modest proposal: the Washington Supreme Court’s explanation of its prior decisions controls. *Law* makes the holding of *Ha’ mim* so clear and unequivocal that it bears repeating: categorically speaking, youth does not relate to the crime and therefore, does not diminish culpability. To argue otherwise, as the State does in its *Response*, is to suggest that the Washington Supreme Court is an unreliable authority on its own caselaw.

O’Dell does not depart from *Law* on the issue of whether the law at the time of *Ha’ mim*, *Law*, and up until *O’Dell* held that youth was not categorically irrelevant to assessing culpability and punishment. Instead, *O’Dell* holds that the statutorily created mitigating circumstances have always permitted exceptional sentences to be imposed and upheld where the defendant makes a showing of diminished responsibility. However, the Legislature could not have considered the science of the developing brain before it existed. “Thus, we decline to hold that the legislature necessarily considered the relationship between age and culpability when it made the SRA applicable to all defendants 18 and older.” *O’Dell*, 183 Wash. 2d at 693.

O’Dell then goes on to recognize:

Scientific advances in the study of adolescent brain development, unavailable to the Ha'mim court, show that youth can significantly mitigate culpability

Id. at 693 (italics in original). *O'Dell* continued:

Today, we do have the benefit of those advances in the scientific literature. Thus, we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18.

Id. at 695.

Light-Roth simply argues that the “benefit of those advances in the scientific literature” has resulted in a change of the law. What was once considered “absurd” has, with the passage of time and our increased knowledge, become the norm.

The Change in the Law is Material to Light-Roth's Sentence

Materiality does not require the ability to foretell the future. Instead, to establish that the change in the law is material to the case under review a Petitioner need only make out a prima facie case that the new law could benefit him. Light-Roth easily meets that standard. He presented un rebutted declarations regarding his youthful attributes at the time of the crime.

Despite the scientific and technical nature of the studies underlying the *Roper*, *Graham*, and *Miller* decisions, “a defendant need not present expert testimony to establish that youth diminished his capacities for purposes of sentencing.” Instead, “lay testimony may be sufficient.” *O'Dell*, 183 Wash. 2d at 697.

Thus, Light-Roth has established that the change in the law is material to his sentence.

C. CONCLUSION

Categorically speaking, a 19-year-old does not have an adult brain. That is now the starting point for the individualized consideration that flows from the recognition that “children are different” and that the distinctive attributes of youth diminish culpability. *Montgomery v. Louisiana*, 136 S. Ct. 718, 733, 193 L. Ed. 2d 599 (2016).

This Court should hold that Light-Roth’s petition is timely because the law has changed and remand for a new sentencing hearing.

DATED this 11th day of November, 2016.

Respectfully Submitted:

/s/Jeffrey Erwin Ellis
Jeffrey Erwin Ellis #17139
Attorney for Mr. Light-Roth
Law Office of Alsept & Ellis
621 SW Morrison St. Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on today's date I efiled the attached *Reply* causing a copy to be sent electronically to opposing counsel at:

ann.summers@kingcounty.gov

November 11, 2016//Portland, OR

/s/Jeffrey Erwin Ellis