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Supplemental Brief of Respondent

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No. 94950-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Personal Restraint Petition of

KEVIN LIGHT-ROTH,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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INTRODUCTION

Over the last decade, the sentencing of youth has undergone a sea change, premised on the fundamental understanding that "children are different." *Miller v. Alabama*, 567 U.S. 460, 481, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017). This realization developed due to advances in brain science, which has changed the way society understands the actions of its youth. "[W]e now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18." *State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359, 366 (2015).

This deceptively simple insight constituted a significant change in the construction of a central provision of the SRA: a sentence cannot be premised on a factor that does not "relate to the crime." RCW 9.94A.340; *State v. Law*, 154 Wn.2d 85, 92, 110 P.3d 717, 720 (2005); *see also* David Boerner, *The Use of Offender Characteristics in Guideline Sentencing: A Laboratory Report from Washington State*, 9 FED. SENT. REP. 136, 138 (1996) ("Since its initial foray into sentencing guidelines, the legislature has never varied its decision that the primary factors which should determine sentence ranges are crime and criminal history.").

For many years, age was considered unrelated to the crime:

> On review, this court rejected the use of age as a mitigating factor. In doing so, this court relied on RCW 9.94A.340 in

> concluding that the age of the defendant does not relate to the crime or the previous record of the defendant. Thus, we held that this personal factor was not a substantial and compelling reason to impose an exceptional sentence.

Law, 154 Wn.2d at 98 (internal citations and quotation marks omitted). In one case where a defendant argued that his young age limited his ability to conform his conduct or to recognize its wrongfulness, the court held that the "argument borders on the absurd." *State v. Scott*, 72 Wn. App. 207, 218, 866 P.2d 1258 (1993), *aff'd sub nom. State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995).

Over time, the science of brain development revealed a fundamental error in this reasoning. The "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472. It is not "absurd" to suggest that youth diminishes culpability because there is a "clear connection between youth and decreased moral culpability for criminal conduct." *O'Dell*, 183 Wn.2d at 695.

The court below properly understood these implications when it granted Kevin Light-Roth's PRP and remanded for resentencing where the court would have the discretion to impose an exceptionally lenient sentence if it finds that Mr. Light-Roth's youth mitigates his crime. When

Mr. Light-Roth was sentenced in 2004, the controlling precedent of *State v. Ha'mim,* 132 Wn.2d 834, 940 P.2d 633 (1997), foreclosed consideration of a defendant's youthful characteristics as mitigating.

Mr. Light-Roth acknowledges that *O'Dell* does not automatically entitle him to a reduced sentence. However, the State seeks to prevent Mr. Light-Roth from even receiving an *opportunity* to have his youthfulness considered as a mitigating factor under the new guidance of *O'Dell*.

Mr. Light-Roth respectfully requests that this Court recognize the propriety of resentencing a young adult defendant who, under *Ha'mim*, did not have the opportunity to have his youthfulness meaningfully considered. Mr. Light-Roth is entitled to a sentencing proceeding that considers how his youthfulness may have impacted his culpability.

ISSUES PRESENTED FOR REVIEW

1. Whether *O'Dell* constitutes a significant change in the law;
2. Whether *O'Dell* applies retroactively; and
3. Whether *O'Dell* is material to Light-Roth's sentence.

STATEMENT OF THE CASE

On February 5, 2003, nineteen-year-old Kevin Light–Roth shot and killed nineteen-year-old Tython Bonnett at an apartment in Federal Way, where two other young men were present. The circumstances

leading up to the shooting included the use of methamphetamine, a sex-tape, and a stolen shotgun.

On the day of the shooting, Light–Roth questioned Bonnett about his missing shotgun. Bonnett denied taking the gun, but appeared nervous. When Bonnett denied knowing about the stolen shotgun, Light–Roth shot Bonnett in the chest.

Eventually, Light-Roth was implicated in Bonnett's murder. When interrogated, Light–Roth waived his *Miranda* rights and initially denied killing Bonnett. But when the detective told Light–Roth that witnesses had reported that he shot Bonnett, Light–Roth surmised that the others present had given statements, and attempted to exchange a confession for complete immunity—an offer that the detective refused. When the detective left the interview for a short time, Light–Roth used a pen to remove his leg shackles and handcuffs and climbed into the ceiling crawl space. The ceiling collapsed and he fell to the floor in the next room. When the officers entered the room, Light–Roth said they were going to have to shoot him. Luckily for Light-Roth, the officers were able to restrain him.

The State charged Light–Roth with murder in the second degree while armed with a firearm, as well as unlawful possession of a firearm. He was convicted on both counts. At sentencing, Light-Roth received the

maximum standard range sentence of 335 months. *State v. Light-Roth*, 139 Wn. App. 1093, 2007 WL 2234613 at *5 (Aug. 6, 2007) (unpublished). Light-Roth did not request an exceptionally lenient sentence.

Light-Roth's PRP included the declarations of his mother (Noreen Light) and a cousin (Kristi O'Brien), both of whom described his personality, behavior and maturity level as a child and up to the time of his crime. His mother stated in part:

> 3. From an early age (in vitro) he was observed as a hyper-active child. His short attention span, distracted nature and impulsivity impacted his relationships with other children and his success in the classroom. With a late June birthday, Kevin was also one of the youngest in his grade, adding to the difference in his ability to delay gratification and apply appropriate social skills, compared to others in his peer cohort. Early in grade school, Kevin was diagnosed with ADHD and behavior management plans were implemented (with little success) to help him self-manage his impulse control.
> ****
> 6. In his early teens, Kevin began using alcohol and, later, other drugs. His drug use exacerbated his inability to judge risk, and to relate actions with outcomes. He befriended others who were using drugs and was increasingly drawn to high-risk, and illegal, behavior (beginning with shoplifting alcohol). Each incident involved alcohol or other drugs. Each time, he expressed sincere remorse and voiced his desire to think things through before acting; but he did not seem to have the ability to do so.
>
> 7. At the age of 19, Kevin still continued to exhibit substantial impulsivity and a limited ability to manage his behavior by thinking through the consequences of his actions and by being drawn to risky and exciting behaviors - both legal and illegal. In fact, it was not for several years after Kevin's arrest and trial did his youthful thought process decrease and eventually disappear.

Ms. O'Brien recounted:

> 5. Prior to when Kevin went to prison, I do not feel he knew how to properly act or react in social situations. On many occasions he would say inappropriate things. Often he would repeat lines or scenes he had watched from television or movies when having casual conversations with myself and others. I believe Kevin was stunted socially and emotionally due to unintentional neglect.
>
> 6. Kevin has always been highly intelligent, however very immature in many ways. I also know Kevin started experimenting with drugs and alcohol at a very young age as well. When intoxicated his behavior was erratic and out of control. There have been times when Kevin has confided to me while in tears, telling me he did not know how to be normal or fit in to society. It would break my heart because I knew he was just a little boy trying to raise himself without a lot of example to follow.

ARGUMENT

Under RCW 10.73.100(6), a significant, retroactive, material change in the law exempts a PRP from the one-year time bar for collateral attacks. Mr. Light-Roth's PRP qualifies for this exemption because he was sentenced at a time when youth was considered a personal factor unrelated to the crime. The law has since changed, and the change in the law applies retroactively and is material to Mr. Light-Roth's case. This Court should remand for resentencing, to allow for Mr. Light-Roth's culpability to be reevaluated in light of evidence of youthfulness.

A. *O'Dell* Was a Significant Change in the Law.

O'Dell constituted a significant change in the law because it overruled and abrogated prior precedent, including *State v. Law*, 154

Wn.2d 85, 95, 110 P.3d 717 (2005); *State v. Ha'mim*, 132 Wn.2d 834, 940 P.2d 633 (1997); and *State v. Scott*, 72 Wn. App. 207, 218–19, 866 P.2d 1258 (1993), *aff'd sub nom State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995).

1. A Significant Change in the Law Occurs When an Intervening Opinion Effectively Overturns a Prior Appellate Decision.

The touchstone for whether there has been a significant change in the law for purposes of RCW 10.73.100(6) is whether the defendant "could have made the argument" prior to the alleged change in the law. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258-59, 111 P.3d 837 (2005); *In re Pers. Restraint of Turay*, 153 Wn.2d 44, 51, 101 P.3d 854 (2004) ("*Turay II*"); *In re Pers. Restraint of Turay*, 150 Wn.2d 71, 83, 74 P.3d 1194 (2003) ("*Turay I*"); *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 264, 36 P.3d 1005 (2001), as amended (Jan. 15, 2002). This Court has stated numerous times that the significant change in the law exception in RCW 10.73.100(6) requires a showing of a case (or statute) that effectively overturns prior material law so that the arguments currently at issue were previously "unavailable" to the litigants.[1] *Lavery*,

[1] Not every decision announcing a new application of the law constitutes a significant change in the law. This Court has made clear that "[a]n appellate decision that settles a point of law without overturning prior precedent" is not a significant change in the law. *Turay I*, 150 Wn.2d at 83, *citing In re Pers. Restraint of Greening*, 141 Wn.2d 687, 696, 9 P.3d 206 (2000).

154 Wn.2d at 258-59; *Turay II*, 153 Wn.2d at 51-52; *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 697, 9 P.3d 206 (2000); *see also In re Pers. Restraint of Rowland*, 149 Wn. App. 496, 503, 204 P.3d 953 (2009).

The court in *Greening* elaborated on the nature of this exception:

> While litigants have a duty to raise available arguments in a timely fashion and may later be procedurally penalized for failing to do so... they should not be faulted for having omitted arguments that were essentially unavailable at the time, as occurred here. We hold that where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a 'significant change in the law' for purposes of exemption from procedural bars.

Greening, 141 Wn.2d at 697. Recently, this Court quoted this language as signaling that "[t]he 'significant change' language is intended to *reduce* procedural barriers to collateral relief in the interests of fairness and justice." *In re Pers. Restraint Yung-Cheng Tsai*, 183 Wn.2d 91, 104, 351 P.3d 138 (2015) (citing *Greening*, 141 Wn.2d at 697) (emphasis in original).

2. *O'Dell* Overturned Prior Authority Interpreting RCW 9.94A.340 and 9.94A.390 that Foreclosed the Consideration of a Youth's Immature Judgment and Impulsiveness as Mitigating Factors.

O'Dell overturned prior authority that held that youth could not be considered a mitigating factor because it did not relate to the crime. Before *O'Dell*, the controlling interpretation of RCW 9.94A.340 and 9.94A.390

(recodified as RCW 9.94A.535 by Laws 2001, ch. 10, § 6) with regard to how age and youth could be considered as mitigating factors by a court when imposing an exceptional sentence was set forth in *Ha'mim*, 132 Wn.2d at 846. Specifically, with regard to RCW 9.94A.340 and 9.94A.390, *Ha'mim* set forth three points:

> (1) under the statute, age is a personal factor that does not relate to the crime and may not, on its own, be used to impose an exceptional sentence, *Ha'mim*, 132 Wn.2d at 846;
>
> (2) age could be relevant if it related to the impairment of a "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" *id*. (citing RCW 9.94A.390(1)(e) (predecessor statute to RCW 9.94A.535)); and
>
> (3) a youth's impulsiveness and lack of mature judgment could not serve as mitigating factors under RCW 9.94A.390(1)(e), at least with regard to crimes that are not common teenage vices, *id*. (citing *Scott*, 72 Wash. App. at 218-19).

Ha'mim's general pronouncement that age could be relevant is largely foreclosed, though, by its endorsement of *Scott's* determination that lack of mature judgment and impulsiveness based on youth could not qualify for mitigation under RCW 9.94A.390(1)(e) and that such an "argument borders on the absurd." *Id.* (quoting *Scott,* 72 Wn. App. at 218). After *Ha'mim*, trial courts that granted exceptionally lenient sentences based on age and/or youth were routinely reversed on appeal unless they identified other mitigating factors. *See, e.g., State v. Wright*, 184 Wn. App.

1024, 2014 WL 5685535 (Nov. 4, 2014) (unpublished, nonbinding authority) (relying on *Ha'mim*, reversing exceptionally lenient sentence that was based on defendant's age, 18 years and 9 months old); *State v. Magana*, 165 Wn. App. 1008, 2011 WL 6091099 (Dec. 8, 2011) (unpublished, nonbinding authority) (relying on *Ha'mim*, finding that trial court erred by considering defendant's age as a mitigating factor).

Ha'mim declared that with regard to RCW 9.94A.340, "[t]he age of the defendant does not relate to the crime or the previous record of the defendant." *Id*. at 847. It further endorsed the view that wrongful conduct "cannot *seriously* be blamed" on youth and its attendant characteristics. *Id*. at 846-47 (*quoting Scott*, 72 Wn. App. at 218–19) (emphasis in original). *Law* reinforced the notion that youth is a personal factor not related to the crime and therefore could be relied upon to mitigate the sentence. *Law*, 154 Wn.2d at 98.

O'Dell rejected these sweeping conclusions, stating, "[I]n light of what we know today about adolescents' cognitive and emotional development, we conclude that youth may, in fact "relate to [a defendant's] crime." 183 Wn.2d at 695 (citations omitted). This Court also noted "that it is far more likely to diminish a defendant's culpability than this court implied in *Ha'mim*; and that youth can, therefore, amount to a

substantial and compelling factor, in particular cases, justifying a sentence below the standard range." *O'Dell*, 183 Wn.2d. at 696.

Though it left intact *Ha'mim's* holding that age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence, *O'Dell* stated explicitly, "[t]o the extent that this court's reasoning in *Ha'mim* is inconsistent, we disavow that reasoning." *Id*. at 695-96. The reasoning disavowed was *Ha'mim's* interpretation of RCW 9.94A.340 and 9.94A.390, which precluded a sentencing court from considering as a non-statutory mitigating factor a youth's lack of maturity and impulsiveness based on the notion that they do not relate to a defendant's crime or culpability. Because the argument that youth relates to the crime was unavailable prior to *O'Dell*, there has been a significant change in the law.

B. *O'Dell* Applies Retroactively.

"Whether a changed legal standard applies retroactively is a distinct inquiry from whether there has been a significant change in the law." *In re Tsai*, 183 Wn.2d at 103. Decisions based on statutory interpretation always apply retroactively because "[o]nce the Court has determined the meaning of a statute, that is what the statute has meant since its enactment." *In re Pers. Restraint of Johnson,* 131 Wn.2d 558, 568, 933 P.2d 1019 (1993); *see also In re Pers. Restraint of Hinton,* 152

Wn.2d 853, 860 n.2, 100 P.3d 801 (2004) ("statute must be applied as construed to conduct occurring since its enactment"); *Greening*, 141 Wn.2d at 693 ("When this court construes a statute, its *original* meaning is clarified. Our ruling is thus automatically 'retroactive.'") (emphasis in original); *In re Pers. Restraint of Moore*, 116 Wn.2d 30, 37, 803 P.2d 300 (1991) ("[O]nce a statute has been construed by the highest court of the state . . . *that is what the statute has meant since its enactment.*") (citing *State v. Darden*, 99 Wn.2d 675, 679, 663 P.2d 1352 (1983)) (emphasis in original).

The SRA was designed to apply equally to all offenders "without discrimination as to any element that does not relate to the crime or the previous record of the defendant." RCW 9.94A.340. *See also* David Boerner, *Sentencing in Washington*, § 2.5(a) (1985). A number of goals motivated the passage of the SRA, including the desire to combat perceived "unwarranted" sentencing disparities. David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 84-85 (2001).

In the years following *Ha'mim* and *Law*, neuroscience led this Nation's courts to dramatically alter the landscape with regard to the sentencing of youths. Applying this guidance, this Court in *O'Dell* rejected the underlying rationale of *Ha'mim* that prevented arguments

about youth and its attendant characteristics from being fairly considered under the SRA. *O'Dell*, 183 Wn.2d at 695–96. *O'Dell* stated that youth, rather than just being a personal characteristic unrelated to the crime, "may, in fact relate to [a defendant's] crime. *Id*. at 696. *O'Dell* further stated that "youth can, therefore amount to a substantial and compelling factor, in particular cases justifying a sentence below the standard range." *Id*. Further, this Court explicitly disavowed the reasoning in *Ha'mim* inconsistent with its holding that "a trial court *must* be allowed to consider youth as a mitigating factor when imposing a sentence on an offender like *O'Dell*." *Id*. (emphasis added).

In addition to construing the SRA's distinction between "personal" and "crime-related" factors, *O'Dell* construed the SRA's definition of "offender." RCW 9.94A.030(35) ("a person who has committed a felony established by state law and is eighteen years of age or older..."). Noting that the legislature made all adult defendants *in general* equally culpable for equivalent crimes, *O'Dell* construed "offender" so that particular vulnerabilities—for example, impulsivity, poor judgment, and susceptibility to outside influences—merit different treatment. *O'Dell*, 183 Wn.2d at 691 ("The trial court is in the best position to consider those factors.").

> [T]here was no way for our legislature to consider these differences when it made the SRA sentencing ranges applicable to all offenders over 18 years of age. 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.

Id. at 693.

O'Dell's construction of the provisions of the SRA extends not just to the definitions of "offender," and "personal" versus crime-related factors, but also to the list of mitigating factors found in RCW 9.94A.535(1) (successor statute to RCW 9.94A.390), holding the scope of those mitigating factors to now permit the consideration of youth. *O'Dell,* 183 Wn.2d at 696 ("[A] trial court must be allowed to consider youth as a mitigating factor[.]"); *id.* at 698–99 ("We hold that a defendant's youthfulness can support an exceptional sentence below the standard range.").

Because *O'Dell* interpreted the SRA—a statute—courts apply this new interpretation to all cases sentenced under the SRA.

C. *O'Dell* Is Material to Mr. Light-Roth's Sentence.

O'Dell is material to Mr. Light-Roth's sentence even though he did not seek an exceptionally lenient sentence. A change in the law is material if the defendant can make a showing (in his PRP or CrR 7.8 motion):

(1) the old law was in effect when he was sentenced; and

(2) he presents facts showing the relevance of the new law to him. *Cf. Zedrick v. Kosenski*, 62 Wn.2d 50, 54, 380 P.2d 870 (1963) ("'material facts' are those '. . . upon which the outcome of the litigation depends.'") (quoting *Capitol Hill Methodist Church of Seattle v. Seattle*, 52 Wn.2d 359, 364, 324 P.2d 1113 (1958)).

Requiring a defendant to have previously sought an exceptionally lenient sentence is contrary to the "change in the law" test set forth by this Court. If a defendant must show that he could not have made the instant argument under the old law because it was unavailable, it is inconsistent to then require him to have made it to establish materiality. As the Court of Appeals correctly noted in this case, it is:

> unreasonable to hold that a case announced a significant change because it made a new argument available to a defendant, and then hold that the change is not material because the defendant did not make that argument. We conclude that the change in the law *O'Dell* announced was material to Light-Roth's sentence because, under *O'Dell*, Light-Roth can now argue that his youth justified an exceptional sentence below the standard range.

In re Pers. Restraint of Light-Roth, 200 Wn. App. 149, 161, 401 P.3d 459 (2017); *see also Barnett v. Roper*, 941 F. Supp. 2d 1099, 1119 (E.D. Mo. 2013) (requiring a habeas petitioner to raise squarely foreclosed claims, would have the "perverse effect" of encouraging federal habeas lawyers to raise every conceivable (and not so conceivable) challenge).

Light-Roth has made the showing that he has at least a viable claim that he is entitled to an exceptionally lenient sentence under *O'Dell.* The sworn and uncontradicted statements he appended to his PRP are similar to the examples of "lay testimony" cited in *O'Dell* for the purpose of "evaluating whether youth diminished a defendant's culpability." 183 Wn.2d at 697-98.

His mother's observation that "[a]t the age of 19, Kevin still continued to exhibit substantial impulsivity and a limited ability to manage his behavior by thinking through the consequences of his actions and by being drawn to risky and exciting behaviors - both legal and illegal," is consistent with the science of adolescent brain development and has relevance to the homicide committed by Light-Roth, as well as his actions following his arrest.

While the determination of whether a change in the law is "material" takes into account the facts presented at the original sentencing hearing, it should not be construed to preclude the presentation of previously unpresented facts relevant to new law.

D. Mr. Light-Roth Is Entitled to Resentencing Under *O'Dell*.

O'Dell is a significant, retroactive, material change in the law and, therefore, applies to Mr. Light-Roth's PRP. Under *O'Dell*, the appropriate remedy for Mr. Light-Roth is to remand for resentencing. *See* 183 Wn.2d

at 698–99 (holding "that a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is"). This Court went on to note that "failure to exercise discretion is itself an abuse of discretion subject to reversal." *Id*. at 697 (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)).

CONCLUSION

Respondent respectfully requests that this Court affirm the decision of the Court of Appeals, which granted Respondent's PRP and remanded for resentencing.

DATED this 26th day of January 2018.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on January 26, 2018, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 26th day of January, 2018.

By: */s/ Melissa R. Lee*

Melissa R. Lee
Counsel for Respondent

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

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