No. 94950-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Personal Restraint Petition of

KEVIN LIGHT-ROTH,

Respondent.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON AND WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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I. IDENTITY AND INTEREST OF *AMICI*

The identity and interest of *Amici* are set forth in the Motion for Leave to File Brief of *Amici Curiae* filed with this brief.

II. ISSUE TO BE ADDRESSED BY *AMICI*

This Court in *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), interpreted the sentencing statute to allow consideration of youthfulness as a mitigating factor, even though case law in effect at the time of Mr. Light-Roth's sentencing, when he was age 19, prohibited consideration of that factor. Does *O'Dell* constitute a significant, material, and retroactive change in the law satisfying the exception to the one-year time limit under RCW 10.73.100(6)?

III. STATEMENT OF THE CASE

Amici rely on the facts set forth in Mr. Light-Roth's briefs below and in this Court. In 2004, Kevin Light-Roth was sentenced to nearly 28 years, the top end of the allowed sentencing range, for a murder he committed when he was only 19 years old. *In re Pers. Restraint of Light-Roth*, 200 Wn. App. 149, 152–53, 401 P.3d 459 (2017). According to this Court, the body of case law at the time Mr. Light-Roth was sentenced was "understood as absolutely barring any exceptional downward departure sentence below the range on the basis of youth." *O'Dell*, 183 Wn.2d at 698.

Eight months after the 2015 ruling in *O'Dell*, Mr. Light-Roth filed this personal restraint petition ("PRP"), arguing that the petition was timely based on the significant, material, and retroactive change in the law exception under RCW 10.73.100(6). His PRP included declarations testifying to his history of immaturity, impulsiveness, and inability to consider the consequences of his actions at the time of the offense, which would be relevant to mitigating his sentence under *O'Dell*. The declarations also stated that after serving more than 14 years in prison, Mr. Light-Roth is "now a mature, 32-year-old man who mentors others in a positive way." Declaration of Noreen Light ¶ 9.

IV. SUMMARY OF ARGUMENT

Mr. Light-Roth's PRP satisfies the exception to the one-year time limit for collateral attacks under RCW 10.73.100(6) because this Court's holding in *O'Dell* was a significant, material, and retroactive change in the law. First, a significant change in the law occurred when this Court held in *O'Dell* that a defendant's youthfulness is a lawfully considered mitigating factor that can support a lower sentence and/or an exceptional sentence below the standard range. Second, *O'Dell* is a material change in the law because it "effectively overturns" and specifically corrects the erroneous analysis in *State v. Ha'mim,* 132 Wn.2d 834, 940 P.2d 633 (1997), and other case law that adopted its rationale. Finally, this Court's prior

precedent and basic principles of fairness and justice instruct that *O'Dell* applies retroactively.

V. ARGUMENT

A. O'Dell was a significant and material change in the law.

Generally, a defendant has one year from the time a judgment becomes final to file a collateral attack against the judgment or sentence imposed. RCW 10.73.090(1). However, under RCW 10.73.100(6), an exception may be made to the time bar where there has been (1) a significant change in the law, (2) that is material, and (3) that applies retroactively. *In re Pers. Restraint of Tsai*, 183 Wn.2d 91, 103, 351 P.3d 138 (2015).

This Court has emphasized the importance of the "[b]road exceptions" to the time bar, stating that the Legislature has specifically "expand[ed] the scope of collateral relief beyond that which is constitutionally required" to include "*situations which affect the continued validity and fairness of the petitioner's incarceration*." *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 695, 9 P.3d 206 (2000) (quoting *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 440, 444–45, 853 P.2d 424 (1993)) (emphasis in original). This case presents one of those situations.

1. This Court's holding in *O'Dell* constitutes a significant change in the law.

"A significant change in state law occurs 'where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue.'" *In re Tsai*, 183 Wn.2d at 104 (quoting *In re Greening*, 141 Wn.2d at 697). "One test to determine whether an intervening case represents a significant change in the law is whether the defendant could have argued this issue before publication of the decision." *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258–59, 111 P.3d 837 (2005) (internal citation and other marks omitted).

This "significant change" test is met here. In 1993, the Court of Appeals held that it "borders on the absurd" to argue that youth could mitigate culpability. *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). In 1997, this Court published *Ha'mim*, which "embraced this reasoning—that it is 'absurd' to believe that youth could mitigate culpability" because the "age of the defendant *does not relate to the crime* or the previous record of the defendant." *O'Dell*, 183 Wn.2d at 695 (quoting *Ha'mim*, 132 Wn.2d at 847) (emphasis in original). In 2005, this Court again reaffirmed its position when it held in *State v. Law* that the age of the offender cannot be used as a factor to justify an exceptional

sentence below the standard range. 154 Wn.2d 85, 98, 110 P.3d 717 (2005) (citing *Ha'mim* 132 Wn.2d at 847).

In 2015, this Court decided *O'Dell*, acknowledging recent breakthroughs in "adolescents' cognitive and emotional development" and concluding that "youth may, in fact, relate to a defendant's crime," even if that defendant is over the age of 18. 183 Wn.2d at 696. This Court further held that youth can "amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range." *Id.* Most importantly for this analysis, this Court explicitly disavowed any reasoning in *Ha'mim* that was inconsistent with its opinion in *O'Dell*. *Id*.

While *O'Dell* did not explicitly overrule *Ha'mim* in its entirety, the Court "was addressing the same question it had already addressed in *Ha'mim* and it came to a different conclusion. It would be disingenuous to suggest that *O'Dell* merely clarified *Ha'mim*'s holding or applied settled law to new facts." *In re Light-Roth,* 200 Wn. App. at 160.

Moreover, this Court has never held that the only way to effect a significant change in the law is for an appellate court to overrule a previous case in its entirety. Indeed, this Court has repeatedly held that a significant change in the law occurs where an intervening appellate decision made an argument available regardless of whether that decision completely overruled a prior case. *See, e.g.*, *In re Greening*, 141 Wn.2d at

697–98 (holding this Court's intervening decision made available to petitioner previously unavailable argument relating to consecutive sentences); *In re Lavery*, 154 Wn.2d at 259 ("The argument that federal bank robbery and robbery in Washington are not comparable was not meaningfully available to Lavery before [*State v. Freeburg*, 120 Wn. App. 192, 84 P.3d 292 (2004)].").

This Court has also held that a significant change in the law can occur where an intervening case merely "supersede[s] the theory underlying" a body of case law that prevented an offender's ability to make an argument. *In re Tsai*, 183 Wn.2d at 107. In *Tsai*, the petitioner challenged the validity of his 2006 guilty plea after the United States Supreme Court's 2010 decision in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). 183 Wn.2d at 96. This Court viewed *Padilla* as "an affirmation of an old rule of state constitutional law—the duty to provide effective assistance of counsel includes the duty to reasonably research and apply relevant statutes." *Id.* At that time, however, "language in certain Washington appellate cases made it appear that this well-established rule did not apply" to cases in which an offender's plea may collaterally affect his or her immigration status. *Id.* This Court held that Washington appellate courts "routinely rejected the possibility that such a failure could ever be ineffective assistance of

counsel" and that the body of case law in effect before *Padilla* "apparently foreclosed any possibility" that an offender could make such an argument. *Id.* at 105–06. This Court concluded that because "*Padilla* superseded the theory underlying these decisions" and made available an argument not previously available, *Padilla* constituted a significant change in Washington law satisfying the statutory exception to the time limit on a PRP. *Id.* at 107.

Thus, the proper inquiry is not whether *O'Dell* completely overruled *Ha'mim*, *Law*, and other similar cases in their entirety. Rather, it is whether an offender could have meaningfully argued before *O'Dell* that his or her youthfulness should mitigate the sentence. Here, an offender could not have meaningfully made that argument before *O'Dell* because the courts viewed it as "absurd"; therefore, *O'Dell* constitutes a significant change in the law.

2. *O'Dell* is material to the issue of pleading youthfulness as a mitigating factor.

This Court has held that a material change in the law may be found where an intervening decision by this Court effectively overrules or corrects the erroneous analysis of a prior appellate decision. *In re Lavery*, 154 Wn.2d at 260; *In re Pers. Restraint of Vandervlugt*, 120 Wn.2d 427, 432–35, 842 P.2d 950 (1992). *In re Lavery* concerned a petitioner who

had, in 1998, been sentenced as a persistent offender based on case law concluding that his prior conviction for federal bank robbery was equivalent to robbery under Washington law for sentencing purposes. *See In re Lavery*, 154 Wn.2d at 253, *relying on State v. Mutch*, 87 Wn. App. 433, 942 P.2d 1018 (1997). Six years later, the Court of Appeals issued its decision in *Freeburg*, which held that federal bank robbery was not legally comparable to the crime of robbery in Washington. *In re Lavery*, 154 Wn.2d at 253. Shortly thereafter, Mr. Lavery filed a PRP arguing that it was not time-barred because *Freeburg* represented a material change in the law. *Id.* This Court agreed, holding that "[b]ecause *Freeburg* effectively corrected the error of the *Mutch* analysis, it represents a material change in the law." *Id.* at 260.

Similarly, in *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 560–62, 933 P.2d 1019 (1997), the Court concluded that a case setting forth the proper way to calculate an offender score was a material intervening change in the law, when the Court of Appeals had previously relied on contrary precedent in upholding the petitioner's offender score. *Id.* at 567. A "material" change in the law is not limited to calculating the sentencing score, as in *Johnson*. Rather, a change in the factors the sentencing court is allowed to consider is also material. *See In re Pers. Restraint of Rowland*, 149 Wn. App. 496, 204 P.3d 953 (2009).

In *In re Rowland*, the sentencing court imposed an exceptional sentence based in part on an offender score that included an out-of-state conviction. *Id.* at 500. On direct appeal, the Court of Appeals held the out-of-state crime was comparable to a Washington crime for sentencing purposes. *Id.* at 502. Fifteen years later, the Court of Appeals changed course and held that the out-of-state crime could not be used as a factor to determine an offender score. *Id.* at 503. The court held that the subsequent change in the law was "material" under RCW 10.73.100(6) because the sentencing court did not have the correct standard range in mind before departing from that range to issue the exceptional sentence. *Id.* at 507–09. The court remanded for resentencing and acknowledged that the sentencing court would have discretion to reduce the sentence but was not required to do so. *Id.* at 512. Nevertheless, the court granted the petition. *Id.* Similarly here, *O'Dell* was a "material" change in the law because it recognizes the sentencing court has discretion to reduce the sentence based on youthfulness, an argument that was previously considered "absurd."

Moreover, this Court's intervening decision in *O'Dell* effectively overturns and specifically corrects the erroneous analysis in *Ha'mim*. 183 Wn.2d at 696 ("To the extent that this court's reasoning in *Ha'mim* is inconsistent, we disavow that reasoning."). The *O'Dell* Court further announced *Ha'mim* contained reasoning that "has been thoroughly

undermined by subsequent scientific developments" and held, contrary to *Ha'mim*, that youthfulness can support an exceptional sentence below the standard range. *Id.* at 698. *O'Dell* is therefore material to a young offender's ability to plead youthfulness as a mitigating factor.

The fact that *O'Dell* does not mandate that every youthful offender's sentence be modified does not alter that outcome. In determining whether the change in the law is material, what matters is whether the young person being sentenced had the opportunity to argue for relief. *O'Dell* is material because prior to the case, the trial court had no choice but to sentence a young person within the standard range or above because any consideration of youth was precluded. After *O'Dell*, there is now the possibility that a young person can obtain a mitigated sentence based on youthfulness. *See Lindsey v. Washington*, 301 U.S. 397, 401, 57 S.Ct. 797, 81 L.Ed. 1182 (1937) ("Removal of the *possibility* of a sentence of less than fifteen years . . . operates to [the defendants'] detriment . . . ." (emphasis added)); *INS v. St. Cyr*, 533 U.S. 289, 325, 121 S.Ct. 2271, 150 L.Ed 347 (2001) (considering whether retroactive application of immigration statute eliminating discretionary relief would be impermissible, and noting "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.")

B. This Court's holding in *O'Dell* should apply retroactively.

1. This Court's prior precedent instructs that *O'Dell* applies retroactively.

Whether there is a significant, material change in the law and whether that change applies retroactively are two separate inquiries. *See In re Vandervlugt,* 120 Wn.2d at 435–36. "The rule established by this court is that where a statute has been construed by the highest court of the state, the court's construction is deemed to be what the statute has meant since its enactment. In other words, there is no question of retroactivity." *State v. Moen*, 129 Wn.2d 535, 538, 919 P.2d 69 (1996) (citing *In re Vandervlugt,* 120 Wn.2d at 436). This Court has long applied its holdings retroactively where it construed the meaning of a statute as it has done in *O'Dell*.

In *In re Vandervlugt,* petitioner Todd Vandervlugt pled guilty to first degree assault and first degree kidnapping while armed with a dangerous weapon. 120 Wn.2d at 428. The court imposed an exceptional sentence in 1988 based in part on a finding of future dangerousness. *Id.* In 1990, this Court issued its opinion in *State v. Pryor,* 115 Wn.2d 445, 799 P.2d 244 (1990), which held that a finding of future dangerousness *can* justify an exceptional sentence in cases involving sexual offenses. *In re Vandervlugt* 120 Wn.2d at 430. The following year, this Court issued its

opinion in *State v. Barnes*, 117 Wn.2d 701, 818 P.2d 1088 (1991), which held that a sentencing court may *not* rely on a finding of future dangerousness to support an exceptional sentence for a *non*sexual offense. *In re Vandervlugt* 120 Wn.2d at 431. Mr. Vandervlugt filed a PRP and this Court granted discretionary review on the issue of how *Pryor* and *Barnes* affected the sentencing court's finding of future dangerousness. *Id*. This Court held that both cases constituted a significant, material change in the law, which occurred after Mr. Vandervlugt's sentencing. *Id.* at 433. This Court further held that because its decision in *Barnes* "construed the meaning of a statute—the SRA," its holding should be applied retroactively back to the SRA's enactment, and that Mr. Vandervlugt was thus entitled to have the holding applied in his case. *Id.* at 436.

Likewise, in *In re Tsai*, this Court held that *Padilla* applied retroactively to the enactment of RCW 10.40.200 because the effect of *Padilla* was essentially to interpret the meaning of the statute against an "old rule of state constitutional law." 183 Wn.2d at 96, 103 ("*Padilla* thus becomes a garden-variety application of the test in *Strickland* that simply refines the scope of defense counsel's constitutional duties" to research and apply RCW 10.40.200) (internal quotation and other marks omitted)). Similarly, in *In re Johnson*, this Court held that a 1994 decision setting out the proper calculation of an offender score under former RCW

9.94A.360(8) must be applied retroactively to the petitioner's 1985 sentence. 131 Wn.2d at 568 ("Once the Court has determined the meaning of a statute, that is what the statute has meant since its enactment.").

Other cases similarly illuminate when a change in interpretation of a statute applies retroactively, supporting Mr. Light-Roth's arguments that his PRP should be considered timely. In *State v. Moen*, this Court held that its earlier decision in *State v. Krall*, 125 Wn.2d 146, 881 P.2d 1040 (1994), upholding the 60-day time limit for ordering restitution under former RCW 9.94A.142(1), applied retroactively to the enactment of the statute because *Krall* construed the meaning of the statute. 129 Wn.2d at 538–39. In *In re Pers. Restraint of Hinton*, multiple petitioners had been convicted of second degree felony murder with assault as the predicate felony. 152 Wn.2d 853, 857, 100 P.3d 801 (2004). In 2002, this Court issued its opinion in *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), which held that under former RCW 9A.32.050, a conviction of second degree felony murder could not be based upon assault as the predicate felony. *In re Hinton*, 152 Wn.2d at 857. The petitioners in *Hinton* filed PRPs arguing that their second degree felony murder convictions were invalid. *Id.* This court agreed, holding that the 2002 decision in *Andress* applied retroactively to the 1976 enactment of the statute. *Id.* at 859–60 and n.2 ("When this court construes a statute,

setting out what the statute has meant since its enactment, there is no question of retroactivity; the statute must be applied as construed to conduct occurring since its enactment.").

In *In re Greening*, petitioner David Greening pled guilty and was sentenced in 1997 for three different offenses. 141 Wn.2d at 689–90. At that time, *State v. Lewis*, 86 Wn. App. 716, 937 P.2d 1325 (1997), *rev'd sub nom. In re Pers. Restraint of Charles*, 135 Wn.2d 239, 955 P.2d 798 (1998), which construed the statute applicable to Mr. Greening's sentence, was "the determinative construction of that statute." *In re Greening*, 141 Wn.2d at 698. The year after Mr. Greening was sentenced, this Court issued its decision in *In re Charles*, which overturned *Lewis* and created a significant, material change in the law. *Id.* Because *In re Charles* construed a statute, this Court held that the change in the law applied retroactively to the enactment of the statute despite the first intervening decision in *Lewis*. *Id.* at 693 n.7 (citing *Moen*, 129 Wn.2d at 538) ("When this court construes a statute, its *original* meaning is clarified. Our ruling is thus automatically 'retroactive.'") (emphasis in original).

In *O'Dell*, this Court construed the meaning of RCW 9.94A.535(1) to allow youthfulness to justify an exceptional sentence below the standard range. 183 Wn.2d at 698–99. Therefore, in keeping with its long history of

prior precedent, the Court should also apply its holding in *O'Dell* retroactively and treat Mr. Light-Roth's PRP as timely.

2. Basic principles of fairness and justice dictate that *O'Dell* should apply retroactively to allow youthful offenders sentenced prior to *O'Dell* to assert youthfulness as a mitigating factor.

By now, this Court is well versed in the recent scientific literature on the adolescent brain demonstrating that our prior notions of youth and youthfulness were not as well informed as previously thought. As recently as 2005, this Court held that the age of an offender could not be used as a factor to justify an exceptional sentence below the standard range. *Law,* 154 Wn.2d at 98. However, only a decade later, this Court has taken great strides to recognize the legal significance of the myriad "studies that establish a clear connection between youth and decreased moral culpability for criminal conduct." *O'Dell,* 183 Wn.2d at 695. This Court further acknowledged that this "connection . . . may persist well past an individual's 18th birthday . . . ." *Id.* The attributes of youth are deeply connected to sentencing: "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences; because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." *Id.*

(quoting *Miller v. Alabama*, 567 U.S. 460, 472, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)) (internal quotation marks omitted).

In light of these revelations, this Court should acknowledge that the scientific realities underlying these conclusions apply to SRA sentencings prior to 2015 as well as to sentences imposed after *O'Dell* was published. To do otherwise would ensure that individuals whose youth did in fact mitigate their culpability would continue to serve lengthy sentences with no opportunity—then or now—to demonstrate the relationship between their youth and the crime. In sum, the basic principles of fairness and justice that led courts to embrace this research on youthfulness as a mitigating factor in sentencing also support this Court's holding that *O'Dell* should apply retroactively.

The number of other PRPs that might be filed based on the correct legal conclusion of *O'Dell*'s retroactivity cannot control the analysis. The State argues that if this Court grants Mr. Light-Roth's petition, it would "necessitate countless resentencing hearings at great cost to society and the court system." Supplemental Brief of Respondent at 15. The State is wrong. But even if the State were right, this does not justify finding that Mr. Light-Roth's petition is time-barred.

RCW 10.73.100(6) sets out one of the exceptions to the procedural time bar, which applies if the three elements are satisfied. As argued

herein, they are; therefore, the exception applies. The State's fear that additional PRPs will be filed under the same procedural exception invoked by Mr. Light-Roth—which was specifically provided by the Legislature to "expand the scope of collateral relief [for] *situations which affect the continued validity and fairness of the petitioner's incarceration*"—should not be a factor in the Court's current analysis. *In re Greening*, 141 Wn.2d at 695 (emphasis in original). The only factors the Court should consider are those that counsel whether Mr. Light-Roth's petition satisfies the three elements of RCW 10.73.100(6). If it does, then Mr. Light-Roth has met his burden under the time-bar exception.

Moreover, there are procedural and substantive requirements that will naturally limit the number of petitions the courts must address. First, the time period within which PRPs based on the Court's decision could be filed and still be considered timely is not unlimited. Rather, they would have to be filed within a reasonable time period. An endless flow of PRPs seeking resentencing based on *O'Dell* would not be allowed.

Second, because *O'Dell* made clear that youthfulness as a mitigating factor must be an individualized inquiry, there is no reason to believe that all sentences being currently served by people who were age 25 or younger at the time of the offense would be re-opened. PRPs that are timely filed may still be rejected because the record does not support the

petitioner's claim of youthfulness or does not support that the petitioner's youthfulness relates to the crime. *See In re Vandervlugt*, 120 Wn.2d at 438 ("Our decision to vacate Vandervlugt's sentence does not mean that all exceptional sentences based on findings of future dangerousness must be vacated in nonsexual offense cases. Each petition must be considered on its own facts.").

Third, those PRPs that are timely filed and are not immediately rejected for lack of evidentiary support would seek only to have their sentences reviewed. They would not be able to request that the court invalidate their convictions or go through a lengthy retrial process years after their judgments were made final.

Finally, for those cases in which youthful offenders' sentences are successfully reduced in line with the Court's holding in *O'Dell*, this will simply result in reduced costs for Washington state, which will no longer have to pay for unlawfully long prison sentences that were previously imposed on young offenders.

VI. CONCLUSION

For the reasons set forth herein, this Court should hold that its decision in *O'Dell* constitutes a significant, material, and retroactive change in the law satisfying the exception to the one-year time limit under

RCW 10.73.100(6) and further hold that Mr. Light-Roth's petition is not time-barred.

RESPECTFULLY SUBMITTED AND DATED this 2nd day of February, 2018.

ACLU OF WASHINGTON FOUNDATION

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of February, 2018.

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