70518-1

70518-1

NO. 70518-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

SAY KEODARA,

Appellant.



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

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# APPELLANT'S OPENING BRIEF

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NANCY P. COLLINS
Attorney for Appellant

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

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## A. INTRODUCTION

Due to the vast amount of personal information easily accessed through a person's cell phone, police must have a warrant to search for even one text message on a cell phone. However, a warrant is unconstitutionally overbroad if it authorizes unrestricted access to private information that is unconnected to the criminal investigation underlying the warrant. The police obtained a warrant allowing full access to all information on Say Keodara's cell phone, without limits on the type of information, the date it was stored on the phone, or specific connection of the cell phone to criminal activity. The evidence obtained from the overbroad warrant should have been suppressed.

Mr. Keodara was 17 years old when the offenses occurred. The court imposed a sentence equivalent to life in prison based on a sentencing scheme that does not permit it to weigh whether a youthful offender is less culpable than a mature adult. The sentence violates the Eighth Amendment and article I, section 14 of the state constitution.

## B. ASSIGNMENTS OF ERROR

1. The search of Mr. Keodara's cell phone violated the Fourth Amendment and the greater protections of article I, section 7.

2. The court erred by denying the motion to suppress evidence gathered from the cell phone.

3. The sentence imposed by the court violates the Eighth Amendment and article I, section 14.

4. Mr. Keodara received ineffective assistance of counsel at sentencing.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A search warrant must insure the invasion of privacy is no more than necessary by restricting the search to items for which the issuing judge has found probable cause of criminal activity. Searches of digital information involve a heightened risk of intrusiveness and require additional privacy protections. The police obtained a warrant to search Mr. Keodara's cell phone for all information stored or accessed through it, even if it had no connection to the alleged offenses used as the basis for the warrant. Did the warrant fail the particularity requirement of the Fourth Amendment and impermissibly invade Mr. Keodara's private affairs in violation of article I, section 7.

2. When a child commits a crime and faces a sentencing scheme crafted for adult offenders, the sentencing court must adjust the sentence to account for his reduced blameworthiness and capacity for

rehabilitation under controlling case law from the United States Supreme Court. The Sentencing Reform Act (SRA) does not permit a judge to reduce a person's sentence based on personal circumstances such as youth or rehabilitation. Is the sentencing court constitutionally required to consider whether a youthful offender's reduced culpability and capacity for rehabilitation merit a sentence below the adult-based standard range?

3. Article I, section 14 provides more protection against cruel punishment than the Eighth Amendment. Does it violate article I, section 14 to impose a *de facto* life sentence on a child by applying mandatory minimum sentencing requirements that do not account for youth and its attributes?

4. An attorney's failure to inform the court of its discretion to impose a lower sentence constitutes ineffective assistance of counsel. Mr. Keodara's attorney did not ask the court to depart from the standard range even though the United States Supreme Court has declared life sentences are presumptively cruel and unusual punishment when imposed on children. Did Mr. Keodara receive ineffective assistance of counsel at sentencing?

D. STATEMENT OF THE CASE

At about 3 a.m. on September 9, 2011, three men and one woman were drinking beer at a bus shelter on Rainer Avenue. 5/8/13RP 20, 118, 122-23. A car pulled up, someone inside offered "soft," meaning cocaine, and one of the men at the bus shelter expressed interest. *Id.* at 128. When the potential sellers got out of their car, they learned that the potential buyer had no money. *Id.* at 129. One potential seller pulled out a gun and demanded everyone hand over the money from their pockets, but no one had money. *Id.* at 132. This man shot at all four people. *Id.* at 136. One man died and the other three received gunshot wounds. 5/9/13RP 46; 5/13/13RP 13, 18, 21.

None of the surveillance cameras from nearby stores captured the shooting, but some showed fuzzy images of a car possibly used by the sellers. Exs. 17, 18, 19; 5/13/13/RP 138. One camera showed a grainy picture of a man in a blue sleeveless jersey with writing on it, similar to the description of the shooter. 5/8/13RP 154; Ex. 18. It may have been a blue jersey from the Charlotte Hornets, which is a "very common NBA jersey." 5/13/14RP 90.

Sharon McMillon, the woman at the bus shelter, was the only eyewitness to the shooting who testified at trial. *Id.* at 118. She

described the shooter as about 23 years old, with no facial hair and no tattoos. *Id.* at 153-54. Say Keodara has large tattoos on his arm. Ex. 62B; 5/16/13RP 39. Ms. McMillon did not identify Mr. Keodara as the shooter in court.

Mr. Keodara was charged several months later. CP 1. Police showed a "very blurry" photograph taken from surveillance video to Lacona Long, a then-15-year old who had dated Mr. Keodara for two months in 2011. 5/13/13RP 142, 145-46. She agreed that the picture showed Mr. Keodara but later said that the image was such a poor quality that she would not have been able to say it showed Mr. Keodara if the police had not prompted her. *Id.* at 149.

Nathan Smallbeck, who met Mr. Keodara when they were both at a juvenile boot camp, told police that Mr. Keodara had called him after the shooting and said he "just shot at a bus station." 5/13/13RP 36. He also claimed Mr. Keodara told him the shooting involved homeless people, but another friend said that he had told Mr. Smallbeck about the incident from the television news. *Id.* at 37; 5/15/13RP 43. Mr. Smallbeck insisted he received the call from Mr. Keodara at 3:18 a.m. the day of the shooting. 5/13/13RP 35. However, telephone records did not show Mr. Smallbeck receiving such a call or other calls he claimed

to have received from Mr. Keodara after the incident. 5/13/13RP 62; 5/14/13RP 31, 33.

The State tried to connect Mr. Keodara to the crime scene through his cell phone. They had seized the phone when arresting him for an unrelated incident about five weeks after the shooting. 5/15/13RP 8, 10. They obtained a warrant to search through all contacts, all pictures, all text messages, all phone calls, and any other stored information on the phone. CP172.

Mr. Keodara objected to this warrant as overbroad and asked to suppress all evidence improperly seized from the phone. 5/2/13RP 23, 26; CP 83-87. The court denied his motion to suppress without an evidentiary hearing. 5/2/13RP 28. At trial, the State used text messages and pictures taken from the seized phone to show that Mr. Keodara wore clothing similar to that worn by the shooter, his relationship with Ms. Long, and how he looked near the time of the incident. *Id.* at 28-30; 5/15/13RP 19-23; Ex. 62; CP 241-47. It also used the cell phone to obtain tracking information indicating the phone was in the area of the shooting at the time of the shooting. 5/14/13RP 11, 27-28, 103, 141-49.

Mr. Keodara was convicted of the charged offenses of first degree murder and three counts of first degree assault, each with a

separate firearm enhancement, as well as unlawful possession of a firearm in the first degree. CP 179-81. Acknowledging that Mr. Keodara was 17 years old at the time of the incident, the court imposed a sentence at the low end of the standard range at the State's request. 6/14/13RP 39, 44. Defense counsel made no sentencing argument other than joining the State's request for a low-end sentence. *Id.* at 40-41. Based on statutory consecutive sentencing requirements, Mr. Keodara received a standard range sentence of 831 months in prison, including 240 months of consecutive firearm enhancements for which no good time is permitted. CP 297; RCW 9.94A.729.

E. ARGUMENT.

1. **The overbroad, generalized search warrant authorizing a seizure of all data contained in a cell phone unreasonably invaded Mr. Keodara's private affairs contrary to the Fourth Amendment and Article I, section 7**

a. *A search warrant must be particularized in its scope to be constitutionally valid.*

One of the "driving forces" in creating the Fourth Amendment was the founder's opposition to "general warrants" that allowed the government "to rummage through their homes in an unrestrained search for evidence of criminal activity." *Riley v. California*, _ U.S. _, 134

S.Ct. 2473, 2494 (2014); U.S. Const. amend. 4.[1] In *Riley*, the Supreme Court unanimously agreed that because modern cell phones are essentially "minicomputers" capable of storing an enormous amount of information about "the privacies of life," they cannot be searched without a warrant. *Id.* at 2489, 2495. However, a warrant that gives police "unbridled discretion to rummage at will among a person's private effects" is also contrary to the Fourth Amendment. *See id.* at 2492.

Under the Fourth Amendment, "a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." *Kentucky v. King,* _U.S. _, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011). Particularity requires that the warrant "must specify the items to be seized by their relationship to the designated crimes." *United States v. Galpin*, 720 F.3d 436, 446 (2nd Cir. 2013). There must also be a nexus between the objects to be seized and the probable cause upon which the warrant is

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[1] The Fourth Amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

based. *Id.* The purpose of the particularity requirement is to ensure that "the permitted invasion of a suspect's privacy and property are no more than absolutely necessary." *Id.* (citing *United States v. George*, 975 F.2d 72, 76 (2nd Cir. 1992)).

"[T]he particularity requirement assumes even greater importance" when the property to be searched is a computer. *Id.* Cell phones, like computers, are capable of storing immense amounts of private information, including tracking a person's location over long periods of times, collecting any personal contacts, and holding thousands of photographs with dates, locations, and descriptions. *Riley*, 134 S.Ct. at 2489-90. Consequently, searches of digital information "involve a degree of intrusiveness much greater in quantity, if not different in kind, from searches of other containers." *United States v. Payton*, 573 F.3d 859, 861 (9th Cir. 2009).

"It is well-established that article I, section 7[2] is qualitatively different from the Fourth Amendment and provides greater protections." *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). Article I, section 7 "clearly recognizes an individual's right to privacy

[2] Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

with no express limitations and places greater emphasis on privacy." *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999).

In *Hinton*, decided before *Riley*, the Washington Supreme Court held that the contents of text messages are protected private affairs under article I, section 7, even those sent to someone else and read by the police on the recipient's phone. 179 Wn.2d at 869-70. Washington has a long history of protecting personal and sensitive information conveyed over telephones, favoring individual privacy by restricting the police from access to such information. *Id.* at 871-72, 874.

Text messages encompass "intimate subjects" as well as a "wealth of detail about a person's familial, political, professional, religious, and sexual associations." *Id.* at 869 (quoting *United States v. Jones*, _U.S. _, 132 S.Ct. 945, 955, 181 L.Ed.2d 911 (2012) (Sotomayor, J. concurring)). The scope of private information available on a cell phone requires "greater vigilance" from courts when authorizing a search that "could become a vehicle for the government to gain access to a larger pool of data that it has no probable cause to collect." *United States v. Schesso*, 730 F.3d 1040, 1042 (9th Cir. 2013). Whether a search warrant contains a sufficiently particularized description permitting seizure of information for which there is

probable cause is reviewed *de novo*. *State v. Perrone*, 119 Wn.2d 538, 549, 834 P.2d 611 (1992).

b. *The search warrant authorizing unlimited access to a cell phone's private information violated the particularity requirement of the Fourth Amendment and the protections of article I, section 7.*

The warrant used to search Mr. Keodara's cell phone was premised on probable cause of fourth degree assault, unlawful possession of a firearm, and possession of a controlled substance with the intent to deliver. CP 174. These alleged offenses were based on discrete incidents in time and place: the assault occurred October 14, 2011, where an unnamed person claimed Mr. Keodara was driving a car involving in a "bb gun" shooting; and the firearm and drug possession arose from Mr. Keodara's October 20, 2011 arrest, where he was a passenger in a car that contained firearms and "three bags of mushrooms in the trunk, located in a camera bag next to paperwork belonging to Michael Pol (the driver of the vehicle)." CP 167, 175. Mr. Keodara's backpack was seized at the time of his October 20, 2011 arrest and the cell phone was inside his backpack. CP 175.

Under the particularity requirement, there must be a nexus between these specific offenses and the search authorized by the

warrant to ensure that the invasion of privacy is "no more than absolutely necessary." *Galpin*, 720 F.3d at 446. Yet the warrant permitting the search of Mr. Keodara's cell phone contained no limitation in time, place, or scope.

The court authorized the police to broadly search the phone and seize evidence of any criminal activity located, including:

> Stored phone contact numbers, all call history logs, all text messages, all picture messages, chat logs, voicemail messages, photographs, and information contained in any save address databases or SIM cards within the cell phone, pictures, videos, a forensic image of the storage media, all documents, chat and internet activity and electronic data that identifies the owner or users of the cellular phone.

CP 172.

Although execution of the warrant was required within ten days, once seized the warrant did not limit the State's access to information from the cell phone. *Id.* It authorized the police to copy all "storage media,"[3] so the police could search through all stored information. *Id.* The warrant did not put any limits on the topics of information for

[3] "Storage media" means "any device capable of holding information" and includes memory cards or cloud storage. *See* Computer Hope, Computer Dictionary -S, available at: http://www.computerhope.com/jargon/s/stordevi.htm (last viewed July 21, 2014). "Without a storage device, your computer would not be able to save any settings or information." *Id.*

which the police could search. *Id.* It did not limit the search to information generated close in time to the incidents for which the police had probable cause. *Id.*

In a recent case involving the government's request to examine electronic records in the context of baseball players suspected of using steroids, the Ninth Circuit warned that a broad search for computer records posed a "serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant." *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 1006 (9th Cir. 2009), *affirmed*, 621 F.3d 1162 (9th Cir. 2010). In *Riley*, the Supreme Court similarly suggested that search protocols limit the scope of an invasion into a person's privacy when rummaging through the host of information accessed through a person's cell phone. 134 S.Ct. at 2491.

Here, the search warrant application claimed the need to search Mr. Keodara's phone because he was a known member of a gang and "it is common for gang members to take pictures of themselves" posing with firearms or before or after committing crimes. CP 175. The detective alleged that the phone would contain "evidence of gang affiliation" and "criminals often text each other or their buyers

photographs of the drugs intended to be sold or recently purchased. Gang members will often take pictures of themselves or fellow gang members with their cell phones such show them using drugs." *Id.*

Being affiliated with a gang is protected First Amendment activity. *State v. Scott*, 151 Wn.App. 520, 526, 213 P.3d 71 (2009) ("Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association."). A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.3d 525 (1978); *Perrone*, 119 Wn.2d at 547 (where warrant authorizes search for materials protected by First Amendment "the degree of particularity demanded is greater").

In *Perrone*, there was probable cause to seize child pornography from the defendant's home, but the search warrant allowed the police to search for items related to adult pornography, drawings, and sexual paraphernalia, which are lawful to possess and implicate First Amendment protected activities. 119 Wn.2d at 551. Although the warrant also referred to illegal "child pornography," it authorized police

to search materials that were not illegal. *Id.* at 553. The court concluded that the warrant was overbroad by "vesting too much discretion in the executing officers" and authorizing a general search of materials protected by the First Amendment. *Id.* at 559. Similarly to *Perrone*, the search warrant gave vast discretion to the police to search for legal contacts, pictures, and messages merely because it might reflect affiliation with a gang, which is not illegal.

Furthermore, generalizations about how drug dealers keep drugs and records of drug selling in their residences do not provide "a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched." *State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999). An affidavit that is simply "a declaration of suspicion and belief" about the habits typical of certain types of people who commit crimes "is legally insufficient." *Id.* Consequently, "generalities" alone are not reasonably specific enough to establish a basis to search a particular place. *Id.* at 147-48.

In the case at bar, the warrant application used generalities about how people behave who are involved in gangs or sell any type of drugs. It was not based on an allegation about Mr. Keodara's use of his phone or how people in a car that contains illegal mushrooms behave. It

authorized the police to search through "all" call history, all contacts, all text messages, and internet history stored through the phone. The police had license to search information that had no nexus to whether Mr. Keodara was involved in the alleged criminal activity on October 14 or 20, 2011, and encompassed material protected by the First Amendment.

For example, the State searched text messages pursuant to the warrant that it used at Mr. Keodara's trial. These texts involved communicating with girls about meeting them. There is nothing related to an assault, illegal gang activity, or drug possession in these friendly, potentially romantic chats. The State's desire to obtain information about Mr. Keodara's personal relationships and affiliations is not justified by the limited assertion of probable cause.

The search warrant contained no limits on the types of text messages, photographs, "call history," "chat logs," or other "internet activity." The police had free reign to read through records contained in the phone, at their leisure, having a forensic image of all data obtained from the phone. The breadth of this invasion of Mr. Keodara's private affairs was not justified by the probable cause alleged describing his involvement in a discrete incident and at single point in time.

Given the ubiquity of cell phones and the broad scope in which cell phones are used to accomplish daily tasks, the police did not provide reasonably specific information required to gain unlimited access to rummage through all private information stored on a cell phone based on the allegation of gang affiliation and habits of gang members or drug sellers.

The warrant wildly exceeded the scope of the offenses for which the State had probable cause and its lack of limitations on the personal, intimate information that could be seized from Mr. Keodara's phone violated article I, section 7 and the Fourth Amendment.

c. *The evidence seized from the phone must be suppressed.*

The photographs and text messages were seized following a wholesale rummaging of digital information stored on Mr. Keodara's cell phone including text messages about whether Mr. Keodara owned and wore blue colored jerseys or knew "Lacana babe," i.e. State's witness and Mr. Keodara's former girlfriend Lacona Long, and a photograph showing him wearing a hat with the Hornets basketball team logo. Ex. 62; 5/15/13RP 19-23.

Evidence obtained pursuant to an unconstitutional search and fruits of an illegal search must be suppressed. *Perrone*, 119 Wn.2d at

556; *see State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002) ("The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means."); *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ("The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.").

The court's failure to suppress evidence obtained in violation of article I, section 7 and the Fourth Amendment "is constitutional error and is presumed to be prejudicial. *State v. McReynolds*, 117 Wn.App. 309, 326, 71 P.3d 663 (2003). "State bears the burden of demonstrating the error is harmless." *Id.* "Constitutional error is harmless only if the State shows beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." Id.

No eyewitnesses identified Mr. Keodara as the shooter and, as the defense explained in its opening statement, this case is a "who dunnit." 5/8/13RP(opening) 16. The prosecution rested its case on stacking together threads of evidence that alone would not have proved Mr. Keodara's involvement. Demonstrating its reliance on the text messages and pictures seized from his cell phone, the State featured them in its Power Point display in its closing argument. CP 241-47; Ex.

62. It was critical for the prosecution to show that Mr. Keodara was the person wearing the jersey, with short hair, shown in blurry surveillance video. It used the text messages and photographs seized from the phone as a result of the overbroad, general search warrant to make this point. Absent the evidence unlawfully seized from the cell phone and its fruits, the prosecution cannot prove beyond a reasonable doubt that the result would have been the same.

2. **Mr. Keodara's sentence is the equivalent of life without the possibility of parole for offenses committed when 17 years old, in violation of the Eighth Amendment and contrary to *Graham* and *Miller***

a. *It constitutes unconstitutionally cruel punishment to impose a sentence amounting to life in prison on a 17-year-old child based on an adult sentencing range.*

Because even children who commit terrible crimes are not as morally culpable as adults, the United States Supreme Court has overturned laws permitting the imposition of the harshest sentences on juveniles. *Miller v. Alabama*, _ U.S. _, 132 S.Ct 2455, 2460, 183 L.Ed.2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 74, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 578, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); U.S. Const. amends. 8, 14; Const. art. I, § 14. The Court's reasoning draws from the evolving

science of brain development and sociological studies, but its resulting rule of law is grounded in the fundamental constitutional principle prohibiting excessive sanctions under the Eighth Amendment.

Children are "constitutionally different from adults for purposes of sentencing." *Miller*, 132 S.Ct. at 2464. They are categorically less blameworthy and more likely to be rehabilitated. *Id.*; *Roper*, 543 U.S. at 572. The principles underlying adult sentences -- retribution, incapacitation, and deterrence -- do not to extend juveniles in the same way. *Graham*, 560 U.S. at 71. Children are less blameworthy because they are less capable of making reasoned decisions. *Miller*, 132 S.Ct at 2464. Scientists have documented their lack of brain development in areas of judgment. *Id.* Also, children cannot control their environments. *Id.* at 2464, 2468. They are more vulnerable to and less able to escape from poverty or abuse and have not yet received a basic education. *Id.* Poverty, abuse, or dysfunction at home further impair the brain's development. Most significantly, juveniles' immaturity or failure to appreciate risk or consequences are temporary deficits. *Id.* at 2464. As children mature and "neurological development occurs," they demonstrate a substantial capacity for change. *Id.* at 2465.

Incapacitating a child for the rest of his life is rarely justifiable when a juvenile's developmental immaturity is temporary and her capacity for change is substantial. *Id.* at 2464-65; *see* M. Levick, et al, "The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence," U. Pa. J.L. & Soc. Change, 297 (2012). Consequently, imposing a severe penalty on a person whose "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity" fails the Eighth Amendment's requirement of proportional punishment. *Roper*, 543 U.S. at 571; *accord Miller*, 132 S.Ct. at 2469.

In *Graham*, the Supreme Court categorically barred a sentence of life without the possibility of parole for a non-homicide offense committed by a person. 560 U.S. at 78-79. Although *Miller* did not categorically bar a sentence of life in prison without parole for a juvenile convicted of homicide, it held that such a severe sentence is constitutionally permissible only in the rarest of circumstances where there is proof of "irreparable corruption." 132 S.Ct. at 2469.

It is necessary to evaluate a youth's individual circumstances *before* imposing a sentence. 132 S.Ct. at 2468; *see People v. Gutierrez*, 324 P.3d 225, 268-69 (Cal. 2014) (construing requirements of *Miller*).

Relevant mitigating factors the judge must consider before imposing sentence are: (1) "chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) family and home environment; (3) the circumstances of the homicide, including extent of participation and the effects of peer or familial pressure; (4) whether "incompetencies associated with youth" impaired his ability to navigate the criminal justice system; and (5) the possibility of rehabilitation. 132 S.Ct. at 2468. *Miller* requires the sentencing judge to treat children differently from adults for sentencing purposes. 132 S.Ct. at 2469.

Mr. Keodara received a sentence of 831 months, or 69.25 years in prison. CP 297. The average life expectancy for men in the United States is 77.4 years, while prison accelerates the negative consequences of aging.[4] The United States Sentencing Commission defines a life sentence as 470 months (or just over 39 years), and treats 64 years of age as the life expectancy for a person in the general prison population.[5]

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[4] http://en.wikipedia.org/wiki/List_of_countries_by_life_expectancy (last viewed July 18, 2014).

[5] U.S. Sentencing Commission Preliminary Quarterly Data Report (through June 30, 2012) at A-8, available at: http://www.ussc.gov/DataandStatistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2012_3rd_Quarter_Report.pdf (last viewed July 18, 2014).

*See United States v. Nelson*, 491 F.3d 344, 350 (7th Cir. 2007) (relying on 470 months as life expectancy in federal prison "as determined by the United States Census Bureau" when sentencing offender). A study of incarcerated people in Michigan found that life expectancy is far lower for a person who starts serving a lengthy prison term as a child, dropping to an average of 50.6 years for people who started serving life sentences as children. Michigan Life Expectancy Data for Youth Serving Natural Life Sentences.[6] Another study found that overall life expectancy decreases by two years for every year actually spent in prison. Evelyn J. Patterson, "The Dose-Response of Time Served in Prison on Mortality: New York State 1989-2003, American Journal of Public Health, March 2013, Vol. 103, No. 3, pp. 523-528. With little ability to earn early release time, Mr. Keodara has been sentenced to the equivalent of life in prison.

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[6] Available at: http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (last viewed July 18, 2014).

b. *The court must meaningfully weigh a child's moral culpability and capacity for rehabilitation in order to comply with the constitution, contrary to the SRA.*

"Criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Miller*, 132 S.Ct. at 2465; *Graham*, 130 S.Ct. at 2027. A minor's chronological age is a "relevant mitigating factor of great weight." *Miller*, 132 S.Ct. at 2467 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 116, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)). In addition, the court "must" take into account the child's "background and emotional development" in assessing culpability. *Id.*

In Washington, the SRA governs sentencing for any person convicted of a felony in adult court. Under this scheme, a standard range sentence presumptively applies unless the court finds substantial and compelling reasons to depart from it. *State v. Law,* 154 Wn.2d 85, 94, 110 P.3d 717 (2005) ("Generally, a trial court must impose a sentence within the standard range."). Case law construing the SRA bars courts from imposing a sentence less than the standard range based on "youth (and all that accompanies it)," even though the Eighth Amendment requires the court to do so. *See Miller*, 132 S.Ct. at 2469.

In *Law*, the defendant was convicted of theft in the first degree and had a lengthy criminal history. 154 Wn.2d at 89. She asked for a reduced sentence, below the standard range, based on her strides in rehabilitating herself. *Id.* at 89-90. She was successfully addressing her drug addiction and improving her parenting skills so she could retain custody of her son; a prison sentence would negatively impact her recovery and her relationship with her young children. *Id.* at 90.

The trial court gave her an exceptional sentence below the standard range but the Supreme Court reversed this sentence because none of the SRA's stated purposes justified a mitigated sentence for the reasons relied on by the trial court. *Id.* at 95-96. It held that the trial court's subjective belief that a person's rehabilitation merits a lesser sentence "is not a substantial and compelling reason justifying a departure." *Id.* at 96.

The *Law* Court explained that case law "prohibit[s] exceptional sentences based on factors personal in nature to a particular defendant." *Id.* at 97. A "personal factor" includes an offender's age, which may not be considered as a reason to impose a sentence less than the standard range. *Id.* at 98. The court also relied on *State v. Ha'mim*, 132 Wn.2d 834, 846-47, 940 P.2d 633 (1997), which reversed an exceptional

sentence imposed based on the youth of an 18 year-old offender and her lack of criminal history. *Id. Law* emphasized that case law has "consistently" held that factors permitting a court to deviate from the standard range must "relate to the crime and distinguish it from others in the same category," and may not be factors personal to the defendant, including age, family circumstances or capacity for rehabilitation. *Id.*

But "removing youth from the balance" and subjecting a juvenile to the most severe penalties "contravenes *Graham*'s (and also *Roper*'s) foundational principle" that a judge may not impose such penalties on juveniles "as though they were not children." *Miller*, 132 S.Ct. at 2466. It is appropriate to reconsider established rules when they are incorrect and harmful under the doctrine of stare decisis. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 343, 217 P.3d 1172 (2009). Prior decisions are harmful when they threaten a fundamental constitutional principle. *Id. Graham* and *Miller* demonstrate that the prior rules requiring a sentencing judge to impose an adult-based sentencing range of life in prison upon a juvenile -- without accounting for his age and its attributes -- violates the fundamental principle barring cruel and unusual punishment. This Court should re-examine

*Law* as it applies to juveniles and construe the exceptional sentence statute consistently with *Miller*.

The court could not meaningfully consider the Eighth Amendment analysis of *Miller*, *Graham* and *Roper* when it adhered to a sentencing scheme that precludes reducing a person's sentence based on personal characteristics.

For Mr. Keodara, "consecutive sentences were presumptively called for," by statute based on three counts of first degree assault and one count of first degree murder, which are "serious violent offenses" unless the court found adequate reasons to depart from this presumption and impose an exceptional sentence below the standard range. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 330-31, 166 P.3d 677 (2007); RCW 9.94A.589(1)(b). Mr. Keodara bore the burden of convincing the court that the offenses should not count as separate and distinct incidents and that there were substantial and compelling reasons to depart from the presumptive sentence. *See State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013); *see also State v. Rogers*, 112 Wn.2d 180, 185, 770 P.2d 180 (1989).

Mr. Keodara is entitled to a new sentencing hearing at which there is no presumption favoring consecutive, standard range terms.

3. **The flat sentence of 70 years in prison is unconstitutional because there is no meaningful opportunity for release.**

Sentencing a juvenile to spend the rest of his life in prison is the "harshest possible penalty" available. *Miller*, 132 S.Ct. at 2469. It is a penalty reserved for those who are irreparably corrupt, beyond redemption, and unfit to reenter society notwithstanding the diminished capacity and greater prospects for reform that ordinarily distinguishes juveniles from adults. *Id.*

The 70-year determinate sentence imposed on Mr. Keodara does not include an opportunity for release based on his rehabilitation. It requires him to spend the rest of his life in prison without the court determining he is irreparably corrupt or beyond redemption.

Our Supreme Court has acknowledged "our repeated recognition that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment." *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000); Wash Const. art. I, § 14. This "established principle" requires no analysis under *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986). *Id.* at 506 n.11. Given the Eighth Amendment's almost categorical prohibition on sentences of lifetime incarceration for a juvenile, article I, section 14 further bars the

imposition of a determinate term of prison lasting the rest of a child's life when that sentence was imposed without regard for the child's capacity for rehabilitation. *See, e.g.*, *State v. Lyle*, 11-1339, 2014 WL 3537026, *4, 20 (Iowa July 18, 2014) (using federal analytical framework and state constitutional authority to hold that mandatory sentences for juvenile offenders are cruel and unusual punishment).

The Legislature has recognized the gross disproportionality in imposing harsh prison sentences on children convicted of serious offenses by removing mandatory minimum sentences for them. RCW 9.94A.540(3) (declaring mandatory minimum terms "shall not be applied in sentencing of juveniles tried as adults"). The reason for this change was because mandatory minimums did not permit courts to take into account the differences in "adolescent intellectual and emotional capabilities" which "differ significantly from those of mature adults." *Laws* 2005, ch. 437 § 1.

It has also enacted a new mechanism for people convicted as juveniles to demonstrate their rehabilitation and receive parole by initiating their own petitions to the Department of Corrections, after serving 20 years. RCW 9.94A.641. This new law was enacted in recognition of the unconstitutional application of the SRA to juveniles.

It will apply to Mr. Keodara, but it does not correct the constitutional invalidity of the sentence and was premised on the court's lack of understanding that it should have had discretion to depart from the standard range. *See Gutierrez*, 324 P.3d at 267 (doubting that potential to later alter life sentence "based on future demonstration of rehabilitation" corrects invalidity of legally erroneous sentence). Furthermore, parole eligibility is an act of "grace"; it does not cure unconstitutionally cruel punishment. *State v. Fain*, 94 Wn.2d 387, 394-95, 617 P.2d 720 (1980). "The prospect of geriatric release," does not provide the constitutionally required meaningful opportunity to demonstrate the maturity and rehabilitation required. *Lyle*, 2014 WL 3537026 at *15. Mr. Keodara is entitled to a new sentencing hearing where the court meaningfully considers the effect of youth on Mr. Keodara's culpability and adjusts its sentence accordingly.

4. **Defense counsel's failure to advocate for a sentence below the standard range predicated on Mr. Keodara's youth constitutes ineffective assistance of counsel**

"[T]he right to counsel is constitutionally guaranteed at all critical stages of a criminal proceeding, including sentencing." *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). The state and

federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995); U.S. Const. amend. 6;[7] Wash. Const. Art I, § 22.[8]

Ineffective assistance of counsel occurs when "counsel's representation fell below an objective standard of reasonableness," and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lafler v. Cooper*, _U.S. _, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012) (quoting *Strickland,* 466 U.S. at 688).

Counsel's failure to apprise the trial court of important legal considerations, such as its discretion to impose a sentence below the standard range, may constitute ineffective assistance of counsel. *See State v. McGill*, 112 Wn.App. 95, 101-02, 47 P.3d 173 (2002) (finding ineffective assistance of counsel for failing to ask for exceptional

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[7] The Sixth Amendment provides:
In all criminal prosecutions, the accused shall enjoy the right to …have the Assistance of Counsel for his defense.

[8] Article I, section 22 provides, in pertinent part:
In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."

sentence downward based on multiple offense policy); *see also State v. Saunders,* 120 Wn.App. 800, 824-25, 86 P.3d 232 (2004) (ineffective assistance of counsel for failing to ask court to treat offenses as same criminal conduct).

"A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." *McGill*, 112 Wn.App. at 102.

An attorney's representation is unreasonable and deficient when it falls below prevailing professional norms. *In re Pers. Restraint of Davis,* 152 Wn.2d 647, 673, 101 P.3d 1 (2004) (quoting *Kimmelman v. Morrison,* 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)). Professional norms include offering a presentence report or other sentencing advocacy. The American Bar Association's standards direct counsel to either file a presentence report or "submit to the court and the prosecutor all favorable information relevant to sentencing." *Criminal Justice Standards, Defense Function, Standard 4–8.1 Sentencing,* American Bar Association (3d ed.1993). The National Legal Aid and Defender Association (NLADA) standards for attorney performance state that defense counsel at sentencing "should be

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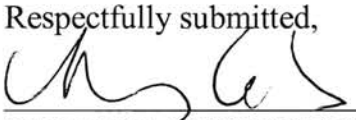
same sentence had it known an exceptional sentence was an option,' remand is proper." *Mulholland*, 161 Wn.2d at 334 (quoting *McGill*, 112 Wn.App. at 100-01). The court could not make an informed decision without knowing the parameters of its decision-making authority. *McGill*, 112 Wn.App. at 102. Mr. Keodara's attorney unreasonably failed to inform the court of its constitutional obligation to take Mr. Keodara's youth and personal circumstances into account before imposing a sentence that was the equivalent of life without the possibility of parole. A new sentencing hearing is required.

F. CONCLUSION.

Mr. Keodara's convictions and sentence should be reversed and the case remanded for further proceedings.

DATED this 21st day of July 2014.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

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| STATE OF WASHINGTON, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | NO. 70518-1-I |
| v. | ) | |
| | ) | |
| SAY KEODARA, | ) | |
| | ) | |
| Appellant. | ) | |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] KING COUNTY PROSECUTING ATTORNEY<br>APPELLATE UNIT<br>KING COUNTY COURTHOUSE<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] SAY KEODARA<br>367524<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13TH AVE<br>WALLA WALLA, WA 99362 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 21ST DAY OF JULY, 2014.

X_____

**Washington Appellate Project**
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710