NO. 96153-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SAY KEODARA,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent, the State of Washington, asks this Court to deny the petition for review.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Keodara, No. 76232-0-I, filed May 7, 2018 (unpublished).

C. STATEMENT OF THE CASE

Say Keodara was convicted by a jury of the crimes of murder in the first degree and three counts of assault in the first degree, all with firearm enhancements. CP 17-18, 310-11. The facts of the crime were summarized in the opinion affirming the convictions, State v. Keodara, 191 Wn. App. 305, 364 P.3d 777 (2015):

> On September 12, 2011, a fatal shooting occurred at a bus stop on Rainier Avenue. Four people were inside the bus shelter located at the southwest corner of Rainier Avenue South and South McClellan Street. A vehicle pulled up and some Asian males, appearing to be in their teens or early twenties, asked the group if they were looking for any "soft." Verbatim Report of Proceedings (VRP) (May 8, 2013) at 135–36. "Soft" was known as a street term for crack cocaine. One of the persons inside the shelter, Victor Lee Parker, approached the vehicle and may have made a purchase. Parker then

returned to the bus stop and the vehicle drove south on Rainier and then turned.

Later, three of the men from the vehicle approached the bus stop from the north on foot. One of them had a gun and demanded money from the group. The gunman fired on the group after one person tried to run. All four people were hit. Parker had been shot once and was lying on the ground when the shooter walked up to him and shot him in the head. Surveillance cameras from a nearby store showed images of a similar vehicle and of a man in a blue sleeveless jersey with writing on it.

. . .

Keodara was charged several months later for the Rainier Avenue shooting after being identified from the surveillance video images. One of the victims, Sharon McMillon, described the gunman and later testified that the car in the video appeared to be the same one that stopped at the shelter, and that the person in the blue basketball jersey appeared to be the shooter. Keodara was also identified in the video by Lacana Long, who had dated Keodara in 2011.

Nathan Smallbeck told police that Keodara called him after the shooting and told him that he had "just shot at a bus station." VRP (May 13, 2013) at 34–35. He provided a statement to police about a call from Keodara around 3:18 a.m. and that he called Keodara later around 11:00 a.m. *Id.* at 36. The State presented Keodara's telephone records showing call records and texts from the day of the shooting. The State also obtained location data for Keodara's phone that showed it was in the area near the time of the shooting.

Id. at 310-11.

Keodara was 17 years old when he committed the crimes. CP 315. At the first sentencing hearing, the trial court imposed a

sentence of 831 months. Id. at 312; CP 20. The Court of Appeals reversed the sentence and remanded for a new sentencing pursuant to Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

Upon remand, a resentencing hearing was held before the trial court. RP 1. The defense presented 240 pages of mitigation materials, which included a detailed and extensive social history, a psychological evaluation, mental health records and prior assessments of Keodara. CP 48-288. The defense presented the testimony of Keodara's mother and Dr. Heavin, who conducted the psychological evaluation. RP 9-69. Keodara elected not to make any statements to the court. RP 92.

The parties agreed that the court had the discretion to impose an exceptional sentence below the standard range. CP 73, 320-21. The court concluded that it could disregard any mandatory minimums and could impose concurrent terms for the firearm enhancements. RP 92; CP 370.

Keodara recommended a sentence of 209.75 months. CP 90-91. The State recommended a sentence of 552 months. CP 320-21. Both of these recommendations were substantially below the presumptive standard range of 831 months to 1025 months

(based on the presumption of consecutive sentences for the serious violent offenses and the firearm enhancements pursuant to RCW 9.94A.589 and 9.94A.533(3)(e)). The court imposed an exceptional sentence below the standard range of total confinement of 480 months by imposing 240 months as to the murder sentence, with the assault sentences (93 months each) to run concurrently, and the four 60-month firearm enhancements to run consecutively to the murder term and each other. CP 357.

In imposing sentence, the court stressed that it had reviewed and considered all the material submitted by the defense. RP 92. The court noted that it had considered Keodara's age, his family history and circumstances, the circumstances of the crime, evidence of his capacity for improvement when placed in a structured environment, and the multiple risk factors that would contribute to the likelihood of Keodara engaging in impulsive behavior as explained by Dr. Heavin in her testimony and report. RP 92-95. In regard to his age and culpability generally, the court stated "his culpability is less because we all know that juveniles have less development in their executive functions." RP 93. The court entered written findings and conclusions detailing its sentencing decision. CP 367-71.

In addition to the new reduced sentence, Keodara also has the opportunity for parole. Because Keodara was 17 years old when he committed the murder, and was not convicted of aggravated murder, he may petition the Indeterminate Sentence Review Board for release after serving 20 years of his sentence pursuant to RCW 9.94A.730. See State v. Scott, 190 Wn.2d 586, 416 P.3d 1182 (2018).

D. ARGUMENT AS TO WHY REVIEW SHOULD NOT BE ACCEPTED

1. THE ISSUE RAISED IN THIS PETITION WAS RAISED FOR THE FIRST TIME IN THE MOTION FOR RECONSIDERATION.

This Court should deny Keodara's petition for review because his argument that his sentence constitutes a de facto life sentence was raised for the first time in his motion for reconsideration of the Court of Appeals opinion. In his opening brief, Keodara did not assign error to imposition of the 40-year sentence as constituting a *de facto* life sentence. Rather, Keodara alleged that the trial court did not meaningfully consider or properly apply the Miller factors, and alleged that the trial court abused its discretion by running the weapon enhancements consecutively to

each other. Keodara never alleged, and never provided legal authority for the proposition that a 40-year sentence imposed on a 17-year-old offender constitutes a de facto life sentence.

2. KEODARA HAS PROVIDED NO AUTHORITY FOR HIS CLAIM THAT A 40-YEAR SENTENCE CONSTITUTES A DE FACTO LIFE SENTENCE.

Keodara has provided no authority for his claim that a 40-year sentence is a de facto life sentence. Washington courts have yet to delineate precisely what constitutes a de facto life sentence. In State v. Ronquillo, 190 Wn. App. 765, 777, 361 P.3d 779 (2015), Division One of the Court of Appeals concluded that a sentence of over 50 years imposed on a 16-year-old constituted a de facto life sentence. Other courts have similarly drawn the line at 45 or 50 years. For example, in Bear Cloud v. State, 334 P.3d 132 (Wyo. 2014), the Wyoming Supreme Court concluded that a 45-year sentence imposed on a 16-year-old offender constituted a de facto life sentence. In People v. Buffer, 75 N.E.3d 470, 481, 412 Ill.Dec. 490 (Ill. App. 2017), the Illinois appellate court concluded that a 50-year sentence imposed on a 16-year-old offender was a de facto life sentence, relying on the United States Sentencing Commission Preliminary Quarterly Data Report indicating that a

person in the general prison population has a life expectancy of 64 years. In People v. Contreras, 4 Cal.5th 349, 369, 411 P.3d 445, 229 Cal.Rptr.3d 249 (2018), the California Supreme Court concluded that a 50-year-sentence imposed on a 16-year-old offender was a de facto life sentence, citing a general legislative consensus. In Casiano v. Commissioner of Correction, 317 Conn. 52, 79, 115 A.3d 1031 (2015), the Supreme Court of Connecticut concluded that a 50-year sentence imposed on a 16-year-old offender was a de facto life sentence, but declined to opine whether a sentence of less than 50 years imposed on a juvenile would be a de facto life sentence. Keodara has not cited to any court that has found that a 40-year-sentence imposed on a juvenile offender is a de facto life sentence. Even assuming that Keodara earns no early release at all, he will be released from prison at age 57 at the latest.

3. THE COURT OF APPEALS OPINION IS NOT IN CONFLICT WITH STATE V. HOUSTON-SCONIERS

Keodara wrongly asserts that the Court of Appeals opinion is in conflict with State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017). Houston-Sconiers did not purport to define what constitutes a de facto life sentence. In that case, the two juvenile

offenders were sentenced without a Miller hearing to lengthy sentences for non-homicide crimes. This Court concluded that the Eighth Amendment allows sentencing courts to exercise complete discretion in a Miller hearing, regardless of the applicable SRA provisions. Id. at 21. The court remanded because the trial court thought it had no discretion to impose a lower sentence. Id. Given Keodara's presumptive range, Houston-Sconiers required a Miller hearing. A Miller hearing was held in this case. The trial court understood it was not bound by mandatory provisions of the SRA in imposing sentence due to Keodara's age, as provided by Houston-Sconiers. RP 92; CP 370. There is no conflict.

E. CONCLUSION

For the foregoing reasons, the State respectfully requests that the petition for review be denied.

DATED this 28th day of August, 2018.

Respectfully submitted,

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