NO. 32027-8-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOEL RAMOS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Federal Court Decisions

United States Constitution

Washington Constitution

Statutes

Court Rules

Other Authorities

A. INTRODUCTION

In 1993, Joel Ramos was sentenced as an adult to 80 years in prison even though he was 14 years old. Later, the Supreme Court held that children are categorically less blameworthy and more capable of rehabilitation than adults, so a judge must weigh the attributes of youth before sentencing a child to life in prison.

Mr. Ramos won a new sentencing hearing in 2013. Although Eighth Amendment now requires a judge to consider the effect of a child's age, life circumstances, and capacity for rehabilitation before imposing lifetime incarceration, the judge believed his authority was limited by the law in effect at the time of the 1993 offense. Prior case law prohibited a judge from using age or rehabilitation as a reason to impose a sentence less than the standard range. Instead of reducing Mr. Ramos's sentence, the judge imposed a sentence of 85 years in prison.

The sentence imposed on Mr. Ramos shows that the adult sentencing laws are unconstitutional as applied to juveniles facing the equivalent of life without the possibility of parole. Mr. Ramos is entitled to be resentenced before a different judge who gives due weight to his youth and immaturity at the time of the offense as well as his demonstrated capacity for rehabilitation.

B. ASSIGNMENTS OF ERROR

1. The court's imposition of a sentence that is the equivalent of life without the possibility of parole violates the Eighth Amendment bar on cruel and unusual punishment and the right to fundamental fairness guaranteed by the Fourteenth Amendment.

2. The 85-year sentence imposed on Mr. Ramos violates the prohibition on inflicting cruel punishment under article I, section 14 of the state constitution.

3. The sentencing scheme contained in the Sentencing Reform Act (SRA) is contrary to the constitutional requirements that courts adjust sentences for children based on their youth.

4. The prosecution breached the plea agreement by supplying the court with reasons to impose a sentence greater than the promised low -end recommendation.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. 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 trial court relied on case law holding that the SRA

does not permit a judge to reduce a person's sentence based on personal circumstances such as youth or rehabilitation. Does it violate the constitutional prohibition on cruel and unusual punishment to impose a sentence of lifetime incarceration for a crime committed by a 14-year-old without using the person's youth and capacity for rehabilitation as factors justifying a decreased sentence?

2. The Eighth Amendment requires sentencing courts to weigh a juvenile's individual circumstances when crafting the appropriate punishment, but the SRA presumes multiple serious violent offenses result in consecutive terms of imprisonment. The sentencing court placed the burden on Mr. Ramos to prove valid mitigating factors entitled him to a reduced sentence below the standard range. Is the SRA's presumption that a standard range sentence must be imposed contrary to the Eighth Amendment when a court sentences a juvenile to life in prison without accounting for the effect of youth and the possibility for rehabilitation?

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 without using the child's age, dysfunctional home environment, lack of criminal

history, and proven rehabilitation as mitigating factors requiring a sentence below the standard range?

4. When the prosecution induces a person to enter into a plea bargain based on a promise to recommend a certain sentence, the State breaches this agreement when it explicitly or implicitly offers reasons the court can impose a greater sentence. The prosecutor promised to recommend a low-end sentence for Mr. Ramos but told the sentencing court that the facts merited a sentence greater than the standard range and described how it could consider the standard range as far higher than the range agreed to in the plea. Did the State's conduct, objectively viewed, breach its promise contained in the plea agreement?

D. STATEMENT OF THE CASE

Twenty-five days after Joel Ramos's 14th birthday in 1993, having never been arrested before, he participated in a robbery that turned into the brutal killing of four members of a family. CP 574-77, 588, 984. Mr. Ramos promptly waived his right to have a decline hearing and agreed to transfer his case to adult court. CP 574, 971. He pled guilty as charged to three counts of first degree felony murder and one count of first degree intentional murder. CP 5. In 1993, he was

sentenced 80-years in prison based on a standard range of 20 years of incarceration for each offense, served consecutively. CP 13-15.

Due to appellate rulings summarized elsewhere, Mr. Ramos received a *de novo* sentencing hearing in 2013. *See State v. Ramos*, 168 Wn.2d 1025, 230 P.3d 576 (2010); *see also State v. Ramos*, 174 Wn.App. 1042 (2013) (unpublished, COA No. 30279–2–III, cited for factual background not legal authority under GR 14.1).

Before his new sentencing hearing, Mr. Ramos filed a motion containing hundreds of pages of information about his personal transformation in the years after he was sentenced to prison and explaining the circumstances of his life in 1993. CP 574-982.

He had lived in an "unstable, chaotic" home that the probation department described as a "hovel," "rundown, [and] ill-kept." CP 675-76, 969. He was raised by a single mother who did not speak English and routinely left him with relatives while she lived in Mexico for months at a time. CP 672-73, 969-70.

He was "slightly built," "very immature," "unsophisticated" and "easily influenced by negative peers." CP 675, 696, 703-04. Because he did not know how to speak English when he started school, he struggled and was required to repeat the second grade. CP 969. At the

end of 6th grade, his reading level was that of a child entering third grade. CP 598. He was "the dumb kid" in school. CP 970.

A relative preyed on him and sexually abused him when he was in Mexico, and another did the same in the United States. CP 969-70. He was ashamed of the abuse and never reported it, explaining that the sexual abuse "destroyed me inside, but I never said a single word about it" to anyone. CP 970. He was also physically beaten. *Id.*

When he was 12 years old, his sister Betty unexpectedly died. CP 599, 970. She was his closest relative and the person who understood him best. CP 676. He was "devastated" by her death, as was his mother who suffered a "hard depression." CP 970.

Feeling an "outcast," the victim of years of "racism and school bullying," and silently suffering from his difficult circumstances including abuse and the death of a close relative, Mr. Ramos became friends with Miguel Gaitan in the sixth grade. CP 969. Mr. Gaitan was "psychologically and emotionally older than an average fourteen year old" and used his physical size to dominate others, according to the trial court's findings. CP 979. Mr. Ramos accompanied Mr. Gaitan and

participated in the incident with him, but the police investigators concluded that Mr. Ramos was not the planner or instigator. RP 74.[1]

At 14 years old, Mr. Ramos was first transferred to adult jail and prison, but the Department of Corrections found space for him at Maple Lane Juvenile Detention Facility. At Maple Lane, he held a long-term job in the laundry, washing dirty bedding, uniforms and underwear. CP 703. He "took the initiative" to be sure the work was complete and had "a cheerful attitude about work despite it being tedious." *Id.* Maple Lane focused on "prepar[ing] Joel for a lifetime of incarceration keeping him in a safer and more nurturing environment until he can more fully develop." *Id.* By the time he was sent into the adult prison population, Maple Lane concluded "we have seen a slow but steady rate of maturity." CP 704 .

As an inmate at Airway Heights, Mr. Ramos exhibits the same reliable work ethic that he showed at Maple Lane. CP 803. The DOC employee who supervised Mr. Ramos in the prison's upholstery program, Mark Dhaenens, testified that Mr. Ramos is an "excellent" worker with a "[w]illingness to learn, [he] took challenge well and did a

[1] The verbatim report of proceedings from the resentencing hearing on October 13 and 14, 2013, is consecutively paginated and will be referred to as

good job." RP 10-11. Due to his skills and positive attitude, Mr. Ramos gained job responsibilities and "he's in charge currently of shipping and receiving," including monitoring the quality and accuracy of all inbound and outbound products. RP 13. Mr. Dhaenens had never heard "anything negative" about his work. RP 13.

Mr. Ramos submitted over 100 pages of letters from people who described the positive impact he has made on their own lives. CP 743-856. Most letters are written by people he met while in prison, and each letter offers a personal statement of Mr. Ramos's good character and inspiring effect on their lives. *Id.* These letters show that Mr. Ramos has not only worked on improving his own education and skills while at DOC, but has also mentored other prisoners. If Mr. Ramos was released, several people testified that they would hire him and open their homes to him. RP 28, 121.

Detective James Sherman initially investigated the crime and saw Mr. Ramos as a sullen, impolite child. RP 68. When he spoke to Mr. Ramos years later, he noticed Mr. Ramos has grown into a "polite, cooperative," and cordial person with a good sense of humor. RP 75.

"RP."

The demonstrated change in Mr. Ramos's behavior from the incident to his 2013 resentencing may be explained by the maturation of a person's brain capacity, as described at the resentencing hearing by psychologist Terry Lee. RP 79, 81, 86. Dr. Lee testified that teenagers have "very different types of functioning" in their brains than adults. RP 83. Brain development is further disrupted by experiences such as "trauma and child abuse, family and social dysfunctions, [and] social chaos or social instability," all of which occurred in Mr. Ramos's childhood. *Id.* Due to undeveloped brain functions, adolescents "perceive risk differently, they're more easily influenced by their peers, they're more impulsive, they have fewer problem solving skills." RP 85. As a result, they are less culpable for their behavior. RP 86.

Psychologist Mark Mays also provided the court with a psychological assessment of Mr. Ramos's current functioning, filed under seal. CP 653, 1020. Dr. Mays concluded that Mr. Ramos was "quite different than the majority of people who have been incarcerated" for any type of crime. CP 1032. He is not aggressive or violent and has good behavioral control. *Id.* Even though he has spent two decades incarcerated, he is psychologically well-adjusted and "appears to be a person without behavioral difficulties." *Id.* His

personality is "agreeable" and he "has worked to improve his life vocationally" as much as he is able to do so. *Id.*

Mr. Ramos told the court he was "sorry from the bottom of my heart" for his "extremely egregious and senseless" behavior. RP 124-25. He said that the "horrible mistake" he made when 14 years old, and the "pain, guilt, sadness, grief, sorrow, and shame" he feels from it, consume him "most every day." *Id.*

The judge, who was not present at the initial sentencing, acknowledged his discretion to reconsider the 80-year sentence previously imposed, including an exceptional sentence below the standard range or a higher sentence. RP 175-76. He restricted his considerations to whether Mr. Ramos was "entitled" to an exceptional sentence under the statute in effect at the time of the offense, former RCW 9.94A.390(1), and the purposes of the SRA. RP 175.

The court focused on Mr. Ramos's behavior during the incident and rejected his request for an exceptional sentence below the standard range. RP 173. It imposed a standard range sentence of 85 years in prison, based on three consecutive terms of 20 years for the three counts of felony murder and one term of 25 years for the count of intentional murder. RP 175-76. This sentence is five years longer than

the original sentence. CP 13. Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT

1. **The court's reliance on a sentencing framework that bars meaningful consideration of youth, home environment, and rehabilitation violates the Eighth Amendment and article I, section 14.**

a. *It constitutes unconstitutionally cruel punishment to impose an adult standard range sentence amounting to life in prison on a 14-year-old child.*

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 consequence 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.

Although *Miller* did not categorically bar a sentence of life in prison without parole for a juvenile convicted of homicide, it came close. It held that such a severe sentence, even for a horrible crime, is constitutionally permissible only in the rarest of circumstances where there is proof of "irreparable corruption." 132 S.Ct. at 2469.

Before imposing a sentence that amounts to a term of lifetime incarceration, *Miller* requires sentencing courts to evaluate the juvenile's individual circumstances and impose a sentence proportional to his culpability. 132 S.Ct. at 2468; *see People v. Gutierrez*, 324 P.3d 225, 2014 WL 1759582, *24-25 (Cal. 2014) (construing requirements of *Miller*). Culpability is not defined by the defendant's participation in the offense. Instead, the relevant mitigating factors the judge must consider 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. Ramos received a sentence of 85 years in prison without the possibility of parole. The Department of Corrections classifies him as *de facto* life without the possibility of parole, and the prosecution concedes his sentence should be considered as the equivalent of life without parole. CP 582; RP 141. The average life expectancy for men who are not in prison is 77.6 years, and prison accelerates the negative consequences of aging. CP 581. Mr. Ramos's earliest possible release date would be when he is in his mid-80s, for a sentence he started serving weeks after he turned 14 years old. CP 581.[2] For Eighth Amendment purposes, a sentence of life without the possibility of

parole is the harshest possible penalty that may be imposed on a juvenile. *Miller*, 132 S.Ct. at 2475. This penalty is reserved for only the rarest case involving a juvenile offender who is irreparably corrupt. *Id.* at 2469. Mr. Ramos's impressive record of caring and responsible behavior as he matured, despite being in prison, demonstrates he is not irredeemable, yet the court sentenced him to the equivalent of life without the possibility of parole by applying an unconstitutional sentencing scheme that failed to account for his personal circumstances.

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

"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

[2] Before Mr. Ramos was resentenced to a *longer* term, his earliest possible release date was May 11, 2061, when he would be 82 years old. CP 581. After remand, he received a five-year increase in his sentence, which would reset his minimum release date to 2065 and maximum release date to 2078. *See* CP 581; CP 986.

child's "background and emotional development" in assessing culpability. *Id.*

In Washington, the SRA governs sentencing for any person convicted and sentenced 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."). As the judge recognized here, case law construing the SRA bars courts from imposing a sentence less than the standard range based on "youth (and all that accompanies it)." *Miller*, 132 S.Ct. at 2469; RP 169, 171.

The defendant in *Law* 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 court in *Law* 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 *Law* Court 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.*

"[R]emoving 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. Yet when resentencing Mr. Ramos, the judge explained he "restrict[ed]" his "considerations to those authorized by *Law*" and the sentencing scheme in effect at the time the offense occurred. RP 169, 171, 175.

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. Miller* demonstrates 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.

The doctrine of constitutional avoidance is an interpretive tool permitting courts to construe ambiguous statutory language to avoid serious constitutional doubts. *State v. Strong*, 167 Wn.App. 206, 212-13, 272 P.3d 281 (2012), *rev. denied*, 174 Wn.2d 1018 (2012). Because RCW 9.94A.535 lists "illustrative" mitigating factors, it may be

construed consistently with *Miller*, *Graham*, and *Roper*, if interpreted to include age and its attributes as reasons to impose a sentence below the standard range. Indeed, under *Miller*, age and its attributes are constitutionally imperative considerations prior to imposing a sentence of lifetime incarceration.

To comply with the Eighth Amendment, a child's age and related attributes must be considered by the sentencing judge as reasons for departing from the standard range when the standard range results in a prison sentence for the rest of the child's life. *Miller*, 132 S.Ct. at 2471.This Court should re-examine *Law* as it applies to juveniles and construe the exceptional sentence statute consistently with *Miller*.

The trial court was restricted by the criteria of the exceptional sentence statute and case law interpreting that statute when confronted with Mr. Ramos's request for a mitigated sentence that accounted for his individual circumstances. The statute and the case law on which the court relied predated *Miller*, *Graham*, *Roper*, and the legislature's own recognition that youth constitutes a valid mitigating factor, as reflected in RCW 9.94A.540(3) (enacted 2005).[3] The court could not

[3] In 2005, the Legislature amended the law requiring mandatory minimum sentences so that they "shall not be applied in sentencing of juveniles

meaningfully consider the mandate of *Miller* and the Eighth Amendment analysis of *Graham* and *Roper* when it adhered to a sentencing scheme that precludes reducing a person's sentence based on personal characteristics.

c. *To comply with Miller, the court may not presume the law favors imposing a life sentence on a child.*

Under the SRA, the standard range is the "presumptive" sentence that the court must impose. *Law,* 154 Wn.2d at 94. However, the presumptive imposition of a term of life in prison for a juvenile violates the Eighth Amendment. *Miller*, 132 S.Ct. at 2469. In order to construe the sentencing scheme in a constitutional manner, the trial court may not presume that a child will receive a sentence of lifetime incarceration.

The California Supreme Court recently evaluated a state statute governing the sentence to be imposed on a juvenile convicted of special circumstances murder. As written, the statute gave the court discretion to impose a sentence of 25 years to life instead of life without parole, but courts had construed the law where life in prison was the generally

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tried as adults pursuant to RCW 13.04.030(1)(e)(i)." RCWA 9.94A.540; Laws 2005, ch. 437 § 4.

imposed sentence. *People v. Gutierrez*, _P.3d _, 2014 WL 1759582, *19 (2014). The *Gutierrez* Court ruled that "[g]iven *Miller*'s conception of a prior individualized sentencing inquiry, a serious constitutional concern would arise" if the court must presume that the appropriate sentence would be life in prison. *Id.* To avoid this "serious constitutional concern," the court decided to re-construe the statute and held there is now "no presumption in favor of life without parole." *Id.* at *23.

For Mr. Ramos, "consecutive sentences were presumptively called for," by statute based on the four counts of murder, 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); *see* former RCW 9.94A.400(1)(b); RCW 9.94A.589(1)(b) (current statute). Mr. Ramos 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). Even though the judge acknowledged he had

discretion to consider a sentence less than the standard range, he understood that the standard range was the presumptively appropriate sentence. RP 167, 169. Under the challenged case law, the court was not permitted to use Mr. Ramos's age alone, or his rehabilitation, as a reason to depart from the standard range as explained in *Law* and *Ha'mim*. Mr. Ramos is entitled to a new sentencing hearing at which there is no presumption favoring consecutive, standard range terms.

d. *Mr. Ramos's remarkable rehabilitation, overcoming abuse and childhood trauma, shows that he has not received the constitutionally mandated meaningful opportunity for release.*

Miller mandates explicit consideration of youth and its attributes as a mitigating factor before determining the sentence that reflects the offender's blameworthiness and potential for rehabilitation, and it violates the Eighth Amendment to impose a term of lifetime incarceration without the possibility of parole without such consideration. *State v. Long*, 8 N.E.890, 899 (Ohio 2014). The court received substantial information about Mr. Ramos's life circumstances at the time he committed this offense 25 days after his 14th birthday but it did not factor Mr. Ramos's age, immaturity, unsettled home life, prior

abuse, educational struggles, or capacity for rehabilitation into the 85-year term imposed.

Presumably because the court viewed its authority as limited by the SRA, it based its sentencing decision on Mr. Ramos's actions during the offense. *See e.g., Law*, 154 Wn.2d at 94. The court examined "impulsivity," but only considered Mr. Ramos's acts at the time of the incident. RP 173. Because the robbery was planned, the court decided that impulsivity could not be a mitigating factor. RP 173. The court looked at Mr. Ramos's "vulnerability to outside pressure" only during the incident and decided his acts seemed too cold and calculating to show vulnerability to outside pressure. RP 174. Finally, it found that because the "acts were monstrous," Mr. Ramos must be judged as irretrievably depraved. *Id.*

In *Miller*, the Supreme Court emphasized that even when juveniles commit terrible crimes, rarely will there be penological justification to impose the harshest sentence. 132 S.Ct. at 2065. *Miller* "mandates" that the court consider "an offender's youth and attendant characteristics" before determining the penalty, and not simply examine his acts during the incident. *Id.* at 2471.

Chronological age is a "relevant mitigating factor of great weight," and Mr. Ramos was only 25 days past his 14th birthday. *Miller*, 132 S.Ct. at 2467. The hallmark features of youth that diminish a juvenile's blameworthiness under the Eighth Amendment include immaturity, impulsivity, and failure to appreciate risks and consequences. *Id.* at 2468.

Caseworkers from Maple Lane described Mr. Ramos as "a very immature and dependent youth" who was less mature than his chronological age would indicate. CP 696, 702. The juvenile detention facility delayed his transfer to adult prison because he was so immature and "too open to be abused or used" in adult prison. CP 702.

Mr. Ramos had no criminal history and had never been charged with a crime. He was not the leader or planner of the incident. RP 74. The incident arose as an intended robbery but the crime quickly escalated into violence instigated by the other participant, not Mr. Ramos. CP 10-11. Mr. Ramos was convicted of three counts of felony murder. CP 6. It is "fallacious reasoning" to impose lifetime incarceration on a juvenile convicted of felony murder because "we know" children "lack the capacity" to consider the "full consequences

of a course of action and adjust one's conduct accordingly." 132 S.Ct. at 2276-77 (Breyer, J., concurring).

Second, the court must consider the child's family and home environment, because life circumstances can render a child extremely vulnerable. *Miller*, 132 S.Ct. at 2468.

Mr. Ramos suffered significant trauma in his home life. As a child, he was sexually abused by distant relatives in Mexico and again when he returned to the United States but he never told anyone even though the abuse "destroyed me inside." CP 598, 970. He was raised by his mother, who did not speak English and who regularly left him in the care of relatives while she lived in Mexico for months at a time. CP 672-73, 969-70. He repeated the second grade due to academic difficulties and he was "low functioning" at school at the time of the incident. CP 598, 676.

The probation department described Mr. Ramos's home at the time of the offense as a "hovel" lacking basic amenities. CP 675-76. It was chaotic and unstable. CP 969. He had little adult supervision. RP 75. Detective Sherman saw Mr. Ramos as a child who was "small in stature" and came from "a broken home." RP 75. The detective thought

Mr. Ramos's difficult home environment made him different than other 14-year-olds he encountered. RP 75- 76.

His closest relative was an older sister who suddenly passed away when Mr. Ramos was 12 years old. CP 599, 970. He thought of his sister as the only person who understood him. CP 599. His behavior at school became worse at this time, in apparent reaction to dealing with his sister's unexpected death. CP 599-60.

Additionally, the court must consider the effect of the "incompetencies associated with youth" on the juvenile's ability to navigate the criminal justice system. *Miller*, 132 S.Ct. at 2468. For example, while the "inherently coercive nature of custodial interrogation" applies to all people, children lack the maturity and judgment necessary to avoid detrimental choices and are more susceptible to outside pressures. *J.D.B. v. N. Carolina*, _ U.S. _, 131 S.Ct. 2394, 2401, 2403, 180 L.Ed.2d 310 (2011).

Mr. Ramos had no contact with the criminal justice system before his arrest in this case. CP 677. He had not been offered available services provided to at-risk children through the juvenile rehabilitation system. CP 677-78. His lack of experience in the criminal justice system is also displayed in his readiness to waive his right to ask the

court to keep the case in juvenile court and his quick guilty plea to the charged crimes. CP 578. His co-defendant, on the other hand, insisted on a decline hearing, followed by a jury trial, without expressing the remorse and willingness to take part in treatment that characterized Mr. Ramos's behavior. CP 97-982. Psychologist Mays noted that if Mr. Ramos had not waived his decline hearing, he would have been able to explain his vulnerability and immaturity to the court. CP 602-03.

Finally, the court must weigh any evidence bearing on the possibility of rehabilitation. *Miller*, 132 S.Ct. at 2468. Past criminal history may shed light on the child's irretrievable depravity. *Id.*

Notwithstanding difficulties of Mr. Ramos's life circumstances before his was 14 years old and once he entered the prison system as a 14-year-old, his capacity for transformation is remarkable. A psychologist who evaluated him in 2013 described him as "quite different from the majority of incarcerated people." CP 1032. He is cooperative, "agreeable," "contributory," "does not display aggression," and "has worked to improve his life." *Id.*

Mr. Ramos demonstrated his capacity for contribution to society by his efforts to help others while incarcerated. Over 100 pages of Mr. Ramos's sentencing memorandum include letters written from people

who met Mr. Ramos while incarcerated. CP 750-855. Each letter contains individual expressions of gratitude and respect for Mr. Ramos.

He took advantage of every educational opportunity presented. CP 952-67. He has worked long-term as an upholsterer, garnering significant responsibility and praise from his employer. RP 10-13. He reached out to other young prisoners and tried to help them navigate prison life by teaching coping mechanisms so they could avoid negative situations. RP 116-18.

When resentencing Mr. Ramos, the court did not weigh and consider his life circumstances at the time of the offense. RP 169-75. The court considered the attributes of youth only in the context of the crime itself. *Id.*

Mr. Ramos's personal circumstances beyond his behavior during the crime itself show that his young age, immaturity, feelings of hopelessness as an outcast and "dumb kid," untreated trauma from undisclosed abuse and his sister's death, and the diminished adolescent brain functioning that is exacerbated by suffering abuse and other dysfunction, contributed to Mr. Ramos's participation in a terrible crime. The transitory nature of his criminal behavior is also apparent. The imposition of a sentence amounting to life in prison without the

possibility of parole without giving due weight to Mr. Ramos's age, personal circumstances, and capacity for transformation violates the Eighth Amendment.

2. **The flat sentence of 85 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 85-year determinate sentence imposed on Mr. Ramos does not include an opportunity for release based on his rehabilitation. It requires him to spend the rest of his life in prison. Yet the uncontested evidence before the court showed Mr. Ramos is not irreparably corrupt or beyond redemption. Sentencing a person who committed a crime when 14 years old to a determinate term that mandates he spend the rest of his life in prison, when he is not beyond redemption, is contrary to *Miller* and violates the Eighth Amendment.

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 14-year-old's life when that sentence was imposed without regard for the child's capacity for rehabilitation.

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").

It has also enacted a new mechanism for people convicted as juveniles to demonstrate their rehabilitation and receive parole through the Department of Corrections, after serving 20 years. SB 5064. ch. 130, § 10 (2014) (adding new section to RCW 9.94A). This new law

was enacted in recognition of the unconstitutional application of the SRA to juveniles. It will apply to Mr. Ramos, but it does not correct the constitutional invalidity of the sentence. *See Gutierrez*, 324 P.3d at __; 2014 WL 1759582 at *23. 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). Mr. Ramos is entitled to a new sentencing hearing where the court meaningfully considers the effect of youth on Mr. Ramos's culpability and adjusts its sentence based on his demonstrated capacity for transformation by maturity and education.

3. The prosecution breached its obligation under the plea agreement

"A plea agreement is a contract, and the government is held to its literal terms." *United States v. Alcala-Sanchez*, 666 F.3d 571, 575 (9th Cir. 2012). When a criminal defendant pleads guilty with the understanding that the prosecution will recommend a particular sentence, the defendant has given up important constitutional rights based on the expectation that the prosecution will adhere to the terms of the agreement. *State v. Carreno-Maldonado*, 135 Wn.App. 77, 83, 143 P.3d 343 (2006). Because plea agreements implicate the accused's fundamental rights, the State is held to "'meticulous standards of both

promise and performance.'" *Palermo v. Warden,* 545 F.2d 286, 296 (2d Cir.1976) (quoting *Correale v. United States,* 479 F.2d 944, 947 (1st Cir.1973)).

The State's "duty of good faith" when plea bargaining prohibits it from "explicitly or implicitly" engaging in conduct that may "circumvent the terms of the plea agreement." *Carreno-Maldonado*, 135 Wn.App. at 83. To determine whether the prosecution has breached its agreement to recommend a particular sentence, the court looks objectively to the "effect of the State's actions, not the intent behind them." *State v. Sledge*, 133 Wn.2d 828, 843, 947 P.2d 1199 (1997). "Neither good motivations nor a reasonable justification will excuse a breach." *State v. Xavier*, 117 Wn.App. 196, 200, 69 P.3d 901 (2003)

A defendant has a right to have the prosecutor act in good faith even though the sentencing judge is not bound or even influenced by the prosecutor's recommendation. *Carreno-Maldonado*, 135 Wn.App. at 88. The prosecution's breach of a plea is a structural error that is not subject to harmless error review and may be raised for the first time on appeal. *Id.* at 87-88; *State v. E.A.J.*, 116 Wn.App. 777, 785, 67 P.3d 518 (2003), *rev. denied*, 150 Wn.2d 1028 (2004); RAP 2.5(a)(3).

In *Carreno-Maldonado*, the prosecution agreed to recommend a low-end sentence for some counts, and clearly stated its sentencing recommendation on the record, but it breached the plea agreement by reciting "potentially aggravating facts." 135 Wn.App. at 85. The judge insisted that he was not affected by the prosecutor's remarks but the reviewing court disregarded the judge's belief, because "the fact that a breach occurred" is the only relevant consideration and harmless error review does not apply. *Id.* at 88.

Even when a prosecutor's reason for discussing the facts of the case is to guard against a lower sentence, "a prosecutor must use great care in such circumstances, and the facts presented must not be of the type that make the crime more egregious than a typical crime of the same class." *Id.* at 84-85.

In Mr. Ramos's case, the State promised it would recommend four consecutive terms of 20 years on each count as an essential part of the plea agreement, which was the low-end of the lowest standard range. CP 8.

At the sentencing hearing, the State told the court that Mr. Ramos could have received an exceptional sentence *above* the standard range for his conduct. RP 140-41. The prosecutor told the court that

"the basis for an aggravating sentence" is "something you have to look at" when weighing what sentence to impose. RP 141. The prosecutor also said the aggravated nature of the crime "is something, as part of the crime that the Court can look at." RP 141.

The prosecutor added,

> And in particular that Bryan was a young child that the defendant knew or should have known was particularly vulnerable or incapable of resistance due to his extreme youth. And so I think you've got to weigh that in in terms of the type of a crime that was committed.

RP 141.

This discussion echoes the improper sentencing argument in *Carreno-Maldonado*, where the prosecutor agreed to recommend a low-end sentence for some counts, but "recited potentially aggravating facts," and for other counts he recommended a mid-range sentence but commented that the crime was "more egregious than a typical crime of the same class." 135 Wn.App. at 85. By presenting facts that the conduct was egregious enough to justify an exceptional sentence above the standard range, the prosecutor went "beyond what was necessary" to explain his sentencing recommendation and breached the plea. *Id.*

Here, the prosecutor gave the court reasons to increase Mr. Ramos's sentence by highlighting the egregiousness of the conduct,

which he not only described as heinous but also argued this would legitimately justify a sentence above the standard range. These remarks went beyond what was necessary to oppose the downward departure Mr. Ramos sought, which the prosecutor addressed by arguing that no valid mitigating factor applied under the controlling statute. RP 134-40.

After the prosecutor explained the appropriateness of an exceptional sentence above the standard range based on the vulnerability of the young child who was killed, the court asked several times for the prosecution to clarify the court's authority to impose a greater sentence. RP 144-46. The prosecutor acknowledged that the court could not actually impose an exceptional sentence above the standard range "under *Blakely v. Washington*," but it nonetheless reminded the judge of the appropriateness of such an increased sentence. RP 144.

The prosecutor also explained the standard range calculation to the court as far higher than the sentence it had promised to recommend. RP 161. He said, "I'd like to point out" that "these are all serious, violent offenses." *Id.* He told the court that the standard range would be 411-548 months if they were counted as prior history:

> But what I'd like to point out too is that because these are all serious, violent offenses, they're mandated to -- the way you score them, they're mandated to run consecutive, and you take the one with the highest offense score. Of course they all have the same offense score. But you take zero. You get a zero offender score there. And -- but everyone else also has a zero offense score, which is unique to the serious, violent, and then you run -- then the standard range is -- or the standard under 9.94A.400 is to run them consecutive.
>
> Okay. If they were, like, prior history, he would get three points for each one of those other offenses if they were committed prior to one murder. And his -- he'd have an offender score of nine, which is 411 to 548 [months]. . . .

RP 161.

The prosecutor's explanation about how the standard range could be considered as 411 to 548 months in other circumstances was unsolicited and inconsistent with its promised sentencing recommendation of the minimum standard range sentence. The plea agreement listed the standard range for each count as 240-320 months, yet the prosecution offered a basis for the court to view the standard range as far higher. CP 7; RP 161. Moreover, its emphasis on the "heinous" nature of the offense and the appropriateness of considering the killing of Bryan Skelton as an aggravating factor justifying an exceptional sentence *above* the standard range was contrary to its promise to seek a low end sentence on all counts.

The court imposed a sentence greater than the prosecution's promised recommendation under the plea bargain and five years longer than the original sentence, notwithstanding the host of new mitigating evidence presented. RP 175-76. The prosecutor breached its promise to seek a low-end sentence by emphasizing how the standard range could be far higher than it actually was and describing the incident as worthy of an exceptional sentence above the standard range.

Where the State breaches a plea agreement, the defendant has the choice to either withdraw his plea or receive specific performance of the agreement. *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003). "[T]he defendant is entitled to a remedy which restores him to the position he occupied before the State breached." *Id.* Specific performance of the plea agreement "requires the State to make its promised recommendation" at a new hearing, and a different judge should preside over the new hearing. *Id.*

4. **The remedy is to order a new sentencing hearing before a different judge.**

A new judge should be appointed on a case when either it is reasonable to expect the judge would have substantial difficulty putting out of his mind evidence that he should not consider or when

reassignment "is advisable" to preserve the appearance of fairness. *In re Ellis*, 356 F.3d 1198, 1211 (9th Cir. 2004). Reassignment to a different sentencing judge is the appropriate remedy in the case at bar.

When a judge makes a sentencing decision without factoring in all necessary information, the judge's continued involvement creates an appearance of unfairness and the remedy is remand before a different judge. *City of Seattle v. Clewis*, 159 Wn.App. 842, 851, 247 P.3d 449 (2011); *see Harrison*, 148 Wn.2d 559 (remedy for prosecution's breach of plea is "reversal of the original sentence and remand for a new sentencing, preferably before a different judge"); *Sledge*, 133 Wn.2d at 846 n.9 (we "provide for a new judge at the disposition hearing in light of the trial court's already-expressed views on the disposition"); *Alcala-Sanchez*, 666 F.3d at 577 (remanding for resentencing before a different judge – regardless of the prior judge's impartiality – because it is necessary "to eliminate the impact of the government's prior mistake and breach").

In addition to cases where the court's initial sentencing decision occurred at a time when the prosecution advocated for a sentence that was not part of the plea bargain promise, the appearance of fairness may require reassignment of a case. In *Clewis*, the defendant

questioned the judge's objectivity after the judge ordered a material witness warrant when the prosecution had not requested the order. 159 Wn.App. at 851. Although the issue became moot when the judge later recused himself, the Court of Appeals agreed that if the judge's continued involvement in the case "created the appearance of a bias" against Clewis, the remedy would be a new trial before a different judge. *Id.*

Similarly, when a judge pronounces a sentence before it has heard and considered all available information, the remedy is remand for further proceedings before a different judge. *State v. Aguilar-Rivera*, 83 Wn.App. 199, 203, 920 P.2d 623 (1996) ("the appearance of fairness requires that when the right of allocution is inadvertently omitted until after the court announced the sentence it intends to impose the remedy is to send the defendant before a different judge for a new sentencing hearing.").

As this Court held in *State v. Crider*, 78 Wn.App. 849, 899 P.2d 24 (1995), and affirmed in *Aguilar-Rivera*, 83 Wn.App. at 203,

> Even when the court stands ready and willing to alter the sentence when presented with new information (and we assume this to be the case here), from the defendant's perspective, the opportunity comes too late. The decision

> has been announced, and the defendant is arguing from a disadvantaged position.

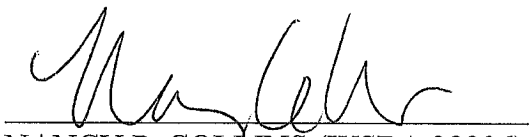
Crider, 78 Wn.App. at 861. It is appropriate to reassign this case to a different judge who did not already announced a sentence, so that Mr. Ramos is not disadvantaged in his request for a sentence that fully weighs the attributes of youth and his potential for rehabilitation, while the State confines itself to its promised low-end sentencing recommendation.

F. CONCLUSION.

Mr. Ramos's case should be remanded for a new sentencing hearing before a different judge.

DATED this 11th day of June 2014.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JOEL RAMOS, Appellant.	)	NO. 32027-8-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF JUNE, 2014.

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