70518-1

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NO. 70518-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SAY KEODARA,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. The unlimited cell phone search premised on overbroad, generalized allegations violated the Fourth Amendment and article I, section 7.

The prosecution's brief inexplicably asserts that Mr. Keodara did not challenge the warrant that authorized the police to sweepingly search any aspect of his cell phone without limitation. Yet Mr. Keodara made such a challenge in the trial court. *See, e.g.*, CP 83-87 (challenging evidence seized from cell phone because affidavit "was based solely on generalized statements of common behavior of gang members and no particularized information tying this particular phone to the items being sought."). The defense motion contains pages of legal discussion explaining why the search warrant fails the particularity requirement. *Id.* The State's claim that the issue is not preserved or not litigated below should be disregarded.

The purpose of the particularity requirement is to prevent the seizure of items other than those for which the police have probable cause and to deny the searching officers discretion about what to search. In *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616, 631 (2014), the Nevada Supreme Court addressed whether two search

warrants for cell phones met the particularity requirement in light of *Riley v. California*, _ U.S. _, 134 S.Ct. 2473, 2494 (2014).

The court agreed there was probable cause that the phones were used in relation to the crimes and evidence about the charged shootings might be found on the phones. 854 N.W.2d at 632. But "we do not think that such probable cause justified the scope of the search warrants actually issued by the county court in this case." *Id.*

Phones store a "vast amount of data" such that there is a "quantitative and qualitative difference" in cell phones from other objects. *Id.* at 632-33 (citing *Riley*, 134 S.Ct. at 2489). "A warrant satisfies the particularity requirement if it leaves nothing about its scope to the discretion of the officer serving it" and that scope is permissibly connected to the crime being investigated. *Id.* at 633.

In *Henderson*, the warrants "were defective for failing to meet the particularity requirement of the Fourth Amendment" because they did not limit the search to evidence of a particular crime or a limited type of information. *Id.* Instead, they authorized a search of "[a]ny and all information" after listing types of data, such as cell phone calls and text messages. *Id.* The *Henderson* Court held, "We conclude that the search warrants in this case did not comply with the particularity

requirement because they did not sufficiently limit the search of the contents of the cell phone." *Id.*

In Mr. Keodara's case, 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. While the warrant listed the offenses for which there was probable cause, the language directing the search of the cell phone did not limit the police to evidence of those crimes. *Id.* It separately authorized the catchall seizure of "any and all other evidence suggesting the crimes listed above" but this qualifying language does not appear in the paragraph authorizing the police to seize and search the phone's entire contents. *Id.* The warrant permitted an unlimited police seizure of the phone for any investigatory purpose and permitted access to the phone's contents in their entirety.

The search warrant authorizing unlimited police seizure and search of any information contained on a cell phone violates the Fourth Amendment and article I, section 7. Any seized evidence must be suppressed.

2. Sentencing Mr. Keodara to a mandatory of lifetime imprisonment for an offense that occurred when he was 17 years old without individualized consideration of his youthful circumstances violated the Eighth Amendment

The United States Supreme Court ruled that the mandatory imposition of a sentence that requires lifetime imprisonment upon a juvenile offender violates the Eighth Amendment. *Miller v. Alabama*, _ U.S. _, 132 S.Ct 2455, 2466, 183 L.Ed.2d 407 (2012); U.S. Const. amends. 8, 14; Const. art. I, § 14. When a sentence is mandatory, the sentencer is "prevented . . . from taking account of" the central considerations that flow from the offender's youth. *Miller*, 132 S.Ct. at 2466. Even if such a sentence may be allowed in "rare" circumstances, "we require [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S.Ct. at 2469.

The prosecution asserts that *Miller* and its progeny have no application to a person who receives a life sentence premised on

consecutive terms imposed for various offenses. Response Brief at 43. In a recent decision, the Wyoming Supreme Court rejected a similar assertion, reasoning that when a juvenile faces aggregate sentences with the practical effect of imposing lifetime incarceration, "the teachings of the *Roper/Graham/Miller*[1] trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's 'diminished culpability and greater prospects for reform.'" *Bear Cloud v. State*, 334 P.3d 132, 141-42 (Wyo. 2014) (quoting *Miller,* 132 S.Ct. at 2460). The court explained that it would not "ignore the reality" that a lengthy aggregate sentence has the effect of mandating a juvenile die in prison without regard for whether a judge or jury would have thought his youth and its attendant circumstances made a lesser sentence more appropriate. *Id.* at 142.

In applying *Miller* to consecutive sentences, the Wyoming Court adopted the reasoning of the Indiana Supreme Court which had held, "we will 'focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.'" *Id.* (quoting *Brown v. State,* 10

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[1] *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

N.E.3d 1, 8 (Ind.2014). It also found "persuasive" the holding of the Iowa Supreme Court, which held that a fixed term of years sentence does not provide the constitutionally mandated "meaningful opportunity for release" even when imposed based on minimum consecutive terms. *State v. Null,* 836 N.W.2d 41, 71 (Iowa 2013).

Considering the actuarial life expectancy of a person incarcerated as a juvenile, a youth "who will likely die in prison is entitled to the Eighth Amendment's presumption 'that children are constitutionally different from adults for sentencing purposes,' and that they 'have diminished culpability and greater prospects for reform.'" *Null,* 836 N.W.2d at 71 (quoting *Miller,* 132 S.Ct. at 2458, 2464). In sum, "[a] juvenile offender sentenced to a lengthy aggregate sentence "should not be worse off than an offender sentenced to life in prison without parole." *Bear Cloud*, 334 P.3d at 142 (quoting *Null,* 836 N.W.2d at 72).[2]

(2005).

[2] Other courts holding that *Miller* and *Graham* apply to lengthy or aggregate sentences under the Eighth Amendment include: *Fuller v. State,* 9 N.E.3d 653, 657–58 (Ind.2014); *People v. Caballero,* 55 Cal.4th 262, 145 Cal.Rptr.3d 286, 282 P.3d 291, 295 (2012); and *Moore v. Biter,* 725 F.3d 1184, 1193–94 (9th Cir.2013).

These decisions exemplify the fallacy of the State's contention that there are no Eighth Amendment implications to imposing a sentence that mandates Mr. Keodara's imprisonment for the rest of his life when it derives from stacking sentences for separate offenses committed at the same time and place in the course of single incident spanning about one minute of time.

The State's reliance on *Lockyer v. Andrade*, 538 U.S. 63, 74 n.1, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003), is similarly misguided. *Miller*, *Graham* and *Roper* stake out a different test for the constitutionality of punishment imposed upon a juvenile offender. *See Miller*, 132 S.Ct. at 2467-69. The rationale that juveniles are *as a class* less criminally culpable than adults and more susceptible to rehabilitation than adults places the juvenile offender's sentence in a different category than adults for Eighth Amendment purposes.

Yet *Lockyer* involved a consecutive sentence imposed upon an adult with a lengthy adult criminal history who was convicted for two separate offenses and received two terms of 25 years to life. Its procedural posture was as a habeas petition, so relief was only available if there was clearly established law as dictated by Supreme Court precednet. *Id.* at 71. *Lockyer* not only predated *Miller*, *Graham*, and

Roper, but its reasoning is contrary to their holdings that a person's age is a constitutionally significant factor in assessing the constitutionality of the punishment imposed. *See Lockyer*, 538 U.S. at 74 n.1 (in *dicta*, noting that "the age of the persons sentenced" is not a material distinction under the Eighth Amendment, which is undermined by *Miller*, *Graham*, and *Roper*).

The consecutive sentence issue in *Lockyer* also involved separate and distinct robberies that occurred weeks apart. *Id.* at 74 n.1. The Court emphasized that the sentence was not imposed for the same set of operative facts and therefore there was a different analysis required for an Eighth Amendment challenge. *Id.* Thus, for many reasons, *Lockyer* is inapposite to the issues raised by Mr. Keodara's sentence.

The State's also contends that Mr. Keodara is not prejudiced by the unconstitutionally imposed life sentence because a newly enacted law would let him petition for release at the discretion of the Indeterminate Sentencing Review Board. Response Brief at 46. But the Supreme Court has held that there is no constitutional difference between a sentence that offers the possibility of parole and that without parole. *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1989). A

defendant who "receives a life sentence with a possibility of parole must expect that he will serve a life sentence. He will, in fact, serve the identical sentence as a defendant who . . . was sentenced to life without possibility of parole; unless the State deigns to exercise its discretion and mollify his life sentence." *Frampton*, 95 Wn.2d at 529 (Dimmick, J., concurring in part, dissenting in part (majority opinion on this issue). Thus, "[t]he two penalties, while obviously not identical, are substantially similar." *Id.* at 530; *see also In re PRP of Grisby*, 121 Wn.2d 419, 426-28, 853 P.2d 901 (1993) (quoting then-Justice Dimmick's opinion with approval).

Not only is parole an act of grace and not an entitlement possessed by the offender, there is a pending bill to make changes to this legislation, which shows this new law's existence should not define the constitutionality of Mr. Keodara's sentence. *See* HB 1319 (2015).[3] As written, the Board may release Mr. Keodara only if it finds he is unlikely to commit any "new criminal law violations if released." RCW 9.94A.730(3). Parole can be denied because an unspecified level of risk that the offender will commit some petty crime at some time during the expected remainder of his life. *Id.* Even if the Board does not think he is

particularly dangerous, it can deny him parole if it thinks his poverty or lack of education may lead him to shoplift or trespass.

Miller mandates consideration of youth and its attributes at the time the sentence is imposed, not later. 132 S.Ct. at 2468. A minor's chronological age is a "relevant mitigating factor of great weight," and the sentence "must" take into account the child's "background and emotional development" in assessing culpability. *Id.* at 2467. The Sentencing Reform Act presumes a court must impose a standard range sentence and bars courts from imposing a sentence less than the standard range based on "youth (and all that accompanies it)." *State v. Law,* 154 Wn.2d 85, 94, 110 P.3d 717 (2005); *see Miller*, 132 S.Ct. at 2469. Mr. Keodara's sentence was a mandatory term premised on the presumptive operation of the SRA, in violation of the Eighth Amendment and article I, section 14.

Finally, no reasonably competent attorney advocating on behalf of Mr. Keodara would not even mention *Miller* and its Eighth Amendment requirements at the time of sentencing. In *Miller*, the Supreme Court held that only the rare juvenile who is proven to be irredeemable may receive a sentence of lifetime incarceration. Even if

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[3] Bill information available at: http://app.leg.wa.gov/billinfo/.

Mr. Keodara did not offer evidence about his youth and its attributes, when a life sentence is only constitutionally permissible in only the rarest of cases, it is reasonably probable he would not fall into this rare category. *Miller*, at 2469; *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 63. "[J]uvenile offenders cannot with reliability be classified among the worst offenders." *Graham*, 560 U.S. at 68. It is reasonably probable that had his lawyer presented any evidence of Mr. Keodara's age, mental capacity, upbringing, or financial circumstances, he would have shown that he falls within the vast majority of all offenders who, even though they have committed horrible crimes, are not so irredeemable that they should spend the rest of their lives serving a term of years in prison. There is a "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Mr. Keodara received ineffective assistance of counsel at sentencing.

B. CONCLUSION.

For the foregoing reasons and the further arguments contained in Appellant's Opening Brief, Mr. Keodara's should receive a new trial and sentencing hearing, and any additional relief this Court deems appropriate.

DATED this 13th day of February 2015.

Respectfully submitted,

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **REPLY 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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