96153-1

Supreme Court No. _____
(COA No. 76232-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SAY KEODARA,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER**Error! Bookmark not defined.**

Say Keodara, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Keodara seeks review of the Court of Appeals decision dated May 7, 2018, for which reconsideration was denied on July 3, 2018, copies of which are attached as Appendix A and B, respectively.

C. ISSUE PRESENTED FOR REVIEW

1. The Court of Appeals ruled that *Miller v. Alabama*[1] and this Court's related Eighth Amendment jurisprudence only apply when the court elects to impose a sentence that exceeds a person's life expectancy. It relied on an insurance table to deem Mr. Keodara's life expectancy as 77 years old, and on this basis refused to apply *Miller* to evaluate Mr. Keodara's lengthy sentence for a crime committed when 17 years old.

Contrary to the Court of Appeals opinion, other jurisdictions deem Mr. Keodara's sentence as de facto life, because a person who spends his youth and adulthood in prison has a far lower life expectancy. Should this Court grant review to decide whether the statistically documented reduced life expectancy for a juvenile sentenced to spend the majority of his life in prison defines when a de facto life sentence is imposed and triggers the constitutional protections to be free from cruel and unusual punishment based on this statistically documented reduced life expectancy?

2. In *Houston-Sconiers**Error! Bookmark not defined.***,[2] this Court held a sentencing court must use its full range of discretion in sentencing juveniles to comply with *Miller*. The sentence imposed may not rest on potential future opportunities for parole, which may be illusory. Here, the court explicitly determined the length of sentence to impose based on the possibility of future parole. Does the court's sentencing decision conflict with this Court's rulings, meriting review?

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[1] *Miller**Error! Bookmark not defined.** v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

[2] *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.2d 409 (2017).

3. In *Houston-Sconiers*, this Court held that judges must exercise discretion and consider mitigating qualities of youth when sentencing juveniles for weapons enhancements. *Houston-Sconiers* was decided after Mr. Keodara's sentencing and the judge did not have the benefit of that change in the law when sentencing Mr. Keodara. Based on the importance of fairly sentencing a young person to a de facto life term, and because the law changed after the sentence was imposed, does this change in the law require remand for further consideration of the sentence to impose?

D. STATEMENT OF THE CASE

Say Keodara received a new sentencing hearing because the court did not consider his youthful attributes diminishing his culpability when sentencing him. *State v. Keodara*, 191 Wn. App. 305, 364 P.3d 777 (2015). At the resentencing, the court learned Mr. Keodara lived in an extremely volatile environment from his birth, as the often-neglected child of young, drug-addicted, and impoverished parents. Mr. Keodara attempted suicide at six years old when his father left the family home. Ex.

1, at 5:32-6:00. His family believed he was molested as a child but did nothing about it. Ex.1, at 4:28-39. An older child used Mr. Keodara as a tool to help commit crimes. CP 66; RP 19; Ex. 1, 14:00-15:20. When given the opportunity for rehabilitation away from his family home, Mr. Keodara responded positively but his time away from home was limited. CP 371.

At resentencing, Mr. Keodara presented extensive evidence of his unstable childhood and mental health struggles including testimony from his mother and a psychological expert. RP 10-70. A videotape further explored the tragic circumstances of Mr. Keodara's youth, including interviews with relatives. Ex. 1.

The prosecution agreed the standard range was too harsh and asked the court to impose 46 years. CP 320-21. Mr. Keodara asked for 17 years and five months—his age at the time of the crime—and argued the firearm enhancements were not mandatory and could be reduced as part of an exceptional sentence. CP 49. The prosecution disagreed and argued the enhancements were mandatory and must be imposed in full and consecutively. CP 320-21.

The court imposed a sentence of 40 years, imposing an exceptional sentence below the standard range for the substantive offenses but refusing to run any of the four firearm enhancements concurrently. CP 357, 370.

On appeal, Mr. Keodara challenged the trial court's inadequate application of *Miller* to the evidence of his greatly reduced culpability and his transitory immaturity. The Court of Appeals did not decide whether the court properly applied *Miller* and instead ruled that *Miller* did not apply because Mr. Keodara did not receive a de facto life sentence. Relying on life expectancy data pertaining to the population at large, it concluded he would be released before he died. Mr. Keodara moved to reconsider, explaining this life expectancy data did not apply to a person who spends his life abused, traumatized and in prison. The Court of Appeals denied the motion to reconsider without comment.

E. ARGUMENT

Life expectancy charts generated for insurance purposes do not define when a lengthy sentence imposed upon a juvenile triggers the considerations of youthfulness mandated by the Supreme Court.

The Court of Appeals used an inapplicable life expectancy chart from an insurance entity to deem Mr. Keodara's 40-year sentence too short to be bound by the requirements of *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); U.S. Const. amend. 8; Const. art. I, § 14. Slip op. at 7-8. This Court should grant review because this issue is both of fundamental constitutional importance and lower courts need clarity on defining the bounds of when a juvenile's lengthy sentence affords the constitutionally mandated meaningful opportunity for release within the person's lifetime.

1. *This Court and the United States Supreme Court mandate meaningful consideration of the attributes of youth before imposing what amounts to a life sentence.*

"[C]hildren are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. This difference triggers an "Eighth Amendment requirement to treat children

differently, with discretion and with consideration of mitigating factors." *Houston-Sconiers*, 188 Wn.2d at 20.

Miller mandates that a sentencing court consider several factors that make juveniles different than adults before imposing a life term on a juvenile. These factors include: (1) "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; and (3) the possibility of rehabilitation. *Miller*, 567 U.S. at 477-78; *see also Houston-Sconiers*, 188 Wn.2d at 23.

A trial court must exercise its sentencing discretion based on these factors at sentencing hearing. *Houston-Sconiers*, 188 Wn.2d at 19. This sentencing discretion may not be postponed; it governs the sentencing "regardless of what opportunities for discretionary release may occur down the line." *Id.*

The Court of Appeals remanded Mr. Keodara's case for a new sentencing hearing because the judge never considered his youth during his original sentencing hearing. On remand, the

court heard a host of information describing the trauma inflicted on Mr. Keodara as a young person, demonstrating his reduced culpability based on his neurological development. But when he complained that the judge did not properly apply the Miller factors, the Court of Appeals summarily ruled that Miller did not apply to Mr. Keodara because his reduced sentence of 480 months cannot constitute a life sentence when a life expectancy chart shows that people typically live until they are 77 years old.

2. Insurance generated life expectancy charts do not control the definition of a life equivalent prison sentence.

In *State v. Ramos*, 187 Wn.2d 420, 437, 387 P.3d 650 (2017), this Court held that "*Miller* applies equally to literal and de facto life-without-parole sentences." The Court of Appeals construed *Ramos* to hold that a de facto life sentence occurs *only* when the court imposes "a total prison sentence exceeding the average human life-span." Slip. op. at 7, citing *Ramos*, 187 Wn.2d at 434.

The Court of Appeals then ruled *Ramos*, *Miller* and other related case law inapplicable to Mr. Keodara because the court imposed a 40-year sentence on remand, which makes him 58

years old upon release. Slip op. at 8. It concluded that "official state records" determine his life expectancy to be 77 years. *Id.* & n.6, citing Life-expectancy table, Office of the Insurance Commissioner Washington State (April 18, 2018), available at: https://insurance.wa.gov/life-expectancy-table.

This insurance data on which the Court of Appeals relied is not Mr. Keodara's actual life expectancy or a reasonable estimate of it. The insurance commissioner's table is inapplicable and inaccurate for a person who spends his youth and adulthood in prison following an extremely traumatic childhood.

The federal prison system classifies any sentence of 470 months or longer as a sentence of life imprisonment. U.S. Sent. Comm'n, 2013 Sourcebook of Federal Sentencing Statistics S-170 (2014). It statistically determined that 470 years or longer is a life term because "it is consistent with the average life expectancy of federal criminal offenders." *Id.*; *see* U.S. Sent. Comm'n, Life Sentences in the Federal System, 10 n.52 (2015).[3]

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[3] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf.

Each year of incarceration correlates with "a two-year decline in life expectancy." E. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003*, 103 Am. J. Pub. Health 523, 526 (2013).[4] As the Connecticut Supreme Court ruled, a general statistic on average life expectancy in the population at large "does not account for any reduction in life expectancy due to the impact of spending the vast majority of one's life in prison." *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1046 (Conn. 2015).

Men, racial minorities, and poor people have lower life expectancies generally and they enter prison in worse health. Cummings & Colling, *There is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables In Post-Graham Sentences*, 18 UC Davis J. Juvenile L. & Policy, 280, 283-85 (2014). Once in prison, "nearly all chronic health conditions are more prevalent" for inmates. Joe Russo, et al, *Caring for Those in Custody: Identifying High-Priority Needs to Reduce Mortality in Correctional Facilities*,

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[4] Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3673515/.

Rand Corporation, 17 (2017).[5] Prisons feature "high levels of violence and communicable diseases, poor diets, and shoddy health care," which lead to "a significant reduction in life expectancy behind bars." Nick Straley, *Miller's Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 Wash. L. Rev. 963, 1007 (2014).

"Entering prison at a young age is particularly dangerous." *Id.* A young person imprisoned in an adult population is far more likely to be the victim of sexual or physical assault. *Id.*

While in prison, people "experience relentless stress, exposure to infectious diseases, and the threat of violence." Cummings, *supra* at 288. They are isolated in small spaces for long periods of time. *Id.* "[I]ncarceration accelerates the aging process and results in life expectancies substantially shorter than estimates for the general population." *Contreras*, 411 P.3d at 450.

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[5] Available at https://www.rand.org/pubs/research_reports/RR1967.html.

The effects of prison do not disappear upon release: former inmates die in Washington at a rate 3.5 times higher than other state residents. I.A. Binswanger, et al, *Release from Prison - A High Risk of Death for Former Inmates*, New Eng. J. Med. 161 (2007).[6]

Say Keodara received a sentence of 480 months for a crime he committed when 17 years old. During his birth and throughout his childhood, his mother was an impoverished drug addict. CP 58-59. His childhood was marked by extreme chaos, including the abandonment of his father to prison and his mother's neglect of him. CP 61, 79, 84. He will be 58 years when he completes this prison term. Due to the effects prison has on any person sent to adult prison at a young age, Mr. Keodara's sentence is a de facto life term.

The Court of Appeals opinion rested on insurance data for life expectancy that no party cited in its briefing to categorically remove Mr. Keodara from the sentencing assessments required in *Ramos*, *Houston-Sconiers*, and *Miller*. Prison substantially diminishes a person's life expectancy. Mr. Keodara's life

[6] Available at https://www.nejm.org/doi/full/10.1056/NEJMsa064115.

expectancy is not validly explained or analyzed by a statistic that does not take into account the impact prison will have on his life expectancy.

This Court should grant review to rectify the Court of Appeals' error and clarify that a child's life expectancy is not defined by that of a person living in freedom when sentenced to a lengthy term in adult prison. This Court should further grant review because the Court of Appeals opinion denies children the protections of the Eighth Amendment and article I, section 14 based on a definition of life expectancy that does not take into account the fundamental tenets of Miller and its related jurisprudence. A young person sentenced to live his life in prison without full consideration of his youthful attributes receives an unconstitutional sentence.

3. Under constitutional and common law principles, a sentence that releases someone at the end of their expected life is a de facto life sentence for a juvenile.

A lawful sentence imposed on a juvenile for even the most horrible of crimes "must offer 'hope of restoration,'" as well as "a chance for fulfillment outside prison walls, and a chance for reconciliation with society." *People v. Contreras*, 411 P.3d 453

(Cal. 2018) (quoting *Graham v. Florida*, 560 U.S. 48, 79, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)). Release near the end of one's biological life is essentially a sentence of life in prison that is constitutional only for the irretrievably incorrigible, which Mr. Keodara is not.

The Court of Appeals used an inapplicable life expectancy chart to deem Mr. Keodara's sentence to be unmoored from the requirements of *Miller v. Alabama*, 567 U.S. 460. 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) and its construction of the Eighth Amendment's individualized sentencing mandate when imposing a life sentence on a person who committed a homicide as a child. Slip op. at 7-8. *Miller* applies to Mr. Keodara's 480-month sentence.

Prison life expectancy is reflected in the federal statistics, showing a 470-month sentence equates with life in prison, and not by insurance tables generated for the population at large. The court rendered its sentencing decision without the benefit of *Houston-Sconiers*, 188 Wn.2d at 20, which substantially altered the court's sentencing discretion. Mr. Keodara offered abundant evidence of his tragic life circumstances diminishing his ability

to control his behavior in his youth and his great capacity for rehabilitation. This Court should grant review because the Court of Appeal decision conflicts with this Court's recent sentencing decisions and demonstrates the need to explain the parameters of a court's sentencing discretion when imposing a sentence that contemplates a juvenile's release near the end of his natural life.

F. CONCLUSION

Based on the foregoing, Petitioner Say Keodara respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 2nd day of August 2018.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SAY SULIN KEODARA, Appellant.	)	DIVISION ONE No. 76232-0-I (consol. with No. 76333-4-I) UNPUBLISHED OPINION FILED: May 7, 2018

DWYER, J. — Say Keodara committed terrible crimes when he was 17 years old. He was sentenced to a low-end standard range sentence of 831 months of incarceration. Finding that this 69-year, three-month sentence was the functional equivalent of a life-without-parole sentence, and that the sentencing court had, at sentencing, treated as immaterial Keodara's youth, we reversed the sentence and remanded the cause for a new sentencing hearing.

On remand, the court considered Keodara's youth at the time of his offense, including the particular circumstances of his upbringing and general circumstances pertaining to youthful offenders. The court concluded that Keodara had proved by a preponderance of the evidence that he should receive an exceptional sentence below the standard range. The court imposed a 480-month sentence. This 40-year sentence is not the equivalent of a life-without-parole sentence.

Because the sentencing court (1) recognized that no mandatory sentence provisions were applicable in Keodara's circumstance, (2) recognized that it had discretion at sentencing to select an appropriate sentence, (3) exercised its discretion, (4) considered Keodara's youth in determining the appropriate sentence, and (5) imposed a sentence below the standard range for a lesser term than life, there was no error. We affirm.

I

In 2013, a jury convicted Keodara for crimes that he committed when he was 17 years old.[1] The crimes of conviction were one count of murder in the first degree, one count of unlawful possession of a firearm in the first degree, and three counts of assault in the first degree. The murder conviction and the three assault convictions included, for sentencing purposes, mandatory firearm enhancements. Keodara was sentenced to a total of 831 months in prison. This sentence was at the lowest end of the standard range of 831 months to 1141 months, as set forth in RCW 9.94A.510.

Keodara appealed his convictions and sentence to this court. We affirmed Keodara's convictions but remanded for resentencing because the sentencing court had imposed a sentence that was, in effect, a life sentence without first adequately considering Keodara's youth and individual circumstances, as required by Eighth Amendment case law. See State v. Keodara, No. 70518-1-I,

[1] The crimes are detailed in State v. Keodara, 191 Wn. App. 305, 364 P.3d 777 (2015), review denied, 185 Wn.2d 1028 (2016).

slip op. at 19 (Wash. Ct. App. Nov. 2, 2015) (published in part) http://www.courts.wa.gov/opinions/pdf/705181.pdf at 19.

On remand, a new sentencing hearing was held. Prior to the hearing, Keodara submitted 240 pages of mitigation materials. The materials included Keodara's mental health assessments, details about his difficult childhood, and educational materials explaining the effects of maltreatment on brain development. Keodara also presented testimony from his mother and psychologist, both of whom testified to Keodara's difficult childhood and to the impact that his difficult childhood had on his psychological health.

Before announcing Keodara's sentence, the trial court emphasized that it had, on several occasions, reviewed all of the information submitted to the court. It also explained that it had considered Keodara's age at the time of the crime, his family and home environment, his susceptibility to influence from older individuals, and his possibility of rehabilitation in reaching a decision about his sentence.[2] Upon considering Keodara's youth, the court imposed an exceptional sentence of 480 months in prison.[3] The sentence is almost 30 years below the lowest end of the standard range—831 months.

Keodara again appeals.

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[2] The trial court entered extensive findings of fact and conclusions of law, as to the impact of his youth, as supplements to the judgment and sentence.

[3] Keodara was sentenced to 240 months for the murder in the first degree conviction. He was sentenced to 87 months for the unlawful possession of a firearm in the first degree conviction. He was given three separate 93 month sentences for each of the three convictions for assault in the first degree. He was also given four separate 60 month sentences for the firearm enhancements to the murder and the assault convictions. The sentences for the murder, assaults, and possession of a firearm convictions were ordered to run concurrently (for a total of 240 months.) The sentences for the four firearm enhancements were ordered to run consecutively (for a total of 240 months.) Thus, the total sentence was for 480 months of incarceration.

II

Keodara's primary contention on appeal is that the procedure at his sentencing hearing fell short of that required by Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Keodara's assertion reflects a fundamental misunderstanding of the Miller decision and of the Eighth Amendment, upon which Miller was grounded.

The Eighth Amendment[4] concerns itself with actual punishment. It is not a procedural guarantee.

The import of Miller was explained by the United States Supreme Court in a later decision. In Miller,

> the Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing.

Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718, 725, 193 L. Ed. 2d 599 (2016). More specifically,

> Miller held that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on "'cruel and unusual punishments.'" Id., at __, 132 S. Ct., at 2460. "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," mandatory life without parole "poses too great a risk of disproportionate punishment." Id., at __, 132 S. Ct., at 2469. Miller required that sentencing courts consider a child's "diminished culpability and heightened capacity for change" before condemning him or her to die in prison. Ibid. Although Miller did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect "'irreparable corruption.'" Ibid.

[4] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

> (quoting Roper v. Simmons, 543 U.S. 551, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)).

Montgomery, 136 S. Ct. at 726.

In Montgomery, the high court made explicit that Miller announced "a new substantive rule of constitutional law." Montgomery, 136 S. Ct. at 729. Such rules, the Court cautioned, are to be distinguished from "procedural rules." Montgomery, 136 S. Ct. at 729. To be sure, Miller conferred a "substantive constitutional right." Montgomery, 136 S. Ct. at 732. The right was substantive, the Montgomery Court explained, because "[p]rotection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment." Montgomery, 136 S. Ct. at 732.

> These considerations underlay the Court's holding in Miller that mandatory life-without-parole sentences for children "pos[e] too great a risk of disproportionate punishment." 567 U.S., at __, 132 S. Ct., at 2469. Miller requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Ibid. The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of "children's diminished culpability and heightened capacity for change," Miller made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Ibid.

Montgomery, 136 S. Ct. at 733–34. The Court then explained,

> [b]ecause Miller determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption,'" 567 U.S., at __, 132 S. Ct., at 2469 (quoting Roper, supra, at 573, 125 S. Ct. 1183), it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders

> whose crimes reflect the transient immaturity of youth. As a result, Miller announced a substantive rule of constitutional law.

Montgomery, 136 S. Ct. at 734 (citation omitted).

But there is even more to be learned about Miller from the Montgomery opinion.

> To be sure, Miller's holding has a procedural component. Miller requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence. . . . *Those procedural requirements do not, of course, transform substantive rules into procedural ones.*
>
> The procedure Miller prescribes is no different. A hearing where "youth and its attendant characteristics" are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. 567 U.S., at __, 132 S. Ct., at 2460. The hearing does not replace but rather gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.

Montgomery, 136 S. Ct. at 734-35 (emphasis added).

Miller thus established two inter-related, substantive constitutional rules. The Eighth Amendment prohibits both (1) the mandatory imposition of a life-without-parole sentence on a juvenile offender, and (2) the imposition of a life-without-parole sentence on a juvenile offender whose crime reflects transient immaturity, as opposed to irretrievable depravity.

Our Supreme Court undertook an application of Miller just last year. In State v. Ramos, the court held that "Miller applies equally to literal and de facto life-without-parole sentences." 187 Wn.2d 420, 437, 387 P.3d 650, cert. denied, 138 S. Ct. 467 (2017). The court described a de facto

life sentence as follows: "a total prison term exceeding the average human life-span—that is, a de facto life sentence." Ramos, 187 Wn.2d at 434.

The Supreme Court then applied the Miller guarantees to the de facto life sentence imposed on Ramos. In so doing, it set forth the rule of Miller: "Miller establishes a substantive rule that a life-without-parole sentence *cannot be imposed* on a juvenile homicide offender whose crimes reflect transient immaturity." Ramos, 187 Wn.2d at 436 (emphasis added). Applying this to Ramos's situation, the court explained that

> Ramos was in fact sentenced to die in prison for homicide offenses he committed as a juvenile. Miller plainly provides that a juvenile homicide offender *cannot be sentenced to die in prison* without a meaningful opportunity to gain early release based on demonstrated rehabilitation unless the offender first receives a constitutionally adequate Miller hearing.

Ramos, 187 Wn.2d at 440 (emphasis added).

The import of the discussions in Montgomery and Ramos is that they make clear that Miller, as an Eighth Amendment case, is concerned with the *punishment imposed.* The Miller rule is applicable when a juvenile offender is sentenced to die in prison (as a result of the imposition of either a literal or a de facto life-without-parole sentence).

Here, Keodara was not sentenced to die in prison. The sentencing judge found that he had proved that he deserved an exceptional sentence below the standard range. Such a sentence was imposed. The 40-year sentence imposed is not a *de facto* life sentence. Should Keodara serve

the full sentence, he will be age 58 upon release.[5] His life expectancy, as predicted by official state records, is 77 years.[6]

Because Keodara did not receive a literal or a de facto life-without-parole sentence, Miller does not apply to appellate review of his sentence.[7]

III

The fact that Keodara was not sentenced to die in prison does not mean that the Eighth Amendment has no applicability to the sentence imposed upon him. In fact, as the recipient of a less-than-life sentence, Keodara's sentence, on appellate review, is measured against the requirements of State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017). In that decision, our Supreme Court noted that

> "[C]hildren are different." Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 2470, 183 L. Ed. 2d 407 (2012). That difference has constitutional ramifications: "An offender's age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." Graham v. Florida, 560 U.S. 48, 76, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); U.S. CONST. amend. VIII.

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[5] If he earns early release, Keodara may be released as early as age 39.

[6] When life expectancy is at issue in litigation, the Washington Pattern Jury Instructions contain a suggested pattern jury instruction addressing the issue. That instruction, WPIC 34.04 (6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 34.04 (6th ed. 2012)), allows the jury to be instructed on a person's life expectancy based on data routinely gathered by the Washington Insurance Commissioner. See 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL APPENDIX B LIFE EXPECTANCY TABLE, at 665-68 (6th ed. 2012). Our statement as to Keodara's life expectancy is based on that data. See Life-expectancy table, Office of the Insurance Commissioner Washington State (April 18, 2018, 10:46 a.m.), https://insurance.wa.gov/life-expectancy-table.

[7] Keodara's appellate contention is that Miller set forth a *procedural right.* That right, Keodara avers, is to have his sentencing hearing proceed in a particular fashion, with the court considering certain factors, *regardless of the sentence actually imposed.* This is wrong. Miller ensures that only juveniles who manifest irretrievable depravity are sentenced to die in prison. The Eighth Amendment does not require an inquiry into irretrievable depravity as a precursor to a sentence such as that imposed on Keodara.

Houston-Sconiers, 188 Wn.2d at 8. Thus, a rule was announced.

> Because "children are different" under the Eighth Amendment and hence "criminal procedure laws" must take the defendants' youthfulness into account, sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there.

Houston-Sconiers, 188 Wn.2d at 9. This rule led to the court's holding.

> [W]e hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled. Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.

Houston-Sconiers, 188 Wn.2d at 21 (footnote omitted). Accordingly, the Supreme Court ruled, the court that sentenced Houston-Sconiers had erred by reasoning that, in sentencing him, it was statutorily required to impose mandatory firearm enhancements to be served consecutively. Houston-Sconiers, 188 Wn.2d at 25-26.

No such error occurred herein. At Keodara's sentencing hearing, the court considered extensive written submittals. It considered, and entered findings and conclusions describing, the impact of his youth on his criminal culpability. It found that Keodara proved by a preponderance of the evidence that he was entitled to an exceptional sentence below the standard range. And it imposed just such a sentence.

The standard range sentence applicable to Keodara was 831 months to 1141 months in prison. The superior court sentenced him to an exceptional sentence downward: a total of 480 months. The sole reason given for this sentence was Keodara's youth.

On appeal, Keodara mistakenly claims that the trial court erred by imposing four consecutive 60-month firearm enhancements. This is not so. The trial court plainly understood that it had the discretion not to do so. However, it chose to structure its leniency by drastically reducing the period of incarceration it imposed on the murder conviction—reducing that part of the sentence to 240 months. It then ordered that the base sentences for Keodara's four other convictions be served concurrently with the murder sentence. "[A]n exceptional sentence may be for a reduced term of years, for concurrent rather than consecutive sentences, or both." Ramos, 187 Wn.2d at 434.

The trial court exercised its discretion, based solely on Keodara's youth, and determined that he should receive an exceptional sentence below the standard range. The trial court then again exercised its discretion, based solely on Keodara's youth, and structured the exceptional sentence so that it totaled 480 months—351 months below the lowest end of the standard range. By recognizing that it had such discretion—and by exercising that discretion in good faith—the sentencing court fully complied with the requirements of Houston-Sconiers.

Affirmed.

We concur:

APPENDIX B

FILED
7/3/2018
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SAY SULIN KEODARA, Appellant.	DIVISION ONE No. 76232-0-I (consol. with No. 76333-4-I) ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

For the Court:

Dwyer, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75546-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☒ petitioner

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: August 2, 2018
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

August 02, 2018 - 3:54 PM

Transmittal Information

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Superior Court Case Number:	12-1-04451-8

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