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Court of Appeals
Division III
State of Washington

No. 95814-9

NO. 33794-4-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JEREMIAH JAMES GILBERT,

Defendant/Appellant.

BRIEF OF APPELLANT

Dennis W. Morgan WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, Washington 99166
(509) 775-0777

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ASSIGNMENT OF ERROR

1. The sentencing court failed to appropriately apply the *Miller*[1] factors at Jeremiah James Gilbert's resentencing haring resulting in a sentence that constitutes a *de facto* life sentence.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Does the sentencing court's failure to impose concurrent sentences amount to a *de facto* life sentence in violation of the constitutional mandates of *Miller v. Arizona, supra, Roper v. Simmons,* 543 U.S. 551, 572-73, 125 S. Ct. 1183, 161 L. Ed.2d 1 (2005) and *Graham v. Florida,* 560 U.S. 48, 88, 130 S. Ct. 2011, 176 L. Ed.2d 825 (2010)?

STATEMENT OF THE CASE

A jury found Mr. Gilbert guilty of six (6) offenses on April 16, 1993. The offenses were:

- Aggravated first degree murder;
- First degree murder;
- Second degree assault;

[1] *Miller v. Alabama,* 567 U.S. ___, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012)

- First degree burglary;
- First degree theft; and
- First degree robbery.

The crimes occurred on September 20, 1992. Mr. Gilbert was fifteen (15) years-old at that time.

All of the foregoing information is contained in the Judgment and Sentence entered on June 7, 1993. The trial court imposed a sentence of life in prison without possibility of parole on aggravated first degree murder. A sentence of two hundred and eighty (280) months, to run consecutive to the sentence for aggravated first degree murder, was imposed on first degree murder. The sentences on the other four (4) offenses were to run concurrent with one another and concurrent with the aggravated murder offense. (CP 0)

Mr. Gilbert filed a Notice of Appeal with the Court of Appeals on June 22, 1993. (CP 9)

The Court of Appeals affirmed Mr. Gilbert's convictions by a decision entered on October 8, 1996. (CP 11)

The Court of Appeals issued its Mandate under Cause Number 13366-4-III on March 5, 1997. (CP 10)

On March 5, 2015 the Court of Appeals issued a Certificate of Finality under Cause Number 32895-3-III following a voluntary withdrawal of Mr. Gilbert's personal restraint petition. (CP 22)

Mr. Gilbert's case was remanded to Klickitat County Superior Court for resentencing based upon *Miller v. Alabama, supra*.

The Court appointed an expert witness to evaluate Mr. Gilbert in accord with the requirements of the *Miller* case. (CP 25)

Ronald Roesch, PhD, a clinical psychologist and professor of psychology conducted the evaluation. His risk assessment was filed on September 17, 2015. (CP 38)

All of the psychological testing conducted by Dr. Roesch indicated that Mr. Gilbert produced a valid personality profile. (CP 43)

The Personality Assessment Inventory (PAI) did not indicate the presence of any clinical psychopathology. (CP 43)

The HCR-20 (an assessment of risk for violence and recidivism) analysis established that Mr. Gilbert was a "low risk to reoffend." (CP 45)

Dr. Roesch also relied upon a report from the Washington State Institute for Public Policy which analyzed follow-up data on violent juvenile offenders. The report found that

> … through age 25, only 20% of these violent young offenders were subsequently sentenced for a violent felony as an adult.

> Thus, the majority of violent youth do not represent a substantial long-term risk of violence. The reasons for this are complex, but from a developmental perspective, it is likely due to the fact that adolescents, compared to adults, are more likely to respond impulsively, take greater risks, think less about long-term consequences of their behavior, and are more likely to be influenced by their peers.

(CP 45)

Dr. Roesch went on to cite a study by the Washington Coalition for the Just Treatment of Youth (2009) which concluded

> "… recent breakthroughs in brain development research have shown that due to anatomical differences in the adolescent brain, youth are less able than adults to assess risks, control impulsive behavior, and engage in moral reasoning."

(CP 46)

After his arrest Mr. Gilbert was evaluated in accord with the *Kent*[2] criteria. That evaluation stated:

> The murders were not planned but rather appeared to be an impulsive reaction to being confronted during the attempted truck theft. The probation report presented at his decline hearing noted that he did not meet the *Kent* criteria for sophistication and maturity and his ability to process information and his decision-making capacity was not the same as an adult's capacity. This per-

[2] *Kent v. United States,* 383 U.S. 541, ___ Sup. Ct. ___, ___ L. Ed. ___ (1966).

> spective was echoed in the testimony of the Klickitat County Juvenile Court Administrator who commented that he was not particularly sophisticated or mature beyond his age. His alcohol use was a factor as it appeared to be associated with declines in his school performance and increasing difficulties in his family life.

(CP 47)

The trial court, at the resentencing hearing, ruled:

> Well, I've read the risk assessment of the defendant and it says many good things about the defendant. Mr. Gilbert, you speak very -- very well and articulately on your own behalf as well and there's no reason that I cannot believe all of those things that you've done on your own behalf and the behalf of others and it seems likely, given your demeanor and your temperament and what I'm hearing now that you'll continue to do those things.
>
> I've given thought to this and poured [*sic*] over what the facts are. I think even Mr. Gilbert would agree that this was a hei-

nous crime, that he gratuitously and senselessly executed at least one person, he's admitted to that and the question before the Court then on resentencing is whether the two hundred and eighty months consecutive to the twenty-five under life sentence, minimum, is justice given all of the circumstances in the context of everything I know or whether in the context of everything I know, justice requires me to agree with Mr. Lanz and reduce that --I --by sentencing concurrently.

So I am finding right now that I am adopting the State's position in-toto. And I am agreeing with their analysis of the law and the statute and I am therefore sentencing you to twenty-five years with a life sentence plus two hundred and eighty months consecutive. I am disagreeing with your position. I wish you the best of luck within the

> prison system and perhaps the parole board will see it your way sometime soon.

(RP 19, l. 14 to RP 20, l. 19).

An Amended Judgment and Sentence was entered on September 21, 2015 in accord with the trial court's ruling. (CP 86)

Mr. Gilbert filed his Notice of Appeal on September 22, 2015. (CP 93)

SUMMARY OF ARGUMENT

The sentence imposed when Mr. Gilbert was resentenced does not comport with the intent of the United States Supreme Court cases delineating the brain development differences between adults and juveniles.

The resentencing court misunderstood that, or ignored the fact that, imposition of a consecutive sentence on first degree murder automatically resulted in an additional mandatory twenty (20) year sentence. Thus precluding any possibility of early release until some time in 2037 when Mr. Gilbert will be sixty (60) years old.

ARGUMENT

RCW 10.95.035(1) provides, in part:

> A person, who was sentenced prior to June 1, 2014, to a term of life without the possibility of parole for an offense committed prior to their eighteenth birthday, shall be returned to the sentencing court or the sentencing court's successor for sentencing consistent with RCW 10.95.030. …

RCW 10.95.030(3)(a)(i) states:

> Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person's sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.

The law continues to advance and realize that juvenile offenders differ from adult offenders. A series of United States Supreme Court decisions have significantly impacted sentencing of juvenile offenders. *See: Roper v. Simmons,* 543 U.S., *supra,* 572-73, (barring capital punishment for children); *Graham v. Florida,* 560 U.S. *supra,* 88 (prohibiting a sentence of life without the possibility of parole for a child who commits a non-homicide offense); and *Miller v. Alabama, supra* (requiring individualized sentencing including consideration of the attributes of youth for a child committing a homicide).

When Mr. Gilbert was sentenced in 1993 aggravated first degree murder was a seriousness level XV. First degree murder was a seriousness level XIV. (Appendix "A")

The Sentencing Guidelines for aggravated first degree murder in 1992 indicated the following:

II. SENTENCE RANGE (LEVEL XV)

DEATH SENTENCE OR LIFE SENTENCE WITHOUT PAROLE.

(Appendix "B")

No offender score calculation was necessary for aggravated first degree murder in 1993.

Aggravated first degree murder is now a Level XVI seriousness offense. In 2015 there still is no need to compute an offender score for an individual convicted of aggravated first degree murder. (Appendix "C")

As indicated by RCW 9.94A.510 (TABLE 1) a conviction of aggravated first degree murder, whether an individual has an offender score of 0 or 9+ has no bearing upon the sentence imposed. (Appendix "D")

At Mr. Gilbert's resentencing hearing the State argued that the only issue before the sentencing court was to impose the twenty-five (25) year minimum - life in prison maximum sentence for the aggravated first degree murder. (RP 3, ll. 8-23)

On the other hand, defense counsel argued that the indeterminate aggravated first degree murder sentence precluded consecutive sentences with the remaining offenses and that all of those offenses should run concurrent with the aggravated first degree murder sentence. (RP 12, ll. 1-9)

Defense counsel was correct in connection with the argument that the sentencing court had the authority to reconsider the original sentence. In *State v. Ramos,* 189 Wn. App. 431, 443 (2015) the Court stated:

> In announcing its sentencing decision, the court acknowledged its discretion to reconsider the original sentence and impose concurrent sentences as an exceptional sentence downward.

"… [T]he plain language of RCW 9.94A.589(1) and RCW 9.94A.535 support the … determination that the trial court had the discretion to impose an exceptional sentence." *Personal Restraint of Mulholland,* 161 Wn.2d 322, 331, 166 P.3d 677 (2007).

In *State v. Graham,* 18l Wn.2d 878, 883 (2014), when discussing the multiple offense policy of RCW 9.94A.589, the Court concluded: "We need look only to .535(1)(g)'s plain meaning to conclude the legislature considered exceptional sentences possible for some serious violent offenses.

The *Graham* Court went on to say at 885:

> We take this opportunity to reaffirm that a sentencing judge may invoke .535(1)(g) to impose exceptional sentences both for multiple violent and nonviolent offenses scored under .589(1)(a) and for multiple serious violent offenses under .589(1)(b).

A sentencing court's reasons for imposing a sentence are reviewed as a matter of law. *See: State v. Hammond,* 121 Wn.2d 787, 794, 854 P.2d 637 (1993).

Mr. Gilbert asserts that, as a matter of law, the trial court committed error when it confined itself to the complete adoption of the State's argument. As the *Miller* Court noted in citing to *Graham v. Florida, supra,* 560 U.S. ___ (*slip op.,* at 24) ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release **based on demonstrated maturity and rehabilitation**"). (Emphasis supplied.)

Dr. Roesch's risk analysis indicates that Mr. Gilbert, through his period of incarceration, has continued to improve and rehabilitate himself. He has been in custody since his arrest in 1992. Twenty-three (23) years of incarceration have changed him from a troubled juvenile into a responsible adult.

The sentencing court's reliance on the fact that he may be eligible for parole by the Independent Sentencing Review Board (ISRB) after he

has served the minimum twenty-five (25) years is flawed. By running the first degree murder sentence consecutive to the aggravated first degree murder sentence Mr. Gilbert must serve an additional mandatory twenty (20) years in prison before being eligible for release. *See:* RCW 9.94A.540(1)(a) (formerly RCW 9.94A.120(4)). (Appendix "E" - 1992 Sentencing Guidelines for First Degree Murder)

Two (2) recent decisions from Division I of the Court of Appeals provide support for Mr. Gilbert's position. In *State v. Ronquillo, slip opinion* 71723-5-I (October 26, 2015) the Court cited an Iowa Supreme Court decision and adopted it as appropriate for the State of Washington:

> In a persuasive opinion by the Iowa Supreme Court, the issue was whether a 52.5-year aggregate prison term imposed upon a juvenile for second degree murder and first degree robbery triggered *Miller*-type protections. *State v. Null,* 836 N.W.2d 41, 71-75 (Iowa) (2013). The court did not regard the juvenile's "potential future release in his or her late sixties after a half century of incarceration" sufficient to escape the rationales of *Graham* or *Miller*. *Null,* 836 N.W.2d at 71. The court concluded that **"*Miller's* principles are fully applicable to a lengthy term-of-years sentence" where the juvenile offender would otherwise face "the prospect of geriatric release."** *Null,* 836 N.W.2d at 71. *See also Cassiano v. Comm'r of Correction,* 317 Conn. 52, 72-80, 115 A3d 1031 (2015) (imposition of a fifty-year sentence without the possibility of parole on

> a juvenile offender was subject to the sentencing procedures set forth in *Miller*).

(Emphasis supplied.)

The *Ronquillo* Court declared his sentence a "*de facto* life sentence." (Appendix "F")

The second case from Division I is *State v. Keodara, slip opinion* 70518-1-I (December 7, 2015). (Appendix "G") The *Keodara* Court concluded, based upon *State v. Ronquillo, supra,*

> … that *Miller* explicitly held that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." …. Accordingly, we found irrelevant the label given to the type of sentence, *i.e.*, a life sentence or a term of years. The critical questions were whether a sentence to a term of years was the equivalent of a life sentence, and if so, whether it can be mandatorily imposed on adults and juveniles alike regardless of the differences that we now know exist between them in terms of their culpability and capacity for rehabilitation. … We determined that the term of years sentence in that case (52.5 years - *Ronquillo*) was "a *de facto* life sentence" and concluded that before imposing it, *Miller* required the court to "'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Ronquillo,* quoting *Miller,* 132 S. Ct. at 2469).

The *Keodara* Court ruled that the sentence imposed violated the constitutional mandate contained in *Miller* and sent the case back for another sentencing hearing.

Mr. Gilbert asserts that his age at the time of the offenses, the *Kent* factor analysis contained in the report submitted at the juvenile decline hearing, the juvenile court administrator's testimony, Dr. Roesch's report and the record of rehabilitation presented through the support letters submitted at the sentencing hearing (CP 73) contravene and override the sentencing court's ruling that concurrent sentences were not appropriate.

The sentencing court provided no findings of fact to support its conclusion. The Court merely stated it was adopting the State's position in-toto.

In order to determine whether Mr. Gilbert is correct, an analysis of the applicable statutes, in light of the *Miller* factors, is necessary.

RCW 9.94A.589 provides, in part:

> (1)(a) Except as provided (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score …. **Sentences imposed under this subsection shall be served concurrently**. Consecutive sentences may only be imposed

> under the exceptional sentence provisions of RCW 9.94A.535. …
>
> (b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, **the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score** and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. … **All sentences imposed under (b) of this subsection shall be served consecutively** to each other and concurrently with sentences imposed under (a) of this subsection.

(Emphasis supplied.)

The presumption is that all sentences are to be served concurrently unless the State can establish a basis for a consecutive sentence.

RCW 9.94A.589(1)(a) states that consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.

RCW 9.94A.535 provides, in part:

> A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585(2) through (6).

See: Personal Restraint of Mulholland, supra.

RCW 9.94A.535(2) sets out the aggravating circumstances that can be considered by a court. None of those circumstances are applicable to Mr. Gilbert's case.

Moreover, the aggravating circumstances involved in Mr. Gilbert's case were the basis for the aggravated first degree murder charge. They became elements of that offense. They are not a sentencing enhancement.

Additionally, it does not appear that the sentencing court considered any mitigating circumstances under RCW 9.94A.535(1). Mr. Gilbert takes the position that subparagraphs (e) and (g) have application to sentencing in his case.

RCW 9.94A.535(1)(e) states:

> The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. …

See: Miller v. Alabama, supra; Roper v. Simmons, supra; Graham v. Florida, supra.

RCW 9.94A.535(1)(g) states:

> The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purposes of this chapter, as expressed in RCW 9.94A.010.

RCW 9.94A.010 provides, in part:

> The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:
>
> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
> (2) Promote respect for the law by providing punishment which is just;
> (3) …;
> (4) …;
> (5) Offer the offender an opportunity to improve himself or herself;
> (6) …;
> (7) Reduce the risk of reoffending by offenders in the community.

Dr. Roesch determined that Mr. Gilbert is a low risk to reoffend.

The record is replete with information that Mr. Gilbert has reformed himself and deserves an opportunity for release after serving the mandatory minimum term on the aggravated first degree murder count.

Mr. Gilbert had no prior felony history before the offenses that occurred in 1992. As noted in *Ronquillo* and *Keodara,* absent consideration of a juvenile offender's age at the time of the offense, the fact of the seriousness of the offense(s) does not preclude concurrent sentences, and *de facto* life sentences leading to geriatric release are unconstitutional.

RCW 9.94A.589(1)(b) deals with "serious violent offenses." In 1992 RCW 9.94A.030(27) defined "serious violent offense" as a subcategory of violent offense meaning: "(a) Murder in the first degree …."

In 1992 RCW 9.94A.030(33) defined "violent offense" as meaning: "(a) Any of the following felonies, as now existing or hereafter amended: Any felony defined under any law as a class A felony …."

RCW 10.95.020 states, in part: "A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder … and one or more of the following aggravating circumstances exist …."

Viewing the foregoing definitions it is apparent that both aggravated first degree murder and first degree murder are serious violent offenses. In 1992 aggravated first degree murder was at seriousness level XV. It is now at XVI. First degree murder was at seriousness level XIV. It is now at XV.

Returning to RCW 9.94A.589(1)(b), a sentencing court is required to use the offense with the "highest seriousness level" in calculating an offender score. Aggravated first degree murder has the highest seriousness level. Aggravated first degree murder does not require calculation of an offender score.

RCW 9.94A.589(1)(b) goes on to state that any other serious violent offense shall have an offender score of zero. The standard range for first degree murder in 1992 was two hundred and forty (240) to three hundred and twenty-months (320) with **a mandatory twenty-year sentence**. (Emphasis supplied.)

Mr. Gilbert was sentenced to the mid-range of two hundred and eighty (280) months on first degree murder at his original sentencing hearing and at the resentencing hearing. Both sentencing courts ran his first degree murder sentence consecutive to the aggravated first degree murder sentence.

The Supreme Court noted in *Miller v. Alabama, supra,* that

> Deciding that a "juvenile offender forever will be a danger to society" would require "mak[ing] a judgment that [he] is incorrigible" - but "'incorrigibility is inconsistent with youth.'" 560 U.S., at ___ (*slip op.,* at 22) (quoting *Workman v. Commonwealth,* 429 S.W.2d 374, 378 (Ky. App. 1968)). And for the same reason, rehabilitation could not justify the sentence. Life without parole "foreswears altogether the rehabilitative ideal." *Graham,* 560 U.S. at ___ (*slip op.,* at 23). It reflects "an irrevocable judgment about [an offender's] value and place in society" is at odds with a child's capacity for change. *Ibid.*

Mr. Gilbert's sentence is at odds with what he has accomplished since 1992. It is at odds with the risk analysis conducted by Dr. Roesch.

It is at odds with the principles underlying the SRA. It is at odds with all that is fair and just.

CONCLUSION

The sentencing court did not, as a matter of law, appropriately consider and apply the directives from the United States Supreme Court as set forth in *Roper*, *Graham* and *Miller*.

The sentencing court operated under the mistaken belief that Mr. Gilbert would be eligible for parole consideration by the ISRB at the end of twenty-five (25) years.

The sentencing court, by running the first degree murder conviction consecutive to the aggravated murder conviction, added an additional mandatory sentence of twenty (20) years.

The sentencing court, in relying upon the State's argument that the only issue at resentencing was imposition of the mandatory minimum twenty-five (25) year sentence, committed an error of law.

Mr. Gilbert is entitled to have all aspects of his sentence reconsidered. Due process under the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3 requires fairness at sentencing as well as

other parts of trial and pre-trial proceedings. *See: State v. Jordan,* 180 Wn.2d 456, 461-63, 325 P.3d 181 (2014)

Mr. Gilbert's sentence must be reversed and the case remanded for resentencing in accord with *Roper, Graham* and *Miller.*

DATED this 11th day of January, 2016.

Respectfully submitted,

s/ Dennis W. Morgan_____
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99166
(509) 775-0777
(509) 775-0776
nodblspk@rcabletv.com

APPENDIX “A”

TABLE 2

CRIMES INCLUDED WITHIN EACH SERIOUSNESS LEVEL

XVAggravated Murder 1 (RCW 10.95.020)
XIV Murder 1 (RCW 9A.32.030)
Homicide by abuse (RCW 9A.32.055)
XIIIMurder 2 (RCW 9A.32.050)
XIIAssault 1 (RCW 9A.36.011)
Assault of a Child 1 (RCW 9A.36.120)
XI Rape 1 (RCW 9A.44.040)
Rape of a Child 1 (RCW 9A.44.073)
XKidnapping 1 (RCW 9A.40.020)
Rape 2 (RCW 9A.44.050)
Rape of a Child 2 (RCW 9A.44.076)
Child Molestation 1 (RCW 9A.44.083)
Damaging building, etc., by explosion with threat to human being (RCW 70.74.280(1))
Over 18 and deliver heroin or narcotic from Schedule I or II to someone under 18 (RCW 69.50.406)
Leading Organized Crime (RCW 9A.82.060(1)(a))

IXAssault of a Child 2 (RCW 9A.36.130)
Robbery 1 (RCW 9A.56.200)
Manslaughter 1 (RCW 9A.32.060)
Explosive devices prohibited (RCW 70.74.180)
Indecent Liberties (with forcible compulsion) (RCW 9A.44.100(1)(a))
Endangering life and property by explosives with threat to human being (RCW 70.74.270)
Over 18 and deliver narcotic from Schedule III, IV, or V or a nonnarcotic from Schedule I-V to someone under 18 and 3 years junior (RCW 69.50.406)
Controlled Substance Homicide (RCW 69.50.415)
Sexual Exploitation (RCW 9.68A.040)
Inciting Criminal Profiteering (RCW 9A.82.060(1)(b))

VIIIArson 1 (RCW 9A.48.020)
Promoting Prostitution 1 (RCW 9A.88.070)
Selling for profit (controlled or counterfeit) any controlled substance (RCW 69.50.410)
Manufacture, deliver, or possess with intent to deliver heroin or cocaine (RCW 69.50.401(a)(1)(i))
Manufacture, deliver, or possess with intent to deliver methamphetamine (RCW 69.50.401(a)(1)(ii))
Vehicular Homicide, by being under the influence of intoxicating liquor or any drug or by the operation of any vehicle in a reckless manner (RCW 46.61.520)

APPENDIX “B”

AGGRAVATED MURDER, FIRST DEGREE

(RCW 10.95.020)

I. OFFENDER SCORING

ADULT HISTORY:

Not Scored

JUVENILE HISTORY:

Not Scored

OTHER CURRENT OFFENSES:

Not Scored

STATUS:

Not Scored

II. SENTENCE RANGE

A. OFFENDER SCORE:	NONE
STANDARD RANGE (LEVEL XV)	DEATH SENTENCE OR LIFE SENTENCE WITHOUT PAROLE

APPENDIX “C”

Aggravated Murder First Degree

RCW 10.95.020 & RCW 10.95.030(1)
CLASS A – SERIOUS VIOLENT

OFFENDER SCORING

ADULT HISTORY: Not scored

JUVENILE HISTORY: Not scored

OTHER CURRENT OFFENSES: Not scored

STATUS: Not scored

SENTENCE RANGE

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
LEVEL XVI	Life sentence without parole/death penalty for offenders at or over the age of eighteen. For offenders under the age of eighteen, a term of twenty-five years to life.									

- ✓ A person found to be intellectually disabled under RCW 10.95.030 may in no case be sentenced to death (RCW 10.95.070).
- ✓ A person who was at least 16 years old but less than 18 years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than 25 years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release. (In setting the minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama,* 132 S. Ct. 2455 (2012)).
- ✓ A person who was younger than 16 years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of 25 years.

The Caseload Forecast Council is not liable for errors or omissions in the manual, for sentences that may be inappropriately calculated as a result of a practitioner's or court's reliance on the manual, or for any other written or verbal information related to adult or juvenile sentencing. The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Caseload Forecast Council.

APPENDIX "D"

RCW 9.94A.510

Table 1—Sentencing grid.

TABLE 1
Sentencing Grid

SERIOUSNESS LEVEL	OFFENDER SCORE									
	0	1	2	3	4	5	6	7	8	9 or more
XVI	Life sentence without parole/death penalty for offenders at or over the age of eighteen. For offenders under the age of eighteen, a term of twenty-five years to life.									
XV	23y4m 240- 320	24y4m 250- 333	25y4m 261- 347	26y4m 271- 361	27y4m 281- 374	28y4m 291- 388	30y4m 312- 416	32y10m 338- 450	36y 370- 493	40y 411- 548
XIV	14y4m 123- 220	15y4m 134- 234	16y2m 144- 244	17y 154- 254	17y11m 165- 265	18y9m 175- 275	20y5m 195- 295	22y2m 216- 316	25y7m 257- 357	29y 298- 397
XIII	12y 123- 164	13y 134- 178	14y 144- 192	15y 154- 205	16y 165- 219	17y 175- 233	19y 195- 260	21y 216- 288	25y 257- 342	29y 298- 397
XII	9y 93- 123	9y11m 102- 136	10y9m 111- 147	11y8m 120- 160	12y6m 129- 171	13y5m 138- 184	15y9m 162- 216	17y3m 178- 236	20y3m 209- 277	23y3m 240- 318
XI	7y6m	8y4m	9y2m	9y11m	10y9m	11y7m	14y2m	15y5m	17y11m	20y5m

APPENDIX “E”

MURDER, FIRST DEGREE

(RCW 9A.32.030)

SERIOUS VIOLENT

(If sexual motivation finding/verdict, use form on page 38)

I. OFFENDER SCORING (RCW 9.94A.360 (10))

ADULT HISTORY:(If the prior offense was committed *before* 7/1/86, count prior adult offenses served concurrently as one offense; those served consecutively are counted separately. If both current and prior offenses were committed *after* 7/1/86, count all convictions separately, except (a) priors found to encompass the same criminal conduct under RCW 9.94A.400(1)(a), and (b) priors sentenced concurrently that the current court determines to count as one offense.)

Enter number of serious violent felony convictions ..... _____ x 3 = _____

Enter number of violent felony convictions ..... _____ x 2 = _____

Enter number of nonviolent felony convictions ..... _____ x 1 = _____

JUVENILE HISTORY: (Adjudications entered on the same date count as one offense except for violent offenses with separate victims)

Enter number of serious violent felony adjudications ..... _____ x 3 = _____

Enter number of violent felony adjudications ..... _____ x 2 = _____

Enter number of nonviolent felony adjudications ..... _____ x 1/2 = _____

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of violent felony convictions ..... _____ x 2 = _____

Enter number of nonviolent felony convictions ..... _____ x 1 = _____

STATUS: Was the offender on community placement on the date the current offense was committed? (if yes), + 1 = _____

Total the last column to get the **Offender Score**
(Round down to the nearest whole number)

II. SENTENCE RANGE

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE	240 - 320	250 - 333	261 - 347	271 - 361	281 - 374	291 - 388	312 - 416	338 - 450	370 - 493	411 - 548

APPENDIX "F"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN KEITH RONQUILLO,

Appellant.

No. 71723-5-1

DIVISION ONE

PUBLISHED OPINION

FILED: October 26, 2015

2015 OCT 26 9:48 COURT OF APPEALS STATE OF WASHINGTON

BECKER, J. — At issue is a sentence of 51.3 years imposed for murder and other violent crimes the offender committed in a gang-motivated drive-by shooting when he was 16 years old. We reverse and remand for resentencing because the trial court erroneously concluded there was no legal basis for an exceptional sentence. This is a de facto life sentence governed by Miller v. Alabama.[1] Under our sentencing statutes and Miller, the diminished culpability of youth may serve as a mitigating factor. The court may also consider whether running three sentences consecutively produced a total sentence that is clearly excessive.

1 U.S. 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

FACTS

This case arises from the resentencing of appellant Brian Ronquillo for crimes he committed in 1994. Ronquillo was 16 years old at the time. Riding in a car with other gang members, he fired at least six shots at a group of students who were standing in front of Ballard High School. He missed two intended targets, but one of his shots killed innocent bystander Melissa Fernandes.

Another student was injured by a bullet fragment.

Ronquillo was initially charged in juvenile court. The State initiated decline proceedings. The court determined that Ronquillo would be tried as an adult, concluding that his "maturity and sophistication weighed heavily in favor of decline" and the juvenile corrections system, which could not keep him past age 21, would not have sufficient time to rehabilitate him if he were convicted. State v. Ronquillo, noted at 89 Wn. App. 1037, 1998 WL 87641, at *3, review denied, 136 Wn.2d 1018 (1998). [3]

Ronquillo was tried with two codefendants. Ronquillo, 1998 WL 87641, at *1 n. 1. A jury convicted him on four counts: one count of first degree murder, two counts of attempted first degree murder, and one count of second degree assault while armed with a firearm. The trial judge sentenced Ronquillo to the bottom of the standard range for each count. This produced a sentence of 621 months: 261 months for the murder and 180 months for each of the attempted murders, all to be served consecutively, with a concurrent sentence of 45 months for the assault. The consecutive aspect of the sentence was an application of what is known as the multiple offense policy. Sentences must run consecutively rather than concurrently when a person "is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct." RCW 9(1)(b), former RCW 9.94A.400 (2001).

Ronquillo's defense counsel Anthony Savage had argued that such a long sentence for a teenager was "morally wrong and legally unnecessary." He asked the court to impose an exceptional sentence by running the sentences concurrently. Savage argued that the operation of the multiple offense policy "results in a presumptive sentence that is clearly excessive." The request for a concurrent sentence was rejected, and Ronquillo was sentenced to 51.75 years in prison.

This court affirmed Ronquillo's conviction on direct appeal. Ronquillo, noted at 89 Wn. App. 1037. Three years later, Ronquillo returned to this court with a personal restraint petition claiming, among other things, that the trial court erred by concluding it was required to impose consecutive sentences. Ronquillo's petition was denied. In re Pers. Restraint of Ronquillo, noted at 109 Wn. App. 1025, 2001 WL 1516938, at *8.

In 2012, this court held that the statute setting forth the multiple offense policy, RCW 9.94A.589(1)(b), is ambiguous where two or more serious violent offenses arguably have the same seriousness level. State v. Breaux, 167 Wn. App. 166, 273 P.3d 447 (2012). Because this holding applied to Ronquillo's sentence, he again sought relief from his sentence on the ground that it was based on an incorrect calculation of his offender score. The State conceded, and this court agreed, that Ronquillo was entitled to a remand for resentencing. In re

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[3] See also decline hearing transcript, Clerk's Papers 374-452 at 415, 449.

Pers. Restraint of Ronquillo, noted at 176 Wn. App. 101 1, 2013 WL 4607710, at

The correct calculation of Ronquillo's offender score under Breaux would reduce his standard range sentence by only 525 months if everything else that went into the determination of the sentence remained the same. But the trial court had discretion to reconsider the sentence as a whole. State v. Graham, 178 Wn. App. 580, 586, 314 P.3d 1 148 (2013), reversed on other grounds, State v. Graham, 181 Wn.2d 878, 337 P.3d 319 (2014). Ronquillo renewed his request for an exceptional sentence, and the court exercised its discretion to hear his argument. Ronquillo requested that his sentence be reduced to 320 months.

Ronquillo presented two alternative grounds for an exceptional sentence. First, he argued that youth alone can be a mitigating factor. As he recognized, this argument was not readily reconcilable with Washington statutes that govern the sentencing of persons convicted of felonies. Generally, a trial court must impose a sentence within the standard range. State v. Law, 154 Wn.2d 85, 94, 1 10 P.3d 717 (2005). The court has discretion to depart from the standard range either upward or downward. But this discretion may be exercised only if: (1) the asserted aggravating or mitigating factor is not one necessarily considered by the legislature in establishing the standard sentence range, and (2) it is sufficiently substantial and compelling to distinguish the crime in question from others in the same category. Law, 154 Wn.2d at 95. A factor is sufficiently substantial and compelling to justify departure only if it relates "directly to the crime or the defendant's culpability for the crime committed." Law, 154 Wn.2d at 95. At the time of Ronquillo's resentencing, a defendant's youthfulness was not, by itself, a mitigating factor that could justify a downward departure. Law, 154 Wn.2d at 9798; State v. Ha'mim, 132 Wn.2d 834, 847, 940 P.2d 633 (1997).

In recent years, the law governing the sentencing of juveniles has been significantly informed and in some respects unequivocally altered by the Eighth Amendment jurisprudence of the United States Supreme Court. Ronquillo asserted that his sentence of more than 51 years, "a near-life sentence," could not be reconciled with the reasoning of Miller v. Alabama, U.S. 132 s. Ct. 2455, 183 L. Ed. 2d 407 (2012), and its predecessors, Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), and Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed, 2d 825 (2010). In Roper and Graham v. Florida, the Court "adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." Miller, 132 S. Ct. at 2463. The first two of these cases held that children may not be subjected to capital punishment, and children who have committed nonhomicide offenses may not be subjected to life without the possibility of parole. Miller, 132 S. Ct. at 2463-64. The third case, Miller, holds that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." Miller, 132 S. Ct. at 2464. Miller "does not categorically bar a penalty for a class of offenders or type of crime," but it does mandate that "a sentencer follow a certain process—considering an offender's youth and attendant circumstances—before imposing a particular penalty." Miller, 132 S.
Ct. at 2471.

Roper and Graham v. Florida established that juvenile offenders "are constitutionally different from adults for purposes of sentencing." Miller, 132 S. Ct. at 2464. The constitutional difference arises from a juvenile's tack of

maturity, underdeveloped sense of responsibility, greater vulnerability to negative outside influences, including peer pressure, and the less fixed nature of the juvenile's character traits. Miller, 132 S. Ct. at 2464. Because juveniles have diminished culpability and greater prospects for reform, they are less deserving of the most severe punishments. Miller, 132 S. Ct. at 2464.

With Miller as a backdrop, Ronquillo argued that his youth at the time of the crime should be considered as a mitigating factor that would permit a departure from the strict application of the adult sentencing statutes. Ronquillo's sentencing memorandum described stressors in his family and school background that may have contributed to his gang involvement. It was accompanied by evidence that he has matured and made significant progress in rehabilitating himself through education and employment while in prison.

As an alternative ground for a reduced sentence, Ronquillo invoked the statute that permits a downward departure from the standard range if "the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive." RCW 9.94A.535(1)(g).

At resentencing on March 21, 2014, the court concluded that Miller had no application in Ronquillo's case. In Miller, the two petitioners were convicted of murder and sentenced to a mandatory term of life without parole. The Supreme Court held that the Eighth Amendment "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Miller, 132 S. Ct. at 2469. Because Ronquillo was not facing a mandatory term of life without parole, the court concluded Miller did not supply a constitutional basis compelling consideration of Ronquillo's youth as a mitigating factor. Accordingly, the court looked only to Washington's sentencing statutes and determined that under Law and Ha'mim, age alone cannot be a lawful mitigating factor in a felony sentence. The court also concluded state sentencing law did not permit a finding that Ronquillo's sentence was "clearly excessive."

> I appreciate the presentation on brain research. I find the science incredibly compelling. We certainly know much more about juveniles' brain development today than we did in 1994. And the research does tell us that juveniles' brains have not—usually have not, developed fully at age 16 and that impulsivity, irresponsibility, and vulnerability to peer pressure can be the product of neurological immaturity. It thus provides a very strong basis for the legislature to revisit current laws relating to the punishment of juvenile offenders.
>
> But this Court has concluded that ultimately what is the appropriate use of that juvenile research in criminal sentencing is a decision for the legislature to make and not one this Court can make.
>
> [Ronquillo's] post-conviction behavior is, as the State points out, not related to the crime he committed in 1994 and thus not something that I can legally turn to when imposing a sentence. As I said earlier, this is not in question of what I personally believe is a good sentence for a 16-year-old.
>
> If the law were different, I might be making a different decision. But I do feel that because of the law, I am constrained by how I rule today. For these reasons, I deny the request for an exceptional sentence. [[4])

Having rejected both bases offered by Ronquillo for an exceptional sentence, the court resentenced him to 615.75 months in prison. This was the same sentence as before, minus 5.25 months to correct for the Breaux error.

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[4] Verbatim Report of Proceedings (Mar. 21, 2014) at 63-65.

Ronquillo appeals. He contends that he is eligible for an exceptional sentence both under the Eighth Amendment as interpreted by Miller and because running his sentences consecutively makes his total sentence "clearly excessive" under RCW 9.94.535(1)(g).

Whether a particular factor can justify an exceptional sentence is a question of law, which we review de novo. State v. O'Dell, No. 90337-9, 2015 WL 4760476, at *4 (Wash. Aug. 13, 2015).

MILLER APPLIES TO DE FACTO LIFE SENTENCES

The State asks us to affirm the sentence and hold that Miller does not apply to a term-of-years sentence.

A sentence of 51.3 years is not necessarily a life sentence for a 16-yearold, but it is a very severe sentence. A question that has emerged is whether Miller's mandates "apply not only to mandatory life sentences without parole, but also to the practical equivalent of life-without-parole sentences." State v. Ragland, 836 N.W.2d 107, 1 19 (Iowa 2013).

Under the Eighth Amendment, the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Miller, 132 S. Ct. at 2466. The Eighth Amendment requires courts to consider a juvenile's chronological age "and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." Miller, 132 S. Ct. at 2468.

In a persuasive opinion by the Iowa Supreme Court, the issue was whether a 52.5-year aggregate prison term imposed upon a juvenile for second degree murder and first degree robbery triggered Miller-type protections. State v. Null, 836 N.W.2d 41, 71-75 (Iowa 2013). The court did not regard the juvenile's "potential future release in his or her late sixties after a half century of incarceration" sufficient to escape the rationales of Graham or Miller. Null, 836 N.W.2d at 71. The court concluded that "Miller's principles are fully applicable to a lengthy term-of-years sentence" where the juvenile offender would otherwise face "the prospect of geriatric release." Null, 836 N.W.2d at 71. See also Casiano v. Comm'r of Correction, 317 Conn. 52, 72-80, 1 15 A.3d 1031 (2015) (imposition of a 50-year sentence without the possibility of parole on a juvenile offender was subject to the sentencing procedures set forth in Miller).

Ronquillo's sentence contemplates that he will remain in prison until the age of 68. This is a de facto life sentence. It assesses Ronquillo as virtually irredeemable. This is inconsistent with the teachings of Miller and its predecessors. Before imposing a term-of-years sentence that is the functional equivalent of a life sentence for crimes committed when the offender was a juvenile, the court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Miller, 132 S. Ct. at 2469. The trial court erred in concluding that only a literally mandatory life sentence falls within the ambit of Miller.

MILLER APPLIES -ro AGGREGATE SENTENCES

The State emphasizes that Ronquillo is serving four separate sentences for crimes against four different victims, not a single lengthy sentence for a single conviction. According to the State, the Eighth Amendment is not implicated by separate sentences for separate crimes. For this proposition, the State relies on State v. Kasic, 228 Ariz. 228, 265 P.3d 410 (App. 2011); Walle v. State, 99 so. 3d 967 (Fla. Dist. Ct. App. 2012); and Bunch v. Smith, 685 F.3d 546 (6th Cir.
2012), cert. denied, 133 S. Ct. 1996 (2013).

The State's cases do not persuasively show that Eighth Amendment analysis does not apply to aggregate or consecutive sentencing of juveniles. In Kasic, a case that is both pre-Miller and factually dissimilar to Ronquillo's, the offender was sentenced to 139.75 years on 32 counts relating to a 1-year spree of arsons, most of them committed after he turned 18. Kasic, 228 Ariz. at 22931. The court concluded the sentences were not categorically barred under Graham. Kasic, 228 Ariz. at 232-33. In Walle, the Florida Court of Appeal interpreted Graham and Miller narrowly and in doing so relied on another Court of Appeal opinion that has since been called into question by the Florida Supreme Court. Walle, 99 So. 3d at 971, citing Henry v. State, 82 So. 3d 1084
(Fla. Dist. Ct. App. 2012), decision quashed by Henry v. State, so. 3d___,

2015 WL 1239696 (2015). Bunch, a habeas matter, is unhelpful because of the restricted standard of review. Bunch, 685 F.3d at 550 (Graham did not "clearly establish" that consecutive, fixed-term sentences for juveniles are unconstitutional when they amount to "the practical equivalent of life without parole").

In Miller, one of the petitioners, Kuntrell Jackson, was convicted of felony murder and aggravated robbery. Miller, 132 S. Ct. at 2461. The Supreme Court reversed his mandatory life sentence with no indication that it should be treated differently on remand than a mandatory life sentence for a single crime. Since Miller, the United States Supreme Court in several cases involving aggregate crimes has granted certiorari, vacated sentences of life without parole, and remanded for further consideration in light of Miller. Blackwell v. California, ___
U.S. 133 S. Ct. 837, 837, 184 L. Ed. 2d 646 (2013); Mauricio v. California,

U.S. 133 S. Ct. 524, 524, 184 L. Ed. 2d 335 (2012); Bear Cloud v. Wyoming, U.S. 133 S. Ct. 183, 183-84, 184 L. Ed. 2d 5 (2012); and Whiteside v. Arkansas, U.S. 133 S. Ct. 65, 66, 183 L. Ed. 2d 708 (2012). On remand in Bear Cloud, the Wyoming Supreme Court held that an individualized sentencing hearing was required under Miller, not only when the sentence is life without parole, but also when aggregate sentences result in the functional equivalent of life without parole. Bear Cloud v. State, 2014 WY 133, 334 P.3d 132, 141-44 (Wyo. 2014); see also Null, 836 N.W.2d at 73 ("we agree with appellate courts that have concluded the imposition of an aggregate sentence does not remove the case from the ambit of Miller's principles.") Viewing these more recent authorities as persuasive, we conclude that the aggregate nature of Ronquillo's 51 a-year sentence does not protect it from a Miller challenge.

THE "MILLER FIX" DOES NOT MAKE RESENTENCING UNNECESSARY

The State also argues that Ronquillo's sentence need not be reversed because a new statute known as the "Miller fix" provides a possibility of early release. The legislature enacted the statute in March 2014 with the intention of bringing Washington's sentencing framework into conformity with Miller. [4] See In re McNeil, 181 Wn.2d 582, 588-89, 334 P.3d 548 (2014) (summarizing the new sentencing guidelines for aggravated first degree murder committed by juvenile offenders). See also Nick Straley, Miller's Promise: Re-evaluatinq Extreme Criminal Sen-

tences for Children, 89 Wash. L. Rev. 963, 993-96 (2014) (summarizing the new statute). The new statute provides that "any person convicted of one or more crimes committed prior to the person's eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than twenty years of total confinement." RCW 9.94.730(1).

Early release after 20 years is presumptive in such cases subject to conditions the board may see fit to impose, unless the board determines that even with conditions, "it is more likely than not that the person will commit new criminal law violations if released." RCW9.94A.7

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[4] Laws of 2014, ch. 130, effective June 1, 2014.

[5] In the same section, a person who commits another crime after age 18 is disqualified from seeking relief under RCW 9.94.730(1). Ronquillo may not be eligible for early release under the Miller fix because he has a conviction for custodial assault arising from an incident that occurred not long after he went to prison. See State v. Ronquillo, noted at 99 Wn. App. 1069, 2000 WL 557902, review denied, 142 Wn.2d 1005 (2000).

This is not an appeal from a proceeding under RCW 9.94.730(1).

Ronquillo's situation is unusual because the Breaux error brought him back to the trial court for a post-Miller resentencing in a way not contemplated by the Miller fix. At resentencing, Ronquillo was able to argue that under Miller, his sentence of more than 50 years was unconstitutional and should be replaced with an exceptional sentence downward. The resentencing that occurred was not governed by the new statute, which had not yet gone into effect. Therefore, the State is not arguing that Ronquillo's sentence should be affirmed as a correct application of the Miller fix. Rather, the State is arguing that the existence of a new statutory avenue for early release means that Ronquillo's sentence can be affirmed because it "is not among those prohibited by Miller."

The distinction is illustrated by an analogous case not cited by the parties. Ragland, 836 N.W.2d at 110. The juvenile offender in Ragland was serving a mandatory term of life without parole for a first degree murder committed in 1986. Ragland, 836 N.W.2d at 110. After Miller was decided, the governor of Iowa was concerned about the prospect that offenders serving life sentences for murders committed as juveniles might be able to obtain substantially shorter sentences by seeking resentencing under Miller. The governor attempted to forestall that outcome by commuting 38 juvenile sentences of life without parole to term-ofyears sentences. Ragland's sentence was commuted to 60 years without the possibility of parole. Ragland, though technically no longer serving a mandatory life sentence, sought resentencing under Miller. The State opposed the request for resentencing, taking the position that the commutation by the governor made the sentence that Ragland was seMng "no longer illegal." Ragland, 836 N.W.2d at 113. The trial court, however, granted Ragland's request by resentencing him to life in prison with the possibility of parole after 25 years, making him immediately eligible for parole. The Iowa Supreme Court rejected the State's argument and affirmed. The court stated that the commutation "did not affect the mandatory nature of the sentence or cure the absence of a process of individualized sentencing considerations mandated under Miller. Miller protects youth at the time of sentencing." Ragland, 836 N.W.2d at 1 19.

Ragland is persuasive, and we apply its reasoning here. Ronquillo's sentence of 51.3 years is not a constitutional sentence because the trial court erroneously concluded it could not apply Miller. The Miller fix does not cor-

rect the error. The error must be corrected in the trial court. We leave it to the trial court to determine what significance, if any, should be given to the potential of early release under the new statute.

YOUTH RELATES TO A JUVENILE OFFENDER'S CULPABILITY

One of the State's concerns in this appeal is that opening the door for Ronquillo to get an exceptional sentence based on his youth will undermine the integrity of the Sentencing Reform Act. As noted above, the Act has been interpreted consistently as disallowing a defendant's personal characteristics from serving as a basis for a sentence outside the standard range. Until recently, age was viewed narrowly as only a personal characteristic. In the leading case of Ha'mim, a defendant unsuccessfully requested an exceptional sentence downward for a robbery conviction on the basis that she was just 18 years old at the time of the crime. The State argued that the factors that can mitigate sentences are limited to two types: where the facts of the crime itself are less serious than typical for that crime, or where the defendant is less culpable because of outside influences on the defendant's judgment. Ha'mim, 132 Wn.2d at 846. On that basis, the court held that "age alone" could not be a substantial and compelling reason justifying an exceptional sentence. Ha'mim, 132 Wn2d at 846. Youthfulness could be considered, but only if relevant to the recognized mitigating factor of impaired capacity to tell right from wrong—and then only if there was evidence of such impaired capacity. Ha'mim, 132 Wn.2d at 846.

At Ronquillo's resentencing, the trial court relied heavily on Ha'mim as the basis for refusing his request for an exceptional sentence. "l cannot rely on Mr. Ronquillo's age and the juvenile brain science to impose an exceptional sentence unless there's a demonstration that he lacked the neurological development to— at the time of his crime such that he did not understand right from wrong or that it impaired his ability to conform his conduct to the law. And reluctantly, the court concludes that that showing has not been made "6

A recent opinion by our Supreme Court has significantly revised the interpretation of Ha'mim relied on by the trial court. O'Dell, 2015 WL 4760476. In O'Dell, the appellant confronted the court with an argument that Ha'mim should be overruled in light of Miller. The court did not overrule Ha'mim and did not directly apply Miller to the case. In fact, the court explicitly adhered to the two-part test cited in Ha'mim that determines whether a departure from the

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[6] Verbatim Report of Proceedings (Mar. 21 , 2014) at 64.

standard range is permissible under the Sentencing Reform Act. But in place of Ha'mim's limitations on the consideration that may be given to a defendant's youthfulness, the court concluded—in light of the studies underlying Miller,
Roper, and Graham v. Florida—that youth can satisfy the two-part test. Because the trial court did not "meaningfully consider youth as a possible mitigating factor" in O'Dell's case, the court remanded for a new sentencing hearing. O'Dell, 2015 WL 4760476, at *4.

The first part of the two-part test is whether the asserted mitigating factor was necessarily considered by the legislature when it established the standard sentence range for the crime in question. Ha'mim, 132 Wn.2d at 840. In O'Dell, the court held that while the legislature has determined that all defendants 18 or over "in genera/' are equally culpable for equivalent crimes, the legislature could not have considered "particular vulnerabilities—for example, impulsivity, poor judgment, and susceptibility to outside influences—of specific individuals." O'Dell, 2015 WL 4760476, at *5. In addition, the legislature did not have the benefit of the relatively recent psychological and neurological studies discussed in Miller. "These studies reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." O'Dell, 2015 WL 4760476, at *6 (footnotes omitted). And it is "precisely these differences that might justify a trial court's finding that youth diminished a defendant's culpability." O'Dell, 2015 WL 4760476, at *6. In O'Dell, these observations were applied to an adult defendant who was barely over the age of 18 when his crime was committed. They must necessarily apply even more forcefully to juvenile offenders.

Moreover, Ronquillo was tried as an adult, not as a juvenile. The decline statute, RCW 13.04.030, is not part of the Sentencing Reform Act. Adult criminal jurisdiction is not inevitable for a juvenile charged as Ronquillo was. This is a further reason to doubt that the legislature necessarily considered that juvenile offenders would have their sentences determined under the adult sentencing provisions that produced Ronquillo's sentence. See Graham v. Florida, 130 S. Ct. at 2025 (decline or transfer statutes tell us nothing about the judgments States have made regarding the appropriate punishment for such youthful offenders); Miller, 132 S. Ct. at 2474-75.

The second part of the two-part test is whether the asserted mitigating factor is "sufficiently substantial and compelling to distinguish the crime in question from others in the same category." Ha'mim, 132 Wn.2d at 840. With this part of the test in mind, the O'Dell court critiqued and revised Ha'mim's reasoning:

> Having embraced this reasoning—that it is "absurd" to believe that youth could mitigate culpability—this court went on to explain that youth alone could not be a nonstatutory mitigating factor under the SRA because "[t]he age of the defendant does not relate to the crime or the previous record of the defendant."
>
> When our court made that sweeping conclusion, it did not have the benefit of the studies underlying Miller, Roper, and Graham—studies that establish a clear connection between youth and decreased moral culpability for criminal conduct. And as the United States Supreme Court recognized in Roper, this connection may persist well past an individual's 1 8th birthday "[t)he qualities that distinguish juveniles from adults do not disappear when an individual turns 18 [just as] some under 18 have already attained a level of maturity some adults will never reach."
>
> Today, we do have the benefit of those advances in the scientific literature. Thus, we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18. It remains true that age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence. In this respect, we adhere to our holding in Ha'mim 132 Wash.2d at 847, 940 P.2d 633. But, in light of what we know today about adolescents' cognitive and emotional development, we conclude that youth may, in fact, "'relate to [a defendant's] crime,'" id at 847, 940 P.2d 633 (quoting RCW 9.94A.340); that it is far more likely to diminish a defendant's culpability than this court implied in Ha'mim; and that youth can, therefore, amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range,
>
> For these reasons, a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender like O'Dell, who committed his offense just a few days after he turned 18. To the extent that this court's reasoning in Ha'mim is inconsistent, we disavow that reasoning.

O'Dell, 2015 WL 4760476, at *7 (alterations in original) (footnote and citations omitted).

Following O'Dell, we conclude it does not compromise the fundamental principles of our statutory felony sentencing regime to hold that Miller is relevant to Ronquillo's request for an exceptional sentence. The trial court erroneously believed Ronquillo's age could not be considered as a possible mitigating factor, whereas we now know from O'Dell that it can be. As in O'Dell, we remand for a new sentencing hearing. O'Dell, 2015 WL 4760476, at *5, *8. At that hearing the trial court will consider, in light of Miller and O'Dell, whether youth diminished Ronquillo's culpability. See O'Dell, 2015 WL 4760476, at *7.

ARGUABLY, RONQUILLO'S SENTENCE WAS "CLEARLY EXCESSIVE"

As a second basis for requesting an exceptional sentence, Ronquillo invoked the statutory mitigating factor that may be considered when the operation of the multiple offense policy of RCW 9.94A.589 "results in a presumptive sentence that is clearly excessive." RCW 9.94A.535(1)(g).

At the time of Ronquillo's resentencing, the trial court found his request was barred by this court's decision in State v. Graham, which held that mitigation for a clearly excessive aggregate sentence is allowed only for nonserious violent offenses. Ronquillo committed serious violent offenses. But this court's decision was reversed, and there is no longer a bar to imposing concurrent standard range sentences for serious violent offenses. State v. Graham, 181 Wn.2d at 886-87. In fact, a "clearly excessive" sentence may be reduced either by lessening the individual sentences or by imposing concurrent sentences or both. State v. Graham, 181 Wn.2d at 885-86. This recent decision by our Supreme Court is another reason why Ronquillo is entitled to consideration of his request for an exceptional sentence.

As directed by the plain language of RCW 9.94A.535(1 a trial court must look to the purposes of the Sentencing Reform Act as expressed in RCW 9.94A.010 to determine whether mitigation of a consecutive sentence is appropriate in a particular case. State v. Graham, 181 Wn.2d at 886-87. Those purposes are as follows:

(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
(2) Promote respect for the law by providing punishment which is just;
(3) Be commensurate with the punishment imposed on others committing similar offenses;
(4) Protect the public;
(5) Offer the offender an opportunity to improve himself or herself;
(6) Make frugal use of the state's and local governments' resources; and
(7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010. "Sentencing judges should examine each of these policies when imposing an exceptional sentence under .535(1)(g)." State v. Graham, 181 Wn.2d at 887.

Here, these purposes should be examined in light of Miller in the same manner that the exceptional sentencing framework in O'Dell was examined in light of Miller. In that light, many if not all of the seven statutory purpos-

es will point toward a mitigated sentence. On remand, the trial court shall let Miller inform and illuminate its consideration of whether Ronquillo's presumptive aggregate sentence for multiple offenses is clearly excessive in light of the purposes of the Sentencing Reform Act.

The sentence is reversed and remanded for further proceedings not inconsistent with this opinion!

---

[7] After oral argument in this case, and contemporaneously with our Supreme Court's opinion in O'Dell, Division Three of this court issued an opinion affirming an 85-year aggregate sentence imposed at resentencing of an offender who was 14 years old when he committed four murders. State v. Ramos, No. 32027-8-111, 2015 WL 4760496 (Wash. Ct. App. Aug. 13, 2015). Unlike here, the trial court in Ramos acknowledged its discretion to: (1) adopt a mitigated sentence in light of Miller, and (2) let the separate sentences on each count run concurrently. Because of this difference, the issues in Ramos are not the same as here and we conclude Ramos does not indicate that Ronquillo's sentence should be affirmed. To the extent Ramos might be interpreted as reasoning that Miller does not apply in cases of nonlife sentences or aggregate sentences, we respectfully disagree.

Becker, J.

WE CONCUR:

Spearman, C.J.

Schindler, J.

COURT OF APPEALS
STATE OF WASHINGTON
2015 OCT 26 AM 9:48

APPENDIX "G"

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
No. 70518-1-1) Respondent,
ORDER PUBLISHING) OPINION IN PART SAY SULIN KEODARA,
Appellant)

Appellant, Say Keodara, moved this court to publish its November 2, 2015 opinion and the State of Washington filed a response to the motion. A majority of the panel has determined that the motion to publish should be granted in part.

IT IS ORDERED that the following paragraph is inserted on page 13, after the last sentence of section entitled "search warrant."

> A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for publish record pursuant to RCW 206.040, it is so ordered.

IT IS FURTHER ORDERED that the final paragraph which reads "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but

COURT OF APPEALS
STATE OF WASHINGTON
2015 DEC -7 AM 10: 19

will be filed for public record pursuant to RCW 206.040, it is so ordered." is deleted.

December, 2015.

Chief Judge

DATED this day of

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 70518-1-1
Respondent,	)	
	)	
	)	
	)	
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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 NOV -2 AM 9:39

DIVISION ONE

SAY SULIN KEODARA,UNPUBLISHED OPINION

AppellantFILED: November 2 2015

SPEARMAN, C.J. — Seventeen-year-old Say Sulin Keodara was involved in a fatal shooting at a bus stop in 201 1. He was apprehended for an unrelated incident and the police seized his cell phone. The State obtained a warrant to search the phone based on an officer's generalized statements about gang members commonly using their phones to take and store photos of illegal activity. Text messages and photos from the phone were submitted at trial. Keodara was convicted and sentenced to a standard range sentence of 831 months, based on the statutory presumptive minimum term for all charges. He appeals, arguing that the evidence from his phone should have been suppressed because the search warrant violated the Fourth Amendment to the United States Constitution and art. l, of the Washington State Constitution. He also appeals his sentence, arguing that pursuant to Miller v. Alabama, U.S. 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) it violates the Eighth Amendment to the United States Constitution. He further argues that his counsel was ineffective for failing to assert this claim during his sentencing hearing.

We hold that although the search of Keodara's phone violated the federal constitution, the failure to suppress the evidence obtained thereby was harmless. We also hold that the sentence imposed below violated the constitutional mandate of Miller because the court failed to take into account Keodara's youth and other age-related factors. Accordingly, we affirm Keodara's conviction but remand for a new sentencing hearing. [5]

[5] In light of our resolution of this case, we do not address Keodara's claim of ineffective assistance of counsel.

FACTS

On September 12, 201 1, a fatal shooting occurred at a bus stop on Rainier Avenue. Four people were inside the bus shelter located at the southwest corner of Rainier Avenue South and South McClellan Street. A vehicle pulled up and some Asian males, appearing to be in their teens or early twenties, asked the group if they were looking for any "soft." Verbatim Report of Proceedings (VRP) (May 8, 2013) at 135-36. "Soft" was known as a street term for crack cocaine. One of the persons inside the shelter, Victor Lee Parker, approached the vehicle and may have made a purchase. Parker then returned to the bus stop and the vehicle drove south on Rainier and then turned.

Later, three of the men from the vehicle approached the bus stop from the north on foot. One of them had a gun and demanded money from the group. The gunman fired on the group after one person tried to run. All four people were hit.

Parker had been shot once and was lying on the ground when the shooter walked up to him and shot him in the head. Surveillance cameras from a nearby store showed images of a similar vehicle and of a man in a blue sleeveless jersey with writing on it.

The State arrested Keodara for an unrelated incident about five weeks after the shooting. On October 20, 201 1 , Renton police officers apprehended him in a silver, four-door Mitsubishi Galant. The car was impounded and the police obtained a warrant to search the car on October 21 , 2011. In the car, the police found mushrooms in a bag belonging to the driver, other drug packaging paraphernalia, and a backpack containing a cell phone.

The police obtained a second warrant to search the cell phone. This warrant authorized search and seizure of the following:

> Stored phone contact numbers, all call history logs, all text messages, all picture messages, chat logs, voicemail messages, photographs, and information contained in any saved 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 cell phone.
>
> Any and all other evidence suggesting the crimes listed above [Assault in the Fourth Degree, Unlawful Possession of Firearms, Possession with Intent to Deliver or Sell Narcotics].

Clerk's Papers (CP) at 172.

The Affidavit in support of the warrant stated:

> I am the current Gang Information Officer for the Renton Police Department and a member of the South King County Violent Gang Initiative Task Force. I have been the Gang Information Officer since 2008 and a member of the Task Force since August of 201 1. Prior to being employed by the Renton Police Department I was employed by the De-

> partment of Defense as a Detective where I investigated gangs. I have attended and instructed gang training since 2002 for [a] total of over 500 hours. I have traveled around the Country attending gang conferences where I learn the current trends of gang members that are widely used. I am currently on the Board of Directors for the International Latino Gang Investigators Association. I have held this position since 2006 and prior to this position I was the regional representative for the Pacific Northwest. I have interviewed over 400 gang members and have identified over 100 gang members residing in the City of Renton, over the last 5 years.
>
> It is this Officer's belief that there is significant evidence contained within the cell phone seized. Based off of my training and experience I know it to be common for gang members to take pictures of themselves where they pose with firearms. Gang members also take pictures of themselves prior to, and after they have committed gang related crimes. Additionally, it appears likely there is evidence of firearms contained within said electronic devices. I believe there is evidence of gang affiliation contained within their electronic devices, as this shooting was gang involved. Additionally, criminals often text each other or their buyers photographs of the drugs intended to be sold or recently purchased. Gang members will often take pictures of themselves or fellow gang members with their cell phones which show them using

CP at 175.

Keodara was charged several months later for the Rainier Avenue shooting after being identified from the surveillance video images. One of the victims, Sharon McMillon, described the gunman and later testified that the car in the video appeared to be the same one that stopped at the shelter, and that the person in the blue basketball jersey appeared to be the shooter. Keodara was also identified in the video by Lacana Long, who had dated Keodara in 201 1.

Nathan Smallbeck told police that Keodara called him after the shooting and told him that he had "just shot at a bus station." VRP (May 13, 2013) at 3435. He provided a statement to police about a call from Keodara around 3:18

a.m. and that he called Keodara later around 11:00 a.m. Id. at 36. The State presented Keodara's telephone records showing call records and texts from the day of the shooting. The State also obtained location data for Keodara's phone that showed it was in the area near the time of the shooting.

At trial, the State presented images from the phone that showed Keodara wearing clothing similar to that worn by the shooter, as well as text messages sent between him and Long. Keodara argued that the police lacked probable cause to search his phone and moved to suppress all evidence seized under the warrant. The trial court denied the motion without holding an evidentiary hearing.

Keodara was charged with and convicted of first degree murder and three counts of first degree assault, each with a separate firearm enhancement, and unlawful possession of a firearm in the first degree. The standard ranges for first degree murder and first degree assault were 312-416 months and 93-123 months, respectively, plus a deadly weapon enhancement of 60 months was added to each count. By statute, the terms for each count are required to be served consecutively and no good time is allowed on the deadly weapon enhancements. see RCW 9.94A.589(1)(b) and 9.94A.533(3)(e)). Defense counsel joined in the State's request that the trial court impose the presumptive minimum sentence for each count. The court did so, resulting in imposition of a total term of 831 months (69.25 years).

DISCUSSION

Search Warrant

Keodara argues that the warrant violated the particularity requirements of the Fourth Amendment of the United States Constitution and the protections of Article l, Section 7 of the Washington Constitution. According to him, the warrant was invalid because there was no specific nexus between

the events alleged to have occurred and the items authorized to be searched. The State argues that the warrant was sufficiently particular because it specified the individual crimes for which evidence was being sought. The State also contends it would be unreasonable to impose additional limits on the scope of the search, because information related to firearms or drugs could be found any place on the phone and pertain to any time period.

We review the issuance of a search warrant under an abuse of discretion standard. state v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1 199 (2004). We give great deference to the magistrate or issuing judge's decision. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). We review de novo, however, the trial court's probable cause and particularity determinations on a motion to suppress. State v. Higgs, 177 wn. App. 414, 426, 31 1 P.3d 1266 (2013) review denied, 179 Wn.2d 1024, 320 P.3d 719 (2014)).

A warrant is overbroad if it fails to describe with particularity items for which probable cause exists to search. State v. Maddox, 1 16 Wn. App. 796, 805, 67 P.3d 1135 (2003)). While the degree of particularity required depends on the nature of the materials sought and the facts of each case, we evaluate search warrants "in a common sense, practical manner, rather than in a hypertechnical sense." State v. Perrone, 1 19 VVn.2d 538, 549, 834 P.2d 61 1 (1992) (citing United States v. Turner, 770 F.2d 1508, 1510 (9th Cir. 1985)).

"Conformance with the particularity requirement eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." Perrone, 1 19 Wn.2d at 549 (citing United States v. Blakeney, 942 F.2d 1001, 1026 (6th Cir. 1991)). The underlying measure of adequacy in a description is whether, given the specificity of the war-

rant, a violation of personal rights is likely. State-y-Reep, [1] 61 Wn.2d 808, 814, 167 P.3d 1 156 (2007). The fact that a warrant lists generic classifications, however, does not necessarily result in an impermissibly broad warrant. State v. Stenson, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997). But blanket inferences and generalities cannot substitute for the required showing of "reasonably specific 'underlying circumstances' that establish evidence of illegal activity will likely be found in the place to be searched in any particular case." State v. Thein, 138 Wn.2d 133, 147-48, 977 P.2d 582 (1999).

Keodara asks this court to consider the special nature of cell phones because of the amount of personal and private information that they contain. He cites a line of federal cases, including Riley v. California, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), revs'd and remanded, People v. Riley, 2015 WL 721254, Cal. App. Feb. 19, 2015)), and United States v. Galpin, 720 F.3d 436, 446 (2nd Cir. 201 3), to support his argument that the vast potential for privacy violations requires increased sensitivity to the particularity requirement. In Riley, the United States Supreme Court held that a warrant was required to search an individual's cell phone because of its potential to contain extensive personal information about '"the privacies of life."' 134 S.Ct. at 2495 (quoting, Boyd v. United States, 1 16 U.S. 616, 625, 6 S. Ct. 524, 29 L.Ed. 746 (1886). Galpin involved the search of a personal computer, digital cameras, and digital storage devices for child pornogra-

phy. The Galpin court held that the particularity requirement was of even greater importance, because advances in technology have "rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain." 720 F.3d at 446.

In general, Washington courts have recognized that the search of computers or other electronic storage devices gives rise to heightened particularity concerns. A properly issued warrant "distinguishes those items the State has probable cause to seize from those it does not," particularly for a search of computers or digital storage devices. State v. Askham, 120 Wn. App. 872, 879, 86 P.3d 1 194 (2004). In Askham, the court held that the warrant was sufficiently particular because while it purported to seize a broad range of equipment, drives, disks, central processing units, and memory storage devices, it also specified which files and applications were to be searched. Id. It listed files related to the owner's use of specific websites, and files relating to manipulations of digital images and authorized the seizure of software related to manipulation of images, the defendant's handwriting, fingerprints, and postage stamps. Id. The warrant's description left no doubt as to which items were to be seized and was

"not a license to rummage for any evidence of any crime." Id. at 880.
On the other hand, the warrant in State v. Griffith, 129 Wn. App. 482, 4889, 120 P.3d 610 (2005), listed cameras, unprocessed film, computer processing units and electronic storage media, documents pertaining to internet accounts, videotapes, etc., as items to be searched. The supporting affidavit stated only that Griffith used a digital camera to take pictures of the victim and that he kept pictures on a computer; it did not contain evidence suggesting that Griffith uploaded pictures to the internet or that he used film or videotape. Id. The warrant was therefore overbroad because it permitted a search of video tapes and internet documents, neither of which had any connection to the alleged offenses.

Keodara argues that general statements about the ways dealers keep their drugs and their sales records are not enough to conclude that his phone contained evidence of illegal activity. In Thein, the affidavits in support of probable cause contained generalized statements of beliefs about the common habits of drug dealers. 138 Wn.2d at 138. The Supreme Court held that the search warrant for Thein's residence was overbroad, because the record showed no incriminating evidence linking drug activity to his home. Id. at 150. The Thein court held that the existence of probable cause is to be evaluated on a case-bycase basis and "'the facts stated, the inferences to be drawn, and the specificity required must fall within the ambit of reasonableness.'" Id. at 149 (quoting State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 1 15 (1975)).

The T hein affidavit read as follows:

> Based on my experience and training, as well as the corporate knowledge and experience of other fellow law enforcement officers, I am aware that it is generally a common practice for drug traffickers to store at least a portion of their drug inventory and drug related paraphernalia in their common residences. It is generally a common practice for drug traffickers to maintain in their residences records relating to drug trafficking activities, including records maintained on personal computers. . . . Moreover, it is generally a common practice for traffickers to conceal at their residences large sums of money, either the proceeds of drug sales or to utilized [sic] to purchase controlled substances. . . Evidence of such financial transactions and records related to incoming expenditures of money and wealth in connection with drug trafficking would also typically be maintained in residences.
>
> I know from previous training and experiences that it is common practice for drug traffickers to maintain firearms, other weapons and ammunition in their residences for the purpose of protecting their drug inventory and drug proceeds[.] I am aware from my own experience and training that it is common practice for [sic] from law enforcement, but more commonly, from other drug traffickers who may attempt to "rip them off." Firearms and ammunition have been recovered in the majority of residence searches in the drug investigations in which I have been involved.

Thein at 138-39.

The affidavit for the warrant for Keodara's phone contained very similar blanket statements about what certain groups of offenders tend to do and what information they tend to store in particular places. Without evidence linking Keodara's use of his phone to any illicit activity, we find the affidavit to be insufficient under the Fourth Amendment. Under Thein, more is required for the necessary nexus than the mere possibility of finding records of criminal activity.

The State tries to distinguish this affidavit and warrant from Thein by citing officer Barfield's "wealth of specific experience and training." Brief of Respondent at 24. The T hein court, however, made no reference to the quality or quantity of the affiant's experience or whether such would suffice for an evidentiary nexus between the evidence and the place to be searched. The blanket statements and broad generalizations are not particular to Keodara or his commission of any offense.

Furthermore, the warrant's language also allowed Keodara's phone to be searched for items that had no association with any criminal activity and for which there was no probable cause whatsoever. There was no limit on the topics of information for which the police could search. Nor did the warrant limit the search to information generated close in time to incidents for which the police had probable cause. The State argued that the warrant was sufficiently limited to search only for information related to specific crimes, such as evidence of possession with intent to sell drugs or possession of firearms or assault in the 4th degree. However, this is not sufficient under State v. Higgins, 136 Wn. App. 87,
92, 147 P.3d 649 (2006). In that case, we rejected the general description of "certain evidence of a crime, to-wit: 'Assault 2nd DV' RCW 9A.36.021 ." The court found that a general reference to evidence of domestic violence was not sufficiently particular, because the statute contained six different ways to commit the crime. Id. A warrant to search for evidence of any such violation would allow for seizure of items for which the State had no probable cause. 'd. at 93.

Here, no evidence was seized that would have linked Keodara's phone to the crimes listed in the warrant—unlawful possession of firearms, possession with intent to deliver or sell narcotics, or assault. Nothing in the record suggests that anyone saw Keodara use the phone to make calls or take photos. In addition, the phone was found in a backpack, separate from the drug paraphernalia or the pistol. There was no indication that

evidence of firearms or drugs were found with the phone. We conclude that the warrant was overbroad and failed to satisfy the Fourth Amendment's particularity requirement. [6]

Keodara argues that because the warrant is invalid, all evidence from the phone should have been suppressed. Admission of evidence obtained in violation of either the federal or state constitution is an error of constitutional magnitude. State v. Contreras, 92 Wn. App. 307, 318, 966 P.2d 915 (1998) (citing state v. Mierz, 72 Wn. App. 783, 866 P.2d 65 (1994). An error of constitutional magnitude can be harmless "if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010) (quoting State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. State v. Fraser, 170 Wn, App. 13, 23-24, 282 P.3d 152 (2012) (review denied, 176 Wn.2d 1022, 297 P.3d 708 (2013)). The appellate court looks only at the untainted evidence to determine if the totality is so overwhelming that it necessarily leads to a finding of guilt. Id. The State must show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Id.

The text messages and photos, while relevant, demonstrated only that Keodara knew Long, to which she testified, and that he commonly wore Hornets' jerseys. The fact that the shooter wore a Hornets' jersey was only

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[6] Keodara argues that the warrant is also invalid under the article l, section 7 of the Washington State Constitution. Because we find the warrant fails the federal constitutional requirements, we need not address the state constitutional issue.

one of many pieces of evidence that supported the State's case. Cf., State v. Wicker, 66 Wn.
App. 409, 414, 832 P.2d 127 (1992) (error not harmless where fingerprints were the sole basis of the State's case and the jury received two opinions, one admitted in error). Here, the untainted evidence of Keodara's guilt was strong. Cellular phone tower records placed him near the location of the shooting, two eyewitnesses identified him, and another witness testified that Keodara contacted him and told him about the shooting. We find that the trial court's denial of Keodara's motion to suppress does not warrant reversal and, accordingly, we affirm his convictions.[7]

Sentence

Relying primarily on Miller v. Alabama, 132 S.Ct. 2455, Keodara argues that the sentence he received violates the Eighth Amendment. He points out that under Washington's sentencing scheme the crimes of which he was convicted, first degree murder and three counts of first degree assault, are deemed "serious violent offenses." See RCW 9.94A.030(45). Under RCVV 9.94A.589(1)(b), the

terms imposed for each such crime shall be served consecutively unless the court finds substantial and compelling reasons to depart from the presumptive standard range sentence. In Keodara's case, the application of the statute resulted in a sentence in excess of 69 years, which he contends is the equivalent of a mandatory life sentence without possibility of parole. Keodara argues that because he was a juvenile when he committed his crimes, Miller forbids the imposition of such a sentence unless the sentencing court considers his youth and individual circumstances. It is undisputed in this case that the court was not asked to and did not do so.

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[7] Keodara also argues that his alleged gang affiliation and related activity also provide a basis to challenge the warrant's validity. He argues that participation in a gang is protected First Amendment activity that gives rise to a higher standard of protection from unreasonable search and seizure. The degree of particularity required by a search warrant is greater if it grants authority to seize materials arguably protected by the First Amendment. Perrone, 1 19 Wn.2d. at 547-48. Perrone held that items seized for their use in furthering criminal activity, such as illicit drug trade or illicit firearms, are not protected. Id. at 548. Here, because the warrant is invalid under the Fourth Amendment's particularity requirement, we need not address whether a search for information related to gang activity would require the higher level of particularity under the First Amendment.

Thus, Keodara contends the sentence is unconstitutional and that he is entitled to a new sentencing hearing.

The State argues that Keodara's reliance on Miller is misplaced because the length of his sentence is not attributable to a conviction for a single offense, but instead the cumulative result of consecutive sentences for separate crimes. The State also argues that even if Miller applies, the sentence is lawful because under RCW 9.94A.730(1) Keodara has a realistic opportunity for release after serving 20 years.

Miller is the latest of three United States Supreme Court cases that address the Eighth Amendment's prohibition against cruel and unusual punishment in the context of sentencing persons for crimes committed as juveniles. In Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the court held that the Eighth Amendment prohibited the imposition of the death penalty for defendants who committed their crimes before the age of 18. In Graham v. Florida, 560 U.S. 48, 130 S.Ct. 201 1, 176 L.Ed.2d. 825 (2010), the court held that the Eighth Amendment forbade the imposition of a life sentence on a juvenile offender who did not commit a homicide if there was no realistic opportunity for the offender to obtain release before the end of that term. And in Miller, the court concluded that mandatory sentencing schemes that require the imposition of life without parole sentences on juvenile offenders convicted of homicide are constitutionally impermissible unless the sentencer takes "into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Miller, 132 S.Ct. at 2469. The fundamental proposition underlying each of these decisions is "that children are constitutionally different from adults for purposes of sentencing." Id. at 2464. Thus, mandatory sentencing schemes that impose the same sentence on adults and juveniles without

taking this critical distinction into account violate the "principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishments." Id. at 2475.

We recently rejected the State's argument that Miller should apply only to sentences of life without parole. In State v. Ronquillo, No. 71723-5-1 (Wash. Ct.
App. Oct. 26, 2015), we noted that Miller explicitly held that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Id. slip opinion at 8 (quoting Miller, 132 S.Ct. at 2466). Accordingly, we found irrelevant the label given to the type of sentence, i.e., a life sentence or a term of years. The critical questions were whether a sentence to a term of years was the equivalent of a life sentence, and if so, whether it can be mandatorily imposed on adults and juveniles alike regardless of the differences that we now know exist between them in terms of their culpability and capacity for rehabilitation. Id. slip opinion at 9. We determined that the term of years sentence in that case (52.5 years) was "a de facto life sentence" and concluded that before imposing it, Miller required the court to "'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" Id., (quotinq Miller, 132 S.Ct. at 2469).
Keodara, like Ronquillo, was sentenced to a term of years that is equivalent to a life sentence without possibility of parole. Like Ronquillo, in imposing its sentence, the court did not take into account that Keodara was a juvenile at the time he committed the crimes or consider other age related factors that weigh on culpability or his capacity for rehabilitation. We conclude that the sentence imposed in this case contravenes Miller's constitutional mandate. Accordingly, we vacate his sentence and remand for a new sentencing hearing.[8]

Statement of Additional Grounds

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[8] Ronquillo also rejected the State's argument that even if the sentence was unconstitutional when imposed, the issue is resolved by the enactment of RCW 9.94A.730(1) which provides juvenile offenders such as Keodara to petition for release after serving a minimum of 20 years. We held that the statute '"did not affect the mandatory nature of the sentence or cure the absence of a process of individualized sentencing considerations mandated under Miller."' Ronquillo, slip opinion at 14 (quoting State v. Raaland, 836 N.W.2d 107, 1 19 (Iowa 2013)). We likewise reject the argument here.

In his statement of additional grounds, Keodara objects to the trial court's evidentiary rulings regarding phone records and testimony about him possessing a weapon. We review a trial court's evidentiary rulings under an abuse of discretion standard. State v. Griffin, 173 Wn.2d 467, 473, 268 P.3d 924 (2012).

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by testimony of a witness with knowledge that the evidence is what it is claimed to be. ER 901 (a).

Keodara argues that cell phone records were not properly authenticated because the name on the records was "SYEO" and the texts and photos taken from his phone showed a different carrier. In this case Joseph Trawicki, records custodian for Sprint Nextel, testified about his familiarity with Sprint's records and the process by which call detail information is generated and recorded on the network for every subscriber. Trawicki testified that the phone records offered by the State included subscriber information, call detail records, and cell tower listings from 9/1/1 1 through 9/30/1 1 , for telephone number 206-501-8354, registered to Syeo Keodara at 17028 105th Avenue South, Renton, Washington. Trawicki's testimony was therefore sufficient to authenticate the records and any question regarding whether the subscriber was Keodara was properly before the jury.

Keodara also argues that the phone records should not have been admitted because the State claimed that these records were from the wrong phone. In opening argument, the State maintained that the phone and the records were from the same number. After Trawicki's testimony and the testimony from Barfield about the phone, it was clear that the phone and the records corresponded to different numbers. The State recognized this in its closing argument. Keodara objects to the prosecutor's misstatement of the evidence, not its authentication. The jury, however, was instructed to remember that the lawyers' statements were not evidence, and that it "must disregard any remark, statement, or argument that is not supported by the evidence or the law.

. . ." CP at 262 The jury is presumed to have followed that instruction. State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008). Keodara has not shown that he was prejudiced by the prosecutor's misstatement and subsequent correction about the phone records and evidence.

Keodara also argues that it was error for the trial court to admit

Smallbeck's testimony that he knew that Keodara possessed a nine millimeter (9 mm) weapon, which was the gun used in the shooting. Keodara argues that such evidence should have been excluded under ER 404(b). ER 404(b) prohibits the admission of evidence of other crimes, wrongs, or acts to show character or to show action in conformity therewith. The test for admitting evidence under ER 404(b) consists of the trial court (1) finding by a preponderance of evidence that the misconduct occurred, (2) identifying the purpose for which the evidence is sought to be introduced, (3) determining whether the evidence is relevant to prove an element of the crime charged, and (4) weighing the probative value against the prejudicial effect. State v. Hartzell, 156 Wn. App. 918, 930, 237 P.3d 928 (2010) (citing State v. Lough. 125 Wn.2d 847, 853. 889 P.2d 487 (1995)).

The trial court engaged in the proper inquiry on the record; first finding that from the testimony and reports that Keodara was found with a 9mm at the time he was arrest. Second, the court found the evidence was offered to show that Keodara had access to such a weapon and that it was relevant to whether he committed the crimes charged. Finally, the trial court balanced the probative value and the prejudicial effect when it stated on record that it would only admit evidence of Keodara having the 9mm prior to the shooting, not evidence of other guns or being convicted for possession of the 9mm at the time of his arrest.

Keodara's ER 404(b) argument fails.

Finally, Keodara argues that the prosecutor committed misconduct by proffering Smallbeck's testimony about the time and occurrence of calls and texts back and forth with Keodara. He also argues that he received ineffective assistance of counsel because his attorney failed to object to such testimony. He claims that the records (the same records he claims

were admitted in error because they had not been authenticated) clearly establish that no such calls occurred. The jury is entitled to weigh the evidence and determine the credibility of witnesses; we do not review such determinations on appeal. State v. Camarillo, 1 15 Wn.2d 60, 71, 794 P.2d 850 (1990). Because the testimony was properly before the jury, we do not find that the prosecutor committed misconduct or that Keodara received ineffective assistance of counsel.

We affirm Keodara's conviction, but vacate his sentence and remand for resentencing in light of Miller and Ronquillo.

Spearman, C.J.

WE CONCUR:

Dwyer, J.

Appelwick, J.

NO. 33794-4-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. JEREMIAH JAMES GILBERT, Defendant, Appellant.	)))))))))))))	KLICKITAT COUNTY NO. 92 1 00108 1 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 11th day of January, 2016, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

COURT OF APPEALS, DIVISION III E-FILE
Attn: Renee Townsley, Clerk
500 N Cedar St
Spokane, WA 99201

DAVID QUESNEL E-FILE
Klickitat County Prosecutor's Office
205 South Columbus Avenue #106
Goldendale, Washington 98620
davidq@klickitatcounty.org

JEREMIAH JAMES GILBERT #709551 U.S. MAIL
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, Washington 98520

s/ Dennis W. Morgan_____
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99169
Phone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com

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February 1, 2016
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Division III
State of Washington

NO. 33794-4-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JEREMIAH JAMES GILBERT,

Defendant/Appellant.

ADDITIONAL STATEMENT OF AUTHORITIES

Dennis W. Morgan WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, Washington 99166
(509) 775-0777

COMES NOW, JEREMIAH JAMES GILBERT, by and through the undersigned attorney, and requests the Court to consider the following additional authorities in connection with his appeal:

> *State v. O'Dell,* 183 Wn. App. 680, 690-97 (2015) (Youth can amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range and a trial court must meaningfully consider youth as a possible mitigating circumstance).

DATED this 1st day of January, 2016.

Respectfully submitted,

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99166
(509) 775-0777
(509) 775-0776
nodblspk@rcabletv.com

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STATE OF WASHINGTON

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I certify under penalty of perjury under the laws of the State of Washington that on this 1st day of February, 2016, I caused a true and correct copy of the *Additional Statement of Authorities* and to be served on:

COURT OF APPEALS, DIVISION III E-FILE
Attn: Renee Townsley, Clerk
500 N Cedar St
Spokane, WA 99201

DAVID QUESNEL E-FILE
Klickitat County Prosecutor's Office
205 South Columbus Avenue #106
Goldendale, Washington 98620
davidq@klickitatcounty.org

JEREMIAH JAMES GILBERT #709551 U.S. MAIL
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, Washington 98520

s/ Dennis W. Morgan
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99169
Phone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com