NO. 53879-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RAYMOND MAYFIELD WILLIAMS,

Appellant.

RESPONSE TO PERSONAL RESTRAINT PETITION

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I. ANSWER TO PETITION

The restraint of petitioner Raymond Mayfield Williams is lawful. The petition is untimely because *State v. Bassett,* 192 Wash. 2d at 73, 428 P.3d 343, (2018) is not a significant change in the law material to Williams which would operate as an exception to the one-year time bar. As such, the petition should be dismissed on that basis alone. The Persistent Offender Accountability Act (POAA) is not unconstitutional as applied to Williams nor categorically. The imposition of a mandatory life sentence, based upon two predicate "most serious offenses" the first of which was committed when Williams was 16 years old, does not violate article I, section 14 of the state constitution, because he is only being punished for the current conviction, which he committed as an adult.

II. AUTHORITY FOR RESTRAINT OF PETITIONER

Williams is being restrained pursuant to the judgment and sentence entered on October 15, 2008 in Cowlitz County Superior Court Cause No. 08-1-00735-6. In this case he was sentenced to life without the possibility of parole under the POAA, upon conviction of assault in the second degree.

STATEMENT OF THE CASE

On October 15, 2008, in Cowlitz County Superior Court, Williams entered a guilty plea to an amended information charging one count of assault in the second degree. Defendant was 28 years old at the time of the plea and sentencing.

The State provided the following factual basis for the plea: "On 5 July, 2008, a gentleman by the name of Chad Gaynor was at his residence at 207 NW.

7th Ave. in the city of Kelso, Cowlitz County, state of Washington. Mr. Gaynor was inside that residence along with two females.... And at that time in the early morning hours, a masked man knocked at the door, demanded entry and brandished a firearm. The man was wearing a ski mask along with black clothing. He forced his way into the residence. He had a small firearm, semi-automatic pistol in his hand, and began demanding money as well as valuable property from Mr. Gaynor and the other individuals in the residence. He backed the individuals into a bedroom. Mr. Gaynor and the other two women then began a discussion of what they should do. They began the discussion of whether the masked man would actually shoot them. Mr. Gaynor apparently believed that perhaps that this masked man would not shoot down, began making a motion the masked man viewed as being dangerous. The man fired one round from the .25 caliber pistol into Mr. Gaynor's lower leg. The individual fled the residence, at which point the police were called. The police responded, found Mr. Gaynor in pain from the gunshot wound to his leg, found a spent shell casing as well as later recovered a slug in the bedding underneath the area where Mr. Gaynor had been shot. Mr. Gaynor was transported to St. John's medical center, where he underwent medical treatment for the gunshot wound to his leg. Between the infection and the pain, the use of his bodily part, his leg, was substantially impaired. Although not permanently, it was impaired for a substantial period of time. Subsequent to that, investigation revealed that the defendant, Raymond Williams, was likely to be the person who had done this and shot Mr. Gaynor. A SWAT team arranged a ruse in which Mr. Williams was lured to a location and then arrested. Subsequent to arrest, Mr. Williams was

advised of Miranda warnings, waived his warnings and agreed to speak to the police. He stated that he had a history. Williams stated at that time that he owed various debts to various people for various reasons and that he was in need of money. He then concocted a plan to rob Mr. Gaynor, who he believed to have some valuable property. Went to the residence and confessed that he shot Mr. Gaynor in the leg with the pistol. Said pistol was recovered. It was a Raven .25 caliber semi-automatic handgun." The gun "was recovered from his girlfriend's residence." RP 5-7.

Addressing the court, Williams stated "the guy's a child molester and I shot him because he fucking deserved it." RP 7. He added, "In closing, I would like to say that many people believe it was a very righteous act to have harmed a 50-year-old man who I witnessed deal drugs to and have sexual relations with a 15-year-old girl. And while I still believe it was righteous, I now also believe it was stupid. I should have done things different. That's all I got to say." RP 10, 11.

Williams had the following criminal history at the time of sentencing:

Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
Malicious mischief 2	9-3-05	NV	J	THURSTON CO, WA	10-31-95
Malicious mischief 2	11-21-95	NV	A	THURSTON CO, WA	12-12-95
Theft 2	6-26-95	NV	A	THURSTON CO, WA	7-21-95

Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
Possession of stolen property 2	6-26-95	NV	A	THURSTON CO, WA	9-7-95
Possession of stolen property 2	6-26-95	NV	A	THURSTON CO, WA	9-7-95
Burglary 1	**2-14-97**	**VIOL**	**A**	**THURSTON CO, WA**	**7-8-97**
Custodial assault	5-11-97	NV	A	THURSTON CO, WA	7-8-97
Burglary 1	**9-13-03**	**VIOL**	**A**	**KING CO, WA**	**2-9-04**

CP 216 (bold emphasis added to the prior strike offenses).

As this was his third strike offense, the court sentenced Williams to life without the possibility of early release under the POAA. His two prior strikes were a burglary in the first degree in 1997, and a burglary in the first degree in 2004. The 1997 burglary in the first degree was entered in Thurston County Superior Court after Williams, then 16 years old, waived his right to be tried as a juvenile.

II. PROCEDURAL BACKGROUND

Williams never filed a direct appeal from either the 1997 conviction, the 2004 conviction for burglary 1, or the 2008 conviction for assault 2. He filed his first personal restraint petition in November of 2016, challenging the 2008 sentencing court's use of the 1997 Thurston County conviction as his first strike.

He argued that his PRP was not time barred because he satisfied two exceptions to the one-year time bar -- his sentence was imposed in excess of the court's jurisdiction, and that a significant change in the law had occurred. The appellate court asked for and received supplemental briefing on whether the 1997 conviction, committed when Williams was 16 years old, could be used as a strike offense under the POAA. Amicus curiae, the Fred T. Korematsu Center for Law and Equality, argued that the POAA, as applied to Williams, is unconstitutional. Amicus curiae and the State addressed the issues the court requested at oral argument as well.

The court rejected his argument that his sentence was in excess of the court's jurisdiction, and dismissed his petition as untimely. The court did not consider his significant change in the law argument because it was inadequately argued, or supported by authority. Because the court concluded the PRP was time-barred it did not address the constitutionality arguments raised by Amicus curiae.[1] Williams then filed this second PRP on September 20, 2019.

III. ISSUES

(1) Does either RCW 10.73.100 (2) or (6) apply as an exception to the one-year time bar for this PRP?

(2) If the issue can be raised, does mandatory sentencing for adults constitute "cruel punishment" in violation of the Washington Constitution?

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[1] "Because of our conclusion that Williams's PRP is time barred, we do not address these issues." In re Williams, No. 49894-4-II, 2019 WL 949431, at 1 (Wash. Ct. App. Feb. 26, 2019).

IV. ARGUMENT

1. **THE PETITION WAS NOT BROUGHT WITHIN ONE YEAR OF THE SENTENCE IN 2008. NEITHER RCW 10.73.100 (2) NOR (6) IS AN EXCEPTION TO THE ONE-YEAR TIME BAR. THE PETITION IS THEREFORE TIME BARRED.**

2. **MANDATORY LIFE SENTENCE, BASED UPON TWO PREDICATE "MOST SERIOUS OFFENSES" THE FIRST OF WHICH WAS A BURGLARY IN THE FIRST DEGREE COMMITTED WHEN THE DEFENDANT WAS 16 YEARS OLD AND SENTENCED IN ADULT COURT, DOES NOT VIOLATE ARTICLE I, SECTION 14 OF THE STATE CONSTITUTION, BECAUSE IT IS ONLY THE CURRENT CONVICTION COMMITTED AS AN ADULT FOR WHICH THE DEFENDANT IS BEING PUNISHED.**

   A. **THE POAA IS NOT UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 14 AS APPLIED TO WILLIAMS.**
   B. **THE USE OF A JUVENILE STRIKE OFFENSE IS NOT CATEGORICALLY UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 14.**

The threshold question is whether this petition is time barred. Personal restraint petitions generally are prohibited if not filed within one year after the judgment and sentence becomes final. RCW 10.73.090(1). No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. RCW 10.73.090(1).

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds: (2) **The statute that the defendant was convicted of violating was unconstitutional** on its face or as applied to the defendant's conduct; (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the

state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard. (emphasis added) RCW 10.73.100. The petitioner bears the burden of proving that an exception to the RCW 10.73.090 statute of limitation applies. *State v. Schwab,* 141 Wash.App. 85, 90, 167 P.3d 1225 (2007). Whether a change in the law is material to a sentence, within the meaning of the statutory exception to the one-year limitations period governing a personal restraint petition, depends upon the facts and circumstances of each case. *In re Marshall*, 455 P.3d 1163 (Wash. Ct. App. 2019).

Williams claims the issues he raises fall within the exceptions set out in RCW 10.73.100 (2) and (6). The State argues that neither exception applies. Under RCW 10.73.100(2) Williams must prove that **the statute he was convicted of violating was unconstitutional** on its face or as applied to his conduct. The focus under this exception is the *particular statute he was convicted of.* He was convicted of violating RCW 9A.36.021 – assault in the second degree. Williams makes no argument that this statute is unconstitutional on its face or as applied to his conduct. Therefore, this exception does not apply.

Williams next claims that a significant change in the law resulted from *State v. Bassett*. Bassett held sentencing *juvenile offenders* to life without parole or early release constitutes cruel punishment and therefore is unconstitutional under article I, section 14 of the Washington Constitution. *Bassett,* at 73. *Bassett* is not a

significant change in the law material to Williams because it only applied to *juvenile* offenders. Williams states when he was sentenced in 2008 "children prosecuted as adults received no special treatment for sentencing purposes" noting the "kids are different jurisprudential arc" had just begun. That may be so, however in 2008 Williams was an adult, not a child. He contends Bassett is material because the constitutional norms of juvenile sentencing have changed since 2008. He is correct that the constitutional norms of sentencing *juveniles* have changed since 2008, but he fails to cite any authority that these changes to *juvenile* sentencing have expanded to include *adults*. Had Bassett been decided before 2008, it would have been no more helpful to Williams than it is now. Rather than relying on a significant change in law, the petitioner is asking this court to *create* one. RCW 10.73.100(6) requires, however, that "[t]here *has been* a significant change in the law." If it were sufficient to ask the court to create a change, the time bar would have little meaning. Since the change that the petitioner seeks has not yet occurred, the statutory exception is inapplicable.

Very recently Division II held the rule announced in Bassett does not apply to adults being sentenced. In *Matter of White*,[2] No. 76988-0-I, 2019 WL 6492823 a jury convicted White of aggravated first degree murder. He was 19 years old at the time of the crime. The trial court sentenced him to life without the possibility of parole (LWOP) pursuant to RCW 10.95.030. White filed an untimely PRP arguing, like Williams, the significant change in the law exception to the one year time bar under RCW 10.73.100. He argued RCW 10.95.030 was unconstitutional

[2]*Matter of White* is an unpublished opinion. See GR 14.1.

as applied to him because the court was unable to consider his youth as a mitigating factor and impose a sentence less than life without parole. He, like Williams, pointed to *Bassett* and argued a trend of cases supported his significant change in the law argument. The court disagreed, holding *Bassett* (along with *Roper, Graham, Miller, Houston-Sconiers*) applied explicitly *only to juveniles*. Thus, *Bassett* was not a significant change in law, so his claim of unconstitutionality was time barred. The *White* court wrote,

> In support of his argument that a significant change in law has occurred, White points to a constellation of recent federal and state cases that address sentencing of juveniles and youthful offenders: *Roper v. Simmons*, (holding the United States Constitution's Eighth and Fourteenth Amendments prohibit imposition of the death penalty on juvenile offenders): *Graham v. Florida*, (holding the United States Constitution's Eighth Amendment prohibits LWOP sentences for juveniles who did not commit homicide): *Miller v. Alabama*, (holding the United States Constitution's Eighth Amendment bars mandatory LWOP sentences for juveniles): *State v. O'Dell*, (holding non-juvenile defendants' youthfulness can support exceptional sentences below the standard range applicable to adult felony defendants): *State v. Houston-Sconiers*, (holding that sentencing courts must consider the mitigating qualities of youth when sentencing juveniles, and must have discretion to depart from mandatory sentence enhancements when sentencing juveniles in adult court); and *State v. Bassett*, (holding LWOP for juvenile defendants violates Washington's Constitution).
>
> Referring to these cases, White asks the court to infer that a significant change in law has occurred that allows sentencing courts to depart from mandatory sentence enhancements **for "youthful" adult offenders**.
>
> The holdings of Roper, Graham, Miller, Houston-Sconiers, **and Bassett apply explicitly only to juveniles.** O'Dell is the only case White cites relating to sentencing of "youthful" adult offenders. But in Light-Roth, our Supreme Court held O'Dell did not constitute a significant change in law, since sentencing courts have always had the discretion to consider a defendant's youthfulness at sentencing. 191 Wn.2d at 336-38.
>
> White asks the court to examine these cases cumulatively, not individually. White offers no legal authority in support of his proposition that the court may examine an array of cases, and from such, infer a significant change in law has occurred. Indeed, the test for determining whether there has been a significant change in law asks the court to examine if the defendant could have made their argument before the publication of a given *decision*—not

> before a trend of decisions. See Miller, at 115. And when courts analyze whether a significant change in law has occurred, the focus of their analysis is whether a *single case* has changed Washington law in some way. See, e.g., Miller, at 115-16 (analyzing whether In re Pers. Restraint of Mulholland, significantly changed the law of concurrent sentencing); Colbert, (analyzing whether State v. W.R., significantly changed the law regarding the burden of proof of consent in second degree rape cases); In re Pers. Restraint of Yung-Cheng Tsai, (analyzing whether Padilla v. Kentucky significantly changed the law regarding ineffective assistance of counsel). White bases his argument on an erroneous understanding of the manner in which a "significant change in law" occurs. (emphasis added) *White,* at 2. (Internal citations omitted).

Williams, like White, was over the age of 18 when he committed his third strike crime. Williams was 28. Thus, Bassett is not a significant change in the law material to the sentence of a 28-year-old just as it was not a significant change in the law material to the sentence of 19-year-old White. Because Bassett is not a significant change in the law material to Williams, this basis simply does not apply as an exemption to the one year time bar. Because both exceptions in RCW 10.73.100 (2) and (6) do not apply, the petition should be dismissed as time-barred.

Williams makes a passing reference to equitable tolling if the court determines neither exception to the time bar is met, citing *In re Carter*, 172 Wash. 2d 917, 263 P.3d 1241 (2011). Footnote 37, petitioner's brief page 46. *In re Carter* noted that, "Any application of equitable tolling to the one-year time bar for a collateral attack by way of a personal restraint petition (PRP), including application of the actual innocence doctrine, must only be done in the narrowest of circumstances and where justice requires. Williams provides no analysis of how his situation is among the "narrowest of circumstances where justice requires" use of equitable tolling or is in any way comparable to the actual innocence doctrine.

If the petitioner's claim is considered on the merits, it should be rejected. The POAA is not unconstitutional as applied to Williams and the use of a strike offense committed by a 16-year-old is not categorically unconstitutional.

STANDARD OF REVIEW

An appellate court reviews alleged constitutional violations de novo. *State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012). Statutes are presumed constitutional. The challenger bears the heavy burden of convincing the court that there is no reasonable doubt that the statute is unconstitutional. *State v. Schmeling*, 191 Wash. App. 795, 798, 365 P.3d 202, 204 (2015), citing *In re Welfare of A.W. & M.W.,* 182 Wash.2d 689, 701, 344 P.3d 1186 (2015).

PERSISTENT OFFENDER ACCOUNTABILITY ACT (POAA)

Whenever a sentencing court concludes an offender is a "persistent offender," the court must impose a life sentence, and the offender is not eligible for any form of early release.[3] RCW 9.94A.570. The definition of "offender" includes a person who has committed a felony established by state law and is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110. RCW 9.94A.030 (35). A "persistent offender" is someone currently being sentenced for a "most serious offense," who also has two or more prior convictions for "most serious offenses."

[3] Washington adopted the Persistent Offender Accountability Act (POAA), known as the "three strikes law," by initiative in 1993. *See State v. Thorne,* 129 Wn.2d 736, 746, 921 P.2d 514 (1996)

RCW 9.94A.030 (37). RCW 9.94A.030(33) lists Washington's "most serious offenses," which includes assault in the second degree. RCW 9.94A.030(33)(b).

A. The POAA is not unconstitutional under article 1, § 14 as applied to Williams.

Article 1, section 14 of the Washington Constitution provides, "Excessive bail shall not be required, excessive fines imposed, *nor cruel punishment inflicted.*" (Emphasis added). State Constitution's prohibition against cruel and unusual punishment protects against sentences that are grossly disproportionate to the crime committed; a punishment is "grossly disproportionate" only if the punishment is clearly arbitrary and shocking to the sense of justice. *State v. Whitfield,* 132 Wash. App. 878, 134 P.3d 1203 (2006).

Determining whether a punishment is "cruel" under article 1, § 14 requires a proportionality analysis. The court will consider (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment that the defendant would receive in other jurisdictions for the same offense, and (4) the punishment that the defendant would receive for other offenses in Washington. *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980). The *Fain* framework does not include significant consideration of the characteristics of the offender class. Instead, it weighs the offense with the punishment. *Bassett*, at 83.

The first factor is the nature of the offense. Under the first *Fain* factor, we consider whether the crime is a violent one and whether it is a crime against a person or property. *Whitfield,* at 901. Williams was convicted of second degree assault, which is classified as a violent offense. Wearing a ski mask and armed with a

firearm he forced his way into a residence. He backed the people inside into a bedroom and began demanding money and property from them. He then shot one man. He later told the police that he needed money because of debts he owed so he concocted a plan to rob the victim who he believed had valuable property. At sentencing Williams told the judge that the victim deserved to be shot. This conduct is far more serious than the second degree theft found to be disproportionate in *Fain.*

Williams contends that proportionality review "must and always has encompassed *all three strikes."* Petitioner's brief, page 12. He states that his "case in particular must give *close scrutiny* to all strike offenses." He asserts "the nature of the offense requires the court to look holistically at all three strike offenses," and that the "focus of the proportionality review is on the juvenile strike offense, burglary in the first degree." In this vein, he then describes why he broke into a home to steal firearms and, citing Bassett, emphasizes his age when he committed this crime. Petitioner's brief, page 33.

Williams is incorrect. The petitioners in *State v. Moretti,* 193 Wash. 2d 809, 446 P.3d 609, 619 (2019), also argued that their sentences were disproportionate because they were relatively young (either 19 or 20 years old) when they committed their first strike offense and their relative youth therefore made them less culpable. The court disagreed, stating that "proportionality review focuses on the nature of **the current offense**, not the nature of past offenses. (Emphasis added.) *Moretti,* at 832. Earlier cases have similarly made no more than passing reference, not close

scrutiny, of the prior strikes. *State v. Lee,* [4] ("Appellant's prior convictions were for robbery, two burglaries in the second degree, and assault in the second degree"); *State v. Manussier*, [5] ("Manussier's two prior convictions for first degree robbery and his current conviction for second degree robbery make his criminal history far more serious than that of the petitioners in *Solem* and *Rummel").*

Under Fain, the first factor is the nature of the offense. Under the first *Fain* factor, we consider whether the crime is a violent one and whether it is a crime against a person or property. *Whitfield,* at 901. Williams cites *State v. Witherspoon.*[6] That court's analysis of the first Fain factor consisted of the following: "the first *Fain* factor is the nature of the offense. As was noted in *Rivers,* robbery is a most serious offense. The nature of the crime of robbery includes the threat of violence against another person. Here, the victim testified that the defendant told her he had a gun behind his back. This statement contains an implied threat." Then, after analyzing the remaining Fain factors the court stated,

> "Here, Witherspoon's earlier offenses were for first degree burglary and residential burglary with a firearm. The sentence of life in prison without the possibility of release for this third strike offense is proportionate to the crime." (Internal citations omitted) *Witherspoon,* at 875.

The Witherspoon court did not analyze much less closely scrutinize the prior strikes in their consideration of the first Fain factor. The court simply made a passing reference in one sentence to what the prior strikes were. Contrary to

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[4] 87 Wash.2d 932, 558 P.2d 236 (1976)
[5] 129 Wash. 2d 652, 676–77, 921 P.2d 473, 485 (1996)
[6] 180 Wash. 2d 875, 888, 329 P.3d 888, 895 (2014), as corrected (Aug. 11, 2014).

Williams's contention, courts have not closely scrutinized prior strikes as part of a proportionality review of persistent offender sentences.

On this very point, the Bassett court noted, "the *Fain* framework does not include significant consideration of the characteristics of the offender class. Instead, it weighs the offense with the punishment. This makes it ill-suited to analyze Bassett's claim because he asserts a categorical challenge based on the characteristics of the offender class—children." *Bassett,* at 83. Citing this holding of Bassett Division 2 recently stated, in *State v. Teas,* 447 P.3d 606, Wash. Ct. App. (2019), "Teas's proposal is a misguided attempt to blur the frameworks for analyzing categorical bar and as-applied challenges. And it fails to appreciate the nature and purpose of the *Fain* framework. The *Fain* framework weighs the nature of a particular offense with its resulting punishment. This analysis informs whether the punishment is disproportionate to the particular circumstances of a defendant's crime. *Moen*, 4 Wash. App.2d at 600, 422 P.3d 930. Thus, the *Fain* framework is "ill suited" to analyze "a categorical challenge based on the characteristics of the offender class." *Bassett*, at 83. Indeed, the very policy Teas hopes to advance through his proposed test—considering the characteristics of the offender class—is the precise reason the categorical bar analysis applies here." *Teas*, footnote 3, *at* 619. Williams, like Teas, blurs the frameworks for analyzing categorical bar and as-applied challenges.

The second factor is the legislative purpose of the statute. The purpose of the law is to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set

proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process. RCW 9.94A.392. *State v. Thorne*, 129 Wash. 2d 736, 771–72, 921 P.2d 514, 531 (1996). Additionally, as stated by the Supreme Court in *Rummel v. Estelle,* 445 U.S. 263, 284–85, 100 S.Ct. 1133, 1144–45, 63 L.Ed.2d 382 (1980), the purpose of a repeat or persistent offender statute is to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction. These goals are served by these sentences. Williams committed dangerous felonies time and time again. He has shown that he is unwilling to stop endangering the public. This factor also suggests that the sentence is not grossly disproportionate.

The third factor is the punishment that the defendant would receive in other jurisdictions for the same offense. Williams asserts that "Washington has the most punitive form of recidivist punishment in the country," citing data in an article written by Beth Caldwell. Petitioner's brief, page 35. However, the data cited in

this article contradicts this assertion. [7] Per the article, nine other states -- Colorado, Delaware, Georgia, Illinois, Louisiana, Mississippi, New Jersey, New Mexico, North Carolina, Tennessee, Virginia, West Virginia, and Wisconsin impose some sort of life without parole as a third strike punishment. Many other states have some other enhanced penalties for second or third strikes. Further, 22 States – Arizona, Arkansas, California, Delaware, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Oregon, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, and West Virginia all either do or at least probably allow juvenile convictions in adult court to count as strikes. It is hard to reconcile the very data Williams cites with his assertion that Washington has the most punitive form of recidivist punishment in the country. The *Moretti* court relied upon the State's brief, writing "it appears as though 13 other states impose mandatory sentences of life without parole on offenders who continue to recidivate. A total of 34 states appear to have some sort of habitual offender statute, many of which allow or require imposing life sentences. Because each state has a different threshold for what qualifies as a strike offense, it is unclear exactly how each of the petitioners would have fared in other jurisdictions. But even if they would have received shorter sentences in some other jurisdictions, "this factor alone is not dispositive." *Moretti,* at 833, citing *Witherspoon,* at 888.

The fourth *Fain* factor is the punishment the offenders would have received for a different crime in the same jurisdiction. In every case the POAA has been challenged as unconstitutionally violating the state and federal guarantees against

[7] Excerpt of article attached as exhibit A.

cruel and unusual punishment our courts have determined that the fourth Fain factor supports the constitutionality of the sentence. See *Witherspoon*, 180 Wash. 2d at 888–89, (In Washington, all adult offenders convicted of three "most serious offenses" are sentenced to life in prison without the possibility of release under the POAA); *State v. Rivers*, 129 Wash. 2d 697, 714–15, (Under the Persistent Offender Accountability Act, all defendants who are convicted of a third "most serious offense" receive sentences of life imprisonment without possibility of parole. The offenses which are the basis for the convictions and sentence in this appeal are serious, violent offenses, which the people of this state have determined call for serious punishment); *Moretti,* at 833–34, (the fourth and final *Fain* factor is the punishment the offenders would have received for a different crime in the same jurisdiction... "[i]n Washington, all adult offenders convicted of three 'most serious offenses' are sentenced to life in prison without the possibility of release under the POAA." ... These petitioners would have received the same sentence if they had committed any other most serious offenses. This final factor supports the constitutionality of these sentences.")

As his third strike offense, Williams shot a man during an armed robbery. He was convicted of assault in the second degree. This crime is classified as a violent offense and what he did certainly was extremely violent. It is not at all like the relatively petty theft involved in Fain. No cases support the proposition that a life sentence under the POAA for such conduct is disproportionate. Williams has not carried his burden of showing the POAA is unconstitutional as being

disproportionate as applied to him. His sentence is not clearly arbitrary and shocking to the sense of justice.

B. The use of a juvenile strike offense is not categorically unconstitutional under article 1, § 14.

Williams argues that imposing a mandatory sentence of life without the possibility of parole on a person who committed a prior strike offenses as a juvenile categorically violates article I, section 14 of the Washington Constitution. In assessing a categorical bar challenge, the court considers "(1) objective indicia of society's standards to determine whether there is national consensus against sentencing those [of a particular class] to mandatory life imprisonment and (2) the courts own understanding of the prohibition of cruel punishment." *State v. Moen*, 422 P.3d 930, 937 (Wash. Ct. App. 2018), review denied, 192 Wash. 2d 1030, 439 P.3d 1063 (2019), citing *Graham*, 130 S.Ct. at 2022, 2026.

The first step in the categorical bar analysis is to determine whether there is a national consensus against" the sentencing practice at issue. *Id.* at 85, 428 P.3d 343. To determine this, we consider " 'objective indicia of society's standards, as expressed in legislative enactments and state practice.' " *Id.* (internal quotation marks omitted) (quoting *Graham v. Florida*, 560 U.S. 48, 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)). " 'It is not so much the number of these States that is significant, but the consistency of the direction of change.' " *Id.* at 86, 428 P.3d 343 (quoting *Atkins v. Virginia*, 536 U.S. 304, 315, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)). The United States Supreme Court has stated that the burden is on the offender to show that a national consensus exists. *State v. Moretti*, 193 Wash. 2d

809, 821, 446 P.3d 609, 614 (2019), citing *Stanford v. Kentucky,* 492 U.S. 361, 373, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), *overruled on other grounds by Roper v. Simmons,* 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

The second step requires the court to consider " 'the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question' and 'whether the challenged sentencing practice serves legitimate penological goals.' " *State v. Teas*, 447 P.3d 606, 619 (Wash. Ct. App. 2019), citing *Bassett*, at 87, (quoting *Graham v. Florida*, 560 U.S. 48, 67, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)).

In *Moretti,* the Washington Supreme Court recently rejected the same argument Williams makes under very similar factual circumstances. Moretti consolidated the cases of three individuals given a LWOP sentence where their first strike offense was as a young adult. Moretti's first strike offense was at age 20, his second strike offense was at age 26, and his third at age 32. Hung Van Nguyen's first strike offense for first degree burglary was at age 20, his second strike offense was at age 39, and his third strike offense was at age 41. Frederick Del Orr's first strike offense was at age 19, his second strike offense was at age 21, and his third strike offense was at age 41.

Moretti held that Article I, section 14 of the Washington Constitution does not require a categorical bar on sentences of life in prison without the possibility of parole for fully developed adult offenders who committed one of their prior strikes as young adults. The court also held that the sentences in these cases were not grossly disproportionate to the crimes. *Moretti*, at 813–14.

Addressing the first step, whether there is a national consensus against the sentencing practice at issue, the court saw "no evidence of a national consensus against applying recidivist statutes to adults who committed prior strike offenses as young adults. This step of the inquiry weighs against a categorical bar." In reaching this conclusion the court explained,

> "A review of the case law shows that many state courts have held that when sentencing an adult recidivist, it is not cruel and unusual to consider strike offenses committed when the offender was not just a young adult, but a juvenile. *See, e.g., Counts v. State,* 2014 WY 151, 338 P.3d 902 (holding that it was constitutional to sentence an adult to life in prison as a habitual offender even though one of his prior qualifying felony convictions was committed at age 16); *State v. Green,* 412 S.C. 65, 85-87, 770 S.E.2d 424 (Ct. App. 2015) (holding that it was constitutional to impose a life without parole sentence on adult recidivist whose prior strike was committed at age 17). Similarly, federal courts have routinely found that it does not violate the Eighth Amendment to impose mandatory minimum sentences on adult recidivists whose prior crimes were committed not just as young adults, but as juveniles. *See, e.g., United States v. Hoffman,* 710 F.3d 1228, 1233 (11th Cir. 2013) ("Nothing in *Miller* suggests that an adult offender who has committed prior crimes as a juvenile should not receive a mandatory life sentence as an adult, after committing a further crime as an adult." (emphasis omitted)); *United States v. Scott,* 610 F.3d 1009, 1018 (8th Cir. 2010) ("Scott was twenty-five years old at the time he committed the conspiracy offense in this case [and was sentenced to a mandatory term of life without parole]. ... The [Supreme] Court in *Graham* did not call into question the constitutionality of using prior convictions, juvenile or otherwise, to enhance the sentence of a convicted adult."); *United States v. Mays,* 466 F.3d 335, 340 (5th Cir. 2006) (affirming a mandatory sentence of life without parole imposed on an adult recidivist who committed his first strike offense at age 17 and explaining that "[t]here is not a national consensus that a sentencing enhancement to life imprisonment based, in part, upon a juvenile conviction contravenes modern standards of decency"). *Moretti,* at 822-23.

Numerous federal courts in addition to those cited in Moretti have held that there is no violation of the eighth amendment where an adult faces an enhanced sentence, including a life sentence, where juvenile convictions are considered as

predicate offenses. The underlying rationale in these cases, and those from other states, is that the person is being sentenced for conduct **as an adult, not a juvenile.**

federal authorities

In *United States v. Salahuddin*, 509 F.3d 858, 863–64 (7th Cir. 2007) defendant challenged the use of his armed robbery offenses, committed while he was a juvenile, to increase his sentence under the armed career criminal provisions of 18 U.S.C. § 924(e). Like Williams he argued that, in light of *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the armed career criminal provisions violate the Eighth Amendment because they permit a sentence increase based on crimes that the defendant committed as a juvenile. The court rejected his contention, stating:

> Mr. Salahuddin contends that *Roper* prohibits increasing a sentence under the armed career criminal provisions for conduct that occurred when the offender was a juvenile but for which he was waived into adult court and there convicted. That contention is without merit. *United States v. Wilks,* 464 F.3d 1240, 1243 (11th Cir.2006). *Roper* held that executing a person for conduct that occurred before the offender was eighteen violates the Eighth Amendment, but it permitted imposing a sentence of life imprisonment based on conduct that occurred when the offender was a juvenile. 543 U.S. at 560, 125 S.Ct. 1183. *Roper* did not specifically or even tangentially address increasing a sentence to imprisonment on the basis of juvenile crimes or convictions. *Wilks,* 464 F.3d at 1243. The Court's reasoning in *Roper* was based "in large measure on the 'special force' with which the Eighth Amendment applies when the state imposes the ultimate punishment of death." *United States v. Mays,* 466 F.3d 335, 340 (5th Cir.2006) (citing *Roper,* 543 U.S. at 568–69, 125 S.Ct. 1183). The reasoning in *Roper* therefore applies "with only limited, if any, force outside of the context of capital punishment." *United States v. Feemster,* 483 F.3d 583, 588 (8th Cir.2007).
>
> Our previous decisions, the case law of the Supreme Court and our sister circuits all support the district court's use of the convictions in question. We have affirmed a sentence that was increased under the armed career criminal provisions by conduct that occurred when the offender was a juvenile. *Wilburn,*

> 473 F.3d at 746. *Roper* itself affirmed that a person may be sentenced to life imprisonment for his juvenile conduct. 543 U.S. at 560, 578–79, 125 S.Ct. 1183. Additionally, our sister circuits that have addressed whether conduct that occurred when the offender was a juvenile may increase a sentence issue in light of *Roper* have uniformly concluded that the increase does not violate the Eighth Amendment. *See, e.g., Feemster,* 483 F.3d at 587 (holding *Roper* does not prohibit using juvenile conduct to enhance a sentence under the Sentencing Guidelines); *Mays,* 466 F.3d at 339–40 (same); *Wilks,* 464 F.3d at 1243 (holding that juvenile conduct may be used to increase a sentence under the armed career criminal provisions).
>
> Forbidding the execution of a youthful offender is an entirely different proposition than increasing the sentence of an adult offender on the basis of conduct that occurred when the offender was a juvenile. *Wilks,* 464 F.3d at 1243. We therefore hold that the Eighth Amendment does not prohibit using a conviction based on juvenile conduct to increase a sentence under the armed career criminal provisions. *United States v. Salahuddin,* 863–64.

In *United States v. Edwards*, 734 F.3d 850, 851 (9th Cir. 2013), defendant appealed a 46–month sentence following a guilty plea for possession of a firearm by a felon. The principal issue on appeal was the constitutionality of a provision of the federal Sentencing Guidelines that assigns criminal history points for crimes that were committed when the defendant was a juvenile. Like Williams, Edwards argued that considering such crimes in sentencing adults is contrary to the Supreme Court's Eighth Amendment cases (*Roper, Graham, and Miller*) limiting the degree of criminal punishment of juveniles. The court rejected that argument, writing "Joining the unanimously held view of our sister circuits, we conclude that the Eighth Amendment permits courts to use prior juvenile convictions to increase the sentence of an adult convicted of a crime." Explaining its rationale the court further observed, "**The conduct for which Edwards is being punished occurred while he was an adult, not a juvenile** as in *Roper, Graham,* and *Miller.* His adult culpability with regard to the crime for which he is being sentenced therefore is not

diminished. As the Eighth Circuit noted, *Roper* and *Graham* "established constitutional limits on certain sentences for offenses committed by juveniles"—not for offenses committed as an adult," (emphasis added) *Edwards* citing *United States v. Scott,* at 1018. Moreover, the prior juvenile offenses at issue in Edwards were not of the more serious nature that allowed for declination into adult court as in the case at bar.

In *United States v. Hunter*, 735 F.3d 172, 174 (4th Cir. 2013), the issue was whether the Armed Career Criminal Act (ACCA) enhancement, which was based on convictions for violent felonies Hunter committed as a juvenile, violated the Eighth Amendment's prohibition against cruel and unusual punishment under *Miller.* Like Williams, though his criminal history included offenses before turning eighteen, in each case he was charged and convicted as an adult.

The Fourth Circuit held that *Miller* and its progeny were not applicable to Hunter's case because the sentence for which he challenged punished *only* his adult criminal conduct. As stated by the court:

> When a defendant is given a higher sentence under a recidivism statute ... 100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's 'status as a recidivist.' *United States v. Rodriquez,* 553 U.S. 377, 386, 128 S.Ct. 1783, 170 L.Ed.2d 719 (2008). Instead, Defendant's enhanced sentence "'is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one.'" *Id.* (quoting *Gryger v. Burke,* 334 U.S. 728, 732, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948)).

Hunter, 735 F.3d at 175.

Ultimately, that court held:

> "In this case, Defendant is not being punished for a crime he committed as a juvenile, because sentence enhancements do not themselves constitute punishment for the prior criminal convictions that trigger them. Instead, Defendant is being punished for the recent offense he committed at thirty-three, an age unquestionably sufficient to render him responsible for his actions. Accordingly, *Miller's* concerns about juveniles' diminished culpability and increased capacity for reform do not apply here." *Id.* at 176.

Likewise, in *United States v. Orona,* 724 F.3d 1297 (10th Cir. 2013), the defendant argued that use of a juvenile adjudication as a predicate offense for ACCA purposes violated the Eighth Amendment and conflicted with the Supreme Court's holdings in *Roper, Graham*, and *Miller.* The court rejected this argument stating: "[t]he problem with this line of argument is that it assumes Orona is being punished in part for conduct he committed as a juvenile." *Id* The Tenth Circuit characterized this assumption as "unfounded," because the defendant was only being sentenced on the last offense committed by him.

The *Orona* court also rejected the defendant's argument that he was less morally culpable because the sentencing court relied on his prior juvenile convictions to enhance his sentence. The court found this argument unpersuasive:

> A juvenile's lack of maturity and susceptibility to negative influences, *see Roper,* 543 U.S. at 569, 125 S.Ct. 1183, cannot explain away Orona's decision to illegally possess a firearm when he was twenty-eight years old. And the third factor identified by the Court as differentiating juvenile and adult offenders, the greater likelihood "that a minor's character deficiencies will be reformed," *id.* at 570, 125 S.Ct. 1183, cuts against Orona's argument. Unlike defendants who receive severe penalties for juvenile offenses and are thus denied "a chance to demonstrate growth and maturity," *Graham,* 130 S.Ct. at 2029, ACCA recidivists have been given an opportunity to demonstrate rehabilitation, but have elected to continue a course of illegal conduct[.]

Id. at 1308;

See also *United States v. Hoffman,* 710 F.3d 1228, 1233 (11th Cir. 2013) ("[n]othing in *Miller* suggests that an adult offender who has committed prior crimes as a juvenile should not receive a mandatory life sentence *as an adult,* after committing a further crime as an adult" (emphasis in the original)); *United States. v. Rich,* 708 F.3d 1135, 1141 (10th Cir. 2013) ("Regardless of the inability of minors to fully understand the consequences of their actions, adults facing enhanced sentences based, only in part, on acts committed as juveniles have had the opportunity to better understand those consequences but have chosen instead to continue to offend"); *United States v. Banks,* 679 F.3d 505, 508 (6th Cir. 2012) (distinguishing *Graham* in relation to a 33-year-old offender who "remained fully culpable as an adult for his violation and fully capable of appreciating that his earlier criminal history could enhance his punishment"); *United States v. Scott,* 610 F.3d 1009, 1018 (8th Cir. 2010) (reasoning that the defendant was 25 years old at the time he committed his instant offense and *Graham* "did not call into question the constitutionality of using prior convictions, juvenile or otherwise, to enhance the sentence of a convicted adult"); *United States v. Rodriquez*, 553 U.S. 377, 399 (2008). ("When a defendant is given a higher sentence under a recidivism statute—or for that matter, when a sentencing judge, under a guidelines regime or a discretionary sentencing system, increases a sentence based on the defendant's criminal history—**100% of the punishment is for the offense of conviction. None is for the prior convictions** or the defendant's "status as a recidivist.") (Emphasis added); *United States v. Feemster,* 483 F.3d 583, 588 (8th Cir.2007) (holding *Roper*

does not prohibit using juvenile conduct to enhance a sentence under the Sentencing Guidelines); *United States v. Smalley,* 294 F.3d 1030, 1032-33 (8th Cir.2002) (juvenile court adjudications may be used for enhancement purposes, we see no reason that convictions for crimes committed by juveniles who are convicted as adults cannot be similarly used.); *United States v. Mays,* 466 F.3d 335 (5th Cir. 2006) (Use of defendant's prior adult felony conviction for possession of a controlled substance, obtained in Louisiana state court when he was 17 years old, as a predicate offense for imposing a life sentence after he was convicted of possession with intent to distribute powder cocaine and cocaine base, was not cruel and unusual punishment under the Eighth Amendment; there was **no national consensus that a sentencing enhancement to life imprisonment based, in part, upon a juvenile conviction, contravened modern standards of decency**.) (Emphasis added); *Moss v. United States*, No. CR491-176, 2014 WL 346758, at 2 (S.D. Ga. Jan. 30, 2014), report and recommendation adopted, No. CR491-176, 2014 WL 793646 (S.D. Ga. Feb. 25, 2014) - (the lower courts have consistently held that enhancing an adult offender's sentence based upon juvenile conduct in no way implicates *Graham.)*

state authorities

Various state courts are in accord with the above authorities. For example, In *Counts v. State,* 2014 WY 151, 338 P.3d 902, 906 (Wyo. 2014), defendant received two concurrent life sentences under Wyoming's mandatory habitual offender statute. One of the predicate convictions for the habitual criminal a determination occurred when he was 16 years old. Defendant argued the sentence

violated the Eighth Amendment prohibition against cruel and unusual punishment because, contrary to the U.S. Supreme Court's holding in *Miller,* it was mandatory and did not allow for consideration of the mitigating factors of youth associated with the predicate juvenile conviction.

The court upheld the sentence, holding defendant was not sentenced to life imprisonment for his juvenile conviction; rather, it enhanced his punishment for his convictions for the crimes he committed as an adult. The court reasoned,

> "Under recidivist sentencing schemes, the enhanced punishment imposed for a current offense is not an additional penalty for earlier crimes but a stiffened penalty for the latest crime. *Riggs v. California,* 525 U.S. 1114, 1115–1116, 119 S.Ct. 890, 142 L.Ed.2d 789 (1999). "A habitual criminal statute does not punish a defendant for his previous offenses but for his persistence in crime." *Urbigkit v. State,* 2003 WY 57, ¶ 56, 67 P.3d 1207, 1227 (Wyo.2003), quoting *Kearns v. State,* 2002 WY 97, ¶ 24, 48 P.3d 1090, 1097–98 (Wyo.2002).

Counts v. State, at ¶ 18.

Similarly, in *Wilson v. State*, 521 S.W.3d 123, 127-128 (Ark. 2017), the court upheld a life sentence where predicate convictions were based on juvenile convictions. Citing Roper, Graham, and Miller, Wilson challenged the constitutionality of the sentencing statutes under state and federal law contending that because he was a juvenile when he committed predicate crimes, they cannot be used to confer an automatic life sentence for aggravated robbery. He asserted that the sentencing court should have been given an opportunity to consider that his prior offenses were committed when he was a juvenile before imposing a life sentence. Like Mr. Williams, Wilson asked the court to adopt a categorical rule that prohibits offenses committed by a juvenile from being used as a basis to impose a mandatory life sentence.

The Wilson court affirmed the life sentence, holding that a conviction imposed on a juvenile sentenced as an adult may be used as the basis for an increased penalty imposed under the habitual-offender statute. The court explained,

> "In considering both his federal and state claims, we note that Wilson was 36 years old when he committed the aggravated robbery. In receiving a life sentence as a defendant convicted of a Class Y felony involving violence and who had previously been convicted as an adult of two felonies involving violence, Wilson was not being sentenced a second time for past crimes that he committed as a juvenile but instead was being punished for his conduct as an adult. *See Dolphus v. State*, 248 Ark. 799, 454 S.W.2d 88 (1970) (rejecting a claim that a statutory sentence as a habitual criminal is unconstitutional as a second punishment for previous offenses). Wilson was being held accountable for his conduct as an adult with knowledge of his past criminal convictions, to include his convictions as a juvenile. Thus, our holding in *Vanesch* concerning juvenile adjudications and the concerns in *Miller* about a juvenile's diminished culpability at the time he commits a crime are not at issue when the defendant, who is an adult and consequently does not suffer from a diminished culpability, is being punished with an enhanced sentence for his conduct as an adult. In fact, several courts have rejected the argument Wilson makes for these same reasons. *See, e.g.*, *United States v. Hunter*, 735 F.3d 172 (4th Cir. 2013); *United States v. Orona*, 724 F.3d 1297 (10th Cir. 2013); *United States v. Hoffman*, 710 F.3d 1228 (11th Cir. 2013) (per curiam); *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010); *Vickers v. Delaware*, 117 A.3d 516 (Del. 2015); *Counts v. Wyoming*, 338 P.3d 902 (Wyo. 2014). *Wilson v. State*, at 7–8.

In *Price v. State*, 2019 Ark. 323, 8–10, 588 S.W.3d 1, 6–7 (2019), the court rejected Price's argument that his automatic life sentence for being a "three striker" violated Eighth Amendment and state constitution where his prior strikes were residential burglary at age seventeen and aggravated robbery at age sixteen and in both instances he was tried as an adult.

In *State v. Green*, 770 S.E.2d 424, 435-36 (S.C. App. 2015) the court rejected a similar claim. Green was convicted of possession of a weapon during the commission of a violent crime and armed robbery. He was sentenced to life without

the possibility of parole (LWOP) for the armed robbery. Among his claims on appeal was that sentencing him to LWOP violated the Eighth Amendment's ban on cruel and unusual punishment. Relying on Miller he argued his "sentence of LWOP, which was mandatory pursuant to the recidivist statute, violated the Eighth Amendment's ban on cruel and unusual punishment because [he] was under the age of eighteen at the time of the triggering offense."

Like Williams, Green had a prior conviction (armed robbery) which he committed when he was 17 but was tried and convicted as an adult. Therefore under South Carolina's statutes and case law this prior conviction of a "most serious offense" was a predicate offense requiring a sentence of LWOP. Noting Green was an adult when he was sentenced to life the court upheld the sentence. As stated by the court:

> "We also find Green's reliance on *Miller* is misplaced. Although *Miller* held that mandatory LWOP sentences for juveniles violate the Eighth Amendment, Green was twenty years old at the time of sentencing; therefore, he was not a juvenile when he was sentenced to LWOP. *Miller*'s holding was based, in part, on the "recklessness, impulsivity, and heedless risk-taking" of children; however, because Green was not a juvenile at the time he committed the current armed robbery, the policy considerations from Miller are inapplicable. 132 S. Ct. at 2458; *see also Aiken*, 410 S.C. at 541-42, 765 S.E.2d at 576 ("[T]he Court in *Miller* noted that . . . children were constitutionally different from adults for sentencing purposes, a conclusion that was based on common sense as well as science and social science."). Therefore, Green's LWOP sentence did not violate the Eighth Amendment." *Green*, at 87.

In *Com. v. Bonner*, 135 A.3d 592, 596 (Pa. Super. Ct.), appeal denied, 636 Pa. 657, 145 A.3d 161 (2016), defendant was sentenced to an aggregate term of 39 to 78 years' imprisonment. Prior juvenile adjudications contributed to his range under Pennsylvania's sentencing guidelines. Defendant argued using juvenile

adjudications when calculating the sentencing range violated the Eighth Amendment to the United States Constitution and Pennsylvania's equivalent statute. Relying on *Roper, Graham,* and *Miller* he argued that juvenile adjudications must be treated differently than adult convictions when calculating a prior record score. Like Williams, he also argued there should be a categorical rule against using prior juvenile adjudications when calculating defendant prior record score because the sentencing guidelines did not account for a youthful defendant's diminished culpability, and the guidelines failed to consider philosophical differences between the juvenile justice system and the criminal justice system.

In evaluating the challenge the court first considered objective indicia of society's standards, as expressed in pertinent legislative enactments and state practice, and found no meaningful consensus regarding the manner in which juvenile adjudications may be considered an adult sentencing proceedings. In this regard the court stated,

> "We agree with the United States Court of Appeals for the Tenth Circuit that "states have not reached a meaningful consensus regarding the manner in which juvenile adjudications may be considered in adult sentencing proceedings." *United States v. Orona,* 724 F.3d 1297, 1301–1302 (10th Cir.2013). "Two states treat juvenile adjudications as convictions for purposes of broadly applicable habitual offender statutes." *Id.* at 1302 (citations omitted). In addition to Pennsylvania, at least 16 "other [states] allow prior juvenile adjudications to enhance a sentence in at least some circumstances." *Id.* (citations omitted). "At least [23] additional states permit the sentencing court to consider prior juvenile adjudications in selecting a sentence within a statutory range." *Id.* at 1304 (citations omitted). Combined, at least 42 states permit the use of juvenile adjudications during adult sentencing proceedings. Thus, the objective indicia of society's standards indicate that section 303.6's use of prior juvenile adjudications when calculating a defendant's prior record score constitutes neither cruel nor unusual punishment.

Com. v. Bonner, at 599.

See also *McDuffey v. State,* 286 So. 3d 364 (Fla. Dist. Ct. App. 2019) (defendant's sentence was solely punishment for his crimes as an adult, making irrelevant any diminished culpability he had as a juvenile, and his criminal history demonstrated persistent criminality rather than the incorrigibility inherent in youth. McDuffey v. State, 286 So. 3d 364 (Fla. Dist. Ct. App. 2019); *People v. Porter*, 2019 COA 73 (**sentencing enhancement under habitual offender statute only punished defendant for offenses committed as adult and not for underlying prior offenses committed as juvenile**. sentence **was constitutional under the Eighth Amendment.** Supreme Court has firmly established that enhanced sentences pursuant to recidivist sentencing statutes **only punish a defendant for the offense of conviction—not for the underlying prior offenses, citing** *United States v. Rodriquez*). (Emphasis added); *Commonwealth v. Johnson*, No. 1783 WDA 2017, 2018 WL 5725304, at 3 (Pa. Super. Ct. Nov. 1, 2018) (Therefore, as in ***Bonner***, it was not unconstitutional for the trial court here to consider Johnson's juvenile adjudication for robbery when calculating his prior record score.); *Commonwealth v. Campbell*, No. 206 WDA 2016, 2016 WL 5266639, at 3 (Pa. Super. Ct. Sept. 22, 2016) (that use of Appellant's juvenile offenses in calculating his prior record score was constitutionally sound.); *Commonwealth v. Burden*, No. 1892 MDA 2016, 2017 WL 4180224, at 6 (Pa. Super. Ct. Sept. 21, 2017) (using juvenile adjudications in calculating the prior record score does not violate the proportionality principles of the Eighth Amendment.)

In *Vickers v. State*, 117 A.3d 516 (Del. 2015), defendant was sentenced to life as a habitual offender. He appealed on the basis that the first of his three predicate felony convictions occurred when he was a juvenile. He argued that because *Roper, Graham, and Miller* require that juveniles be treated differently under the eighth and 14th amendment to the United States Constitution, the statutory sentencing provisions which allowed his prior juvenile offense to be counted was unconstitutional. Upholding the sentence, the court stated,

> "In each of these Supreme Court cases, the Court imposed severe sentences on juvenile offenders for crimes committed as juveniles. Here, Vickers was sentenced as an adult for crimes committed as an adult much later in life. The sentencing leniency required by the Supreme Court for criminal conduct in a juvenile's formative years has no application to an adult being sentenced as an adult.
>
> When faced with similar arguments under these Supreme Court cases, the federal courts have found that juvenile offenses can be used to determine the criminal history of adults. In essence, courts consider it an enhanced punishment for the current offense, not an additional punishment for the earlier juvenile offense. As the Tenth Circuit has explained, "[u]nlike defendants who receive severe penalties for juvenile offenses and are thus denied 'a chance to demonstrate growth and maturity,'... recidivists have been given an opportunity to demonstrate rehabilitation, but have elected to continue a course of illegal conduct."
>
> Vickers committed the most recent felonies at the age of 36. Before his last conviction, he had the chance to rehabilitate himself. Having failed to do so, the Superior Court correctly considered Vickers' prior youthful offenses under the habitual criminal statute as he continued his illegal activity into adulthood." *Vickers*, at 520.

The problem with Williams's argument is it assumes he is being punished in part for conduct he committed as a juvenile. He contends that the POAA is unconstitutional because it requires imposition of life without parole "based on juvenile conduct." But, as the *Orona* court stated, "The Tenth Circuit characterized this assumption as "unfounded," because the defendant was only being sentenced

on the last offense committed by him." *Moretti* also clearly spoke to this faulty assumption – "The petitioners' argument depends on the assumption that these sentences punish them for crimes they committed as young adults. But these sentences are for the most serious offenses they committed at either age 32 (Moretti) or age 41 (Nguyen and Orr), well into adulthood. These POAA sentences are not punishment for the crimes the petitioners committed as young adults because recidivist statutes do not impose "cumulative punishment for prior crimes. The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime." *Moretti,* at 826, citing *State v. Lee,* 87 Wash.2d 932, 937, 558 P.2d 236 (1976); *see also State v. Le Pitre,* 54 Wash. 166, 168, 103 P. 27 (1909).

The second step in the categorical bar analysis requires the court to exercise its independent judgment. In addressing the second step, the Moretti court considered the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question' " and " 'whether the challenged sentencing practice serves legitimate penological goals. Regarding culpability the court wrote,

a. There has been no showing of reduced culpability here

First, we must assess the culpability of these petitioners in light of their crimes and characteristics. We now understand that "children are less criminally culpable than adults." *Id.* Petitioners rely on cases and "psychological and neurological studies showing that the 'parts of the brain involved in behavior control' continue to develop well into a person's 20s" to argue that they are less culpable than other POAA offenders. *State v. O'Dell,* 183 Wash.2d 680, 691-92, 358 P.3d 359 (2015) (footnote omitted) (quoting *Miller,* 567 U.S. at 472, 132 S.Ct. 2455 *see also MIT Young Adult Development Project: Brain Changes,* Mass. Inst. of Tech., https://hr.mit.edu/static/worklife/youngadult/brain.html [https://perma.cc/C9B8-

MWDU] ("The brain isn't fully mature at ... 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car."). "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,* 183 Wash.2d at 692, 358 P.3d 359 (footnotes omitted). The United States Supreme Court has relied on this science to hold that "[b]ecause juveniles have diminished culpability and greater prospects for reform, ... 'they are less deserving of the most severe punishments.' " *Miller,* 567 U.S. at 471, 132 S.Ct. 2455 (quoting *Graham,* 560 U.S. at 68, 130 S.Ct. 2011).

It is true that our new understanding of juvenile brains "establish[es] a clear connection between youth and decreased moral culpability for criminal conduct." *O'Dell,* 183 Wash.2d at 695, 358 P.3d 359. And in *O'Dell,* we recognized that "age may well mitigate a defendant's culpability, even if that defendant is over the age of 18." *Id.* But "age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence." *Id.* Instead, we held that trial courts are statutorily allowed to consider evidence that a "youth in fact diminished [the young adult] defendant's culpability." *Id.* at 689, 358 P.3d 359. **Moretti, Nguyen, and Orr have not produced any evidence that their youth contributed to the commission of the instant offenses, or even that youth contributed to their prior offenses. They have not suggested that the brains of 32 or 41 year old men are not fully mature. Nothing in this record suggests that they are any less culpable than any other adult offender.** (Emphasis added) *Moretti*, at 823–24.

The *Moretti* court then thoroughly analyzed the penological goals of retribution, deterrence, incapacitation, and rehabilitation. The court noted that the main purposes of the POAA are " 'deterrence of criminals who commit three "most serious offenses" and the segregation of those criminals from the rest of society, citing *Witherspoon, Rivers, Thorne, Ewing v. California,* and *Rummel v. Estelle,* (internal citations omitted). Distinguishing the sentencing of an adult from a juvenile, the court observed that "deterrence cannot justify life without parole sentences for juveniles because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment, citing *Bassett,* (quoting *Miller,* 567 U.S. at 472, 132 S.Ct. 2455). But, again, the petitioners have made no showing that

their youth at the time of their prior offenses made them less culpable than a typical POAA offender. The POAA makes it clear that every offender who commits a third most serious offense will be sentenced to life in prison without the possibility of parole. Each of these petitioners had been imprisoned twice before for committing most serious offenses. There is no evidence before us that adults in their 30s or 40s are less likely than any other adult to consider the consequences of choosing to reoffend."

Regarding the penological goal of incapacitation, the court stated,

> Incapacitation is a particularly strong justification in this context. As the United States Supreme Court has recognized, "[r]ecidivism is a serious risk to public safety, and so incapacitation is an important goal." *Graham,* at 72. In passing the POAA, the voters explained, "Community protection from persistent offenders is a priority," and by passing this law, "the people intend[ed] to ... [i]mprove public safety." RCW 9.94A.555. In *Bassett,* we explained that incapacitation could not justify sentencing a juvenile to life in prison without the possibility of parole because this "sentence 'makes an irrevocable judgment about that person[ ]' that is at odds with what we know about children's capacity for change." quoting *Graham.* at 74...
> But the petitioners are neither juveniles nor young adults. We do not have to guess whether they will continue committing crimes into adulthood because they already have. Moretti was the youngest of the petitioners when he chose to commit his third most serious offense, but even he was 32 years old. This is well past the age when courts have recognized that youth may mitigate criminal culpability. *See O'Dell,* 183 Wash.2d at 692 n.5, 358 P.3d 359 (citing reports that the brain may not fully mature until age 25). Because Moretti, Nguyen, and Orr each committed their third most serious offense as adults in their 30s and 40s, they have shown that they are part of this rare group of offenders who are "simply unable to bring [their] conduct within the social norms prescribed by the criminal law." *Rummel,* 445 U.S. at 284, 100 S.Ct. 1133. It was rational for the people to decide that offenders like the petitioners must be incarcerated in order to protect the public." *Moretti,* at 829.

Ultimately, the court concluded, "The petitioners have failed to establish a national consensus against the sentencing practice at issue here and our own

independent judgment confirms that these sentences are supported by legitimate penological goals. We hold that article I, section 14 does not categorically prohibit imposing a life without parole sentence on a fully developed adult offender who committed one of their prior strike offenses as a young adult. *Moretti*, at 830.

In *State v. Teas*, 447 P.3d 606, 619 (Wash. Ct. App. 2019), defendant made a similar argument – that it is unconstitutional to sentence a class of defendants, adults who committed a predicate offense under the POAA as a "youth," to mandatory life imprisonment. The court rejected his argument, noting that in *State v. Moretti* our Supreme Court held that "Article I, section 14 of the Washington Constitution does not require a categorical bar on sentences of life in prison without the possibility of parole for **fully developed adult offenders who committed one of their prior strikes a young adults.**" (Emphasis added). Teas further held that punishing an adult as a persistent offender when a predicate offense was youthful does not contradict the penological goals of the POAA. *Teas,* at 619. The court stated, "Teas is not a juvenile being punished for a crime he committed as a juvenile. He was 39 years old when he raped R.C. by forcible compulsion. Therefore, the mitigating factors of youth were not applicable when he was sentenced for this crime. Teas's constitutional challenge to his sentence fails. *Teas*, at 620.

Likewise, in *State v. Vasquez*, No. 36123-3-III, 2019 WL 2537939, at 3 (Wash. Ct. App. June 20, 2019), review denied, 194 Wash. 2d 1005, 451 P.3d 334

(2019)[8] defendant argued his 660-month sentence was cruel punishment based on *Bassett.* The court rejected his argument holding *Bassett* did not apply because Vasquez was 23 when he committed the murder. State v. Vasquez, No. 36123-3-III, 2019 WL 2537939, at 3 (Wash. Ct. App. June 20, 2019), review denied, 194 Wash. 2d 1005, 451 P.3d 334 (2019).

The rationale applied in Moretti and the above cases applies with equal force to Williams. Williams faced an enhanced punishment for committing an assault in the second degree as an adult, not an additional punishment for the earlier juvenile offense. He was being held accountable for his conduct as an adult knowing he already had two prior strikes. His serious criminal history did not deter him from shooting a man. The issues in *Miller* that dealt with a juvenile's diminished culpability *at the time he or she commits a current crime* are not at issue here because Williams, who *is* an adult, is being punished with an enhanced sentence for his conduct *as* an adult.

Williams had the opportunity to rehabilitate himself after he committed two prior "most serious offenses." Having failed to do so, at age 28 he committed a very serious violent offense. He has shown that he is within this rare group of offenders who are simply unable to bring their conduct within the social norms prescribed by the criminal law. The interests of community protection from persistent offenders is just as well served here as in Moretti. Because he is being punished for a crime committed as an adult, after having ample opportunities to rehabilitate and conform

[8] *State v. Vasquez* is an unpublished opinion. See GR 14.1.

his conduct to the law, there is no more reason to categorically prohibit imposing a life without parole sentence on all fully developed adult offenders who commit one prior strike offense as a 16-year-old then there was to categorically prohibit imposing a life without parole sentence on all adult offenders who commit one of their prior strike offenses as young adults. Given the weight of the federal and state court precedent cited above, his *Miller*-based article I, section 14 argument fails. He has not met his heavy burden of convincing the court that there is no reasonable doubt that the statute is unconstitutional, both as applied to him and categorically.

Williams asks this court to "engage in a *serious re-examination of our mandatory sentencing practices*." Petitioner's brief, page 36. But courts have "consistently held that the fixing of legal punishments for criminal offenses is a legislative function." *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719 (1986). The power of the legislature in this respect is "plenary and subject only to constitutional provisions against excessive fines and cruel and inhuman punishment." Id. (quoting *State v. Mulcare*, 189 Wash. 625, 66 P.3d 360 (1937). It is "the function of the legislature and not of the judiciary to alter the sentencing process." Id. The legislature could have responded to *Miller* by changing the statue such that a juvenile decline conviction in adult court would not be a "strike" offense, but opted not to do so. This is exactly the sort of policy decision the legislature is entrusted to make, and our legislature's decision to maintain the current statutory sentencing scheme keeps Washington in line with the federal government and the majority of other states. It is the role of the legislative branch of government to make the type of policy decision that Williams asks this court to make.

VI. CONCLUSION

Williams's petition is untimely and should be dismissed because Bassett is not a material change in the law and Williams does not claim that the statute he was convicted of violating is unconstitutional. No exception to the one year time bar applies. Should the court reach the merits of his constitutional arguments, Williams has not met his burden of showing the POAA is unconstitutional as applied to him, or categorically to all offenders similarly situated. Based on the preceding argument, respondent requests the Court deny the petition.

Respectfully submitted this 13 day of March, 2020

By _____
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ATTACHMENT A

Appendix A

Gray shading indicates that the state's three strikes law is substantially different from California's.

State	Third Strike Punishment	Juvenile Adjudications = Strikes?[364]	Juvenile Convictions in Adult Court = Strikes?
Alabama	Fifteen years to life.[365]	No (per case law).[366]	Yes, but youthful offender exception.[367]
Alaska	Ninety-nine years.[368]	Silent.[369]	Silent.
Arizona	Life (must serve at least twenty-five years).[370]	No.[371]	Probably allowed.[372]

364. Data contained in this column refers specifically to the state's use of juvenile adjudications as prior convictions for sentencing enhancement under three strikes laws. It does not refer to the state's use of juvenile adjudications for sentencing enhancements in other circumstances. Many states allow the use of juvenile adjudications to enhance sentences for some purposes but disallow their use for three strikes enhancements.

365. ALA. CODE § 13A-5-9 (LexisNexis 2005). Alabama imposes different sentences depending on whether the third strike is a Class A, B, or C felony. For third strikes that are Class A felonies, an individual "must be punished by imprisonment for life or for any term of not less than 99 years." § 13A-5-9(b)(3). Class B felonies constituting third strikes are punished by "imprisonment for life or for any term of not more than 99 years but not less than 15 years." § 13A-5-9(b)(2).

366. Gordon v. Nagle, 647 So. 2d 91 (Ala. 1994); *Ex parte* Thomas, 435 So. 2d 1324, 1326 (Ala. 1982); Craig v. State, 893 So. 2d 1250 (Ala. Crim. App. 2004).

367. *Gordon*, 647 So. 2d 91; *Ex parte Thomas*, 435 So. 2d 1324; Phillips v. State, 462 So. 2d 981 (Ala. Crim. App. 1984); *Craig*, 893 So. 2d at 1263.

368. ALASKA STAT. § 12.55.125(l) (2010).

369. A juvenile adjudication is not a conviction in Alaska. ALASKA STAT. § 47.12.180(a)(3) (2010). However, a felony juvenile adjudication can be considered as an aggravating factor for sentencing purposes in adult court. § 12.55.155(c)(19). The law is silent with regards to whether juvenile adjudications may be considered specifically to enhance sentences under the habitual offender sentencing provision.

370. ARIZ. REV. STAT. ANN. § 13-706 (2010).

371. *See In re* Casey G., 224 P.3d 1016, 1017–18 (Ariz. Ct. App. 2010) (holding that a juvenile adjudication does not constitute a predicate felony for the purposes of a statute regulating dangerous crimes against children because the adjudication is not a conviction).

372. Arizona case law prohibits the use of juvenile adjudications to enhance future sentences in adult court because they are not "convictions." *Id.* In contrast, a juvenile found guilty in adult court is technically "convicted" of a crime. *See id.*

Arkansas	Forty to eighty years or life.[373]	No (per case law).[374]	Probably allowed.[375]
California	Twenty-five to life.[376]	Yes (per statute).[377]	Yes.[378]
Colorado	Life.[379]	Silent.[380]	Silent.
Connecticut[381]	Up to life.[382]	Silent, but case law says delinquency not criminal.[383]	Silent.
Delaware	LWOP.[384]	No (per case law).[385]	Probably.[386]

373. ARK. CODE ANN. § 5-4-501(c)(1) (1997 & Supp. 2011) (imposing forty to eighty year sentence, or life, for second conviction of serious felony involving violence); *id.* § 16-90-202 (imposing mandatory life sentence).

374. Vanesch v. State, 37 S.W.3d 196 (Ark. 2001).

375. Arkansas does not address whether convictions of juvenile offenders in adult court qualify as "prior convictions" for the habitual offender statute. However, the reasoning in *Vanesch v. State* implies that juvenile adjudications may not be used to enhance adult sentences under the habitual offender statute because they are not "convictions" and do not constitute findings of guilt. *Id.* at 201. This reasoning would not prohibit the use of juvenile convictions from adult courts to enhance future sentences.

376. CAL. PENAL CODE § 667(e)(2) (West 2010 & Supp. 2011).

377. *Id.* § 667(d)(3).

378. Convictions of juvenile defendants in adult court are treated as adult court convictions and may be used to enhance future sentences. People v. Jacob, 220 Cal. Rptr. 520, 523 (Ct. App. 1985).

379. COLO. REV. STAT. ANN. § 18-1.3-801(1)(a) (West 2004 & Supp. 2011).

380. Juvenile adjudications are not criminal convictions. S.G.W. v. People, 752 P.2d 86, 90 (Colo. 1988). However, they may be used as aggravating factors to increase sentences in adult court. People v. Mazzoni, 165 P.3d 719, 723 (Colo. App. 2006). No statutes or case law address whether juvenile adjudications may be considered to enhance sentences under Colorado's habitual offender sentencing law.

381. Connecticut is categorized as substantially different from California because its habitual offender statute grants judges significant discretion to determine the length of sentence under the statute. *See* CONN. GEN. STAT. ANN. § 53a-40(h) (West 2007 & Supp. 2011).

382. *Id.*

383. State v. Angel C., 715 A.2d 652, 659 (Conn. 1998).

384. DEL. CODE ANN. tit. 11, § 4214(b) (2007).

385. Fletcher v. State, 409 A.2d 1254, 1256 (Del. 1979).

386. In *Fletcher*, the court held juvenile convictions (in other jurisdiction's adult courts) that would have been processed in juvenile court under Delaware law cannot enhance sentences under state's the habitual offender law because the legislature indicated an intent "to treat juvenile offenders in a different manner than adult offenders." *Id.* This reasoning implies that juveniles processed through adult court under Delaware law should not be treated differently than adults.

District of Columbia	Fifteen years to LWOP.[387]	Silent, but statute requires "conviction."[388]	Silent.
Florida[389]	Ten or thirty year minimum, or life.[390]	No (statute requires conviction "as an adult").[391]	Yes.[392]
Georgia	LWOP for 2d strike.[393]	No (per case law).[394]	Yes.[395]
Hawaii	Three to twenty year minimum.[396]	Silent.	Silent.
Idaho	Five years to life.[397]	Silent.	Silent.
Illinois	Natural life.[398]	Probably not.[399]	Yes.[400]

387. D.C. CODE § 22-1804a (LexisNexis 2010). An individual who is convicted of a crime of violence after suffering two prior convictions for crimes of violence must be sentenced to at least fifteen years and may be sentenced up to life without parole. § 22-1804a (a)(2). An individual convicted of any three felonies may be sentenced up to thirty years. § 22-1804a (a)(1).

388. *Id.* § 22-1804a(b).

389. Florida is categorized as similar to California because it imposes lengthy, mandatory prison terms under its habitual offender statute. Florida enhances sentences for habitual offenders under four separate provisions (for "violent career criminals," "habitual felony offenders," "habitual violent felony offenders," and "three-time violent felony offenders"). FLA. STAT. ANN. § 775.084 (West 2010). The "violent career criminal" provisions are most similar to California's three strikes law because the statute imposes mandatory, lengthy sentences. A third-strike first degree felony is punished by life in prison under these provisions, and a second degree felony is punished by thirty to forty years. § 775.084(4)(d). Florida is different from California because its statute imposes different punishments depending on the type of third-strike conviction. For example, third degree felony is punished by ten to fifteen years in prison as a third strike under the "violent career criminal" provisions. *Id.*

390. *Id.* § 775.084(1)(d).

391. *Id.* § 775.084(1)(a)–(d) (requiring predicate felonies to be adult court convictions for "three time violent offender" and "violent career criminal" sentences).

392. Williams v. State, 994 So.2d 337 (Fla. Dist. Ct. App. 2008).

393. GA. CODE ANN. § 17-10-7 (2008).

394. Smith v. State, 596 S.E.2d. 230 (Ga. Ct. App. 2004).

395. Lee v. State, 600 S.E.2d 825, 829 (Ga. Ct. App. 2004).

396. HAW. REV. STAT. § 706-606.5(1)(b) (1993 & Supp. 2011).

397. IDAHO CODE ANN. § 19-2514 (2004).

398. 730 ILL. COMP. STAT. 5/5-4.5-95(a)(5) (West Supp. 2011).

399. Illinois requires prior "convictions." 730 ILL. COMP. STAT. 5/5-4.5-95(a). In *People v. Bryant*, the court reasoned that juveniles transferred to adult court are treated as adults, and their convictions can therefore be used to enhance future sentences under the habitual offender statute. People v. Bryant, 663 N.E.2d 105, 111 (Ill. App. Ct. 1996). This reasoning highlights the important distinction between convictions in adult criminal courts and adjudications in juvenile courts. As such, it is unlikely that juvenile adjudications would qualify as "convictions" under the habitual offender sentencing statute.

400. *Bryant*, 663 N.E.2d 105; People v. Banks, 569 N.E.2d 1388 (Ill. App. Ct. 1991).

Indiana	At least advisory range for the underlying offense, up to three times this range (but not more than thirty years).[401]	Silent.	Yes.[402]
Iowa	Three to fifteen years.[403]	Silent.[404]	Silent.
Kansas	Repealed habitual offender statute.[405]	No (per case law).[406]	Silent.
Kentucky	Twenty to fifty years, or life.[407]	No (per statute).[408]	No (must be at least eighteen years old for prior conviction to qualify as a strike).[409]
Louisiana	LWOP.[410]	No per 2010 statutory revisions.[411]	Yes (per case law).[412]
Maine	No habitual offender law		

401. IND. CODE ANN. § 35-50-2-8 (LexisNexis 2009). The sentence may not exceed thirty years. § 35-50-2-8(h).

402. Polk v. State, 783 N.E.2d 1253, 1262 (Ind. Ct. App. 2003).

403. IOWA CODE ANN. §§ 902.8–.9 (West 2006).

404. Iowa law does not specifically address whether a juvenile adjudication may enhance a sentence under the habitual offender sentencing law. The Iowa Supreme Court has indicated that enhancing a sentence under a recidivist sentencing scheme on the basis of a juvenile adjudication may contribute to rendering a punishment cruel and unusual. State v. Bruegger, 773 N.W.2d 862, 885–86 (Iowa 2009).

405. 2010 Kan. Sess. Laws 136 (repealing KAN. STAT. ANN. § 21-4711 (2007), the state's former habitual offender sentencing statute).

406. Prior to the repeal of Kansas' habitual offender sentencing statute, juvenile delinquency adjudications did not qualify as convictions for the purposes of enhancing sentences under the Habitual Criminal Act. Paige v. Gaffney, 483 P.2d 494, 495 (Kan. 1971). Kansas allows juvenile adjudications to be considered for sentencing under its amended code in calculating general criminal history scores.

407. KY. REV. STAT. ANN. § 532.080 (West 2006 & Supp. 2011).

408. *Id.* § 532.080(2)(b)–(3)(b).

409. *Id.*

410. LA. REV. STAT. ANN. § 15:529.1 (2011).

411. *Id.*

412. State v. Youngblood, 647 So. 2d 1388, 1391–92 (La. Ct. App. 1994).

Maryland	Twenty-five years; life for fourth strike.[413]	Probably not because statute requires time served in a "correctional facility" for prior.[414]	Yes (implied by case law).[415]
Massachusetts	Ten to fifteen years.[416]	Yes (if involves a deadly weapon).[417]	Yes.[418]
Michigan	Up to double the maximum.[419]	Silent.	Silent.
Minnesota	Presumptive sentence under guidelines.[420]	Probably not.[421]	Yes.[422]
Mississippi	LWOP.[423]	Probably not.[424]	Silent.
Missouri	Increases sentencing range to next class of felonies.[425]	Silent.	Silent.

413. MD. CODE ANN., CRIM. LAW § 14-101 (LexisNexis Supp. 2011).

414. *Id.* § 14-101(d)(1)(ii).

415. *See* Calhoun v. State, 418 A.2d 1241, 1246 (Md. Ct. Spec. App. 1980).

416. MASS. GEN. LAWS ANN. ch. 269, § 10G (West 2008). A bill is currently pending in Massachusetts that is substantially similar to California's three strikes law. H.B. 3818, 187th Gen. Court (Mass. 2011); S.B. 2080, 187th Gen. Court (Mass. 2011). This proposed legislation would require that individuals convicted of a third strike receive the maximum penalty for the offense, which would require life without parole sentences for many crimes. *Id.* Interestingly, juvenile adjudications are specifically excluded as prior convictions in the text of the proposed legislation. H.B. 3818, § 3; S.B. 2080, § 46.

417. MASS. GEN. LAWS ANN. ch. 140, § 121 (West Supp. 2011) (defining "violent crime" to "mean any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or possession of a deadly weapon that would be punishable by imprisonment for such term if committed by an adult").

418. *Id.*

419. MICH. COMP. LAWS ANN. § 769.11 (West 2006 & Supp. 2011).

420. MINN. STAT. ANN. § 609.1095 (West 2009).

421. *Id.* § 609.1095(2) (providing that courts may consider prior juvenile adjudications in determining the appropriate sentence to impose). *See supra* note 235.

422. Given that courts may consider prior juvenile adjudications, it is logical to conclude that courts may also consider convictions of juveniles in adult courts. *Id.*

423. MISS. CODE ANN. § 99-19-83 (2007).

424. The statute is silent as to whether juvenile adjudications qualify as prior convictions. However, a separate statute provides that "[n]o adjudication upon the status of any child shall operate to impose any of the civil disabilities ordinarily imposed on an adult because of a criminal conviction, nor shall any child be deemed a criminal by reason of adjudication, nor shall that adjudication be deemed a conviction." MISS. CODE ANN. § 43-21-561(5) (2009 & Supp. 2011). According to a practicing attorney in the state, prosecutors do not use juvenile adjudications as prior convictions under the habitual offender statute. E-mail from Brenda Locke, Pub. Defender, Jackson Cnty. Youth Court, to author (March 13, 2012, 12:08 PST) (on file with author).

425. MO. ANN. STAT. § 558-019 (West 1999 & Supp. 2012).

Montana	Ten to one hundred years.[426]	No (per statute and case law).[427]	Yes per case law.[428]
Nebraska[429]	Ten to sixty years.[430]	Probably not (per case law).[431]	Yes (per case law).[432]
Nevada	Five to twenty years; LWOP or life for fourth strike.[433]	Silent.	Silent.
New Hampshire	Ten to thirty years.[434]	Silent.	Silent.
New Jersey	LWOP (for conviction of certain specified violent crimes).[435]	No (per statute priors must occur when 18 years old).[436]	No (priors must occur when eighteen years old).[437]
New Mexico	Life.[438]	No (per statute).[439]	No (has to be at least eighteen).[440]
New York	Twelve to twenty-five years up to life.[441]	Probably not because statute excludes "youthful offenders."[442]	Yes (but youthful offender exception.[443]

426. MONT. CODE ANN. § 46-18-501 (2011); § 46-18-502.

427. *See id.* § 41-5-106.

428. State v. Mainwaring, 151 P.3d 53, 57 (Mont. 2007).

429. Despite the fact that there are a wide range of possible sentences under the habitual offender law, Nebraska is categorized as similar to California because it requires sentences of twenty-five to sixty years for some third strike offenses. NEB. REV. STAT. § 29-2221(1)(a)–(b) (2008).

430. *Id.* § 29-2221(1).

431. In *Kennedy v. Sigler*, a juvenile conviction from adult court was found to be properly used to enhance a sentence under the state's habitual criminal statute. Kennedy v. Sigler, 397 F.2d 556, 561 (8th Cir. 1968). The court's reasoning focused on the fact that the juvenile in that case had been tried in adult court and therefore was convicted of a crime. *Id.* In addition, the court reasoned that the defendant could have been sentenced to the adult penitentiary even if his case had remained in juvenile court, which would result in a felony conviction arising out of the juvenile court. *Id.* This reasoning would not apply under current law, which more clearly distinguishes the dispositions available in juvenile court from those available in adult court. *See* NEB. REV. STAT. § 43-286 (2008 & Supp. 2011).

432. *Kennedy*, 397 F.2d at 561.

433. NEV. REV. STAT. § 207.010 (2011); *id.* § 207.012.

434. N.H. REV. STAT. ANN. § 651:6 (2007 & Supp. 2011).

435. N.J. STAT. ANN. § 2C:43-7.1 (West 2005).

436. *Id.* § 2C:44-3(a) (defining a "persistent offender" as "a person who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age").

437. *Id.*

438. N.M. STAT. ANN. § 31-18-23 (2010).

439. *Id.* § 31-18-23(C).

440. *Id.*

441. N.Y. PENAL LAW § 70.4 (McKinney 2009 & Supp. 2012); § 70.08.

442. N.Y. PENAL LAW § 60.10 (McKinney 2009); People v. Meckwood, 927 N.Y.S. 2d 729, 730 (N.Y. App. Div. 2011).

443. N.Y. PENAL LAW § 60.10.

North Carolina	LWOP.[444]	Probably not(per case law).[445]	Silent.
North Dakota[446]	Up to ten years to life.[447]	No (per statute).[448]	No (per statute must be adult when convicted of prior).[449]
Ohio	Mandatory increased sentences.[450]	No (per statute).[451]	Silent.
Oklahoma	Twenty to life.[452]	Silent.	Silent.
Oregon	Thirty years (but also requires a personality disorder).[453]	Probably not.[454]	Yes, but must be at least sixteen at time of commission of prior crime.[455]

444. N.C. GEN. STAT. ANN. § 14-7.12 (West 2000 & Supp. 2010).

445. Juvenile adjudications are not criminal convictions, and a minor processed through juvenile court cannot be sentenced to a term of imprisonment. Therefore, an adult court sentence could be enhanced under a statute that imposed additional penalties for defendants who commit offenses while serving terms of imprisonment. State v. Tucker, 573 S.E.2d 197, 200–01 (N.C. Ct. App. 2002). Although this case did not specifically address whether juvenile adjudications could be used to enhance sentences under the habitual offender statute, the decision emphasizes the importance of the distinction between juvenile adjudications and criminal convictions and thus implies that juvenile adjudications cannot be used as predicates for habitual offender sentencing.

446. North Dakota's statute provides increased maximum penalties but does not require minimum terms. N.D. CENT. CODE § 12.1-32-09 (1997 & Supp. 2011). Judges maintain discretion to determine the appropriate sentence. *Id.* Accordingly, North Dakota is categorized as substantially different from California.

447. *Id.* § 12.1-32-09(2).

448. *Id.* § 12.1-32-09(1)(c) (providing that the prior felonies must have been committed "when the offender was an adult").

449. *Id.*

450. OHIO REV. CODE ANN. § 2929.14(B)(2) (LexisNexis 2010). Ohio is categorized as substantially different from California because the enhancements provided are less severe than California's and judges maintain substantial discretion to determine the appropriate sentence. The Ohio statute requires courts to impose the maximum prison term authorized for the underlying offense for repeat violent offenders. *Id.* It also allows (but does not require) judges to impose additional prison terms of one to ten years. *Id.*

451. *Id.* § 2901.08(B).

452. OKLA. STAT. ANN. tit. 21, § 51.1(B)–(C) (West 2002).

453. OR. REV. STAT. ANN. § 161.725 (2011).

454. *See id.* § 419C.400(5).

455. *Id.* § 161.725(3)(a).

Pennsylvania	LWOP or twenty-five year minimum.[456]	No (per case law).[457]	Probably (implied by case law).[458]
Rhode Island	Up to twenty-five year enhancement.[459]	Probably not because statute requires prison sentence for prior.[460]	Silent.
South Carolina	Up to LWOP.[461]	No (per case law).[462]	Probably (implied by case law).[463]
South Dakota	Enhance to next class of felonies; life for fourth strike.[464]	Silent.	Silent.
Tennessee	LWOP.[465]	No (per statute).[466]	Probably.[467]
Texas	Life or twenty-five to ninety-nine years.[468]	No (although statute allows use for other enhancements).[469]	Silent.
Utah	Five years to life.[470]	No (per statute).[471]	Silent.
Vermont	Up to life for 4th strike.[472]	No (per case law).[473]	Yes per case law.[474]

456. 42 PA. CONS. STAT. ANN. § 9714 (West 2007).

457. Commonwealth v. Thomas, 743 A.2d 460, 461 (Pa. Super. Ct. 1999).

458. *See id.* at 465.

459. R.I. GEN. LAWS § 12-19-21 (2002).

460. In order to enhance a sentence under this provision, a prior conviction must have resulted in a prison sentence. *Id.* Minors whose cases are addressed in juvenile courts cannot be sentenced to adult prisons, which would seem to exclude juvenile adjudications as prior convictions under this statute. *See* § 14-1-26.

461. S.C. CODE ANN. § 17-25-45 (2003 & Supp. 2011).

462. State v. Ellis, 547 S.E.2d 490, 492 (S.C. 2001).

463. *See id.*

464. S.D. CODIFIED LAWS §§ 22-7-7 to -8 (2006).

465. TENN. CODE ANN. § 40-35-120(g) (2010).

466. *Id.* § 40-35-120(e)(3) ("A finding or adjudication that a defendant committed an act as a juvenile . . . shall not be considered a prior conviction for the purposes of this section unless the juvenile was convicted of the predicate offense in a criminal court and sentenced to confinement in the department of correction . . . .").

467. State v. Moore, 596 S.W.2d 841 (Tenn. Crim. App. 1980).

468. TEX. PENAL CODE ANN. § 12.42 (West 2011 & Supp. 2011). Texas has multiple habitual offender sentencing provisions. Section 12.42(d) most closely resembles California's three strikes law because it imposes mandatory sentences of life, or twenty-five years to ninety-nine years, for third strike offenses.

469. *Id.* § 12.42(f); *see also* Vaughns v. State, No. 04-10-00364-CR, 2011 WL 915700, at *4 (Tex. App. Mar. 16, 2011).

470. UTAH CODE ANN. § 76-3-203.5 (LexisNexis 2008 & Supp. 2011); § 78A-6-116.

471. *Id.* § 78A-6-116 (stating that juvenile adjudications may only be used to enhance the level or degree of an adult offense as specifically provided). The habitual offender statute does not specifically provide that juvenile adjudications may be used to enhance adult sentences. § 76-3-203.5.

472. VT. STAT. ANN. tit. 13, § 11 (2009).

473. State v. Rideout, 933 A.2d 706 (Vt. 2007).

474. *Id.*

Virginia	LWOP.[475]	No (per case law).[476]	Probably (implied by case law).[477]
Washington	LWOP.[478]	No (per statute).[479]	Yes (case law implies)[480]
West Virginia	Life[481]	No (per case law)[482]	Probably (implied by case law)[483]
Wisconsin	LWOP.[484]	No (per statute).[485]	Probably, but youthful offender exception.[486]
Wyoming	Ten to fifty years, life for fourth strike[487]	Silent.	Silent.

475. VA. CODE ANN. § 19.2-297.1 (2008).

476. Conkling v. Commonwealth, 612 S.E.2d 235, 238–39 (Va. Ct. App. 2005).

477. *See id.*

478. WASH. REV. CODE ANN. § 9.94A.570 (West 2010).

479. *Id.* § 9.94A.030; *see also* State v. Knippling, 206 P.3d 332, 335–36 (Wash. 2009).

480. *Knippling*, 206 P.3d 332.

481. W. VA. CODE ANN. § 61-11-18 (LexisNexis 2011).

482. Justice v. Hedrick, 350 S.E.2d 565, 568 (W. Va. 1986).

483. *See id.* The reasoning in *Hedrick* focuses on the importance of the distinction between juvenile delinquency cases (in juvenile court) and juvenile cases handled in adult criminal court. *Id.* at 567. For example, the decision references the importance of maintaining the confidentiality of juvenile offenders and of separating children's wrongful actions from those of adults. *Id.* Accordingly, the court concludes that a juvenile conviction from a Michigan adult court "may not be used for enhancement purposes pursuant to the West Virginia Habitual Criminal Statute" because the conviction would have been a juvenile offense, and therefore not a felony, in West Virginia. *Id.* at 568. Based on this reasoning, the decision implies that if the offense would have been processed in adult court in West Virginia, it would have been acceptable to use it as a prior conviction because the distinguishing features of juvenile offenses (i.e. that they are not felonies) would not apply.

484. WIS. STAT. ANN. § 939.62(2) (West 2005 & Supp. 2011).

485. *Id.* § 939.62(3)(a).

486. State v. Geary, 289 N.W.2d 375 (Wis. 1980).

487. WYO. STAT. ANN. § 6-10-201 (2011).

CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that RESPONDENT'S MOTION AND CERTIFICATE FOR EXTENSION OF TIME TO FILE RESPONDENT'S BRIEF was filed and electronically served via the Court of Appeals, Division II Portal to the following people:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 13, 2020.

Julie Dalton

Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

March 13, 2020 - 3:17 PM

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Superior Court Case Number:	08-1-00735-6

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