NO. 53879-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RAYMOND M. WILLIAMS,

Appellant.

RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEFS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Federal

State

TABLE OF AUTHORITIES (CONT.)

Page

Statutes

Washington State

TABLE OF AUTHORITIES (CONT.)

Page

Constitutional Provisions

Other Authorities

I. INTRODUCTION

Two amicus curiae briefs have been filed in support of the petitioner, one by a group consisting of The American Civil Liberties Union of Washington, Perkins Coie, the Washington Association of Criminal Defense Lawyers, and the Washington Defender Association (hereafter ACLU), and a second by the Juvenile Law Center and Teamchild (hereafter Joint Amicus).

The ACLU argues that the goals of the Persistent Offender Accountability Act (hereafter the POAA) are not met when applied to an adult with a prior strike committed under the age of 18, and that article I, section 14 of the Washington Constitution categorically bars any juvenile offense from counting as a strike. The Joint Amicus argues the POAA is unconstitutional under both the Federal and Washington State Constitutions where it imposes a mandatory life sentence "based upon a juvenile offense."

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 leg was substantially impaired, although not permanently, it was impaired for a substantial period of time. Subsequent to that, the investigation revealed that the defendant, Raymond Williams, was likely to be the person who had 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. Williams 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
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.

PERSISTENT OFFENDER ACCOUNTABILITY ACT (POAA)

In 1993, Washington voters approved the "three strikes law," recodified under the POAA as RCW 9.94A.570 and RCW 9.94A.030(38). 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.' " *State v. Moretti*, 193 Wash. 2d 809, 827, 446 P.3d 609, 617 (2019), citing *Witherspoon,* 180 Wash.2d at 888, 329 P.3d 888 (quoting *Rivers,* 129 Wash.2d at 712, 921 P.2d 495).

The public policy for the law is set out in RCW 9.94A.555, which provides:

(1) The people of the state of Washington find and declare that:
(a) Community protection from persistent offenders is a priority for any civilized society.
(b) Nearly fifty percent of the criminals convicted in Washington state have active prior criminal histories.
(c) Punishments for criminal offenses should be proportionate to both the seriousness of the crime and the prior criminal history.
(d) The public has the right and the responsibility to determine when to impose a life sentence.
(2) By sentencing three-time, most serious offenders to prison for life without the possibility of parole, the people intend to:
(a) Improve public safety by placing the most dangerous criminals in prison.
(b) Reduce the number of serious, repeat offenders by tougher sentencing.
(c) Set proper and simplified sentencing practices that both the victims and persistent offenders can understand.
(d) Restore public trust in our criminal justice system by directly involving the people in the process.

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. 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." 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).

STANDARD OF REVIEW

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).

Article I, section 14, of our state constitution provides, "[e]xcessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." At the time of ratification of our state constitution:

> [C]ruelty was generally understood to encompass two elements: (1) punishment beyond that which is necessary and (2) absence of mercy. One dictionary defined "cruel" to mean "hard-hearted," "harsh," or "severe." Etymological Dictionary of the English Language (Oxford 1883). In another "cruelty" was the "unnecessary infliction of pain...." Henry Campbell Black, A Dictionary of Law 305 (1891). Accord Noah Webster, An American Dictionary of the English Language (1862) ("Cruelty[:] .... giving unnecessary pain or distress to others."). ...

State v. Rivers, 129 Wn.2d 697, 723-24, 921 P.2d 495 (1996).

Article I, section 14 of the Washington Constitution protects against sentences that are grossly disproportionate to the crime committed. *State v. Gimarelli*, 105 Wn. App. 370, 380, 20 P.3d 430 (2001).

The Eighth Amendment bars cruel and unusual punishment while article I, section 14, bars cruel punishment. *Witherspoon*, 180 Wn.2d at 887. This Court has often found article I, section 14, provides greater protection than the Eighth Amendment. *See Bassett*, 192 Wn.2d at 79; *State v. Gregory*, 192 Wn.2d 1, 16 n. 6, 427 P.3d 621 (2018); *Ramos*, 187 Wn.2d at 453-54; *Witherspoon,* 180 Wn.2d at 887; *Rivers*, 129 Wn.2d at 712.

II. ARGUMENT

THE LIMITED USE OF A JUVENILE STRIKE OFFENSE UNDER THE POAA IS NOT CATEGORICALLY UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 14

The underlying assumption of the arguments of the ACLU and Joint Amici is that petitioner's sentence under the POAA is *based upon* his first strike, here, a conviction for burglary in the first degree committed at age 16, where he broke into someone's home and stole firearms. For example, Joint Amicus writes "Williams is currently serving a life sentence without any possibility of parole, based on a robbery of an unoccupied house he committed at age sixteen," and the "POAA thus imposes mandatory life without parole based on juvenile conduct, violating the U.S. Supreme Court's holdings that such a sentence is limited to those youth who have committed homicide and whose crime reflects permanent incorrigibility." The ACLU writes "Mr. Williams will die in prison because of a property crime he committed when he was a child."

The arguments of the ACLU and Joint Amici are based on the premise that the circumstances and characteristics of the individual defendant *at the time prior crimes* were committed must be examined before imposing a sentence that is predicated on the existence of those prior convictions. Amici cite no authority specifically supporting their premise.

Amici rely on cases extending special constitutional protection to defendants being sentenced *for crimes committed while they were juveniles,* beginning with *Roper v. Simmons*,[1] and extending through this Court's decision in *State v. Gilbert*.[2] They have not established that an extension of these cases to adult recidivists is constitutionally compelled.

Washington courts, as well as federal and other state courts, have specifically held that an enhanced sentence pursuant to a habitual offender statute is punishment only for the current crime, not cumulative punishment for prior crimes, even prior crimes committed by a juvenile. These courts have rejected claims that such recidivist statutes are unconstitutional as cruel in circumstances like this case. Respondent discussed these authorities at length in its Reply to Williams' Petition at pages 21-34. The following is a brief summary of the cases.

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

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[1] 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (invalidating death penalty for crimes committed when under 18).

[2] 193 Wash. 2d 169, 438 P.3d 133 (2019)

sentence on adult recidivist whose prior strike was committed at age 17); *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.**") (Emphasis added); *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.); *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.)*

In *State v. Moretti* [3], the Washington Supreme Court rejected the same argument Williams makes under very similar circumstances. *Moretti* held th 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. Understanding that the defendants in that case were young adults, ages 20, and 19 when they committed their earliest strike, the

[3] *State v. Moretti,* 193 Wash. 2d 809, 446 P.3d 609, 619 (2019)

court's rationale applies as well to Williams. Like Williams, the underlying assumption in Moretti was that the sentences were *based upon* crimes committed when the three defendants were youthful. The court wrote,

> "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." *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 habitual criminal statute did not "inflict a cruel or unusual punishment, or impose a penalty for crimes committed outside of the state. It merely provide[d] an increased punishment for the last offense.") *Moretti,* at 826.

Further, the *Moretti* court saw no evidence of a national consensus against applying recidivist statutes to adults who committed prior strike offenses as young adults, and under its independent judgment found that the sentences were supported by legitimate penological goals. *Moretti,* at 830.

Federal courts have commented on the same unwarranted assumption Williams makes here. 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;

Very recently, Washington courts have again addressed this issue, reiterating that the use of youthful and juvenile convictions in calculating an offender score is not unconstitutional. In *State v. Conyers,* No. 78727-6-I, 2020 WL 3047247, at 1 (Wash. Ct. App. June 8, 2020), defendant argued

his life sentence under the POAA, for a robbery in the second degree committed at age 42, was cruel and unusual punishment, where an earlier strike occurred when he was between the ages of 18 and 20. Like Williams he cited to case law giving Washington courts discretion to consider youthfulness when sentencing a juvenile, and argued his life sentence is as much a punishment for his previous strike offenses at ages 18 through 20 as it was for his current strike conviction. The court, citing *Moretti* disagreed, stated the "argument that his sentence rests equally on all his convictions is misguided. Life sentences under the POAA are "not cumulative punishments for prior crimes." Witherspoon, 180 Wn.2d at 888-89. The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime." *Id.* at 889. Thus, Conyers's sentence is not for his previous crimes, where his relative youthfulness may have been a consideration, but for his most recent crimes, that he committed when he was 42 years old." [4]

In *State v. Parker*, No. 78551-6-I, 2020 WL 1640228, at *1 (Wash. Ct. App. Mar. 30, 2020)[5] defendant was convicted of second degree murder with a firearm enhancement and unlawful possession of a firearm in the first

[4] *State v. Conyers* is an unpublished opinion. See GR 14.1.

[5] *State v. Parker* is an unpublished opinion. See GR 14.1.

degree. Based upon prior juvenile convictions his offender score was 10. He argued that counting juvenile offenses to determine the offender score on adult sentences constituted cruel and unusual punishment. Like Williams he brought a categorical challenge to the constitutionality of the SRA. The court noted that Moretti did not find that there was a national consensus against using a crime committed as a juvenile or young adult to enhance the sentence of an adult who continued to offend, and held that the POAA was not unconstitutional where youthfulness may have been a factor in the behavior underlying an earlier strike. The court rejected Parker's argument that including juvenile convictions in his offender score was unconstitutional.

The ACLU criticizes the POAA for being *unfair* and *unsuccessful in achieving the Act's goals*. It contends the act defies "our notions of justice and the purposes of the three strikes law." Such arguments go to the wisdom and effectiveness of the act, not its constitutionality.[6] 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

[6] Regardless of any personal opinions as to the wisdom of this statute, we have "long deferred to the legislative judgment that repeat offenders may face an enhanced penalty because of their recidivism." *Moretti*, at 830, citing *Fain,* 94 Wash.2d at 390-91, 402, 617 P.2d 720.

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 the *Miller* line of cases by changing the POAA 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 legislature's role to assess policy arguments such as those the ACLU makes.

III. CONCLUSION

Respondent maintains that Williams's petition is untimely. Should the Court reach the merits of his constitutional arguments, Williams has not met his burden of showing the POAA is categorically unconstitutional. Based on the preceding argument, respondent requests the Court deny the petition.

Respectfully submitted this 27th day of July, 2020

By _____
For Tom Ladouceur, WSBA #19963
Chief Criminal Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEFS was filed electronically via the Court of Appeals, Division II Portal which will automatically cause such filing to be served on counsel for all other parties in this matter

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 July 27, 2020.

Julie Dalton

Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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