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Division II
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NO. 49894-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RAYMOND MAYFIELD WILLIAMS, JR.,

Appellant.

RESPONSE TO BRIEF OF AMICUS CURIAE

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I. STATEMENT OF THE CASE

On October 15, 2008, in Cowlitz County Superior Court, Mr. Williams entered a guilty plea to an amended information charging one count of assault in the second degree. CP 25. 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 them, 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. Mr. 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, Mr. 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.

Prior to taking the plea the court advised Mr. Williams that the "standard sentence range is life in prison without the possibility of parole. If I accept your guilty plea, that's the only sentence that I can impose. You will spend the rest of your life in the institution. Do you understand that?" Defendant replied, "Yes, I do." RP 3. The court also stated: "you agree that you have a prior conviction for burglary in the first degree out of Thurston County in 1997 and another for burglary in the first degree out of King County in 2004?" The defendant replied: "yes." RP 8. The judgment and sentence which he signed outlined his entire criminal history (paragraph 2.2) which included a burglary 1 from 1997, and a burglary 1 from 2004. In addition, the judgment and sentence indicated that "the following prior offenses require that the defendant be sentenced as a persistent offender: Burg 1 1997 and Burg 1 2004." Judgment and sentence, page 3. Defendant signed the judgment and sentence. The court sentenced defendant to life without the possibility of early release under the persistent offender

accountability act (hereinafter POAA). CP 28. Defendant was 28 years old at the time of plea and sentencing.[1]

II. PROCEDURAL HISTORY

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 the instant personal restraint petition in November of 2016. This court requested that counsel address at oral argument whether using a conviction that was committed when individual was under the age of 18 years old as a strike in a persistent offender case violates the prohibition against cruel and unusual punishment. This brief is in reply to the brief of Amicus Curiae.

III. ARGUMENT

THE IMPOSITION OF A 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 DECLINED, DOES NOT VIOLATE THE EIGHTH AMENDMENT OF THE FEDERAL CONSTITUTION OR 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.

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[1] According to the judgment and sentence, defendant's date of birth was April 6, 1980.

Mr. Williams claims that the POAA as applied to him is unconstitutional in that it violates the Eight Amendment of the federal constitution and article I, section 14 of the state constitution. He contends that the POAA is unconstitutional because it does not permit the current sentencing court to account for his youth at the time he committed the first strike offense. He asks this court to adopt a new rule that no crime committed by a juvenile can ever count as a strike, and since the POAA explicitly allows, in certain narrow circumstances, a juvenile to be convicted of a strike offense, it is unconstitutional. There is no Washington state precedent for this position and most federal courts and many state courts addressing the precise issue have rejected the same proposal.

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).

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.[2] 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). Mr. Williams' current conviction of second degree assault is a strike offense. RCW 9.94A.030(33)(b); RCW 9A.52.020(2).

Federal Authorities

Numerous federal courts 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.

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[2] 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).

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, writing:

> 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. Scott*, 610 F.3d 1009, 1018 (8th Cir. 2010), the court held that using defendant's prior felony drug convictions, for crimes committed by defendant when he was a juvenile but convicted as an adult, to enhance his sentence for drug conspiracy to a mandatory life sentence did not violate the Eighth Amendment. Like Mr. Williams, Scott argued that the Eighth Amendment prohibits enhancing his sentence based on his previous felony drug convictions because he was a juvenile when he committed those crimes. The court noted that while Scott committed his

prior felony drug offenses as a juvenile, he was charged and convicted of both crimes as an adult. Affirming the sentence the court wrote,

> "Nonetheless, we have upheld the use of juvenile court adjudications to enhance subsequent sentences for adult convictions. *See United States v. Smalley,* 294 F.3d 1030, 1032-33 (8th Cir.2002). Given the holding in *Smalley* that 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.
> The U.S. Supreme Court cases that Scott cites, *Roper* and *Graham,* do not change this result. These decisions established constitutional limits on certain sentences for offenses committed by juveniles. However, Scott was twenty-five years old at the time he committed the conspiracy offense in this case. Neither *Roper* nor *Graham* involved the use of prior offenses committed as a juvenile to enhance an adult conviction, as here. The *Roper* decision addressed the constitutionality of imposing the death penalty for a murder committed by a juvenile and does not call into question our decision in *Smalley. See United States v. Kirkland,* 450 F.3d 804, 805 (8th Cir.2006) (applying *Smalley* after *Roper*). Similarly, the Court's analysis in *Graham* was limited to defendants sentenced to life in prison without parole for crimes committed as juveniles. The 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. Scott, at 1018.

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," 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 Mr. 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

(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").

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 *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 Mr. 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.

The court next conducted their own independent review of the Eighth Amendment's prohibition against cruel and unusual punishment so

as to determine in the exercise of our independent judgment whether the sentencing guideline in question violates the Constitution. The court concluded that use of a juvenile adjudication in calculating an adult defendant's prior record score does not violate the proportionality principles of the Eighth Amendment of the United States Constitution and Article 1, § 13 of the Pennsylvania Constitution and held the Pennsylvania Sentencing Guidelines fully complies with the Eighth Amendment as interpreted by *Roper, Graham,* and *Miller.*

In conducting their independent review court noted that, "federal courts of appeals have held that a prior juvenile adjudication can be used to raise a mandatory minimum and/or maximum sentence. *See United States v. Hunter,* 735 F.3d 172, 176 (4th Cir.2013); *Orona,* 724 F.3d at 1309–1310; *United States v. Hoffman,* 710 F.3d 1228, 1233 (11th Cir.2013) (*per curiam*); *United States v. Banks,* 679 F.3d 505, 507–508 (6th Cir.2012); *United States v. Scott,* 610 F.3d 1009, 1018 (8th Cir.2010); *United States v. Salahuddin,* 509 F.3d 858, 863–864 (7th Cir.2007); *United States v. Mays,* 466 F.3d 335, 339–340 (5th Cir.2006). Sister state courts have reached the same conclusion. *See Vickers v. Delaware,* 117 A.3d 516, 519–520 (Del.2015); *South Carolina v. Smith,* 2015 WL 691506, (S.C.Ct.App. Feb.

18, 2015) (*per curiam*); *Counts v. Wyoming,* 338 P.3d 902, 905–906 (Wyo.2014)." *Com. v. Bonner*, at 599–600.

The court further noted that *Roper, Graham,* and *Miller* all addressed the constitutionality of sentencing a defendant for offenses committed as a juvenile but those cases are inapposite because defendant was an adult when he committed the instant offenses. The court emphasized that defendant was sentenced for conduct and choices he made as an adult with full knowledge of the nature and scope of his own criminal past, including juvenile adjudications. *Com. v. Bonner,* at 600–01.

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.

Williams relies upon *State v. Bassett*, 198 Wash. App. 714, 727, 394 P.3d 430, 437, review granted, 189 Wash. 2d 1008, 402 P.3d 827 (2017) in arguing that the provisions of the POAA which permit certain juvenile offenses to count as strikes violates Washington's proscription against cruel punishment under article 1, section 14. However, Bassett, unlike Williams, was sentenced to life when he was a *juvenile* for crimes he committed *as a juvenile*. It is hardly a "corollary" to extend this holding to a life sentence imposed upon an adult for crimes committed as an adult. Such an extension of the law does not flow naturally as a matter of common sense from the facts and principles of *Bassett* or any other authorities. Further, to the extent *Bassett* could conceivably advance Petitioner's arguments, it is as yet unsettled law as it is under review by the Washington state Supreme Court.

"This court has 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.

Under current law a person less than 18 years of age can be convicted of a "strike" offense only if declined and convicted in adult court for an enumerated offense. Only after such person becomes an adult can he or she be sentenced to life upon committing a final strike offense. Defendant proposes to radically change the current sentencing laws to categorically bar a group of such offenders from accountability under the POAA. This would amount to a substantial extension of the *Miller* line of cases and have far reaching consequences to the community at large as well as the community

of affected offenders. It is the role of the legislative branch of government to make these types of policy decisions.

IV. CONCLUSION

Here, Mr. 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. This 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 Mr. Williams, who *is* an adult, is being punished with an enhanced sentence for his conduct *as* an adult.

Mr. 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. Given the weight of the federal and state court precedent cited above, his *Miller*-based Eighth Amendment and article I, section 14 argument fails. Contrary to William's contention, the fact that the POAA as applied to him when he was an adult "failed to take youth into account" does not contravene *Graham*. He suggests that "the central principle in Graham – that juveniles are intrinsically less capable than adults – *casts significant doubt* on the constitutionality of using a strike committed as a juvenile to support a life

without parole sentence." (Brief of Amicus, page 8.) He has not met his heavy burden of convincing the court that there is no reasonable doubt that the statute is unconstitutional.

Respectfully submitted this 23 day of May, 2018.

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CERTIFICATE OF SERVICE

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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 May 23rd, 2018.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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