

FILED
Court of Appeals
Division II
State of Washington
2/26/2018 8:55 AM

Court of Appeals No. 49894-4-II

In the
Court of Appeals for the State of Washington
Division Two

In re the Personal Restraint Petition of:

RAYMOND MAYFIELD WILLIAMS, JR.,

Petitioner

**PETITIONER'S REPLY BRIEF RESPONDING TO THE
AMENDED BRIEF OF RESPONDENT FILED BY THE
COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE**

Cowlitz County Superior Court No. 08-1-00735-6

Corey Evan Parker
Washington State Bar Number 40006
1275 12th Ave NW, Suite 1B
Issaquah, Washington 98027
Telephone: 425-221-2195
Facsimile: 1-877-802-8580
corey@coreyevanparkerlaw.com

Attorney for Petitioner

PETITIONER'S REPLY BRIEF RESPONDING TO COWLITZ COUNTY

Cowlitz County has attached as Appendix B to its Amended Brief a copy of a verbatim report of proceedings dated October 15, 2008. It should be kept in mind in reading that transcript that Petitioner Raymond Williams was, even at that time, unaware of the fact that his earlier 1997 conviction was being used improperly as a “first strike,” as explained below.

INTRODUCTION

When Thurston County filed its response to Petitioner's PRP in April of 2017 (which response has been replaced by the current response filed by Cowlitz County on January 30, 2018), the response, in part, was that “Williams did not challenge his persistent offender status at his 2008 sentencing.” (*See* Thurston County's response at page 4, lines 5-6.) Now, with the presentation of the October 15, 2008 sentencing hearing transcript, that argument is known to be false, for Appendix B attached to Cowlitz County's Amended Brief clearly shows that Petitioner did, in fact, challenge his persistent offender status at his 2008 sentencing (as shown from the following quotation from Appendix B, page 9, line 17, through page 10, line 17):

Instead of being sentenced to life in prison without the possibility of parole as a persistent offender, I believe this is a gross error in the reasons why this law was created in relation to the deeds that led me here.

At age 16 I witnessed a family leave their home on a camping trip. Later that day, knowing nobody was home, I broke into the home. Inside of the home I stumbled upon numerous rifles. Knowing I could sell them to support myself, as I was homeless, I bundled them up and sold them. For this I was sentenced to burglary in the first degree in court. That was my first strike.

At age 23 I went over to a friend's house and discovered to my great shock that my girlfriend was in bed with another man. I was told to leave. A fight broke out between me and this other man, and once again I was arrested for various crimes including first degree burglary. And that was strike two.

And here I stand at age 28 with assault in the second degree as strike three. This Court has deemed me as persistent in my offenses. I don't believe there to be any persistence in my criminal behavior that would warrant me as unfit for my society for the rest of my days on earth. I will point out that as an adult, saying after the age 18, I only have one single felony conviction on my record other than the one that I stand here for today.

(App. B, 9:17-10:17.)

Probably because of the need to make its arguments appear to be consistent with the statements made by the Petitioner as recorded in Appendix B, Cowlitz County has jettisoned the argument made by Thurston County (to the effect that "Williams did not challenge his persistent offender status at his 2008 sentencing"). So, instead, Cowlitz County now argues **(1)** that at the 2008 sentencing hearing Petitioner acknowledged his "prior conviction for burglary in the first degree out of Thurston County in 1997" (Cowlitz County Amended Brief at pp. 1-2) and **(2)** that Petitioner signed his name to the 2008 judgment and sentence which "outlined his entire criminal history . . . which included [the] burglary from 1997. . . ." (Cowlitz County Amended Brief at p. 2.) Based thus upon Petitioner's asserted acknowledgement of his two prior strikes and the timing of his present PRP, Cowlitz County now argues that the PRP is untimely and is based on arguments that Petitioner assertedly has waived.

However, as with the transcript of the sentencing hearing (App. B), so with the arguments in the Cowlitz County Amended Brief: It should be kept in mind in

reading the County’s Amended Brief, that Petitioner Raymond Williams was, at the time of the 2008 sentencing hearing, unaware of the fact that his earlier 1997 conviction was being used improperly as a “first strike,” as explained below.

Technically, in this present PRP matter, the collateral attack is *not* against “the prior 1997 conviction,” as stated in this court’s November 15, 2017 Order. Rather, the present PRP attacks the October 15, 2008 sentencing order. While it may seem that the PRP in effect attacks the 1997 conviction, it is more correctly to be viewed as an attack on the 2008 court’s improper use of the 1997 conviction.

FACTS

On October 15, 2008 the Superior Court of Washington for Cowlitz County entered its Felony Judgment and Sentence (PRP, App. A), and in sentencing Mr. Williams, the court pointed to the July 8, 1997 first degree burglary conviction (PRP, App. F) as one of two “prior offenses that require the defendant to be sentenced as a Persistent Offender.” (*See* PRP, App. A, p. 3, fourth paragraph (“The following prior offenses require that the defendant be sentenced as a Persistent Offender (RCW 9.94A.570): BURG 1 1997, AND BURG 1 2004”).) The court in 2008 thereupon “found the defendant to be a Persistent Offender,” sentencing Petitioner to life without parole. (*Id.*, p. 6.)

ARGUMENT

1. **THE PETITION IS NOT TIME BARRED ON ACCOUNT OF ITS NOT HAVING BEEN BROUGHT WITHIN ONE YEAR OF THE JUVENILE COURT DECLINE IN 1997**

At pages 8 to 14 of the Cowlitz County Amended Brief, the argument is made that Petitioner’s present PRP is time barred because it was not filed within

one year after the 1997 sentencing. The premise of that argument assumes that Petitioner is directly attacking the 1997 sentence and the 1997 decline. However, that is not what Petitioner is attacking by his present PRP. Rather, he is attacking the 2008 court's improper use of the 1997 conviction.

The underlying premise of Cowlitz County's arguments regarding timeliness is stated on page 3 of its Amended Brief. Citing RCW 10.73.090(1), it does not help Cowlitz County's argument. Cowlitz County argues: "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.*" Amended Brief at page 3, emphasis here added.

Petitioner asserts that his petition is not time barred because he has met his burden of proof under RCW 10.73.100 (5) that the sentence imposed *was in excess of the court's jurisdiction* when he was sentenced for a "third strike" where the first strike was imposed by adult court after an *invalid transfer of jurisdiction* from juvenile court.

First and foremost on this account, it is helpful to discuss what is not at issue. The State has already conceded through Thurston County that if Williams was improperly transferred from Juvenile Court to Adult Court, then the Superior Court lacked jurisdiction to count his 1997 conviction as his first strike. See Thurston County's Resp. at page 6, footnote 4. And it necessarily follows that Williams could not be sentenced under the Persistent Offender Act for a "third strike" in 2008. Through Thurston County, the State focused largely on what may

have been contained within the audio tape and other documents that were destroyed. *See* Thurston County’s Resp. at page 9. Cowlitz County, too, relies on this area of focus. *See* Cowlitz County’s Amended Brief at page 10. In both response briefs, the State argues that in absence of the audio, this Court should conclude findings were made after a decline hearing was held because one was *scheduled* and because a declaration from Christen Peters states it was standard practice for Thurston County juvenile courts to address intelligent waivers by juveniles at decline hearings generally. *See* State’s Resp. at 2, 9-10 FN 5.

The State further argues that even though it would have been the State’s burden to prove that Williams was properly sentenced as a persistent offender in 2008, RCW 10.73.100 now shifts the burden to Williams to prove that jurisdiction was improper. *See* State’s Resp. at 6. But, that argument mischaracterizes Williams’ burden under RCW 10.73.100 and overemphasizes the importance of extrinsic evidence and the impact of Mr. Peters’ testimony.

First, the State reads a heightened standard into RCW 10.73.100 that is not there. To avoid the one year time limit outlined in RCW 10.73.190, Williams is only required to prove that the juvenile court lacked jurisdiction. Under *Saenz*, the decline order is facially invalid because it does not analyze the *Kent* factors with enough specificity to provide a meaningful review. Therefore, the adult court lacked jurisdiction to hear the case. *Saenz*, 175 Wn.2d at 170. This conclusion undermines the premise of the Cowlitz County argument—which is to the effect, as it states, that “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.*” (Amended Brief at page 3, emphasis here added.)

Second, this court does not need to “speculate that the decline hearing never addressed the required *Kent* factors or intelligent waiver...” as the State suggests because it need not look further than the order itself. *See* State’s Resp. at 6-7. The *Saenz* court made it clear that if there are no *written findings* that the transfer was in the best interest of the juvenile or the public, then the transfer is invalid. *State v. Saenz*, 175 Wn.2d 167, 170, 283 P.3d 1094 (2012) (“Our juvenile justice code requires court to enter written findings before declining juvenile jurisdiction Next, we hold that Sanez’s case was not properly transferred to adult court because the commissioner transferring the case failed to enter findings that transfer was in the best interest of the juvenile or the public as required by statute”).

The State, through Thurston County, already has conceded that the order is insufficient to provide a meaningful review in violation of well-established Washington law. *See* Thurston County’s Resp. at 9-10 (The written order in the instant case fails to “provide much of a basis for judicial review”); *In re Harbert*, 85 Wn.2d 719, 724, 538 P.2d 1212 (1975) (When a juvenile court declines jurisdiction, it must make written findings that analyze the factors with enough “specificity to permit meaningful review”). Cowlitz County realizes that such a concession is unhelpful to its position, so it remains silent concerning it, mentioning nothing of the sort in its Amended Brief.

Yet, Cowlitz County, just like Thurston County previously, would have this court overlook the omission of findings simply because there may have been an audio recording of the decline hearing, which may or may not have taken place, which may have indicated that the court questioned Williams about intelligent waiver. *See State's Resp.* at 13. The State has already conceded through Thurston County that its argument is speculative and now Cowlitz County remains mum on the issue, hoping it will disappear. *See Thurston's Response* at 13 (“Granted this is speculative, but no more than any arguments offered by Williams . . .”).

Third, although a reviewing court may consider transcripts and statements in the record, the absence of such a record is not fatal. The State even conceded, through Thurston County, that *State v. Holland*, 98 Wn.2d 507, 518-19, 656 P.2d 1056 (1983), which is still good law, did not approve of the juvenile court's omission of a written analysis. *See State's Resp.* at 10.

And even in *Saenz*, 175 Wn.2d at 179, our Supreme Court affirmed its disapproval of omitting written findings. By way of Thurston County's April 2017 Response, the State tried to cure this omission by reliance on a declaration from Mr. Christen Anton Peters. Cowlitz County attaches, as Appendix A to its Amended Brief, that same April 2017 declaration. However, that declaration provides no authority whatsoever that would allow this court to replace the actual record with a declaration in which Mr. Peters is “unable to recall specific details” of Williams' prosecution. *See Decl. of Christen Peters* at para. 3. And, in any event, providing a 20-year-old recollection of the standard practice is not a guarantee that the proper legal procedure took place.

The State's contention that "the juvenile courts [*sic*] decision to transfer Williams likely would have been upheld as a valid exercise of discretion" presumes that there actually was an exercise of discretion. And the only record that could confirm whether or not the decline hearing actually addressed the *Kent* factor and intelligent waiver is no longer available. Therefore, as the State concedes, it is unknown whether or not these issues were addressed. *See* State's Resp. through Thurston County, at page 3. On this account, Cowlitz County repeats the very strange argument that was made by Thurston County:

"Williams waives his right to a decline hearing, he shall be transferred to Superior Court, and pursuant to State v. Holland adopting U.S. v. Kent, the court finds that respondent shall be declined to adult Superior Court."

See Cowlitz County Amended Brief at page 10 (similar to Thurston County's Response at page 10. Such a statement is the epitome of circularity; it is a perfect example of making no finding whatsoever; instead, it states a conclusion and supports the conclusion by restating the conclusion. It is not a finding.

The State (both by Thurston County and now by Cowlitz County) would have this court impose the risk on Petitioner, but neither County cites authority allowing the imposition of risk. The State argues, still, that the presiding judge should be taken at his word that he considered the *Kent* factors in making his decision to decline jurisdiction. *See* Thurston County's response at p. 10 and now in Cowlitz County's Amended Brief at p. 10. But, in requiring that an analysis be done in writing and that findings be made and memorialized, the *Saenz* court essentially rejected any such argument. Simply *stating* that the *Kent* factors were considered does not equate to memorializing findings themselves, as the State has

now twice suggested. *See* State’s Resp. at page 2 in the Thurston County response and at page 12 in the Cowlitz County Amended Brief. Strangely, having seen Petitioner’s prior brief, Cowlitz County now attempts (at p. 12) to distinguish *State v. Knippling* (2007) 141 Wn. App. 50, on the ground “there is an Order summarizing the court’s findings.” Not so. Stating a conclusion is not the same as “summarizing”—let alone making—findings. (*See* more on *Knippling* below.)

The fact that *Saenz* was an appeal and not a PRP does not distinguish it from the instant case. In *Saenz* the defendant appealed his life sentence under the Persistent Offender Accountability Act (RCW 9.94A). That life sentence, was the immediate result of 22-year-old Saenz’s decision to commit first-degree assault and to unlawfully possess a firearm in 2008, knowing that he already had two strikes. At his three-strikes hearing, Saenz challenged his 2001 “strike” resulting from conviction rendered when he was only 15 years of age. Despite the fact that the third strike was for a crime he committed as an adult, the Washington Supreme Court still applied all of the public policy considerations for sentencing a juvenile. *Saenz*, 175 Wn.2d at 170-71.

Given the *Saenz* court’s analysis, it is irrelevant that “Williams is being punished for his actions as an adult, not what he may have done as a juvenile.” *See* State’s Resp. (by Thurston County) at page 8. Cowlitz County has rightly jettisoned this argument. The fact is, Williams’ life sentence is a direct result of the strike that he received from a court that lacked jurisdiction to impose it.

a. Cowlitz County Errs in Attempting to Distinguish the *Knippling* Case. In *State v. Knippling* (2007) 141 Wn. App. 50, 168 P.3d 426, the State

contended before the Supreme Court of Washington that the appellate court had erred in affirming the trial court's determination that the State had failed to prove that one of defendant's prior convictions counted as a strike for purposes of persistent offender status. The appellate court had disagreed, finding that the State had not met its burden of showing that defendant was convicted as an "offender" at the time of the prior conviction in question because there had been no evidence in the record that the superior court had jurisdiction over the defendant. This was critical because to classify defendant as an "offender," the State had to show either that the defendant had been convicted of an automatic decline charge or that the juvenile court had after conducting a declination hearing declined jurisdiction. The juvenile court had jurisdiction over the second degree robbery charge and there was no evidence before the sentencing judge indicating that a declination hearing had occurred. By failing to establish the existence of a declination hearing in juvenile court, the State could not show that defendant was convicted as an "offender" under Wash. Rev. Code § 9.94A.030(37)(a)(ii). Therefore, defendant could not be sentenced as a persistent offender.

As with defendant Knippling in the 2005 sentencing in the *Knippling* case, so to with Williams in the present case. In *Knippling* the defendant was "not challenging the constitutional validity of the 1999 conviction" but "[i]nstead, Knippling present[ed] a statutory challenge to the use of the 1999 conviction for sentencing purposes." *State v. Knippling*, 166 Wn.2d 93, at 103. Said the *Knippling* court:

The State’s burden, as required by the [Persistent Offender Accountability Act], is to establish that Knippling is a three-time “offender” in order to sentence him to life without release. *See* RCW 9.94A.030(37)(a)(ii). This burden is related to but distinct from an affirmative duty to prove the constitutional validity of prior convictions.

State v. Knippling, 166 Wn.2d 93, 103-104.

In light of the above analysis, a strict interpretation of this court’s November 15, 2017 Order is that it properly should invite the parties to brief the question whether petitioner in this present PRP can collaterally attack the October 15, 2008 finding, made by the Superior Court of Washington for Cowlitz County in its Felony Judgment and Sentence, that Mr. Williams is a three-time “offender” based, in part, on the existence of the earlier, 1997, conviction for burglary in the first degree. This reformulation of the question presented by this court’s November 15, 2017 Order is justified by what the *Knippling* court says regarding the State’s contention in that case (which is similar to what the State contends in its Response to PRP here):

The State contends that Knippling cannot dispute the 1999 conviction at his persistent offender sentencing because doing so amounts to an improper collateral attack on that conviction. This argument also fails. We reach that conclusion because Knippling’s objection to the use of that conviction is not a collateral attack. Rather, his arguments are directed at the present use of a prior conviction to establish his current status as a persistent offender. *See State v. Carpenter*, 117 Wn. App. 673, 678, 72 P.3d 784 (2003) (objecting to a prior conviction in a POAA sentencing proceeding is not a collateral attack).

State v. Knippling, 166 Wn.2d 93, 102-103.

As for the *ratio decidendi* in *Knippling*, leading to the conclusion there that “[b]y failing to establish the existence of a declination hearing in juvenile

court, the State could not show that defendant was convicted as an ‘offender’ under Wash. Rev. Code § 9.94A.030(37)(a)(ii),”¹ the *Knippling* court reasoned as follows:

The State urges this court to ignore the declination requirement, asserting that an absence of information in the judgment form does not affirmatively mean that Knippling’s conviction does not exist for sentencing purposes under the POAA. That argument fails because Washington courts have long held that in imposing a sentence, the facts relied upon by the trial court “‘*must have some basis in the record.*’” [*State v.*] *Ford*, 137 Wn.2d [472] at 482 (quoting *State v. Bresolin*, 13 Wn. App. 386, 396, 534 P.2d 1394 (1975)). The [Sentencing Reform Act] places the burden of proving prior strikes “on the State because it is ‘inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.’” *Ford*, 137 Wn.2d at 480 (quoting *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). If the juvenile court declined jurisdiction in 1999, the State should have been able to produce the record because all juvenile court declination decisions are to be in writing. See RCW 13.40.110(3). If there is no record of the declination hearing, we can presume that no such hearing occurred. See *State v. Golden*, 112 Wn. App. 68, 80, 47 P.3d 587 (2002).

In sum, the juvenile court had jurisdiction over the second degree robbery charge and there was no evidence before the sentencing judge in 2005 indicating that a declination hearing occurred. By failing to establish the existence of a declination hearing in juvenile court, the State cannot show that Knippling was convicted as an “offender” in 1999. Therefore, we agree with the Court of Appeals and the trial court that Knippling cannot be sentenced as a persistent offender because he was not “convicted as an *offender* on at least two separate occasions” prior to the 2005 sentencing. RCW 9.94A.030(37)(a)(ii) (emphasis added).

State v. Knippling, 166 Wn.2d 93, 102 (italics in original, emphasizing that the facts relied upon by the trial court “*must have some basis in the record.*”)

In the present case, the record is crystal clear: the Juvenile Court Order of

¹ *State v. Knippling*, 166 Wn.2d 93, 96.

May 19, 1997 either contradicts itself if it is read to say that a declination hearing was held or it is wholly consistent with itself if it is read to say what it actually says—namely, (1) that a declination hearing was *waived*; (2) that declination occurred nonetheless (albeit without a hearing); and (3) that no *Kent* findings were stated on the record. In short, the State necessarily fails in this present case to establish the holding of a declination *hearing* in juvenile court in 1997 because there is no record of the declination *hearing* and therefore this court necessarily “can presume that no such hearing occurred.” See *State v. Golden*, 112 Wn. App. 68, 80 (2002).

Here is what the May 19, 1997 Juvenile Court Order states (with reference to the *waiver* preceded here by insertion of a bracketed “[1]” and with reference to the declination here preceded by a bracketed “[2]”):

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON,)	
)	
Plaintiff,)	No. 978601-4
vs.)	ORDER
)	to Decline Raymond Williams
Raymond Williams)	to Adult Court Jurisdiction
Defendant.)	

IT IS HEREBY ORDERED that the Respondent [*sic*] having been charged with Burglary in the First Degree 9A.52 020(1)(a) and two counts of Theft of a Firearm RCW 9A.56.300, [1] hereby waives his right to a decline hearing pursuant to RCW 13.40.110, and jurisdiction for the above named Respondent shall be transferred to Superior Court.

Probable cause has been established for the above enumerated charges.

Pursuant to *State v. Holland* adopting *US v. Kent* 383 U.S 541 (1966), court finds that Respondent [*sic*] shall be [2] Declined to Adult Superior Court. Respondent to be held in Adult Thurston County Jail for further

proceedings on this matter.

DATED: 5/19/97

_____/s/
JUDGE

PRESENTED BY:
_____/s/
Deputy Prosecuting Attorney

APPROVED BY:
_____/s/
Attorney for Defendant

_____/s/

(See PRP at App. E, underlining added; note there is no reference in the Order to the court having held a declination hearing and no *stated Kent* findings.)

In short, therefore, the State in this present case necessarily must be held to have failed in 2008 to establish the holding of a declination *hearing* in juvenile court in 1997 because there is no record of a declination *hearing*. This court necessarily “can presume that no such hearing occurred.” See *State v. Golden*, 112 Wn. App. 68, 80 (2002).

In its Response to Personal Restraint Petition (“RPRP”), the State tiptoes around this inescapable fact by making unsubstantiated assertions that such a hearing was held. For example, the State contends, “In that 1997 case, Williams was tried as an adult *following a decline hearing in Thurston County*. Petitioner’s Appendix F.” (See RPRP at p. 2, emphasis added.) While the State’s citation to the PRP’s Appendix F does lead to the Superior Court’s Judgment and Sentence, that document in turn is wholly silent about there having been held any “decline hearing.” The State also contends in its RPRP that “Williams waived his right to be tried as a juvenile, and the juvenile court entered a brief finding of facts^[2] *at the*

² The May 19, 1997 Order does *not* “enter[] a brief finding of facts.” [*sic*] Rather, it “finds that Respondent [*sic*] shall be Declined to Adult Superior Court.” That is not a statement that the court found any facts but it is a statement of the conclusion (“Respondent shall be declined”) as if it were a “finding.” Not one of

conclusion of the hearing. See Petitioner’s Appendix H; E.” (See RPRP at p. 2, emphasis added.) However, Appendices H and E are silent. Appendix H (the Declaration of Raymond Williams) does not refer to “the conclusion of the hearing” and does not even refer to a hearing; rather, it asserts that Mr. Williams “*waived my right to the hearing.*” (See PRP, App. H, p. 4, lines 1-2, emphasis added.) And Appendix E, likewise, is silent about any declination hearing having been held. And in its RPRP the State repeatedly thereafter refers to “the decline hearing” (see third-to-last line on p. 2 of the RPRP, fourth and eighth lines of the argument on p. 3 of the RPRP, etc.), and yet never cites any other document in support of the notion that there was evidence before the sentencing judge in 2008 “indicating that a declination hearing [had in 1997] occurred.” *State v. Knippling*, 166 Wn.2d 93, 102. Here quoting from *State v. Knippling*, 166 Wn.2d 93, 102 but substituting Mr. Williams’ name for Mr. Knippling’s and changing the years of the comparable proceedings in the two cases from the years in Mr. Kippling’s cases to those in Mr. Williams’ cases, we can say here as was said in *Kippling*:

By failing to establish the existence of a declination *hearing* in juvenile court, the State cannot show that [Mr. Williams] was convicted as an ‘offender’ in 199[7]. Therefore, [the Supreme Court of Washington may well] agree with [this present] Court of Appeals . . . that [Williams could not properly have been] sentenced as a persistent offender because he was not “convicted as an *offender* on at least two separate occasions” prior to the 200[8] sentencing. RCW 9.94A.030(37)(a)(ii) (emphasis added).

State v. Knippling, 166 Wn.2d 93, 102.

/ / /

the *Kent* factors is mentioned.

Here the State argues in its RPRP that the burden of proof rests on Mr. Williams to prove “that he was not warned of the consequences of intelligent waiver.” (RPRP at pp. 12-13.) However, the burden of proof is on *the State*, to show that Mr. Williams was convicted as an “offender” at the time of the 1997 conviction based on *evidence in the record* that the superior court had jurisdiction over the defendant, *evidence in the record* that establishes the existence of a declination hearing in juvenile court in 1997. *State v. Knippling*, 166 Wn.2d 93, 102.

The court imposing on Mr. Williams the life-without-parole sentence in 2008 cannot possibly have relied on a transcript or recording of any declination hearing held in 1997 for not only was such transcript or recording of any declination hearing (if held) not available in 2016 (*see* PRP at App. G), it was not available in 2008. RCW 13.50.010 - 13.50.270.³ That is one reason why “If the juvenile court declined jurisdiction in 199[7], the State should have been able to produce the record *because all juvenile court declination decisions are to be in writing*. See RCW 13.40.110(3).” *State v. Knippling*, 166 Wn.2d 93, 102. And “[i]f there is no record of the declination hearing, we can presume that no such hearing occurred. See *State v. Golden*, 112 Wn. App. 68, 80, 47 P.3d 587 (2002).” *State v. Knippling*, 166 Wn.2d 93, 102.

/ / /

³ *See also* County Clerks and Superior Court Records Retention Schedule (1983, 1993, 2001, 2006-2007, 2009, 2014) available at https://www.sos.wa.gov/_assets/archives/RecordsManagement/County%20Clerks%20and%20Superior%20Court%20Records%20RS%20ver%207.0.pdf and Juvenile Courts and Services Records Retention Schedule available at https://www.sos.wa.gov/_assets/archives/RecordsManagement/Juvenile%20Cts%20and%20Services%20ver%201.0%20Revocation%20Guide.pdf

In its RPRP, the State points to the Notice of Hearing (PRP App. D) as supposed evidence that the hearing actually was held. *See* RPRP at pp. 9-10, n. 5 (“Williams states in his brief that there is no evidence that a decline hearing actually occurred. Petitioner’s Motion [PRP] at 7. To the contrary, there is a notice that the decline hearing was scheduled for May 19, 1997, Petitioner’s Appendix D, in addition to an order declining jurisdiction dated May 19. Petitioner’s Appendix E. Based on these documents, it seems clear that a decline hearing did actually occur.”). No. The documents merely say what they say: a decline hearing was *scheduled* (App. D) and Mr. Williams *waived* the hearing (App. E).

b. The Kent, Saenz, and Bailey Cases. Under Wash. Rev. Code § 13.40.110, a judge must carefully weigh whether declining jurisdiction is in the best interest of the juvenile or the public and enter findings to that effect, even where the party waives the decline hearing and stipulates to transfer to adult court. If the judge is unable to *enter findings* without a hearing, the judge should order a hearing. *State v. Saenz*, 175 Wn. 2d 167, 180-181. Such a hearing was not ordered and the record shows the court entered *no findings*. (*See* footnote 2 above.) The prosecution bears the burden of proving by a preponderance of the evidence that a prior conviction constitutes a “strike” under the POAA. *Saenz*, 175 Wn.2d at 172; *State v. Bailey*, 179 Wn. App. 433, 439. The burden of establishing criminal history by a preponderance of the evidence, for purposes of determining the offender score at sentencing, lies with the prosecution. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868 n.3, 50 P.3d 618 (2002). “The best evidence of a prior conviction is a

certified⁴ copy of the judgment.” *State v. Priest*, 147 Wn. App. 662, 668, 196 P.3d 763 (2008) (quoting *Ford*, 137 Wn.2d at 480). As stated above, “[b]y failing to establish the existence of a declination hearing in juvenile court, the State could not show that defendant was convicted as an ‘offender’ under Wash. Rev. Code § 9.94A.030(37)(a)(ii).” *Knippling*, 166 Wn.2d 93, 96.

Even where the parties stipulate to decline juvenile jurisdiction, the statute still requires the court to enter findings, and the court cannot transfer a case to adult court until it has done so.” *Saenz*, 175 Wn.2d at 179. Jurisdiction cannot be transferred if declination is not in the best interest of the juvenile or the public, despite any agreement between the parties. *Id.* The *Saenz* court explained:

Juvenile court judges are not simply potted palms adorning the courtroom and sitting idly by while the parties stipulate to critically important facts. Instead, these judges enforce a juvenile code, “designed with [juveniles’] special needs and limitations in mind.” *Saenz*, 175 Wn.2d at 179 (alteration in original) (quoting *Dutil v. State*, 93 Wn.2d 84, 94, 606 P.2d 269 (1980)).

State v. Bailey, 179 Wn. App. 433, 442-443 (2014).

c. The Standard of Review. An appellate court reviews *de novo* a trial court’s determination that a convicted defendant’s prior convictions qualify as “strike” offenses for purposes of persistent offender sentencing to life imprisonment without the possibility of parole under the Sentencing Reform Act of 1981 (ch. 9.94A RCW). *State v. Bailey*, 179 Wn. App. 433, 438-439 (2014), citing *State v. Thieffault*, 160 Wn. 2d 409, 414, 158 P.3d 580 (2007). *See also Saenz* at 172.

/ / /

⁴ PRP App. F shows a photocopy of the July 8, 1997 Judgment and Sentence relied upon by the sentencing court in 2008 but does not show that it was a certified copy.

d. Constitutional Argument

This court has asked the parties to address at oral argument the question whether “using a conviction that was committed when an individual was under the age of 18 years old as a strike in a persistent offender case violate the prohibition against cruel and unusual punishment.” Petitioner sets forth in Appendix A attached hereto what his contention will be on that question, so that the oral argument on the issue will be concise. Petitioner’s argument will be that using as a strike in a persistent offender case a punishment that was imposed on an individual for an offense he committed when he under the age of 18 years does indeed violate the prohibition against cruel and unusual punishment.

CONCLUSION

For the foregoing reasons, Mr. Williams respectfully suggests that upon *de novo* review, this court should conclude that the 2008 sentencing court’s use of the 1997 conviction was improper.

Dated: February 26, 2018

Corey Evan Parker

COREY EVAN PARKER
Attorney for Petitioner Williams

APPENDIX A

This court has asked the parties to address the question at oral argument whether “using a conviction that was committed when an individual was under the age of 18 years old as a strike in a persistent offender case violate the prohibition against cruel and unusual punishment.” For the convenience of the court and for the benefit of Cowlitz County, Petitioner here sets forth what its contention will be at oral argument. Petitioner will contend that using as a strike in a persistent offender case a punishment that was imposed on an individual for an offense he committed when he under the age of 18 years does indeed violate the prohibition against cruel and unusual punishment.

The oral argument by Petitioner (set forth at page 27 below) will essentially be founded on the following one factual resource (item 1 below) and the two legal resources (items 2 and 3 below), and essentially will constitute reliance on the principles enunciated in the dissenting opinion by Chief Justice Bjorgen in *State v. Moretti*, 2017 Wash. App. LEXIS 2491 (at ¶¶ 121-135).

1. Facts. Petitioner, born on April 6, 1980 (PRP, App. A, p. 1), was sixteen (16) years of age on February 14, 1997 when he committed the first offense. (*See* PRP, App. F, p. 1.) Although this court’s December 1, 2017 request for discussion of the question regarding the prohibition against cruel and unusual punishment does not distinguish between the Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution, both of which prohibit cruel punishment but the latter of which is more protective of the defendant than the former, it is respectfully suggested that Chief Justice Bjorgen’s dissenting opinion in

State v. Moretti, 2017 Wash. App. LEXIS 2491, ¶¶ 121-135 surely applies particularly powerfully to Petitioner, who was age 16 at the time of the first offense. While it may be argued regarding Petitioner Williams here, paraphrasing here what was stated in *State v. Nguyen*, 2018 Wash. App. LEXIS 69, that “the trial court [in 2008] did not sentence [Williams] for his first strike offense that he committed when he was [16] years old” and, rather, that “the court sentenced [Williams] for his third strike offense that he committed when he was [28] years old” (compare at *State v. Nguyen*, 2018 Wash. App. LEXIS 69 ¶ 15), here it should be found that Williams “was not sentenced to life without possibility of release for his last ‘strike’ conviction or for any single ‘strike’ conviction[, but] his sentence rested equally on all three convictions, his first as indispensable as the rest to the POAA sentence.” (Compare *State v. Moretti*, Chief Justice Bjorgen dissenting, 2017 Wash. App. LEXIS 2491, ¶ 132.) “Without that first conviction, he could not have been sentenced under the POAA. His POAA sentence, therefore, was as much a punishment for his first ‘strike’ offense at age [16] as it was for any of the others.” (*Id.*)

2. Legally. In *State v. Nguyen*, 2018 Wash. App. LEXIS 69 defendant Nguyen claimed that a sentence of life without the possibility of parole violated the federal and state constitutions’ prohibition against cruel and unusual punishment because he committed his first strike offense when he was only **20** years old. The court rejected that claim. The court reasoned:

The Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution prohibit cruel punishment. This includes punishment disproportionate to the crime

committed. Nguyen cites a number of United States Supreme Court cases to support that life in prison without the possibility of parole is a disproportionate punishment for youth.

But here, the trial court did not sentence Nguyen for his first strike offense that he committed when he was 20 years old; the court sentenced Nguyen for his third strike offense that he committed when he was 41 years old. In affirming a life sentence under the former habitual criminal law, our Supreme Court stated, “The life sentence contained in RCW 9.92.090 is not 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.” Thus, neither the fact that Nguyen was 20 years old when he committed his first strike offense nor the constitutional limits on sentences imposed on juveniles is relevant. In addition, our Supreme Court has held that the mandatory sentence imposed on persistent offenders does not violate the state or federal constitutions. The trial court did not err in imposing a term of life sentence under the POAA.

See State v. Nguyen, 2018 Wash. App. LEXIS 69 at ¶¶ 14-15.

3. Legally. In a dissent in *State v. Moretti*, 2017 Wash. App. LEXIS 2491 (at ¶¶ 121-135), Chief Justice Bjorgen analyzed the issue thus dealing with a **20-year-old**:

This appeal presents the next step in the evolution of our law governing punishment of those with psychological traits of juveniles at the time of the offense. Moretti was sentenced as an adult under the Persistent Offender Accountability Act of the Sentencing Reform Act of 1981 (POAA), chapter 9.94A RCW, to mandatory life imprisonment without possibility of release. However, he committed one of the “strike” offenses that was essential to this sentence when he was 20 years old, well within the age at which our Supreme Court has recognized the characteristics of youth persist. *State v. O’Dell*, 183 Wn.2d 680, 692 n.5, 358 P.3d 359 (2015). The question, then, is whether our law consigns one to imprisonment without hope of release, with no whisper of human discretion and no consideration of the characteristics of youth, based in part on a crime committed when our law recognizes those characteristics persist. After *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), *O’Dell*, 183 Wn.2d 680, and *State v. Houston- Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), the answer must be no.

¶122 In *Miller*, the Supreme Court held that “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” 567 U.S. at 479. The court rested this holding on its recognition that

[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.

Miller, 567 U.S. at 479.

¶123 The characteristics of youth on which *Miller* relied were those first summarized in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). *Miller*, 567 U.S. at 472. In that decision the Court identified three general differences between adults and juveniles central to an Eighth Amendment analysis. First, juveniles more often display “[a] lack of maturity and an underdeveloped sense of responsibility,” often resulting in “impetuous and ill-considered actions and decisions.” *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). This susceptibility means that their “irresponsible conduct is not as morally reprehensible as that of an adult.” *Roper*, 543 U.S. at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988)).

¶124 Second, juveniles “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” *Roper*, 543 U.S. at 569. This “vulnerability and comparative lack of control over their immediate surroundings” give juveniles “a greater claim than adults to be forgiven for failing to escape negative influences.” *Id.* at 570.

¶125 Finally, “the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles . . . less fixed.” *Id.* at 570. Thus, “it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” *Id.* at 570.

¶126 In finding these differences, the Court in *Roper*, *Miller*, and the intervening *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), drew on developments in psychology and neuroscience showing “‘fundamental differences between juvenile and adult minds’—for example, in ‘parts of the brain involved in behavior control.’” *Miller*, 567 U.S. at 471-72 (quoting *Graham*, 560 U.S. at 68). These differences, the Court

recognized, both lessened a juvenile’s moral culpability, *Roper*, 543 U.S. at 571, and enhanced the prospect of reformation, *Miller*, 567 U.S. at 472. With these differences, each decision recognized that the penological justifications for imposing the harshest sentences were diminished for juveniles. *See Miller*, 567 U.S. at 472.

¶127 Our state Supreme Court has embraced the reasoning of the *Roper* line of cases and extended that reasoning to hold that

[t]he Eighth Amendment [r]equires [s]entencing [c]ourts [t]o [c]onsider [t]he [m]itigating [q]ualities of [y]outh at [s]entencing, [e]ven in [a]dult [c]ourt.

Houston-Sconiers, 188 Wn.2d at 18. The court read the Sentencing Reform Act (SRA), chapter 9.94A RCW, to allow courts to comply with this mandate. The court also held that the mandatory nature of the sentencing enhancements imposed violated the Eighth Amendment under the same reasoning. *Houston-Sconiers*, 188 Wn.2d at 25-26.

¶128 *Roper*, *Graham*, *Miller*, and *Houston-Sconiers* all dealt with crimes committed while the defendant was a juvenile. Moretti’s POAA offenses were committed while an adult, the first at age 20. Thus, the specific holdings of these three decisions do not disclose any flaw in his POAA sentence, but their rationales and empirical bases do.

¶129 The law acknowledges that one’s 18th birthday does not mark some abrupt and mystic translation into the mind of an adult. In *Roper*, 543 U.S. at 574, the United States Supreme Court recognized that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.” Consistently with that recognition, the Washington Supreme Court held in *O’Dell*, 183 Wn.2d at 698-99, that

a defendant’s youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is.

(Emphasis added.) *O’Dell* reasoned that the same characteristics of youth based on the same scientific findings relied on by *Miller*, *Roper*, and *Graham* require a sentencing court to consider whether a youthful defendant should receive an exceptional sentence below the standard range under the SRA, even if the defendant was over 18

when he or she committed the offense. *O'Dell*, 183 Wn.2d at 689, 691-92, 695.

¶130 In reaching this holding *O'Dell* quoted A. Rae Simpson, MIT Young Adult Development Project: Brain Changes, Mass. Inst. of Tech. (2008), <http://hrweb.mit.edu/worklife/youngadult/brain.html>, for the proposition that “[t]he 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.” *O'Dell*, 183 Wn.2d at 692 n.5. The court also quoted the finding in Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Ann. N.Y. Acad. Sci. 77 (2004), that “[t]he dorsal lateral prefrontal cortex, important for controlling impulses, is among the latest brain regions to mature without reaching adult dimensions until the early 20s.” *O'Dell*, 183 Wn.2d at 692 n.5. These neurological characteristics also formed the substrate of the constitutional reasoning in *Roper*, *Graham*, *Miller*, and *Houston-Sconiers*.

¶131 *O'Dell*, in other words, is instructing us that the very characteristics that underlie *Miller* and *Houston-Sconiers* may persist well into one’s 20s. With that, the same characteristics that led to the Eighth Amendment analyses and holdings of *Roper*, *Graham*, and *Miller* and to the constitutional and statutory analyses and holdings of *Houston-Sconiers*, would apply equally to crimes committed at age 20, when Moretti committed his first “strike” offense. That is the ineluctable result of *O'Dell*’s recognition of the psychological and neurological realities of the maturing mind.

¶132 The application of these principles to the POAA is more vexing. On one hand, these holdings apply to sentencing, and Moretti was sentenced under the POAA at age 32, well beyond the age at which *O'Dell* demands that we heed the characteristics of youth. However, Moretti was not sentenced to life without possibility of release for his last “strike” conviction or for any single “strike” conviction. Rather, his sentence rested equally on all three convictions, his first as indispensable as the rest to the POAA sentence. Without that first conviction, he could not have been sentenced under the POAA. His POAA sentence, therefore, was as much a punishment for his first “strike” offense at age 20 as it was for any of the others. [Underlining here added.]

¶133 In some ways, life imprisonment without possibility of release forfeits one’s humanity more deeply than does execution. It condemns the prisoner to a captivity from which the only release is

death. It disinherits the prisoner once and for all from the hope of freedom, the common inheritance that lies near the heart of what it is to be human.

¶134 Public safety may show the need for even that forfeit. *Miller* holds, though, that the mandatory imposition of that punishment for crimes committed while a juvenile is not tolerated by the Eighth Amendment. *Houston-Sconiers* holds that the Eighth Amendment requires that the characteristics of youth be considered in sentencing for crimes committed while a juvenile, whether or not mandatory. *O'Dell* requires that the same characteristics of youth that underlie *Miller* and *Houston-Sconiers* be considered in sentencing for crimes committed at an age these characteristics generally persist. The studies on which *O'Dell* relied show that range extends at least to age 20. *O'Dell*, 183 Wn.2d at 689, 691-92, 695.

¶135 Moretti was mandatorily sentenced to life imprisonment without possibility of release, a sentence that punished his offense at age 20 as much as did any other “strike” offense. His mandatory sentencing involved not a shred of human discretion or consideration of the individual. Nor did it require that any heed be paid to the characteristics of youth at the time of his offense at age 20. *O'Dell* recognized that the same characteristics of youth that led to *Miller*'s condemnation of mandatory life without parole and *Houston-Sconiers*' requirement that youth be considered in sentencing generally are also present in young adulthood, certainly including age 20. *O'Dell* thus demands the same conclusions as in *Miller* and *Houston-Sconiers* for crimes committed at age 20. Under the confluence of *Miller*, *Houston-Sconiers*, and *O'Dell*, Moretti's POAA sentence violated the Eighth Amendment.

State v. Moretti, Chief Justice Bjorgen dissenting, 2017 Wash. App. LEXIS 2491, ¶¶ 121-135.

Thus, based on the above three resources, the first being the fact established in item 1 above that petitioner was age 16 when he committed his first offense and the second and third being the legal principles discussed in items 2 and 3 above, the following is essentially what Petitioner's oral argument will be on the constitutional issue posed by the court:

Here, Petitioner, born on April 6, 1980 (PRP, App. A, p. 1), was sixteen (16) years of age on February 14, 1997 when he committed the first offense. (*See* PRP, App. F, p. 1.) Although this court’s December 1, 2017 request for discussion of the question regarding the prohibition against cruel and unusual punishment does not distinguish between the Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution, both of which prohibit cruel punishment but the latter of which is more protective of the defendant than the former, it is respectfully suggested that Chief Justice Bjorgen’s dissenting opinion in *State v. Moretti*, 2017 Wash. App. LEXIS 2491, ¶¶ 121-135 surely applies with more power to Petitioner, who was age 16 at the time of the first offense. While it may be argued, regarding Petitioner Williams here, here paraphrasing what was stated in *Nguyen, supra*, 2018 Wash. App. LEXIS 69 at ¶ 15, that “the trial court [in 2008] did not sentence [Williams] for his first strike offense that he committed when he was [16] years old” and, rather, that “the court sentenced [Williams] for his third strike offense that he committed when he was [28] years old” (compare at *Nguyen, supra*, 2018 Wash. App. LEXIS 69 at ¶ 15), here it should be held that Williams “was not sentenced to life without possibility of release for his last ‘strike’ conviction or for any single ‘strike’ conviction[, but] his sentence rested equally on all three convictions, his first as indispensable as the rest to the POAA sentence.” (Compare *Moretti, supra*, Chief Justice Bjorgen dissenting, 2017 Wash. App. LEXIS 2491, ¶ 132.) “Without that first conviction, he could not have been sentenced under the POAA. His POAA sentence, therefore, was as much a punishment for his first ‘strike’ offense at age [16] as it was for any of the others.” (*Id.*)

CERTIFICATE OF SERVICE

I, Corey Evan Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on February 26, 2018, I caused to be served the document to which this is attached to the party listed below in the manner shown next to their name:

Attorney for Respondent:

Tom Ladouceur
Tom.ladouceur@co.cowlitz.wa.us

- By Email
- By Fax
- By Fed Express
- By Hand Delivery
- By Messenger

/s/ Corey Evan Parker
Corey Evan Parker
WSBA #40006
1275 12th Ave., NW Suite 1B
Issaquah, WA 98027
(425) 221-2195

LAW OFFICE OF COREY EVAN PARKER

February 26, 2018 - 8:55 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49894-4
Appellate Court Case Title: Personal Restraint Petition of Raymond Mayfield Williams, Jr.
Superior Court Case Number: 97-8-00060-1

The following documents have been uploaded:

- 498944_Briefs_20180226085326D2343889_0617.pdf
This File Contains:
Briefs - Petitioners Reply
The Original File Name was Reply Brief - Raymond Williams.pdf

A copy of the uploaded files will be sent to:

- Tom.ladouceur@co.cowlitz.wa.us
- appeals@co.cowlitz.wa.us

Comments:

Sender Name: Corey Parker - Email: corey@coreyevanparkerlaw.com

Address:

1230 ROSECRANS AVE STE 300
MANHATTAN BEACH, CA, 90266-2494
Phone: 425-221-2195

Note: The Filing Id is 20180226085326D2343889