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SUPREME COURT
STATE OF WASHINGTON
Oct 11, 2013, 10:40 am
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
NO. 88118-9

STATE OF WASHINGTON,

Respondent,

vs.

ALVIN L. WITHERSPOON,

Appellant/Petitioner.

RESPONSE TO *AMICUS*

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COUNTERSTATEMENT OF THE ISSUES

ISSUE ONE

When the trial court conducted a hearing in which every bit of the testimony was to prove by a preponderance that Mr. Witherspoon had two prior "strike" convictions, has the trial court conducted a hearing for which no jury was required by *Apprendi*?

ISSUE TWO

When a recent United States Supreme Court opinion (2003) determined incapacitating and deterring recidivist felons for a term of 25 years to life is not grossly disproportionate to a state's legitimate interest in public safety, and when 48 states and the federal government employ mandatory minimum sentencing, including life without possibility of parole (LWOP) sentences, is it accurate to say that adult mandatory minimum sentencing does not violate the Eighth Amendment?

STATEMENT OF THE CASE

The necessary facts of this case have been stated in previous briefing.

ARGUMENT

ISSUE ONE

When the trial court conducted a hearing in which every bit of the testimony was to prove by a preponderance that Mr. Witherspoon had two prior "strike" convictions, has the trial court conducted a hearing for which no jury was required by *Apprendi*?

RESPONSE

Sentencing judges in Washington State do not review the facts or elements of a crime to determine whether the conviction is a strike offense. They review the conviction itself, in the same manner that every sentencing judge reviews prior convictions for sentencing

ANALYSIS

I. Standard of Review: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 446, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Amicus admits on page three that the Witherspoon's sentencing complied with current United States Supreme Court decisions. *Almendarez-Torres*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d (1998) is still the controlling case, holding a greater sentence based upon a current offense and a *prior* conviction is a sentencing statute. *Alleyne v. United States*, --- U.S. ---, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), also applied the logic of *Apprendi* to hold that any fact that increases the minimum sentence for a *current* conviction must be proved to a jury. Nothing from *Alleyne* applies here. A jury convicted Mr. Witherspoon of a strike offense. The trial court determined the sentence, as all trial courts must do, by determining whether the state had proved the existence of prior convictions by a preponderance of the evidence. There is no Sixth Amendment violation.

Descamps v. United States, --- U.S. ---, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), is completely inapplicable to this case. In *Aguila-Montes*, 655 F.3d 915 (9th Cir. 2011), the *en banc* Court, attempting to apply shifting United States Supreme Court precedent, held a state crime

with a missing element for purposes of the Armed Criminal Career Act could be addressed with the “modified categorical approach.” *Id.* at 945. The Ninth Circuit determined it could review the charging and plea documents to determine whether the defendant entered a building without permission, a fact needed to meet the generic definition for burglary. The United States Supreme Court held this was error; the Ninth Circuit’s decision to review actual plea documents created a risk that it was conducting a fact hearing. *Descamps* at ---, 133 S.Ct. at 2288. The United States Supreme Court’s approach avoided factual decisions by sentencing courts, thus avoiding Sixth Amendment issues.

Descamps does not apply to this case. Washington law requires the sentencing court to determine by a preponderance of the evidence – supplied by the prosecution -- that a defendant has *convictions* for two previous strike crimes before deciding whether a recidivist sentence is appropriate. The sentencing judge is not looking at elements or facts of an underlying conviction but rather whether the State has supplied sufficient information to meet its burden to show a prior conviction for a most serious offense. See *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 257, 111 P.3d 837 (2005) (“In applying *Apprendi*, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt. See *State v. Smith*, 150 Wn.2d 135, 141-43, 75

P.3d 934 (2003); accord *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 360 (1998)”).

ISSUE TWO

When a recent United States Supreme Court opinion (2003) determined incapacitating and deterring recidivist felons for a term of 25 years to life is not grossly disproportionate to a state’s legitimate interest in public safety, and when 48 states and the federal government employ mandatory minimum sentencing, including life without possibility of parole (LWOP) sentences, is it accurate to say that adult mandatory minimum sentencing does not violate the Eighth Amendment?

RESPONSE

Nothing in past or current Eighth Amendment jurisprudence indicates Washington’s LWOP sentencing structure violates the Eighth Amendment.

I. Standard of Review: A prison sentence that violates the Eighth Amendment’s prohibition against “cruel and unusual punishment” must be dismissed, *Weems v. United States*, 217 U.S. 349, 382, 30 S.Ct. 544, 54 L.Ed. 793 (1910), or set aside for resentencing, *Solem v. Helm*, 463 U.S. 277, 284, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). An LWOP sentence for a juvenile is cruel and unusual punishment unless the youth is permitted to offer mitigating circumstance evidence. *Miller v. Alabama*, --- U.S. ---, 132 S.Ct. 2455, 183 L.Ed.2d (2012). An LWOP sentence for an adult offender is not generically cruel and unusual punishment. *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991).

Amicus presented no analysis concerning Const. art. I, § 14.

Perhaps this is because the Washington Supreme Court recently held that a 100 year sentence was not cruel in light of the crimes and the legislative intent behind punishing criminals who commit “most serious offenses” while armed with a firearm. *State v. Korum*, 157 Wn.2d 614, 640-641, 141 P.3d 13 (2006). Because the Washington Constitution was not discussed, the State will focus on the Eighth Amendment.

From the Standard of Review, it is obvious that sentencing issues and Eighth Amendment analysis are very complex and not easily categorized. For instance, it is a mantra of those who do not like mandatory minimums to indicate that “there is a strong national trend away from harsh mandatory sentences...” *Amicus*, page 7. *Amicus* points to a handful of states that have modified their sentencing practices (almost all drug related, which reflects more that long sentences for drug crimes are very expensive and do not meet any sentencing criteria except incapacitation), intimating that this is all because of “evolving standards of decency.” Countering this, however, is the fact that in 2008 only Alaska, (99 years) and a few other states had no LWOP prisoners.¹ In 2001, Alaska, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana,

¹ Lerner, *Life Without Parole as a Conflicted Punishment*, George Mason Law Review, Vol 48, page 22. This article demolishes several tenets of the movement to end LWOP, indicating that many inmates are given clemency, that LWOP inmates are permitted the opportunity to employ programs to rehabilitate and reform, and that LWOP inmates live in a social setting increasingly comfortable as the inmate becomes less a security risk.

Kentucky, Maine, Massachusetts, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, South Carolina, Texas, Vermont, West Virginia, and Wyoming had less than LWOP sentences.² Since 1970, almost every state in the United States has adopted an LWOP category. By 2010, all but Alaska and New Mexico had at least 2 LWOP prisoners.³ A report completed by the Congressional Research Service⁴ states the following in the summary: “[s]tate and federal mandatory minimums have come under constitutional attack on several grounds over the years, and have generally survived.” Indeed, the Eighth Circuit recently affirmed an LWOP sentence for a person convicted of possession with intent to distribute 50 grams of methamphetamine. *United States v. Capps*, 716 F.3d 494 (8th Cir. 2013). In short, there is no evidence that “evolving standards of decency” has provoked the states and the federal government to reduce the number of mandatory minimum sentences and LWOP prisoners over the past twenty years. The number of LWOP and mandatory sentencing alternatives has increased exponentially; current revisions of mandatory minimum sentences for minor drug offenses is

² An Analysis of the Mandatory Sentencing Policies of Selected States, May 2001.

³ Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, Federal Sentencing Reporter, 2010. Alaska has no LWOP prisoners, but there is no information about how many prisoners Alaska has that are serving 99 years. New Mexico has no LWOP prisoners because it has no LWOP punishment.

⁴ Doyle, *Federal Mandatory Minimum Sentencing Statutes*, Congressional Research Service (2013).

merely a reflection by legislatures that the costs of incarceration outweigh any benefit that may be obtained.

It is also not true that sentencing has “evolved away from harsh, mandatory sentencing.” *Amicus* provides an appendix showing that a few of the 50 states have reduced mandatory minimums for drug offenses; the State is also aware that Attorney General Eric Holder is asking for shorter minimum sentences or no prosecution of minor drug offenses. None of the discussion about a general trend reflects more than the changes made by individual state legislatures. As the State showed in its REVISED SUPPLEMENTAL RESPONSE, sentencing practices ebb and flow⁵, depending on the current (failing) attempt to control recidivism.⁶ Further, arguments about sentencing and the cost of incarceration, including aging prisoners, are political issues best determined by the state legislature. As the WAPA *Amicus* proved, the Washington Legislature has repeatedly refused to modify three strike LWOP sentencing. All of *Amici*'s rhetoric begs the issue, however; the question is whether an LWOP sentence for 3 violent strikes is unconstitutional. A lifetime incarceration for three defined and delineated most serious offenses is not a violation of the

⁵ See *Hutto v. Davis*, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) (Powell, J., concurring in result, for more discussion about Virginia's increasingly rigid attempts in the 1980s to control drug trafficking. Virginia is free to reduce the lengthy sentences if it wishes, as other jurisdictions have, because that is what legislatures do.

⁶ Nellis, *supra*, page 27: “The rising number of LWOP prisoners is the end result of three decades of tough-on-crime policies that have made little impact on crime...”

Eighth Amendment.

Amicus appears to have focused its arguments on the social reasons for eliminating mandatory sentencing, including life in prison without parole, but cites only to social issues and juvenile Eighth Amendment cases. None of the cases cited by *Amicus* addressed whether an LWOP sentence was “cruel and unusual” punishment for an adult offender with serious violent convictions. A review of adult Eighth Amendment cases provides an entirely different view of the issue.

The fundamental case establishing Eighth Amendment analysis is *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910). The facts are well known; the effect of the sentence was summed up as follows:

“We can now give graphic description of Weems's sentence and of the law under which it was imposed. Let us confine it to the minimum degree of the law, for it is with the law that we are most concerned. Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council. These parts of his penalty endure for the term of imprisonment. From other parts there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the ‘authority immediately in charge of his surveillance,’ and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall

from rectitude. Even that hope is taken from him, and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain.”

Id., at 366, 30 S.Ct. 544. The Court began a review of English common law and state decisions to determine the parameters of the term “cruel and unusual”:

“What constitutes a cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous,—torture and the like. *McDonald v. Com.* 173 Mass. 322, 73 Am. St. Rep. 293, 53 N.E. 874. The court, however, in that case, conceded the possibility ‘that punishment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment.’”

Id., at 366, 30 S.Ct. 544. After a further review of English common law and other state decisions about the meaning of the term “cruel and unusual” the Court determined that the sentence was “cruel and unusual”:

“It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind.”

Id., at 377, 30 S.Ct. 544.

Even then, the Court had to determine whether it had authority to overturn the conviction. It determined that it first was responsible to

comprehend “all that the legislature did or could take into account—that is, a consideration of the mischief and the remedy.” *Id.*, at 379, 30 S.Ct. 544. From this review standard, the Court determined that the punishment was more severe than for some murder convictions. *Id.*, at 380, 30 S.Ct. 544. Based upon a review of other statutory penalties for less “mischief,” the Court determined the present penalties were excessive. *Id.*, at 381, 30 S.Ct. 544.

The decision establishes that the term “cruel” relates to an “excess of imprisonment” and the penalties “which accompanies and follows imprisonment.” The character of the sentence makes it “unusual.” The dissent provided more insight into what the terms mean. It stated “cruel and unusual punishment” refers to “the atrocious, sanguinary, and inhumane punishments which had been inflicted in the past upon the persons of criminals.” *Id.*, at 390, 30 S.Ct. 544. Historically, a sentence was “unusual” because it was “illegal.” A sentence was “cruel” because it is “inhuman” or, even if permitted, was inflicted to such an extent as to be unusual and consequently illegal. *Id.*, at 381, 30 S.Ct. 544. However, the dissent disagreed with the majority’s proportionality analysis, arguing that the Supreme Court was not permitted to determine whether a legislature had created a punishment that, when apportioned, was unconstitutional. *Id.*, at 387-8, 30 S.Ct. 544.

Weems was next addressed in *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). The defendant alleged a “sentence of life imprisonment, as opposed to a substantial term of years, for his third felony” is cruel and unusual punishment. *Id.* at 270-71, 100 S.Ct. 1133. The Court accepted that sentences grossly disproportionate to the crime had become a measure of whether a sentence was cruel and unusual. It pointed out, however, that aside from death penalty cases, “successful challenges to the proportionality of particular sentences have been exceedingly rare.” *Id.* at 272, 100 S.Ct. 1133. In fact, the Court only addressed one case, *Weems*, and dismissed it as a “highly unusual” form of punishment generally imposed under the Anglo-Saxon system.” *Id.* at 275, 100 S.Ct. 1133.

The Court held that “the length of sentences actually imposed is purely a matter of legislative prerogative,” referring to Justice Holmes decision in *Badders v. United States*, 240 U.S. 391, 36 S.Ct. 367, 60 L.Ed. 706 (1916), in which the Court summarily dismissed all constitutional challenges to his sentence. *Badders, supra*, at 394, 36 S.Ct. 367. The *Rummel* Court held that sentencing issues are a matter for the state legislature and that the state’s interest in dealing with recidivism was an appropriate state interest. *Rummell*, at 276, 100 S.Ct. 1133. Further, the Court held that, even if the life sentence was more stringent than the

defendant could have received in all other states, it still would not render his punishment "grossly disproportionate." *Id.* at 281, 100 S.Ct. 1133. The Court rejected the argument that it should compare the statutes of each state:

"Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Id.* at 282, 100 S.Ct. 1133. It is therefore clear the Supreme Court did not accept that a proportionality analysis encompassing the sentencing practices of other states was appropriate when the defendant was given a life sentence for felony crimes.⁷

Three years later, Justice Stewart switched sides, joining the majority of the Court. *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Based upon their interpretation of the common law

⁷ The Court made a very illuminating statement at 445 U.S. 283-84: "Perhaps, as asserted in *Weems*, 'time works changes' upon the Eighth Amendment, bringing into existence 'new conditions and purposes.' 217 U.S. at 373, 30 S.Ct., at 551. We all, of course, would like to think that we are 'moving down the road toward human decency.' *Furman v. Georgia*, 408 U.S., at 410, 92 S.Ct., at 2814 (BLACKMUN, J., dissenting). Within the confines of this judicial proceeding, however, we have no way of knowing in which direction that road lies. Penologists themselves have been unable to agree whether sentences should be light or heavy, discretionary or determinate. This uncertainty reinforces our conviction that any 'nationwide trend' toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts." (footnotes omitted). This quotation encompasses the State's position: The Legislature should determine the current ineffective mode of dealing with recidivism, not the Courts.

history of the term “cruel and unusual,” the Court held that “[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence.” *Id.*, at 284, 103 S.Ct. 3001. The Court held that “no penalty is *per se* constitutional.” *Id.*, at 284, 103 S.Ct. 3001. From there, the Court determined that life in prison without possibility of parole was clearly excessive for the minimalist crimes Helm had committed.

In 1991, analysis of Eighth Amendment sentencing reverted back to the analysis prior to *Solem*. In *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), four Justices and the Chief Justice agreed that the Eighth Amendment does not require the states to adopt a sentencing scheme in which life in prison without possibility of parole “is simply the most severe of a range of available penalties that the sentence may impose after hearing evidence in mitigation and aggravation.” *Id.*, at 994, 111 S.Ct. 2680. “Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation’s history.” *Id.*, at 994, 111 S.Ct. 2680. A sentence is not cruel and unusual “simply because it is ‘mandatory.’” *Id.*, at 995, 111 S.Ct. 2680.

Justice Scalia and the Chief Justice held in sections I, II and III that the term “cruel and unusual” referred only to the mode of punishment and,

historically, the courts did not employ a proportionality analysis. Justice Kennedy authored a concurring opinion, joined by Justices O'Connor and Souter, which argued that prior decisions "recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle," mostly in capital cases. *Id.*, at 997, 111 S.Ct. 2680. Justice Kennedy established a series of principles that provided most of the content to the Court's analysis. First, "sentencing is properly within the province of legislatures, not courts," citing to *Rummel, supra*, 445 U.S., at 275-76, 100 S.Ct., 1140. Reviewing courts "should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes," citing to *Solem, supra*, 463 U.S., at 290, 103 S.Ct., at 3009. "[T]he Eighth Amendment does not mandate adoption of any one penological theory." *Id.*, at 999, 111 S.Ct. 2680. "The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation." *Id.*, at 999, 111 S.Ct. 2680. "State sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise." *Id.*, at 1000, 111 S.Ct. 2680. If proportionality review is used, it should be informed by objective factors to the maximum extent. *Id.*, at 999, 111 S.Ct. 2680. *Weems* provided an objective factor;

the reviewing court could differentiate it from more traditional punishments in the Anglo-Saxon system. Capital punishment for a crime provides an objective difference between it and noncapital punishment, but noncapital punishment lacks relatively clear objective standards to determine whether one or the other violates the Eighth Amendment. *Id.*, at 1001, 111 S.Ct. 2680. All these factors taken together indicate the Eighth Amendment “does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Id.*, at 1001, 111 S.Ct. 2680. Altogether, then, four Justices and the Chief Justice that proportionality analysis either was not correct or was limited to death penalty cases.

Ewing v. California, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003), specifically addressed the “sea change” in enhanced sentencing during 1993 to 1995. The opinion raises three points: First, “[r]ecidivism has long been recognized as a legitimate basis for increased punishment.” *Id.*, at 25, 123 S.Ct. 1179. Second, the Court held that doubts about the wisdom of such laws, the cost-efficiency and the effectiveness in reaching its goals “is appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme.” *Id.*, at 28, 123 S.Ct. 1179. Third, the enhanced sentence given to Ewing “is justified by the State’s public-safety

interest in incapacitating and deterring recidivist felons...” *Id.*, at 29-30, 123 S.Ct. 1179. The Court therefore held that the sentence “is not grossly disproportionate and therefore does not violate the Eighth Amendment’s prohibition on cruel and unusual punishment.” *Id.*, at 30-1, 123 S.Ct. 1179.

This backdrop of adult decisions shows a striking similarity of factors that apply to the case at hand. First, recidivism in California as set forth in *Ewing* clearly matched the statistics presented in the State’s REVISED SUPPLEMENTAL BRIEF OF RESPONDENT. Nothing has changed in the past ten years to show that shorter sentences for recidivist convicted of “most serious offenses” works. Second, the legislature, as the law maker, adopted the present scheme and is in a position to change it when it deems appropriate. WAPA’s *Amicus* provided ample information that the legislature is not ready to modify “three strikes” sentencing. Third, the legislature is in a position to weight the costs and benefits of LWOP sentencing and to apply contemporary societal standards. It is, and has, made substantial adjustments, including as Mr. Witherspoon points out, permitting some LWOP prisoners to obtain relief through the Parole and Clemency process. Fourth, a life sentence without possibility of parole is not cruel and unusual -- disproportionate – when weighed against the state’s responsibility to protect citizens from continuing crimes of violence. Fifth, the arguments presented by Mr. Witherspoon and *Amicus*

have never been accepted as an objective standard. Unlike Helm, Mr. Witherspoon is not a poor drifter in prison for passing a “no account” check. Witherspoon’s criminal history includes Attempting to Elude, 3 convictions for Residential Burglary, Residential Burglary with deadly weapon enhancement, First Degree Burglary, Possession of Stolen Property 2, Third Degree Assault, First Degree Theft, Taking a Motor Vehicle Without Permission, and Second Degree Burglary. Judgment and Sentence, CP 7. Separating Witherspoon from society is based upon an objective standard – the three strikes as part of a continuing history of criminal behavior.

Amicus, however, relies on a trilogy of recent decisions relating to capital punishment and life in prison without possibility of parole for juveniles to posit that evolving standards of decency require elimination of LWOP sentences. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller v. Alabama*, --- U.S. ---, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). These three decisions employ an analysis markedly different from the analysis applied to adult recidivists with a lengthy history of criminal behavior.

The three decisions rely heavily on a national consensus against the death penalty in general or LWOP sentencing for juveniles. There is

no national consensus against adult LWOP punishment. By 2008, over 40 states had enacted LWOP sentencing for adult offenders.⁸ By 2010, state prisons contained over 41,000 LWOP prisoners.⁹ Both the number of states with LWOP statutes and those who impose LWOP sentences contradict *Amici's* argument that a national consensus is growing to eliminate adult LWOP.

Second, in *Roper v. Simmons, supra*, at 569-70, 125 S.Ct. 1183, the Court posited three general differences between those under 18 and adult offenders: (1) a lack of maturity and an under-developed sense of responsibility; (2) susceptibility to negative influences and outside pressures; (3) a character that is not as well formed as that of an adult. None of these differences apply to a recidivist as a matter of law. An adult is responsible for his or her choices and has had adequate opportunity to mature. Defendants who committed three separate “most serious offenses” should be separated from society.

The United States Supreme Court determined in 2010 that LWOP sentences were appropriate for juveniles that committed murder. *Graham v. Florida, supra*. Two years later, that decision was set aside and the Court determined that LWOP sentences for juveniles violated the Eighth Amendment unless the court or jury considered mitigating circumstances

⁸ Lerner, *supra*, note 2.

⁹ Nellis, *supra*, note 3.

before imposing JLWOP.¹⁰ Now, the “national consensus” is that JLWOP sentences are not appropriate for any juvenile who has not had the opportunity to offer mitigating circumstances to a judge or jury “before imposing the harshest possible penalty for juveniles.” *Miller v. Alabama, supra*, 132 S.Ct. 2475. The decision repeats *Roper’s* analysis that juveniles have diminished capacity and greater prospects. *Miller* at ---, 132 S.Ct. 2455, 2464. It then pointed out another significant difference between juvenile and recidivist defendants: Only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior. *Miller* at ---, 132 S.Ct. 2455, 2464. The Court’s analysis focused on youth’s immaturity and general lack of recidivism, not aspects that apply to adult offenders. None of *Miller’s* reasoning applies to entrenched criminals who, among other crimes, commit three most serious offenses as an adult. These adults have had the opportunity to mature and learn to act better but *choose* to endanger Washington’s citizens.

Miller further excepted itself from issues related to adult sentencing. The Court stated at page ---, 132 S.Ct. 2455, 2470:

“We have by now held on multiple occasions that a sentencing rule

¹⁰ After reviewing each United States Supreme Court case from *Weems* through *Miller*, the comment of Chief Justice Burger appears entirely accurate: “What the Court means is that a sentence is unconstitutional if it is more severe than five justices think appropriate.” *Solem v. Helm, supra* at 305 (Burger, Chief Justice, dissenting).

permissible for adults may not be so for children. Capital punishment, our decisions hold, generally comports with the Eighth Amendment—except it cannot be imposed on children. So too, life without parole is permissible for nonhomicide offenses—except for children. Nor are these sentencing decisions an oddity in the law. To the contrary, '[o]ur history is replete with laws and judicial recognition' that children cannot be viewed as simply as miniature adults.' (citations omitted).

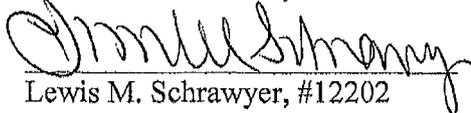
Miller therefore further separates juvenile defendants from adult defendants. The underlying difference in concepts is fundamentally that youth should not be seen as a lifetime public danger while adults with three most serious offense convictions have already proved they are a serious public danger. *Miller* stated that all of these requirements are because a juvenile is not an adult. In simple terms, nothing from the Supreme Court's Eighth Amendment analysis in recent history relates *in any manner* to adult sentencing.

CONCLUSION

This Court should hold that the Eighth Amendment does not require the State of Washington to eliminate adult life without possibility of parole sentences.

Respectfully submitted this 11th day of October, 2013.

DEBORAH KELLY, Prosecutor



Lewis M. Schrawyer, #12202
Deputy Prosecuting Attorney
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CERTIFICATE OF DELIVERY

Lewis M. Schrawyer, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically on October 11, 2013, to:

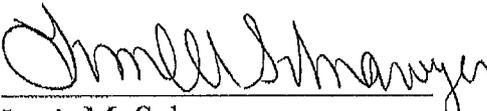
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