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NO. 67572-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GUY ROOK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **The unwarranted use of a stun belt throughout his jury trial violated Mr. Rook's constitutional right to due process of law.**

The trial court ordered Guy Rook to wear a stun-belt during his jury trial based upon the sentence he faced, the judge's unspecified concerns about security in the courtroom, and Mr. Rook's apparent agreement to the form of the restraints. The ruling was not based upon proof that Mr. Rook was an escape risk, was likely to injure anyone in the courtroom, or would be disorderly, and Mr. Rook did not validly waive his constitutional right to appear in court without restraints. The restraints thus violated Mr. Rook's constitutional right to be free from restraint during his jury trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); State v. Williams, 18 Wash. 47, 50, 50 P. 580 (1897).

a. Mr. Rook was restrained during his jury trial. Mr. Rook was required to wear the "R-e-a-c-t System Band-It" during trial. CP 102-05, 534-35. The Band It is designed to restrain and control the activity of the individual wearing it, and Mr. Rook was instructed that he would be subjected to 50,000 volts of electricity if he made any hostile movements, attempted to escape, or tampered with the system. CP 98, 107; 4/6/11RP 43. The order was made at the request of the King County Jail, which

asked the court to restrain Mr. Rook and cited the Band-It as the preferable method of restraint. CP 507-24. On appeal, however, the State contends the Band-It "does not constitute 'restraints' in the traditional sense as the term is used in relevant case law." Brief of Respondent (BOR) at 14.

This disingenuous argument is refuted by Washington cases specifically addressing whether the Band-It or equivalent stun-belts are unconstitutional restraints. State v. Thompson, ___ Wn. App. ___, 2012 WL 2877533 at *13-14 (No. 63241-8-I, 7/16/2012) (holding that "the court did not err in ordering physical restraints" which included the Band-It system plus soft-restraints); State v. Monschke, 133 Wn. App. 313, 336, 135 P.3d 966 (2006) (assessing the validity of an order for defendant to wear a stun belt by considering the factors relevant to deciding whether or not to restrain a defendant), rev. denied, 159 Wn.2d 1010, cert. denied, 522 U.S. 841 (2007). A stun belt is clearly understood by Washington courts to be a form of restraint.

Additionally, the Eleventh Circuit has discussed the restraining effects of a stun belt and found that

> stun belts plainly pose many of the same constitutional concerns as do other physical restraints, though in somewhat different ways. Stun belts are less visible than many other restraining devices, and may be less likely to interfere with a defendant's entitlement to the presumption of innocence. However, a stun belt imposes a substantial burden on the ability of a defendant to participate in his

> own defense and confer with his attorney during a trial. If activated, the device poses a serious threat to the dignity and decorum of the courtroom.

United States v. Durham, 287 F.3d 1297, 1306 (11th Cir. 2002). The fact that a stun belt is perhaps less restraining than shackles or handcuffs does not mean that it is not a restraint.

The State also suggests that, because the Band-It was not visible to the jury, Mr. Rook's due process rights were not violated. BOR at 15. Due process and the defendant's right to be present and participate in his own defense are prejudiced by the unwarranted use of restraints. State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981) ("Restraints are viewed with disfavor because they may abridge important constitutional rights, including the presumption of innocence, privilege of testifying in one's own behalf, and right to consult with counsel during trial."). The Ninth Circuit found that an individual wearing a stun belt might not be able to adequately confer with his attorney for fear of retaliation through the use of the shocking mechanism. Gonzalez v. Pliler, 341 F.3d 897, 900 (9th Cir. 2003). "'The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely' hinders a defendant's participation in defense of the case, 'chill[ing] [that] defendant's inclination to make any movements during trial -- including those movements necessary for effective communication with counsel.'"

Id. (quoting Durham, 287 F.3d at 1305). Mr. Rook's right to be present was affected in the same manner. See 4/14/11RP 12-15.

In addition to protecting a defendant's due process rights, restraints are typically prohibited from courtrooms to preserve the dignity and decorum of the court as a place of justice and equal rights under the law. See Durham, 287 F.3d at 1306 (stating that a stun belt "poses a serious threat to the dignity and decorum of the courtroom"). "It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country." Allen, 397 U.S. at 343. The Supreme Court in Allen goes on to discuss how physical restraints are "an affront to the very dignity and decorum of judicial proceedings." Id. at 344. The dignity of the court is also harmed by stun belts that inhibit the defendant's ability to effectively participate in the proceedings.

b. Mr. Rook did not offer a knowledgeable and effective waiver of his right not to be retrained. The State concedes that Mr. Rook did not knowingly, intelligently, and voluntarily waive his right to be free from trial restraints. BOR at 19. Instead, the State argues that Mr. Rook's "agreement is still a relevant consideration in determining whether any

error occurred." Id.[1] The State does not explain why an "agreement" to waive one's constitutional rights need not meet the same criteria as a "waiver" of those rights.

In order for a defendant to knowingly and effectively waive one of his constitutional rights the court must ensure that the defendant fully understands what he is giving up. Johnson v. Zerbst explains what is required and directs that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights." 304 U.S. 458, 464, 58 S. Ct. 1019, 83 L. Ed. 2d 1461 (1938). "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id.

Mr. Rook's conduct and the circumstances of the case demonstrate there was no valid waiver, because Mr. Rook was forced by the trial court to agree to wear the Band-it or suffer from more severe forms of restraint.

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[1] The State's citation to State v. Elmore, 139 Wn.2d 250, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837 (2000), to support this proposition is misplaced. Although Elmore's counsel agreed that the defendant could appear on the first day of voire dire in shackles, the court found the shackling was error, but determined the error was harmless. Elmore, 139 Wn.2d at 274. Importantly, Elmore had already pled guilty and was selecting a jury only for the death penalty portion of his case. Id. at 263, 272.

> The Court: Okay. So I guess my initial point is, I haven't made any ruling as to whether I will require it or not, but I do know that the security – the way it looks is going to be much different if you choose to have it or if I order it, even over your objection.

4/6/11RP 45 (emphasis added); accord 4/14/11RP 13 ("You will be more restricted if you don't have a band, I will guarantee that."). Mr. Rook's apparent acquiescence to wearing the Band-It was thus coerced by the threat that the only other option was to be subject to more significant restraint.

Because Mr. Rook was forced to either agree to wear the stun belt or to be subject to greater restraint, his agreement cannot be viewed as a knowing, intelligent and voluntary waiver of his right to be free from restraints while in court. See United States v. Braunstein, 474 F. Supp. 1, 11 (D. N.J. 1978) (finding that "[t]he court will not direct that any waiver be made as a condition for a ruling" and "[w]aivers, to be effective must be knowledgeable and voluntary"). Mr. Rook's waiver was not voluntary because it was made under the duress of being threatened with more severe restraints. It cannot justify the trial court's restraint order.

c. The judge must set forth a factual basis for using restraints on the record. The trial court's decision to restrain Mr. Rook was based in large part upon its unspecified concerns about the security of the courtroom. The State claims the court's failure to make these concerns

part of the record may be excused because it would require the court to detail the perceived security inadequacies to Mr. Rook, thus allowing him to take advantage of them. BOR at 19.

Precedent requires the court to base a finding of the need for restraints on evidence that the defendant poses a risk of escape, intends to injure someone, or cannot otherwise behave in an orderly manner in court. See In re Persistent Restraint of Davis, 152 Wn.2d 647, 695, 101 P.3d 1 (2004). The court's exercise of its discretion in requiring restraints must be based upon facts of the individual case set forth in the record. Hartzog, 96 Wn.2d at 392. There is no support in these or other cases for the courtroom security exception urged by the State.

d. Mr. Rook's courtroom conduct does not provide an alternative basis for upholding the trial court's ruling. The trial court decided to restraint Mr. Rook based only upon (1) the life sentence he was facing, (2) vague concerns for courtroom security, and (3) Mr. Rook's agreement to the stun-belt; the court declined to make any of the findings of fact proposed by the King County Jail. 6/4/11RP 45, 52. The State claims Mr. Rook's courtroom conduct offers an alternative basis to uphold the court's decision. BOR at 18. A careful review of the record, however, reveals the State claim is exaggerated. Id.

The State can offer no incident where Mr. Rook threatened to escape or injure anyone. Instead, the State refers to Mr. Rook's language in court. The purpose of courtroom restraints, however, is to maintain courtroom security not to prevent the defendant from participating in the proceedings against him. See State v. Finch, 137 Wn.2d 792, 850, 975 P.2d 967 (1999).

The State claims Mr. Rook was "verbally abusive to the prosecutor, defense counsel, and the court." BOR at 18. The record, however, does not support this conclusion. For example, the State asserts as a fact that Mr. Rook pounded the table at a pretrial hearing. BOR at 3 (citing 2/4/11RP 81, 96-97). The transcript, however, was prepared by a transcriptionist from a taped recording, not by a court reporter. The transcriptionist has no idea who is pounding the table, just as he could not identify who was causing the "stapling interference" noises moments earlier. 2/4/11RP 79. Moreover, pounding counsel table for emphasis is a legal tradition, not a reason to shackle a pro se defendant.[2]

Prior to trial, Mr. Rook appeared in court a number of times to address whether he had received the discovery he needed to represent

[2] This Court may remember the old saying, "When the law is against you, argue the facts. When the facts are against you, argue the law. When both are against you, pound the table." See William Henderson, "Second Look at Second City," Legal Affairs Nov-Dec. 2055, available at http://legalaffairs.org/issues/November-December-2005/review_henderson_novdec05.msp (last viewed 9/28/12).

himself. 1/7/11RP 35, 38; 2/4/11RP 86, 88-89, 95, 96; 2/18/11RP 120-22; 4/6/11RP 6. During these hearings Mr. Rook would occasionally offer his theory that the prosecution was meritless and therefore corrupt, but there were no threats or indications that Mr. Rook wanted to harm anyone. The one use of profanity was directed to the lawyer Mr. Rook had just relieved of his responsibilities. 11/22/10RP 26. In fact, the pretrial hearings were sometimes light-hearted, with the prosecutor and even the court laughing, occasionally at Mr. Rook. 1/14/11RP 51, 53, 54, 57, 58, 64; 2/4/11RP 71, 75, 83, 95. Most importantly, Mr. Rook did not threaten the judge, prosecutor or his lawyer. See Thompson, 2012 WL 2877533 at * 3-6, 13 (restraints proper where defendant threatened to kill defense counsel and prosecutor and repeatedly disrupted proceedings).

The State points to only one time during Mr. Rook's jury trial where it claims he was "disruptive." BOR at 18 (citing 6/29/11RP 51). After Mr. Rook's testimony was over and the jury was exiting the courtroom, Mr. Rook said, "They don't want you to hear this" and "They don't want you to hear my --- wasn't drunk." 6/29/11RP 51. Once the entire jury was out of the courtroom, the trial court told Mr. Rook he was "one comment from me asking the officer to active [the stun belt]."[3] Id.

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[3] The jail staff, however, had made it clear that they would not active the Band-It because the wearer was angry or shouting. 4/6/11RP 41. "He would have to be actively involved with [sic] refusing the officer's direct order, attempting to escape,

This lone example does not support the State's argument that Mr. Rook was consistently disruptive. Nor does it show that he was threatening or trying to escape. See Thompson, 2012 WL at *4-7, 13 (restraints proper where defendant jerked away from jail officers in apparent escape attempt, injuring himself and another person, repeatedly threatened to kill his attorney and the prosecutor, screamed at the trial court judge and referred to her as a "Power-tripping bitch" who should be killed).

While Mr. Rook occasionally expressed his disagreement with the prosecution against him, he was not threatening and did not present an escape risk. Mr. Rook did nothing that would provide an alternate justification for the court's decision to restrain him during trial.

e. Mr. Rook's conviction must be reversed and remanded for a new trial. A defendant may not be physically restrained during trial simply because he is "potentially dangerous." Finch, 137 Wn.2d at 852; Hartzog, 96 Wn.2d at 400. Thus, the use of restraints could not be based simply upon the life sentence Mr. Rook faced. See Finch, 137 Wn.2d at 853 (error to shackle defendant facing death penalty in absence of evidence he was an escape risk, threat to others, or disruptive). The trial court abused its discretion by ordering Mr. Rook restrained based upon

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assaulting an individual, or visibly tampering with the device." Id. Displeasure with the court's rulings would not "rise to the level, as long as he remains seated and does move forward towards the bench." Id. at 41-42.

unnamed security concerns about the courtroom, Mr. Rook's coerced agreement, and the sentence he faced.

The unwarranted use of restraints during trial is a constitutional error that is presumed prejudicial. State v. Damon, 144 Wn.2d 686, 632, 25 P.3d 418, 33 P.3d 735 (2001); Finch, 137 Wn.2d at 839. The State thus bears the burden of proving the error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Damon, 144 Wn.2d at 632. It is not, as the State suggests, Mr. Rook's burden to show prejudice. BOR at 21-22.

The State argues any error is harmless simply because the restraint was not visible to the jury.[4] BOR at 21. As argued above, however, physical restraints impeded Mr. Rook's ability to be fully present in court. He had to be ever mindful of the instructions provided to him by the jail staff as to what movements he could and could not make in court. He thus could not listen with the same attention or react as naturally as he would if he had not been restrained. Not only was Mr. Rook present and visible to the jury throughout the entire trial, he was the only defense witness. He was prejudiced because he was unable to be fully present at his jury trial.

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[4] The State does not respond to Mr. Rook's argument that the facts of his case are not so overwhelming that the evidence presented at trial was not so overwhelming that it necessarily leads to the conclusion that Mr. Rook was guilty. Appellant's Opening Brief at 25-25; BOR at 20-22.

Other jurisdictions have looked carefully at the adverse effects of stun belt restraints, even if they are not visible to the jury. See Pliler, 341 F.3d at 900-01 (stun belt would increase defendant's anxiety when testifying and impact demeanor); Durham, 287 F.3d at 1306; People v. Mar, 28 Cal.4th 1201, 52 P.3d 95, 106, 124 Cal.Rptr.2d 161 (2002); Wrinkles v. State, 749 N.E.2d 1179, 1194-95 (Ind. 2001), cert. denied, 535 U.S. 1019 (2002). The State did not met its burden of showing that the unneeded restraints did not prejudice Mr. Rook's constitutional right to be present and participate in his defense. His conviction must be reversed and remanded for a new trial. Damon, 144 Wn.2d at 695-96.

2. **Mr. Rook's sentence of life without the possibility of parole violates the cruel punishment clause of the Washington Constitution.**

Cases challenging criminal sentences under Article I, section 14 are analyzed using four factors: (1) the nature of the offense, (2) the legislative purpose behind the sentencing statute, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for similar offenses in Washington. State v. Fain, 94 Wn.2d 387, 395-97, 617 P.2d 720 (1980); accord State v. Korum, 157 Wn.2d 614, 640, 141 P.3d 13 (2006); State v. Rivers, 129 Wn.2d 697, 712-13, 921 P.2d 495 (1996). In response to Mr. Rook's detailed analysis of the four factors, the State argues these factors "merely

guide the court," thus suggesting this Court may utilize other factors in reviewing the constitutionality of Mr. Rook's sentence. BOR at 24 (citing State v. Gimarelli, 105 Wn. App. 370, 381-82, 20 P.3d 430, rev. denied, 144 Wn.2d 1014 (2001)). Gimarelli and the case it relied upon, however, simply stand for the proposition that no one factor is dispositive; all must be considered. Gimarelli, 105 Wn. App. at 381-82 (reviewing all four factors); State v. Morin, 100 Wn. App. 25, 30-33, 995 P.2d 113 ("applying the four part test to this case"), rev. denied, 142 Wn.2d 1010 (2000).

a. Factor One - The nature of the offense. The first Fain factor requires that court consider the nature of the offense when determining if the punishment is grossly disproportionate. Although one of the three "strike" offenses cannot be considered alone, "[]the nature of the offense is also a factual question; proportionality standards apply "to a specific set of facts." Morin, 100 Wn. App. at 31. The facts of Mr. Rook's vehicular assault conviction demonstrate that he was involved in a terrible automobile accident. Mr. Rook was not found to be intoxicated, but was distracted after his girlfriend dumped a drink on his lap and knocked off his glasses impairing his ability to see while he was driving. CP 192; 6/29/11RP 18, 21, 23, 31. Morin recognizes there may be some cases where the facts of a particular crime might not justify the sentence of life without the possibility of parole while other cases might. 100 Wn. App. at

34, n. 29 ("We note that given the range of possible conduct that may constitute indecent liberties by forcible compulsion, there may be circumstances which call for a different result."). Similarly, the facts of Mr. Rook's case present the situation where a vehicular assault conviction does not warrant life without the possibility of parole.

b. Factor 2 - The purpose of the legislation. The Supreme Court described the purpose of the POAA as "to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process." State v. Thorne, 129 Wn.2d 736, 771-72, 921 P.2d 514 (1996). Sentencing Mr. Rook to life without the possibility of parole does not serve the purpose of instilling trust in the criminal justice system. Allowing for an individual's reckless mistake, an accident, to be the impetus for taking away their freedom for the rest of their life does not promote faith in the justice system, it promotes fear of irrational sentences as punishment for tragic accidents.

c. Factor Three – The punishment for similar offenses in other jurisdictions. The State urges this Court to discount Mr. Rook's analysis of the sentence he would receive for the same conduct in other

jurisdictions because it is based upon the jury verdict rather than the prosecutor's interpretation of the evidence produced at trial. BOR at 27-33. Sentencing in Washington, however, is based upon the facts found by the jury or admitted by the defendant.[5] Blakely v. Washington, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); State v. Suleiman, 158 Wn.2d 280, 288-89, 143 P.3d 795 (2006); RCW 9.94A.530(2); 535(2), (3); 537(3). The jury did not find that the victim sustained great bodily harm, did not find that Mr. Rook was driving under the influence of alcohol or drugs, and did not find that Mr. Rook left the scene of the accident. CP 210, 191- 93. This Court must reject the State's efforts to compare Mr. Rook's vehicular assault conviction to crimes in other jurisdictions that contain elements not found by his jury.

In response to Mr. Rook's detailed analysis of what sentence he would receive in all 49 sister states, the State cites a few cases and statutes from other states that indicate that Mr. Rook would be subject to strict penalties if charged and convicted there. Proving that Mr. Rook might receive a tough sentence in other states does not demonstrate that the sentence of life without the possibility of parole was not cruel or unusual.

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[5] A rare exception is the existence and comparability of the offender's prior convictions. In re Personal Restraint of Lavery, 154 Wn.2d 249, 252, 111 P.3d 837 (2005).

In fact, the State has not demonstrated that Rook would receive a mandatory life without parole sentence in any state.

i. *The State incorrectly claims Mr. Rook would be convicted of assault with a deadly weapon in North Carolina or California and therefore sentenced as a persistent offender.* The State asserts that Mr. Rook could have been found guilty of assault with a deadly weapon in North Carolina and thereby subject to a life without the possibility of parole sentence. BOR at 28-29 (citing State v. Jones, 353 N.C. 159, 538 S.E.2d 917 (2000); N.C.Gen.Stat. § 14-32(b)). In fact, North Carolina's serious injury by motor vehicle statute is more comparable to Washington's vehicular assault statute, but it requires the defendant be driving while under the influence of alcohol or drugs, a fact that was not found by Mr. Rook's jury. RCW 46.61.522(1)(a); N.C.Gen.Stat. § 20-141.4(a3); N.C.Gen.Stat. § 20-138.1; CP 192.

North Carolina's assault with a deadly weapon statue requires (1) intent to kill and/or (2) the infliction of serious bodily injury, but these are not elements of Washington's vehicular assault. N.C.Gen.Stat. 14-32(b); Jones, 538 S.E.2d at 922-23. "[A] driver who operates a motor vehicle in a manner such that it constitutes a deadly weapon, thereby causing serious injury to another, may be convicted of AWDWISI provided there is either an actual intent to inflict injury or culpable or criminal negligence from

which such intent may be implied." Jones, 538 S.E.2d at 922-23; State v. Eason, 242 N.C. 59, 86 S.E.2d 744, 778 (1955). Thus, in Eason, a police officer jumped onto the defendant's truck to stop him from driving, and the defendant drove the car in such a manner that he successfully ejected the officer from the vehicle. Eason, 86 S.E.2d at 778. In Jones, the defendant used his car to bump the car in front of him, telling the driver to get out of his way. The defendant then drove on the wrong side of the highway substantially over the speed limit, all while under the influence of a combination of medication and alcohol, and crashed into a car that was trying to avoid a collision. Jones, 538 S.E.2d at 921, 923. The facts of Mr. Rook's case do not prove the necessary intent to use his car as a weapon required for a conviction under this North Carolina statute.

The State also claims Mr. Rook's conduct in would have qualified as an assault with a deadly weapon in California and therefore been eligible for sentencing under that state's three-strikes legislation. BOR at 29 (citing People v. Wright, 100 Cal. App. 4th 703, 705 (2002)). The State misinterprets the mental state required by California law. California defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on another person." Cal.Pen.Code § 240. The required mental state is "the intentional commission of an 'act that by its nature would probably and directly result in the application of physical

force on another person.'" Wright, 100 Cal. App. 4th at 705. The California Supreme Court explained:

> [A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. . . . [M]ere recklessness or criminal negligence is still not enough . .

People v. Williams, 26 Cal.4th 779, 788, 29 P.3d 197, 111 Cal.Reptr.2d 114 (2001) (emphasis added).

Thus, the Wright Court upheld convictions for assault with a deadly weapon where the defendant twice drove his pickup at people with whom he had contentious relationships. In one incident he smirked when he came within two to three feet of a police department employee who had to run to avoid being hit. In the other he got in a fight with another man, hit him with a baseball bat, and then drove by him two times at a high rate of speed, once coming with 10 feet of the man and then striking him so that he fell over. Wright, 100 Cal.App.4th at 707-08. It thus seems clear that Mr. Rook could not be convicted for assault with a deadly weapon for an accident where his conduct was rash or heedless, but he was not using his car as a weapon.

Moreover, California's recidivist sentence statute allows for the possibility of parole after 25 years. Cal.Pen.Code § 667.5(d). There is a

significant difference in a mandatory sentence of life without the possibility of parole and life with the possibility of parole after 25 years. The fact that Washington is the only jurisdiction where Mr. Rook would be subject to mandatory life without the possibility of parole makes it clear that this punishment is grossly disproportionate.

ii. *The State's argument that other states' recidivist sentencing laws include other offenses is irrelevant to Mr. Rook's sentence*. The State also argues that Rook's sentence is not grossly disproportionate because there are states where a lesser crime might subject an individual to conviction under a three strikes law. BOR at 29-30. This argument is irrelevant. A hypothetical discussion of other crimes that Mr. Rook could have (but did not) commit, which would make him eligible for conviction as a habitual offender in other states does not shed light on the reasonableness of the current sentence for the current crime.

The State for example, mentions that Indiana has a strict "three strikes" statute wherein life without the possibility of parole could be imposed for a variety of crimes. BOR at 29-30. But the Indiana crimes comparable to vehicular assault do not subject the offender to a life sentence. Indiana criminalizes criminal recklessness. This offense is a misdemeanor if committed with a motor vehicle and a Class D felony if it results in serious bodily injury due to "aggressive driving," but in neither

case is it subject to recidivist sentencing. Ind.Code §§ 35-42-2-2; 35-50-2-2(b)(4). Moreover, the sentence of life without the possibility of parole is discretionary in Indiana, and the jury must find the prior convictions beyond a reasonable doubt. Ind.Code § 35-50-2-8.5(c), (d), (e).

Mr. Rook could not be sentenced to life without the possibility of parole for a felony committed in Montana, but the State suggests he could receive a high sentence. Mont.Code § 46-18-219; BOR at 30. While the court must impose a 5 or 10-year minimum term with Mr. Rook's prior record, the rest of the sentence may be deferred or suspended. Mont.Code § 46-18-502(3).

Mr. Rook is also not subject to Nevada's persistent offender sentencing provisions because he was not driving while under the influence of alcohol. Nev.RevStat. § 484C.430(1)(f). Moreover, Nevada's habitual criminal sentencing statute gives the sentencing court the discretion to impose life without the possibility of parole, life with the possibility of parole after 10 years, or a 25-year prison term with parole eligibility after 10 years. Nev.Rev.Stat. § 207.010(b). Life without the possibility of parole is not an option in Vermont, where the court has the discretion to impose any sentence up to life. 13 Vt.Stat. § 11, 11a.

The State also argues Mr. Rook could have received a high sentence in several states, claiming he would have been convicted of

assault in Alaska or Oregon. BOR at 30-32. The State is incorrect. Second degree assault in Alaska requires "serious" bodily injury, not the substantial bodily injury found by Mr. Rook's jury. Alaska Stat. § 11.41.210(a)(2). And Oregon's second degree assault statute requires an intentional assault or recklessly causing physical injury with a weapon "under circumstances manifesting extreme indifference to human life." Or.Rev.Stat. § 163.175(1). The sentence in neither state would be life without the possibility of parole. Alaska Stat. § 12.55.125(d)(4) (6 to 10 years); Or.Rev.Stat. §§ 137.637 (determinate sentence set by Oregon Crime Commission).

The State also asserts that Mr. Rook could have been convicted of aggravated battery in Kansas, which requires "great bodily harm" because that term is not defined by statute in Kansas. BOR at 31-32; Kan.Stat. § 21-3201(c). The State fails to mention, however, that Kansas repealed its habitual offender statute, in 2011. Kan. Laws of 2010, ch. 136, § 307.

iii. *States with statutes similar to Washington's vehicular assault do not authorize the sentence of life without the possibility of parole*. None of the states that have crimes comparable to Washington's vehicular assault by means of reckless driving authorize the punishment of life without the possibility of parole. AOB at 36-37; Appendix at i-ii. While a number of states criminalize similar conduct, most contain

elements Mr. Rook was not convicted of, such as serious bodily harm or driving while under the influence of alcohol or drugs. AOB at 38; Appendix at iii-xiv.

One example is Colorado. Colorado's vehicular assault statute requires "serious bodily injury," which is more serious than the substantial bodily injury required in Washington. Colo.Rev.Stat. § 18-3-205(1)(a). Vehicular assault is a Class 5 felony in Colorado, so anyone convicted of that crime, with or without Mr. Rook's prior record, would not be subject to Colorado's three strikes law. Colo.Rev.Stat. § 18-3-205(c); Col.Rev.Stat. § 18-1.3-801(1)(a) (applicable only to Class 1 and 2 felonies or Class 3 violent felonies). And Colorado defendants sentenced as habitual offenders may be paroled after 40 years. Col.Rev.Stat. § 18-1.3-801(1)(c).

Thus, in Colorado, as in other states, Mr. Rook would not receive a life without the possibility of parole sentence and would not even be eligible for a three strikes sentence even if he were convicted under that state's vehicular assault statute.

d. Factor Four – The punishment for similar offenses in Washington. Vehicular assault and assault by watercraft are equivalent Washington crimes, both crimes involve the infliction of serious bodily harm by operating a vehicle in a reckless manner, but one is on land and

the other on water. Vehicular assault, however, is subject to sentencing under the POAA and assault by watercraft is not. AOB at 38-40. The State counters that this factor is unimportant and the comparison irrelevant because the current offense is not to be "considered in a vacuum." BOR at 33-35. The State is incorrect. It is inequitable that an individual Mr. Rook's criminal history, but who is convicted of assault with a watercraft rather than an automobile, will receive a drastically lower sentence. This inequity demonstrates that Mr. Rook's severe punishment is unconstitutional.

e. This Court must vacate Mr. Rook's sentence. Mr. Rook appears to be the only person currently serving life without the possibility of parole in Washington as a sentence for vehicular assault.[6] A careful review of all four Fain factors demonstrates that this sentence is greatly disproportionate to Mr. Rook's offense and therefore unconstitutional. This Court must vacate his Mr. Rook's sentence and remand for a sentence within the standard sentence range. Fain, 94 Wn.2d at 402-03.

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[6] The most recent list of three-strike offenders in Washington (current as of 2008) shows only one offender sentenced for vehicular assault and one with a prior conviction for vehicular assault. State of Washington Sentencing Guidelines Commission, Two-Strikes and Three-Strikes: Persistence Offender Sentencing in Washington State Through June 2008 at 9 (February 2009) (available at www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2011.pdf). The first offender's sentence, however, was vacated after a successful personal restraint petition. Id. at 4; In re Personal Restraint of Keller, No. 51797-0-I (6/5/06) (2006 WL 1523333).

3. **Mr. Rook's sentence of life without the possibility of parole violates the Eighth Amendment's prohibition of punishment that his cruel and unusual.**

Mr. Rook also argues his sentence violates the Eighth Amendment's prohibition of cruel and unusual punishment. AOB at 42-49. The State argues that he cannot rely upon Graham v. Florida to support his argument because the Graham Court did not address a life sentence as a recidivist. BOR at 36-37. The Graham reasoning, however, is relevant to the determination in this case. The Supreme Court found that "[e]mbodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" Graham v. Florida, 560 U.S. ___, 130 S. Ct. 2011, 2021, 176 L. Ed. 2d 825 (2010) (quoting Weems v. United States, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910)); accord Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 2463, 183 L. Ed. 2d 407 (2012).

The first step of determining the constitutionality of a sentence is "comparing the gravity of the offense and the severity of the sentence." Graham, 130 S. Ct. 2011, 2022. The sentence Rook received is the second most severe sentence an individual can receive. Life without the possibility of parole is traditionally reserved for the most serious offenders and the offense that Rook is convicted of is only a class B felony that is

punishable by a maximum of ten years. RCW 46.61.522; RCW 9A.20.021. A sentence of life without the possibility of parole for a class B felony is not a punishment that is equitable to the gravity of the offense.

Additionally, Graham is part of a line of cases adopting categorical bans on certain sentences based upon "mismatches between the culpability of a class of offenders and the severity of a penalty." Miller, 132 S. Ct. at 2463. Under the Eighth Amendment, this Court should conclude that a sentence of life without the possibility of parole a Washington vehicular assault conviction is always unconstitutional because the punishment is so disproportionate to the elements of the crime, which do not require intent or serious bodily injury.

This Court must reverse Mr. Rook's sentence because it violates the Eighth Amendment. Graham, 130 S. Ct. at 2034.

B. CONCLUSION

For the reasons stated above and in his opening brief, Mr. Rook's vehicular assault conviction must be reversed and remanded for a new trial because he was unconstitutionally restrained during his jury trial. In the alternative, his sentence of life without the possibility of parole is unconstitutional because it (1) violates article I, section 14's prohibition against cruel punishment, (2) violates the Eighth Amendment, (3) is based upon prior convictions found by the trial court by a preponderance of the

evidence in violation of the Fourteenth Amendment, and (4) is based upon prior convictions found by the trial court by a preponderance of the evidence in violation of his constitutional right to equal protection.

In the alternative, as agreed by the State, this Court must remand for correction of the Judgment and Sentence because it incorrectly states the jury verdict. BOR at 39.

DATED this 10th day of October, 2012.

Respectfully submitted,

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Washington Appellate Project
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67572-9-I
v.	)	
	)	
GUY ROOK,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF OCTOBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANDREA VITALICH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] GUY ROOK 293154 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF OCTOBER, 2012.

X_____

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