No. 53879-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION TWO

In re the Personal Restraint of

RAYMOND MAYFIELD WILLIAMS,

Petitioner.

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE WASHINGTON DEFENDER ASSOCIATION

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Injustice anywhere is a threat to justice everywhere.
—Rev. Dr. Martin Luther King, Jr.

I. INTRODUCTION

Sparked by Mr. George Floyd's death, our nation's consciousness appears ready, at last, to start the difficult work of breaking down systemic and pervasive racial inequities. At all levels of government, legislators are making tremendous leaps forward in dismantling laws that disproportionally and unfairly impact populations of color. It is a time in which our collective understanding is being forced to confront persistent inequities and finally remedy the injustices laid bare (again) by Mr. Floyd's slaying. The Black Lives Matter movement demonstrates that there are times when we, as a society, need to leap forwards to address injustices.[1] We cannot always wait until there is a majority, or an indisputable national consensus, or a comfortable time, to recognize an historic wrong and fix it. This case allows this Court to address one such historic wrong, which not only disproportionately punishes people of

[1] *See, e.g.*, *Letter of June 4, 2020*, Supreme Court of Wash. (June 4, 2020), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf ("We continue to see racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems. . . . The legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will.").

color, but also punishes people for crimes committed when they were children. Advanced brain science and continued psychological research have clearly demonstrated that children do not have the capacity to make reasoned decisions, or understand the ramifications of their actions, the same way that adults do. And we, as a society, have chosen to embrace that new science and recognize that juveniles have less criminal culpability and greater capacity for rehabilitation.

Relevant here, the Washington Supreme Court has already held that crimes committed by juveniles and handled in the juvenile system cannot be counted as predicate offenses for the imposition of a life sentence under Washington's "three strikes" law. *See State v. Saenz*, 175 Wn.2d 167, 173, 283 P.3d 1094 (2012). Yet that same grace is not extended to those juveniles caught up in the adult criminal system—an indefensible loophole that allows the imposition of our State's most severe punishment on those whose criminal conduct includes the less culpable actions of a child.

Mr. Williams, the petitioner here, is a textbook example of how the Persistent Offender Accountability Act (the "Act") can be applied in ways that defy both our notions of justice and the purposes of the three strikes law. He was just 16 years old—and struggling against both homelessness and mental illness—when he agreed to be tried as an adult and pleaded

guilty to first-degree burglary. Only if this conviction for a crime committed as a juvenile is counted as a strike could he receive his sentence of life-without-parole ("life sentence") under the Act. Mr. Williams will die in prison because of a property crime he committed when he was a child. That cannot be right.

This Court should rule that the Washington Constitution categorically precludes the use of convictions for offenses committed as a juvenile as predicate offenses under the Act.

II. IDENTITY AND INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") of Washington, the Washington Association of Criminal Defense Lawyers ("WACDL"), and the Washington Defender Association ("WDA") (collectively, "amici") submit this brief as *amici curiae*.

III. STATEMENT OF THE CASE

The parties' briefs presented the relevant factual background, and it will not be repeated here.

IV. ARGUMENT

The most severe punishment possible in our state consists of a sentence of life in prison without the possibility of parole. "Like the death penalty, a life sentence without the possibility of parole is the deprivation of hope. It is the forfeiture of liberty for life." *State v. Moretti*, 193 Wn.2d

809, 836, 446 P.3d 609 (2019) (Yu, J., concurring). The Act imposes this harshest of sentences reflexively, stripping from the sentencing judge any discretion to account for relevant characteristics of the convicted person or the offense. While the legislature has authority to enact statutes that not only define crimes but also their punishment, "this 'authority is ultimately circumscribed by the constitutional mandate forbidding cruel punishment.'" *State v. Bassett*, 192 Wn.2d 67, 78, 428 P.3d 343 (2018) (quoting *State v. Fain*, 94 Wn.2d 387, 402, 617 P.2d 720 (1980)). Sentences automatically imposed by legislative fiat must still comply with not only the U.S. Constitution's Eighth Amendment, but also the more protective Washington Constitution. *See* Wash. Const. art. I, § 14. This brief provides some important historical and social context for this issue and then turns to a discussion of the constitutional issues.

A. Sentencing a person to life in prison based on a crime committed as a child fails to meet the three strikes law's limited purpose.

Mr. Williams' case exemplifies the injustice inherent in the Act's sentencing scheme, which mandates the harshest possible sentence even for defendants who commit predicate offenses as children—a result at odds not only with contemporary understandings of juvenile criminality and culpability, but also with the motivating principles behind the statute.

1. The Act was enacted at a time of widespread fear and misunderstanding.

First, amici offers some important historical context for the passage of the so-called three-strikes law that animates this case. In 1993, after a few, highly publicized crimes committed by repeat offenders peppered headlines, voters approved Initiative 593, and Washington became the first state in the nation to adopt a "three strikes" law—the Act.[2]

Sponsored by a Republican legislator whose daughter had been murdered by a "career criminal," Initiative 593 was viewed with skepticism even before its passage, with law enforcement officers predicting that the measure would not result in safer communities. And that "perception of increasing crime, once media sensationalism and political posturing are set aside, [was] not supported by statistics."[3] But such reasoned perspectives were no match for the passions of the early 1990s. A "get tough on crime" attitude permeated the national psyche, as did the view that judges were too lenient because certain people were "so

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[2] *See* Jennifer Cox Shapiro, *Life in Prison for Stealing $48?: Rethinking Second-Degree Robbery as a Strike Offense in Washington State*, 34 Seattle U. L. Rev. 935, 939–44 (2011) (discussing history of the initiative); Katherine Beckett & Heather D. Evans, ACLU of Wash., *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State* 16 (2020) ("ACLU Report").

[3] Daniel W. Stiller, Note, *Initiative 593: Washington's Voters Go Down Swinging*, 30 Gonz. L. Rev. 433, 437, 439 (1995); *see also id.* at 439–41 (exploring Washington crime statistics of the early 1990s).

culpable and irredeemable, and their offenses so heinous, that they do not deserve the individualized consideration normally afforded defendants in this country."[4]

In short, when Washington voters passed the Act, they did so without any apparent consideration given to the mitigating characteristics of youth, systemic racism, or socioeconomic factors that today are widely recognized by researchers, commentators, and courts.[5]

2. The law recognizes the uncontroversial principle that children are not adults.

Since the Act's passage over twenty years ago, our society's understanding of juvenile culpability has changed dramatically, resulting in a marked shift in the way courts treat children. Courts now know that the parts of the brain involved in behavioral control continue to develop well into a person's twenties, and that children therefore have diminished culpability. *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 471–72, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *State v. O'Dell*, 183 Wn.2d 680, 692–93,

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[4] Perry L. Moriearty, *Miller v. Alabama and the Retroactivity of Proportionality Rules*, 17 U. Pa. J. Const. L. 929, 977 (2015).

[5] Another contemporary development exacerbating the misguided punishment of the young and the racial disparity inherent in Washington's criminal justice system: the advent of the "auto-decline" system. Between 1992 and 1999, 49 states enacted laws to make it easier, and easy, to charge children as adults. "Eighty percent of the men sentenced to juvenile life without parole in Washington were sentenced between 1987 and 1999. While youth of color make up twenty-nine percent of the children in Washington, fifty percent of the men serving life without parole for crimes they committed as children are people of color." Straley, 89 Wash. L. Rev. at 991–92.

358 P.3d 359 (2015). Indeed, the U.S. Supreme Court reasoned that "[a]s compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (alteration in original) (citation and internal quotation omitted). As our state Supreme Court has observed, "studies reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." *O'Dell*, 183 Wn.2d at 692–93.

In light of the mitigating characteristics of youth, courts also accept that children cannot be held to the same standards as adults when meting out punishment: "Because juveniles have diminished culpability and greater prospects for reform . . . they are less deserving of the most severe punishments." *Miller*, 567 U.S. at 471–72 (quotation omitted); *see also, e.g.*, *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017) ("In accordance with *Miller*, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline

hearing or not."). This acknowledgement of diminished ability and culpability for juveniles was not accepted at the time of the Act's passage, resulting in little consideration—if any—of the mitigating characteristics of youth when the law was enacted.

3. Locking away people for crimes they committed as children does not advance the goals of the Act.

Ultimately, the Act's goals are incompatible with what we know today about children and young adults. The Washington Supreme Court has "concluded that the legislative purpose of the [Act] was to deter criminals from committing three most serious offenses and to segregate repeat offenders from society if they do." *State v. Witherspoon*, 171 Wn. App. 271, 302, 286 P.3d 996 (2012) (citation omitted). These purposes are not served by applying the Act's mandatory life sentence to those whose predicate offenses were committed when they were children. As the Washington Supreme Court has recognized, the overall juvenile justice system has "remained rehabilitative." *Saenz*, 175 Wn.2d at 173.[6] That objective is consistent with what we now know about the ability of youths to continue to develop and improve, and decidedly *inconsistent* with the retributive motivation behind the Act. As commentators have noted,

[6] It is for this reason that, among other notable distinctions, "juvenile offenses do not count as strikes under the [Act]." *Saenz*, 175 Wn.2d at 173.

"[t]hree-strikes laws have been harshly criticized as applied to adult offenders"—indeed, there is strong evidence that the Act does not have much of a deterrent effect even for *adults*[7]—"but they are even more discordant with ideas of fair punishment when a juvenile conviction is included as a predicate offense. The likelihood that the youthful offense was the product of immaturity is too compelling to allow it to be the basis for a later draconian sentence."[8]

Indeed, rather than decreasing violent crime, the Act, and its reflexive sentencing, has done little good in our community. It has, however, led to a dramatic increase in Washington's incarceration rate and prison population. Washington's incarceration rate is "more than three times higher than the average rate" recorded in other OECD countries. Indeed, Washington's population of prisoners serving life sentences (a punishment allowed by only *20 percent* of the world's countries), vastly exceeds the totals in other nations, as the below graphic shows:

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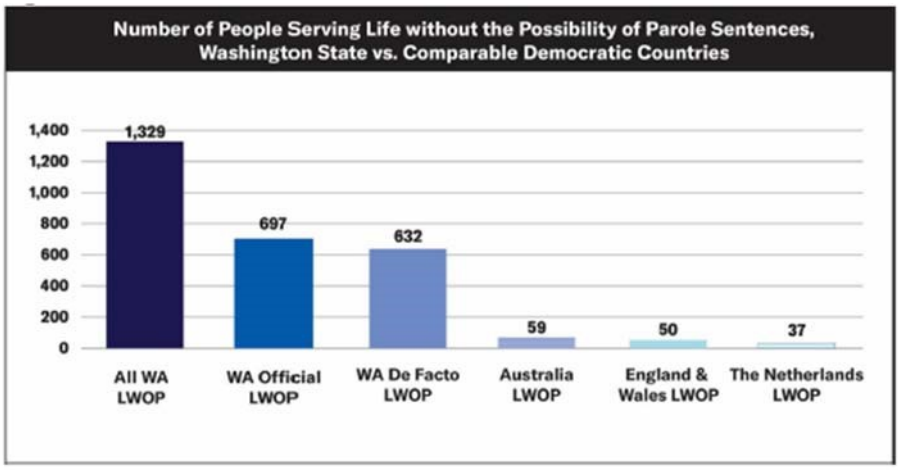
[7] *See* ACLU Report at 16–17, 21–22. Studies have compared crime trends in states with three strikes laws to trends in states without them, and found no statistically significant difference attributable to the enactment of persistent offender laws. *Id.* at 16–17. Other recent studies have found "no credible statistical evidence that passage of three strikes laws reduces crime by deterring potential criminals or incapacitating repeat offenders." *Id.* at 17.

[8] Scott et al., 88 Temp. L. Rev. at 709.



A result of this dramatic increase—which has occurred despite evidence that longer prison sentences provide no greater deterrent effect than shorter sentences—is an expanding and aging prison population, which has placed enormous costs on the State both financially and otherwise.[9]

Moreover, the Act disproportionately impacts vulnerable populations and people of color. "The negative effects of incarceration imposed by Washington's criminal legal system"—the Act included—"have been disproportionately imposed on people of color. These adverse effects include reduced employment and earnings, worsened mental and physical health, exacerbated housing instability, and increased debt."[10]

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[9] *See* ACLU Report at 4–5, 48–49. Notably, "[u]sing long and life sentences to incapacitate is also an inefficient means of protecting the public because recidivism rates decline markedly with age. . . . Even those with the most extensive criminal records desist from crime at relatively early ages, most commonly by their thirties." *Id.* at 48.

[10] ACLU Report at 50. These "adverse effects extend beyond incarcerated and formerly incarcerated people. For example, the children, partners, and relatives of the incarcerated experience a number of hardships, including diminished mental well-being, increased

Indeed, as is true nationally, in Washington racial disparities in "the prison population are starkest among those serving the longest prison terms. . . . [B]lack people comprise 3.5 percent of the state population, but 19 percent of those sentenced to prison and 28 percent of the defendants sentenced to life without the possibility of parole since 1986."[11] The high incarceration rates created and exacerbated by the Act "also impact the poor neighborhoods and communities from which the [incarcerated] are overwhelmingly drawn, exacerbating poverty, hardship, marginality, and inequality."[12]

The Act—which provides no opportunity for parole or early release—has served to magnify Washington's systemic inequalities. And when applied to those who committed predicate acts as children, it is not only indefensible, but unconstitutional as well.

B. The Court must consider all three strikes in assessing the constitutionality of the life sentence.

As a threshold matter, the Court's proportionality review must account for *all* predicate strikes in finding that it is cruel to impose a life sentence based in part on juvenile conduct. *See Fain*, 94 Wn.2d at 397–98

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stress, and reduced income." *Id*.

[11] ACLU Report at 51. "Native Americans are also notably over-represented among those who receive long and life sentences relative to their representation in the state population." *Id*.

[12] ACLU Report at 51.

(in determining whether Mr. Fain's sentence violated article I, section 14, the court analyzed "*each of the crimes* that underlies his conviction as a habitual offender" (emphasis added)); *see also* Pet'r Br. at 13–17. While the life sentence itself is technically imposed only for the third and final strike, a "three strikes" sentence can only be imposed when there are three qualifying events to trigger the application of the State's harshest sentence. Turning a blind eye to the first two predicates would essentially immunize the prior strikes and allow unconstitutional sentences to be immune from challenge—and the Court has *never* countenanced leaving injustices unaddressed. Here, the Court must assess whether a life sentence can be handed down when a predicate offense is committed by a child and still comply with our Constitution—a critical question that needs to be addressed, even when a first or second predicate is at issue.

Moreover, no case squarely holds that all three offenses are *not* part of an overall Act sentence—nor that each offense should *not* be considered. *See also* Pet'r Reply Br. at 12–13.

C. Imposing a life sentence based on childhood conduct categorically violates the Washington constitution.

Washington courts have long acknowledged that our state constitution provides its citizens with more protection than the U.S. Constitution. *See, e.g.*, *Fain*, 94 Wn.2d at 392 ("[W]e may interpret the

Washington Constitution as more protective than its federal counterpart."); *State v. Gregory*, 192 Wn.2d 1, 15, 427 P.3d 621 (2018) ("This court has repeatedly recognized that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment." (internal quotations marks, citation and alterations omitted)). Implicit in our state constitution's robust protection against cruel punishment is the continuing duty of Washington courts to develop article I, section 14 jurisprudence to ensure that it remains more protective than the Eighth Amendment.

Critically, the *Moretti* court left open the question of whether a sentencing an individual to life in prison without parole based on a childhood strike offense is cruel punishment. *See* 193 Wn.2d at 821 n.5 ("We express no opinion on whether it is constitutional to apply the [Act] to an offender who committed a strike offense as a juvenile and was convicted in adult court."). Mr. Williams allows this Court to address this open question, as he represents a class of prisoners that warrants categorical protection: inmates serving a life sentence because of a juvenile strike. To answer this question, the Court should apply the constitutional framework set forth in *Bassett*, which properly accounts for the mitigating characteristics of children in conducting a proportionality review. *See* 192 Wn.2d at 90–91. The bar on juvenile strikes is also

informed by *Saenz*, with the only difference here being Mr. Williams' waiver of decline.

Under the categorical analysis, a court (1) considers whether there is objective indicia of a national consensus against the sentencing practice at issue, and (2) exercises its "own independent judgment based on '"the standards elaborated by controlling precedents and by the [c]ourt's own understanding and interpretation of the [cruel punishment provision]'s text, history, . . . and purpose."'" *Id.* at 83 (alterations in original) (quoting *Graham*, 560 U.S. at 61).

1. A national consensus is emerging against life sentences for juvenile conduct.

The first step in the categorical bar analysis considers the national consensus regarding the sentencing practice at issue. *Id.* at 85. It looks at indicia of society's standards, including legislative enactments and state practice. *Id.* Not only has there been a sea-change in how we view the culpability of children in recent years—a development recognized across the nation and by the U.S. Supreme Court—but nine states have moved to eliminate juvenile strikes from their habitual offender statutes altogether. *See* Pet'r Br. at 20–23; Pet'r Reply Br. at 19.

Notably, a "consensus" does not mean a "majority." Nor does it require Washington to wait to address a historical wrong until other states

have first moved to address the same wrongs in their communities. In other words, a "consensus" cannot be so narrowly defined as to prevent this Court from taking the steps necessary to embrace the "evolving standards of decency that mark the progress of a maturing society." *Hall v. Florida*, 572 U.S. 701, 708, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). The *Miller* Court, for example, recognized that a majority of states need not be trending in a certain direction to find that there is a growing consensus that a sentencing practice violates the constitution. *See* 567 U.S. at 4; *see also Graham*, 560 U.S. at 62. Thus, the fact that some states still permit consideration of juvenile offenses in meting out life or near-life sentences should not restrict *this Court* from recognizing the shift away from this practice. Looking at the issue holistically, there is little dispute—and, indeed, a clear national consensus—that children cannot, and should not, be held accountable for criminal behavior in the same manner as adults.

Similarly, any reliance on cases predating courts' modern understanding of juvenile culpability and the cruelty of life sentences for juveniles should be rejected, as it does not reflect current trends. *See also* Pet'r Reply Br. at 17–18. Rather, "[i]t is more instructive to look at how our jurisprudence on juvenile sentencing has evolved to ensure greater protections for children." *Bassett*, 192 Wn.2d at 81.

2. A life sentence based on juvenile conduct is cruel punishment.

For the second step of the categorical analysis, the Court exercises its "own independent judgment based on the standards elaborated by controlling precedents and by the court's own understanding and interpretation of the cruel punishment provision's text, history, and purpose." *Id.* at 83 (quotation omitted). This analysis includes (1) consideration of the culpability of the class at issue in light of their crimes and characteristics, (2) the severity of the punishment in question, and (3) whether the challenged sentencing practice serves legitimate penological goals. *Id.* at 83–84. Here, a consideration of the facts and circumstances of this category of prisoners should convince this Court that imposing an irrevocable life sentence for conduct in part done as a child is cruel and constitutionally infirm.

First, the characteristics of the relevant class. As discussed already, both the law and society have recognized that children are less culpable than adults for criminal conduct. *See supra* Section IV(A)(2). Here, the group of prisoners represented by Mr. Williams is being punished in part for criminal conduct performed as children, regardless of the fact that the life sentence is imposed technically at the time of the last crime. Significantly, a crime committed by a juvenile who is charged in juvenile

court *cannot* count towards a three strikes sentence. *See Saenz*, 175 Wn.2d at 173. But children who enter the adult criminal justice system at a young age are no more culpable or mature than those who proceed through the juvenile system. The mitigating effects of childhood remain the same. What's more, a juvenile who, like Mr. Williams, waives the protections of juvenile court, "also waives the increased protections of the juvenile justice system, exiting a system designed to rehabilitate and entering a system designed to punish." *Id.* at 174.This Court should eliminate the discrepancy between juvenile offenses subject to juvenile adjudication and juvenile offenses subject to adult adjudication, especially in light of the flawed history and inequitable application of the declination process. *See supra* note 10.

Second, the punishment at issue in this case—life in prison without the possibility of parole—is the most severe punishment under Washington law. As the *Graham* Court explained, while the "State does not execute the offender sentenced to life without parole," it nevertheless "alters the offender's life by a forfeiture that is irrevocable." 560 U.S. at 69–70. Given the severity of the punishment, Justice Yu, in her concurring opinion in *Moretti*, expressed a "growing discomfort with the routine practice of sentencing individuals to life without the possibility of parole, regardless of the offense or the age of the offender." 193 Wn.2d at 835

(Yu, J., concurring). The facts of this case should rankle worse: Mr. Williams was 16 years old (and homeless, and struggling with depression) when he entered an unoccupied house, agreed to be charged as an adult, and pleaded guilty to his first strike (burglary). He was a child, pressed into an adult process. Science and sociology now agree that he lacked the ability to make informed decisions about any of these steps—and yet, he is now serving the harshest punishment available in our State. *See supra* Section IV(A)(2).

Third, the penological goals supposedly advanced by the sentence imposed here are not served by punishing juvenile conduct:

> [T]he long-term incarceration of young people, most of whom have experienced significant deprivation and trauma, combined with limited opportunities to engage in rehabilitative programming in prison, is in tension with a substantial body of research that demonstrates that youth is best understood as a mitigating circumstance, and that most young people benefit enormously from education and other rehabilitative programming.[13]

See supra Section IV(A)(3). When penological goals are not furthered by the imposition of a sentence such as life sentence, it "'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence

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[13] ACLU Report at 54.

an unconstitutional punishment." *Moretti*, 193 Wn.2d at 838 (Yu, J., concurring) (quoting *Gregory*, 192 Wn.2d at 24–25).[14]

Moreover, life without parole sentences are shown to have minimal deterrent effect, if any, and particularly for juveniles. *See supra* Section IV(A)(3). Finally, incapacitation is not served by counting juvenile strikes when we know that children are less culpable than adults. Mr. Williams and others with childhood strike offenses are being held to the same standard as those with three adult strikes, which fails to account for the difference in blameworthiness and capacity for change. The same is true for retribution: "Because '"[t]he heart of the retribution rationale"' relates to an offender's blameworthiness, '"the case for retribution is not as strong with a minor as with an adult."'" *Miller*, 567 U.S. at 472 (alteration in original) (quoting *Graham*, 560 U.S. at 71).

Finally, when considering life sentences, it is also important to recognize the disparate impacts that the criminal justice system has on society as a whole. Not only does a life sentence affect the individual sentenced, but if affects that person's community and society at large. Mr. Williams, for example, has a son growing up without his father. Further,

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[14] The absence of legitimate penological goals in cases like Mr. Williams' is particularly insidious given that *victims* of violence are notably overrepresented among arrestees and prisoners. *See* ACLU Report at 55.

the Act was passed at a time when our understanding of youth criminality was permeated by racist undertones, and children were not given a fair chance at rehabilitation and change. African Americans are also overrepresented in the life sentence prison population, deprived of the opportunity to return and contribute to their communities. As a society, we are also faced with the financial and moral costs of caring for an aging prison population that has been sentenced to die in prison. These factors—both individually and collectively—deeply undermine the penological goals of sentencing those with childhood predicate strikes to life in prison, rendering the punishment unconstitutionally cruel.

V. CONCLUSION

This case allows the Court to address a lopsided application of the three strikes law, which spares some children with criminal convictions from incurring a "strike," but not others—based largely on factors revolving around declination hearings and prosecutorial discretion on how to charge crimes. The Act disproportionally impacts people of color, reflecting the flawed processes that have wormed themselves into our criminal system and legal process. It is time to address this injustice, and to bring an end to it.

DATED: June 25, 2020

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DATED: June 25, 2020, at Seattle, Washington.

June Starr

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