

No. 84949-8

J.M. JOHNSON, J. (dissenting)—Jorge Ariel Saenz has been convicted of second degree assault on two separate occasions and of attempted murder on the present occasion. These convictions are “most serious offense[s]” and justify the imposition of a sentence of life without the possibility of parole. Former RCW 9.94A.030(28) (Laws of 2006, ch. 139, § 5). The majority erroneously subjects Saenz’s waiver of his statutory rights to the most exacting of scrutiny and in a manner that equates a statutory right with one of constitutional import. Against reasonable inferences from the common and ordinary meaning of former RCW 13.40.110 (1997), the majority also requires that the juvenile court provide written findings that a juvenile’s waiver of jurisdiction and a declination hearing is in the best interest of the juvenile or the public. The record indicates that it was Saenz’s expressed desire to proceed with the transfer after coming to a full

understanding of the effect of the waiver. Thus, I would affirm the Court of Appeals in ruling that Saenz's 2001 conviction can be used as a strike and respectfully dissent.

A. Waiver

The majority relies heavily on *State v. Knippling*, 166 Wn.2d 93, 206 P.3d 332 (2009) in arguing that the juvenile court did not properly decline jurisdiction. In *Knippling*, a juvenile had originally been charged with first degree robbery, which was an offense for which the adult court had automatic jurisdiction. *Id.* at 97. After plea negotiations, the charge was reduced to second degree robbery, thereby giving the juvenile court exclusive jurisdiction. *Id.* The adult court, however, never remanded the case to juvenile court. *Id.* This court decided in *Knippling* that the second degree robbery conviction did not count as a strike under the Persistent Offender Accountability Act (POAA) of the Sentencing Reform Act of 1981, chapter 9.94A RCW, because there was no evidence other than a judgment and sentence to explain why the adult court had jurisdiction. *Id.* at 97-98.

In Saenz's case, however, there is no issue of automatic jurisdiction with subsequent failure to remand once the juvenile court gained exclusive

jurisdiction. Additionally, there is specific documentation regarding Saenz's waiver of juvenile court jurisdiction. The record contains a written stipulation and agreed order declining jurisdiction and a specific statement from counsel indicating Saenz's expressed desire to proceed with the transfer after coming to a full understanding of the effect of the waiver. All of these facts distinguish Saenz's case from *Knippling* and demonstrate that *Knippling*'s holding should not control in the current case.

By statute, Washington state law provides that “[w]aiver of any right which a juvenile has under [RCW 13.40.110] must be an express waiver intelligently made by the juvenile after the juvenile has been fully informed of the right being waived.” RCW 13.40.140(9). The majority chooses to disregard evidence on the record from counsel indicating that it was Saenz's expressed desire to proceed with the transfer after coming to a full understanding of the effect of the waiver. Majority at 9. The majority's reasoning in this regard is that there were no extra-judicial conversations in the record as to what was actually discussed between counsel and defendant. *Id.* First, this reasoning ignores the protections of attorney-client privilege that preclude counsel from providing extra-judicial statements between

counsel and defendant without the consent of his or her client.

Second, the majority elevates a statutory right to juvenile court jurisdiction and a declination hearing to that of a right deserving constitutional protection. Defense counsel is considered an officer of the court and charged with representing the interests of each defendant. The indication of defense counsel in this case that Saenz had come to a full understanding of the effect of the waiver should be sufficient under the circumstances. By explaining that the outcome of this case is consistent with our precedent in *Dutil v. State*, 93 Wn.2d 84, 90, 606 P.2d 269 (1980), the majority demonstrates its concern for protecting the statutory right of juvenile jurisdiction in a manner reserved only for rights of constitutional import because the waiver at issue in *Dutil* was for the juveniles' *Miranda*<sup>1</sup> rights under the United States Constitution. Our juvenile system's paternalistic and protective foundations do not justify a level of scrutiny for a waiver of a statutory right that is commensurate with constitutional protections. The legislature is also free to clarify the intended requirements for waiver of any right which a juvenile has under RCW 13.40.110.

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Here, Saenz declined juvenile court jurisdiction and personally signed an agreed stipulation specifically waiving the requirement of a declination hearing. He sought the advice of counsel multiple times in making this decision. His counsel also confirmed on the record that it was Saenz's expressed desire to proceed with the transfer after coming to a full understanding of the effect of the waiver. Furthermore, Saenz checked a box in his guilty plea and signed, which further indicates that he understood that he would be sentenced to life without the possibility of parole if convicted of two other most serious offenses. Thus, I would hold that the record demonstrates that Saenz's waiver of juvenile court jurisdiction was "an express waiver intelligently made by the juvenile after the juvenile has been fully informed of the right being waived." RCW 13.40.140(9).

**B. Written Findings**

In declining jurisdiction, former RCW 13.40.110(2) requires the juvenile court to make a finding that transfer to adult court "would be in the best interest of the juvenile or the public." This finding must be in writing and "supported by relevant facts and opinions produced at the hearing." Former RCW 13.40.110(3). Once the juvenile waives both jurisdiction and a

declination hearing, however, there are no facts and opinions produced at the hearing to support a finding because there was no hearing in the first place. Without a hearing, the juvenile court cannot be expected to provide a written finding that transfer to adult court “would be in the best interest of the juvenile or the public.” Former RCW 13.40.110(2). Thus, I would hold that the juvenile court’s failure to make a finding where there was no hearing—by agreement—does not prevent Saenz’s 2001 conviction from counting as a strike under the POAA.

### Conclusion

I would affirm the Court of Appeals and remand Saenz’s case to the Yakima County Superior Court for resentencing. Evidence in the record demonstrates that Saenz understood the implications of transfer to adult court after consultation with counsel, and Saenz executed an express waiver of juvenile court jurisdiction. After execution of the waiver, which also waived the hearing, the juvenile court was not required to make a finding regarding the best interest of the juvenile or the public. Thus, I would hold that Saenz’s 2001 second degree assault conviction counts as a strike under the POAA.

AUTHOR:

Justice James M. Johnson

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WE CONCUR:

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Justice Debra L. Stephens

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