PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Mercer*, 2017 NSPC 20

Date: 20170424
Docket: Syd 2906851
Registry: Sydney

Between:

Her Majesty the Queen

v.

John Russell Mercer

Judge:	The Honourable Judge Brian Williston
Heard:	April 10, 2017, in Sydney, Nova Scotia
Decision	April 24, 2017
Charge:	Section 286.1(1) *Criminal Code of Canada*
Counsel:	Christa MacKinnon and Peter Harrison, for the Prosecution Nash T. Brogan and T.J. McKeough, for the Defence

By the Court:

[1] I want to thank counsel for their briefs and for their submissions in respect to what is now the sentencing phase in regard to Mr. Mercer who entered a guilty plea.

[2] In this sentencing phase the Defence has applied for *Charter* relief making an application under s.12 of the *Canadian Charter of Rights and Freedoms* 1985.

[3] The accused, John Russell Mercer, plead guilty to the charge that he did on or about the 26th of August of 2015, at or near Cape Breton Regional Municipality, Nova Scotia, did communicate with Constable Ashley MacDonald for the purpose of obtaining, for consideration, the sexual services of Constable Ashley MacDonald, contrary to s.286.1(1) of the *Criminal Code of Canada.*

[4] I've dealt with this previously in respect to earlier applications but I am going to just briefly go through the facts again in respect to this case.

[5] At approximately 7:20 p.m. on August 26, 2015, Cst. Ashley MacDonald, posing as a prostitute, standing in front of the Bank of Montreal on Charlotte Street, observed a red truck circle around and noted the driver immediately nodded his head showing signs of being interested. The undercover officer was dressed in

long black leggings, open toed shoes and a regular shirt which was not cut low. The driver who was later identified as the accused Mr. Mercer established eye contact and after pulling into an alleyway made nodding motions to her to come over. For safety reasons the undercover officer did not go into the alley and Mr. Mercer went around again and pulled over right in front of her on the street. Cst. MacDonald again made eye contact with him. He nodded for her to come over and she went over to the car asking him what he wanted. He replied that he wanted a blow job and a price of $30.00 was agreed upon.

BACKGROUND OF LEGISLATION:

[6] With respect to the background of this legislation, on December 20, 2013 the Supreme Court of Canada in the decision of *Canada Attorney General v. Bedford*, 2013, SCC 72, unanimously declared former prostitution related offences were unconstitutional. The Supreme Court of Canada concluded that the earlier offence prohibiting communicating in public for the purpose of prostitution, along with offences regarding body houses and living on the avails of prostitution unjustifiably violated the s.7 rights of sex trade workers under the *Charter of Rights and Freedoms* because those laws deprived them of security of the person in a manner that was not in accordance with the principles of fundamental justice.

[7] The law was found to punish all who lived on the avails of prostitution without distinguishing those who exploit prostitutes such as johns and pimps, from those who could enhance the safety of prostitutes such as legitimate drivers and bodyguards.

[8] In declaring those offences unconstitutional as a violation of s.7 of the *Charter* the Supreme Court of Canada held that the former laws were arbitrarily overly broad and grossly disproportionate. The Court issued a one year suspension of the declaration of invalidity giving Parliament that one year period in which to enact new legislation.

[9] Following that decision Parliament enacted new *Criminal Code* offences in Bill C-36, which are now contained in sections 286.1 to 286.5.

[10] In regard to this application the applicable section with respect to the guilty plea of Mr. Mercer is the following:

> 286.1(1) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration the sexual services of a person is guilty of
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> > (b) an offence punishable on summary conviction and liable to imprisonment for a term of not more than 18 months and a minimum punishment of
> >
> > > for a first offence, a fine of $500, and

> for each subsequent offence a fine of $1,000.

***OPERATION JOHN BE GONE*:**

[11] In the spring of 2014 the Cape Breton Regional Police Service received complaints from the Downtown Business Association that customers and tourists were being approached by sex trade workers and johns who thought they were sex trade workers. The police responded by putting more uniformed officers on those streets along with plain clothes officers to try to move the activity to other locations away from the downtown core.

[12] Sergeant Jodie Wilson, officer in charge of the Community Safety Enforcement Unit, continued to monitor and gather information regarding prostitution in downtown Sydney. It was determined that the scope of the problem was more serious than originally thought. Overtime there were upwards of 37 sex trade workers and over 50 johns visiting the downtown area. The police came to learn that many of the workers were being subjected to violence from some of the johns as well as from boyfriends who were pimping them out.

[13] When Bill C-36 became law, it changed the approach of the police who, with the realization of the potential violence from johns and pimps now treated the

sex trade workers as victims. The police had not realized the extent of the violence the street workers had been subjected to until they looked at their situation over time. The police felt that they had to do something before someone was seriously injured or killed. In one case when an aboriginal sex trade worker went missing, police were very concerned about her well being. She was later discovered but police became very concerned.

[14] The police began Operation John Be Gone to deter and abolish the sex trade from the downtown area. The officers received training regarding human trafficking as well as methods to help the workers exit from the sex trade. Many of those workers were seen by the police as not being in that line of work by choice but by circumstances such as socioeconomic conditions, childhood abuse and addictions to alcohol and drugs.

[15] The police began to focus more on helping the workers find an exit strategy through making them aware of what was available in the local area regarding addiction and mental health treatment. Many of those workers were aboriginal so the police also partnered with the Royal Canadian Mounted Police in the community of Eskasoni to identify support groups and elders in that location who could help those suffering with addiction and mental health issues. Some of the elders even accompanied the police officers when they met with aboriginal sex

trade workers in the downtown area of Sydney to encourage them to get help and support from their addictions and health issues.

[16] During that time period police surveillance identified vehicles and license plate numbers of johns who had a history of violence. With this information the police began to stop vehicles driven by these individuals to try to disrupt their transactions with the sex trade workers. During that time, the police also laid charges under the *Motor Vehicle Act* against these individuals and other johns.

[17] The police also began to give the sex trade workers as much information as they could about these potentially violent johns and did safety checks on the workers. The police enlisted reformed, former sex trade workers to come on patrols with them to talk to the workers. They offered peer counseling and introductions to the Methadone Treatment Program to wean them from their addictions enabling them to leave prostitution if they wished to do so.

[18] Sgt. Wilson testified that as the police came to the realization that something more had to be done before someone was killed or injured, Operation John Be Gone was established to deter and abolish the ongoing activity in the downtown area. During the 18 months leading up to that operation, the police had given the johns warnings and second chances, but it was to no avail. In the opinion of the

officers who witnessed the increasing demand on the sex trade, it was felt they could no longer use a band-aid approach and the decision was made to begin the use of undercover police officers, such as Cst. Ashley MacDonald, and the laying of charges as the best form of action to enforce Bill C-36.

[19] As a result of that undercover sting operation, Mr. Mercer was one of the 27 men charged with communicating for the purpose of obtaining sexual services.

SUBMISSIONS ON SENTENCE:

[20] The accused plead guilty to the offence after failing in his application for a stay of proceedings alleging abuse of process by the police under s.7 of the *Charter of Rights and Freedoms*. After his guilty plea he applied for a stay of proceedings alleging he was entrapped by the police into committing the offence. That application was not successful.

[21] The Crown is seeking the imposition of a sentence of the minimum fine of $500.00 and an order for the collection of Mr. Mercer's DNA.

[22] The accused has now made application for this Court, in the sentencing process, to decline to impose the mandatory minimum penalty submitting that the

penalty amounts to cruel and unusual punishment in violation of s.12 of the *Charter of Rights and Freedoms*.

[23] With respect to the powers of the provincial court judges to determine the constitutionality of law, the Supreme Court of Canada in *R. v. Lloyd* 2016, SCC13 dealt with this issue and McLachlin, C.J.C. held at paras 15 and 16:

> 15 The law on this matter is clear. Provincial court judges are not empowered to make formal declarations that a law is of no force or effect under s.52(1) of the *Constitution Act*, 1982; only superior court judges of inherent jurisdiction and courts with statutory authority possess this power. However, provincial court judges do have the power to determine the constitutionality of a law where it is properly before them. As this Court stated in *R. v. Big M Drug Mart Ltd.*,, [1985] 1 S.C.R. 295 (S.C.C.), at p.316 'it has always been open to provincial courts to declare legislation invalid in criminal cases. No one may be convicted of an offence under an invalid statue.' See also *Cuddy Chicks Ltd., v. Ontario Labour Relations Board),* [1991] 2 S.C.R. 5 (S.C.C.), at pp. 14-17; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 (S.C.C.), at p.592; *Shewchuk v. Richard* (1986), 28 D.L.R. (4th) 429 (B.C. C.A.), at pp.439-40; *K. Roach, Constitutional Remedies in Canada (2nd ed.(loose-leaf)*, at p.6-25.

And at para.16:

> 16 Just as no one may be convicted of an offence under an invalid statute, so too may no one be sentenced under an invalid statute. Provincial court judges must have the power to determine the constitutional validity of

> mandatory minimum provisions when the issue arises in a case they are hearing. This power flows directly from their statutory power to decide the cases before them. The rule of law demands no less.

[24] Chief Justice McLachlin went on to state in paras. 18-20:

> 18 To be sure, it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue. Judicial economy dictates that judges should not squander time and resources on matters they need not decide. But a formalistic approach should be avoided. Thus, once the judge in this case determined that the mandatory minimum did not materially exceed the bottom of the sentencing range applicable to Mr. Lloyd, he could have declined to consider its constitutionality. To put it in legal terms, the doctrine of mootness should be flexibly applied. If an issue arises as to the validity of the law, the provincial court judge has the power to determine it as part of the decision-making process in the case. To compel provincial court judges to conduct an analysis of whether the law could have any impact on an offender's sentence, as a condition precedent to considering the law's constitutional validity, would place artificial constraints on the trail and decision-making process.
>
> 19 The effect of a finding by a provincial court judge that a law does not conform to the Constitution is to permit the judge to refuse to apply it in the case at bar. The finding does not render the law of no force or effect under s.52(1) of the *Constitution Act, 1982*. It is open to provincial court judges in subsequent cases to decline to apply the law, for reasons already given or for their own; however, the law remains in full force or effect, absent a

> formal declaration of invalidity by a court of inherent jurisdiction.
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> 20 I conclude that the provincial court judge in this case had the power to consider the constitutional validity of the challenged sentencing provision in the course of making his decision on the case before him.

TEST FOR CRUEL AND UNUSUAL PUNISHMENT:

[25] The decision in *R. v. Lloyd, supra*, went on to summarize the law in regard to what constitutes "cruel and unusual" punishment under s.12 of the *Charter*. McLachlin, C.J.C. held at paras 22-24:

> 22 The analytical framework to determine whether a sentence constitutes a "cruel and unusual" punishment under s.12 of the *Charter* was recently clarified by this Court in *Nur*. A sentence will infringe s.12 if it is "grossly disproportionate" to the punishment that is appropriate, having regard in the nature of the offence and the circumstances of the offender: *Nur*, at para.39; *R. v. Smith*, [1987] 1 S.C.R. 1045 (S.C.C.), at p.1073. A law will violate s.12 if it imposes a grossly disproportionate sentence on the individual before the court, or if the law's reasonably foreseeable applications will impose grossly disproportionate sentences on others; *Nur*, at para.77.
>
> 23 A challenge to a mandatory minimum sentencing provision under s.12 of the *Charter* involves two steps: *Nur*, at para.46. First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. The court need not fix

> the sentence or sentencing range at a specific point, particularly for a reasonable hypothetical case framed at a high level of generality. But the court should consider, even implicitly, the rough scale of the appropriate sentence. Second, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the offence and its circumstances: *Smith*, at p.1073; *R. v. Goltz*, [1991] 3 S.C.R. 485 (S.C.C.), at p. 498; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R 90 (S.C.C.), at paras. 26-29; *R.v Lyons*, [1987] 2 S.C.R. 309 (S.C.C.) at pp.337-38. In the past, this Court has referred to proportionality as the relationship between the sentence to be imposed and the sentence that is fit and proportionate: see *Nur* at para.46; *Smith* at pp.1072-73. The question, put simply, is this: In view of the fit and proportionate sentence, is the mandatory minimum sentence grossly disproportionate to the offence and its circumstances? If so, the provision violates s.12.

[26] Finally at para. 24, Chief Justice of Canada McLachlin went on to state:

> 24 This Court has established a high bar for finding that a sentence represents a cruel and unusual punishment. To be 'grossly disproportionate' a sentence must be more than merely excessive. It must be 'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society: *Smith*, at p.1072, citing *R. v Miller* (1976), [1977] 2 S.C.R. 680 (S.C.C.), at p.688; *Morrisey*, at para.26; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96 (S.C.C.), at para.14. The wider the range of conduct and circumstances captured by the mandatory minimum, the more likely it is that the mandatory minimum will apply to offenders for whom the sentence would be grossly disproportionate.

[27] Mandatory minimum sentences passed by legislators highlight and emphasize the objectives of deterrence and denunciation over other objectives of sentencing. In the case of *R. v. Nur* [2015] S.C.J. No. 15, McLachlin C.J.C. stated at para. 44:

> Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. They emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of the sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing.

[28] The Supreme Court of Canada in *R. v. Lloyd* supra, and earlier cases has made it clear that the standard for gross disproportionality is a stringent one and McLachlin, C.J.C. at para.45 of *Lloyd*, supra, held:

> It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in

> determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set out by the *Charter* is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.

[29] In *R. v. Morrissey* [2000] 2 S.C.R. 90 at para.26, the Court stated:

> Where a punishment is merely disproportionate, no remedy can be found under section 12. Rather, the court must be satisfied that the punishment imposed is grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable. As I said in *Goltz*, [1991] 3 S.C.R. 485 at p.501, the test is not one which is quick to invalidate sentences crafted by legislators.

[30] The law is clear. Judges are cautioned not to easily interfere with minimum sentences passed in law by Parliament.

[31] In *Steele v. Mountain Institution* [1990] 2 S.C.R, 1385, the Supreme Court of Canada cautioned that it will only be on rare and unique occasions that a sentence will be so grossly disproportionate that it violates s.12 of the *Charter*.

[32] The correct approach in assessing the constitutionality of a mandatory minimum sentence first requires that the sentencing judge determine what a fit sentence would be applying traditional sentencing principles. The question then

becomes whether the mandatory minimum sentence is grossly disproportionate to the fit and proportionate sentence. If the court finds that it is grossly disproportionate to the offender being sentenced then the mandatory minimum violates s.12 of the *Charter*. Even if it is not grossly disproportionate to this specific offender the Court must still consider whether the mandatory minimum sentence would be grossly disproportionate for a reasonably foreseeable hypothetical offender.

[33] In determining what an appropriate sentence should be in this case, I have taken into account the sentencing objectives in s.718 of the *Criminal Code* and the factors set out in s.718.2 of the *Criminal Code*.

[34] Defence counsel submits that a mandatory minimum sentence of a $500 fine falls into the grossly disproportionate range. He argues that a fine would saddle this 74 year old accused with a criminal conviction which he never had before for "one simple mistake where there was no victim or danger to anyone." He also refers to Mr. Mercer's evidence regarding the strain on his relationship with his wife and the embarrassment the charge and resulting publicity have had on his life. The Defence argues that a conviction could cause trouble with cross-border travel for years before a pardon could be obtained and asks the Court to declare the

mandatory minimum sentence unconstitutional as being cruel and unusual punishment thus allowing the Court to impose an absolute discharge.

[35] On the other hand, the Crown submits that the mandatory minimum sentence of a fine of $500 in this case is valid constitutionally. The Crown points out the circumstances which led up to the launch of Operation John Be Gone whereby Mr. Mercer and 26 others were charged. The Crown further argues that the Defence submission that there was no victim or danger to anyone in committing an offence contrary to s.286.1 trivializes the section and its purpose.

[36] In *Bedford* supra, the Supreme Court of Canada undertook a serious and broad review of the previous legislation involving offences relating to prostitution. As McLachlin, C.J.C. observed at para.86:

> First, while some prostitutes may fit the descriptions of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Ms. Bedford herself stated that she initially prostituted herself 'to make enough money to at least feed myself' (cross-examination of Ms. Bedford, J.A.R., vol.2, at p.92). As the application judge found, street prostitutes, with some exceptions, are a particularly marginalized population (paras.458 and 472). Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money. Realistically, while they may retain some minimal power of choice-what the

> Attorney General of Canada called "constrained choice" (transcript, at p.22) these are not people who can be said to be truly "choosing" a risky line of business (see PHS, at paras. 97-101).

[37] Counsel for the Crown and Defence have jointly filed for consideration of the Court the technical paper Bill C-36 *Protection of Communities and Exploited Persons Act* published by the Department of Justice that was presented in the abuse application prior to the guilty plea. The technical paper speaks of the purpose in creating the new provisions and goes into the background of research and consultation leading to these new *Criminal Code* provisions.

[38] The centerpiece of Bill C-36 is a shift in legislative policy away from the old approach which treated prostitution as a public nuisance to a recognition that prostitution is inherently exploitive to sex trade workers with great potential for violence from johns and pimps.

[39] The technical paper goes on to state regarding Bill C-36:

> Objectives are based on the following conclusions drawn from the research that informed its development:
>
> > The majority of those who sell their own sexual services are women and girls. Marginalized groups, such as Aboriginal women and girls, are disproportionately represented.

Entry into prostitution and remaining in it are both influenced by a variety of socio-economic factors, such as poverty, youth, lack of education, child sexual abuse and other forms of child abuse, and drug addition.

Prostitution is an extremely dangerous activity that poses a risk of violence and psychological harm to those subjected to it, regardless of the venue or legal framework in which it takes place, both from purchasers of sexual services and prostitution.

Prostitution reinforces gender inequalities in society at large by normalizing the treatment of primarily women's bodies as commodities as to be bought and sold. In this regard, prostitution harms everyone in society by sending the message that sexual acts can be bought by those with money and power. Prostitution allows men, who are primarily the purchasers of sexual services, paid access to female bodies, thereby demeaning and degrading the human dignity of all women and girls by entrenching a clearly gendered practice in Canadian society.

Prostitution also negatively impacts the communities in which it takes place through a number of factors, including: related criminality, such as human trafficking and drug-related crime; exposure of children to the sale of sex as commodity and the risk of being drawn into a life of exploitation; harassment of residents; noise, impeding traffic, unsanitary acts, including leaving behind dangerous refuse such as used

condoms or drug paraphernalia; and, unwelcome solicitation of children by purchasers.

The purchase of sexual services creates the demand for prostitution, which maintains and furthers pre-existing power imbalances, and ensures that vulnerable persons remain subjected to it.

Third parties promote and capitalize on this demand by facilitating the prostitution of others for their own gain. Such persons may initially pose as benevolent helpers, providers of assistance and protection to those who 'work' for them. But the development of economic interests in the prostitution of others creates an incentive for exploitative conduct in order to maximize profits. Commercial enterprises in which prostitution takes place also raise these concerns and create opportunities for human trafficking for sexual exploitations to flourish. Consequently Bill-36 recognizes that prostitution's victims are manifold; individuals who sell their own sexual services are prostitution's primary victims, but communities, in particular children who are exposed to prostitution, are also victims, as well as society itself. Bill C-36 also recognizes that those who create the demand for prostitution, i.e., purchasers of sexual services and those who capitalize on that demand, i.e. third parties who economically benefit from the sale of those services, both cause and perpetuate prostitution's harms.

[40] The new law has shifted the focus away from the women who are seen as victims to the johns and pimps on the demand and exploitative side.

[41] The new legislation, for the most part, decriminalizes prostitutes in recognition of their marginalized and vulnerable positions and criminalizes the johns who buy, or attempt to buy, and the pimps and human traffickers who exploit, and profit from, coercing women into the sex trade.

[42] When Mr. Mercer communicated with Cst. Ashley MacDonald for the purpose of obtaining a sexual service he did not know that she was a police officer. I do not agree with Defence counsel's contention that this is a victimless crime.

[43] Prostitution is a practice steeped in gender and economic inequalities that leaves a devastating effect on those sold and exploited in the sex trade.

[44] The sex industry, involving street prostitution, is predicated on dehumanization, degradation, and gender violence and psychological harm to those exploited at the hands of human traffickers, pimps and buyers of sex.

[45] Solicitation of street prostitution with its potential for violence in the downtown area of Sydney had become a very serious issue by the time the Cape Breton Regional Police responded with the undercover operation in Operation John Be Gone.

[46] The minimum $500 fine raises the bottom level of the sanctions for communicating for the purpose of prostitution. The minimum sentence of $500 precludes consideration of an absolute or conditional discharge if it is not declared unconstitutional. Prior to this regime of mandatory minimum sentences for these types of offences, the sentences imposed by courts could have allowed, in some cases, for other types of sentencing including lower fines or even discharges.

[47] However, with respect to the consideration of this Court, the mandatory minimum sentence is a forceful statement of Parliament in regard to the present legislation under challenge.

[48] In completing my analysis I have considered what a fit sentence would be in applying traditional sentencing principles and objectives as codified in s.718 and s.718.1 of the *Criminal Code*. Although an absolute or conditional discharge might be in the best interest of Mr. Mercer, in the circumstances of the significant problems identified with unlawful solicitation in downtown Sydney in Operation John Be Gone, the exploitation of a persons who I hold were, for the most part, not there by free choice but by social economic conditions, addictions, and abuse as well as the potential for violence to them, a discharge would be contrary to the public interest and send the wrong message.

[49] I believe that a fine and not a discharge is the appropriate sentence in all the circumstances of the offender and the offence committed taking into account the principles of sentencing, including denunciation and deterrence as well as the circumstances of the offender.

[50] In determining whether the mandatory minimum sentence is grossly disproportionate thereby in violation of s.12 of the *Charter*, I find that in regard to the accused, the imposition of a $500 fine is not so excessive that it would outrage the standards of decency as being abhorrent or intolerable by Canadian citizens. Nor has the applicant satisfied this Court that the mandatory minimum sentence would be grossly disproportionate for a reasonably hypothetical offender.

CONCLUSION:

[51] In conclusion, the applicant has not established that the minimum fine of $500 is grossly disproportionate within the meaning of cruel and unusual punishment under s.12 of the *Charter* either to him personally or to a reasonable hypothetical offender.

[52] Having found the law before me constitutional, I will now apply the minimum sentence of a $500 fine.

[53] I will hear counsel as to time to pay and also the Crown was requesting the DNA order.

[54] **MR. MCKEOUGH:** No objection to the DNA order.

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Williston J.