NO. 95263-9 (CONSOLIDATED)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
ANTHONY A. MORETTI,
Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. Moretti was 20-years old when he committed his first "strike" offense under the Persistent Offender Accountability Act (POAA), which was for the crime of Arson in the First Degree. Moretti was 26-years old when he committed his second "strike" offense, which was for the crime of Vehicular Assault. Moretti was 31-years old when he committed Robbery in the First Degree and two counts of Assault in the Second Degree. Each of those crimes constituted a third strike under the POAA. As a result, Moretti received a mandatory sentence of life without parole for each conviction. Given Moretti's history of repeated violent conduct as an adult, does his age at the time of his first strike offense render his current sentence invalid as a violation of Washington State's constitutional prohibition on cruel punishment and/or the Eight Amendment's prohibition on cruel and unusual punishment?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The Petitioner was originally charged by Information filed on January 6, 2015. CP 1. An Amended Information was filed on March 23, 2015, alleging three charges: 1) Robbery in the First Degree, 2) Assault in the Second Degree (against Michael L. Knapp), and 3) Assault in the Second Degree (against Tyson Ball). CP 31; RCW 9A.56.200; RCW

9A.36.021. The Honorable F. Mark McCauley (retired) presided over the jury trial, which commenced on July 14, 2015. CP 14-17. The jury found Moretti guilty as charged on July 16, 2015. CP 14-17. The Petitioner was found to be a persistent offender and sentenced to Life without the possibility of early release on all three charges on July 24, 2015. CP 82.

The convictions were affirmed by the Court of Appeals. *State v. Moretti*, 1 Wn. App. 2d 1007 (No. 47868-4-II) (2017) (unpublished). This Court granted review only on the issue of whether the persistent offender sentence violates the state or federal prohibition against cruel punishment. The Court consolidated this case with *State v. Orr*, 3 Wn. App. 2d 1039 (No. 34729-0-III) (2018) and *State v. Nguyen*, 2 Wn. App. 2d 1001 (No. 74962-5-I) (2018).

2. SUBSTANTIVE FACTS

In summary, these crimes occurred when the Petitioner assaulted both Michael Knapp and Tyson Ball and robbed Michael Knapp at the Oakville boat launch on September 11, 2014. RP 64, 106, 154, 209, 210.

Mr. Knapp had gone to the boat launch with Mr. Ball in order to buy drugs. RP 156. Mr. Knapp had won a jackpot of $1,250 at the Little Creek Casino a few days before the attack and had between $900 and $1,000 left of the money with him when he and Mr. Ball went to the boat launch. RP 158, 202. Mr. Knapp was going to buy the drugs with some of

the money he had won. RP 157. Mr. Ball had made arrangements for them to meet a girl, identified as Halli Hoey, who Mr. Knapp had seen around before, at the boat launch in order to pick up methamphetamine from her. RP 156, 161. Mr. Ball testified at trial that when he and Mr. Knapp first arrived at the boat launch, the only person there was Ms. Hoey, who also had a toddler with her at the time. RP 112, 113.

Mr. Knapp and Mr. Ball were able to meet up with Ms. Hoey, but she did not have any drugs at the time. RP 161. At trial, both Mr. Knapp and Mr. Ball testified that it seemed strange that Ms. Hoey didn't have the drugs and Mr. Ball testified that she seemed nervous. RP 114, 162. Mr. Knapp and Mr. Ball then left the boat launch and headed back to town. RP 162. While headed back to town, they received a call that Ms. Hoey's car battery was dead. RP 162. Both Mr. Knapp and Mr. Ball testified that they went back to help because her car allegedly wouldn't start and she had a child with her. RP 115, 162. As Mr. Ball was getting out the jumper cables to help Ms. Hoey, Moretti popped out of the bushes and was walking around the boat launch area, eventually coming up to ask for a cigarette and a light. RP 117. At trial, Mr. Ball testified that Ms. Hoey became more nervous when Moretti came out of the bushes. RP 117.

At this point, Moretti pulled a small bat from his pants and attacked them, striking Mr. Ball first. RP 118, 119. A second man, later identified as Sam Hill, then came out of the bushes, armed with an ASP baton. RP 120, 127. Mr. Ball testified that he was hit on the arms with the bat by Moretti and that the bat broke on his arms. RP 121. When deputies from the Grays Harbor County Sheriff's Office later searched the boat launch for evidence, a broken bat was located at the scene. RP 71, 212. Mr. Ball was also struck in the head with a police-type baton by Sam Hill. RP 120. Both Mr. Knapp and Mr. Ball testified that Ms. Hoey took off in her vehicle after Moretti and Sam Hill began attacking them. RP 122, 165. Mr. Knapp was also attacked by both Moretti and Sam Hill. RP 121. Mr. Knapp testified several times that he was in shock as a result of the attack and that he was in pain after. RP 164, 168, 171. Mr. Knapp described his injuries to include deep cuts and lacerations on his forehead, the back of his head, and his ear being split open as well as injuries on his arms from tying to block the attack. *Id*.

Both Mr. Knapp and Mr. Ball testified that Moretti and Sam Hill focused their attack on Mr. Knapp. RP 122, 165. Both Mr. Knapp and Mr. Ball testified that Mr. Knapp tried to defend himself with a knife, but he couldn't because he was beat down. RP 123, 166.

During the attack, Moretti and Sam Hill were telling Mr. Knapp to give them the money and they took his money from him. RP 123, 125, 167. Moretti and Sam Hill continued to beat Mr. Knapp even after they had taken his money from him. RP 163.

3. FACTS RELATING TO SENTENCING

Moretti's birthdate is April 22, 1983. CP 1. Moretti committed his first strike offense, Arson in the First Degree, on January 19, 2004, when he was 20-years old. CP 82. Moretti committed his second strike offense, Vehicular Assault, on October 27, 2009, when he was 26-years old. *Id*. Moretti committed the current crimes, Robbery in the First Degree and Assault in the Second Degree (Two Counts), on September 11, 2014, when he was 31-years old. CP 1.

C. ARGUMENT

1. MORETTI'S LIFE SENTENCE DOES NOT VIOLATE THE STATE CONSTITUTIONAL PROHIBITION OF CRUEL PUNISHMENT.

Moretti asserts that the life sentence imposed for his most recent strike offense crimes committed when he was 31-years old amounts to cruel and/or cruel and unusual punishment under Washington and Federal law. WASH. CONST. art. I, § 14; U.S.C.A. Cont. Amend VIII. Moretti was sentenced as a persistent offender and claims the sentence is disproportionate to his crimes because of his youth when he committed his

first strike offense. That argument is meritless because the sentence imposed is not cumulative punishment for a series of crimes, but solely punishment for Moretti's current convictions.

Under RCW 9.94A.570, a persistent offender shall be sentenced to life in prison without the possibility of release. A persistent offender is one who has been convicted of a most serious offense and has two prior felony convictions on separate occasions that are also most serious offenses, and at least one of those previous convictions occurred before the commission of any of the other previous convictions for a most serious offense. RCW 9.94A.030(38)(a). All three of Moretti's current convictions are most serious offenses. RCW 9.94A.030(33)(a)(b); RCW 9A.56.200 (Robbery in the First Degree is a Class A Felony). Moretti's two prior convictions for most serious offenses are a 2004 conviction for Arson in the First Degree, and a 2009 conviction for Vehicular Assault. CP 82; RCW 9A.48.020; RCW 46.61.522(1)(b).

The legislature has near plenary authority to define crimes and punishments. *State v. Varga*, 151 Wn.2d 179, 193, 86 P.3d 139 (2004). The Washington Supreme Court has repeatedly upheld Washington's persistent offender statute against both federal and state constitutional challenges. See *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014); *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996); *State v.*

Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996); *State v. Manussier*, 129 Wn.2d 652, 677, 921 P.2d 473 (1996). Moretti's argument has been rejected by the Court of Appeals in all three consolidated cases before this Court and in one published opinion, *State v. Hart*, 188 Wn. App. 453, 353 P.3d 253 (2015).

a. There Is No Basis To Apply Broader State Constitutional Protection To A Cruel Punishment Claim That Is Based On Relative Youth At The Time A Prior Offense Was Committed.

Whether the State constitutional prohibition on cruel punishment provides greater protection than the Eighth Amendment in a particular instance requires analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Washington's cruel punishment clause often provides greater protection, but not always. *State v. Bassett*, 192 Wn.2d 67, 78-79, 428 P.3d 343 (2018). Parties are "required to explain why enhanced protections are appropriate in specific applications." *Id*. at 79 (quoting *State v. Ramos*, 187 Wn.2d 420, 454, 387 P.3d 650 (2017)).

This Court recently conducted a Gunwall analysis in the context of juvenile sentences of life without parole, concluding that greater protection was warranted in that instance. *Bassett*, 192 Wn.2d at 78-82. Factors one through three of that analysis focus on textual differences in the constitutional language and always support broader state protection

based on Washington's prohibition on "cruel punishment" while the federal prohibition is on "cruel and unusual punishment." *Bassett*, 192 Wn.2d at 80. The fifth factor of any Gunwall analysis always points to an independent state analysis, based on the structural difference between the two constitutions.[1] *Id.* at 82.

The fourth Gunwall factor is an analysis of how preexisting state law bears on granting distinct state constitutional rights. *Gunwall*, 106 Wn.2d at 61. In *Bassett*, the Court concluded that this factor weighed in favor of an independent state interpretation because the Court and the state legislature have recognized that "children warrant special protections in sentencing." *Bassett*, 192 Wn.2d at 81. The sixth Gunwall factor is whether the matter is of particular state interest or there is a need for national uniformity. *Gunwall*, 106 Wn.2d at 61. The Court in *Bassett* concluded that this factor weighed in favor of an independent state interpretation because of the state policy to grant juveniles special sentencing protection when appropriate. *Bassett*, 192 Wn.2d at 82.

The state constitutional analysis applied in *Bassett* is not applicable to a sentence imposed for a crime committed by a 31-year-old man. The court in *Bassett* noted that it was conducting the required Gunwall analysis

[1] The structural difference is that "the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power." *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

"in the specific context of challenges to juvenile life without parole sentences." *Bassett*, 192 Wn.2d at 79. The court's justification for the greater protection applied in that case was specific to sentencing children, not an adult. The legislature has drawn a line between juveniles and adults at age 18, and the State constitution does not provide justification to move that line.

Only one Washington case has concluded that the age of an adult defendant may be relevant to sentencing. *State v. O'Dell,* 183 Wn.2d 680, 358 P.3d 359 (2015). In *O'Dell*, the court held that youth alone is not a basis to impose an exceptional sentence below the presumptive range, but that youth might be relevant as a mitigating circumstance under RCW 9.94A.535, if it affected whether the defendant had the capacity to appreciate the wrongfulness of his conduct or to conform his behavior to the law. *Id.* at 695-99. *O'Dell* has no relevance to a sentence imposed for crimes committed when a defendant is no longer youthful, when the sentence imposed for prior offenses is irrelevant to the appropriate sentence for the current offense – only the fact of the earlier conviction plays any role in the current sentence.

Even if the Gunwall analysis in *Bassett* were extended to provide protection to a person who is sentenced for a crime committed as a young adult, there is no logical justification to extend special protection based on

youth to a person who was 31-years old when he committed his most recent strike offenses and being sentenced for those offenses.

b. *Fain* Proportionality Analysis.

Analysis of whether a sentence constitutes cruel punishment under the State constitution traditionally has been conducted using the analysis adopted in *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980). The *Fain* court recognized that in a proportionality analysis, "courts have sought to use objective standards to minimize the possibility that the merely personal preferences of judges will decide the outcome of each case." *Id.* at 397. It adopted a proportionality analysis that requires consideration of four factors: (1) the nature of the crime; (2) the legislative purpose behind the sentencing statute; (3) the punishment the defendant would have received in other jurisdictions for the same crime; and (4) the punishment for other crimes in Washington state. *Id.* at 397; *Witherspoon*, 180 Wn.2d at 887.

i. Nature of the crime.

Moretti received a life sentence under the POAA for Robbery in the First Degree related to Mr. Knapp and two counts of Assault in the Second Degree, each involving a separate victim, related to Mr. Knapp and Mr. Ball. CP 74-76. Both Robbery in the First Degree and Assault in the Second Degree are violent offenses, which caused serious injury to the

victims, particularly to Mr. Knapp. RP 118, 119, 121, 164, 168, 171. The Court of Appeals has rejected a cruel punishment challenge to a life sentence as a persistent offender based on a current conviction of second degree assault. *State v. Ames*, 89 Wn. App. 702, 709-10, 950 P.2d 514 (1998).

ii. The legislative purpose of the sentencing statute.

"[T]he purposes of the [POAA] include deterrence of criminals who commit three 'most serious offenses' and the segregation of those criminals from the rest of society." *Rivers*, 129 Wn.2d at 713 (quoting *State v. Thorne*, 129 Wn.2d 736, 775, 921 P.2d 574 (1996)). This purpose is served by incarcerating Moretti, whose violent behavior is a threat to the public.

iii. Punishment the Petitioner would receive in other jurisdictions.

Moretti has provided no argument as to how his crimes would be punished in other jurisdictions. However, other states have rejected cruel punishment challenges and upheld life sentences for recidivist offenders even where the first strike offense occurred when the defendant was a juvenile. *Wilson v. State*, 2017 Ark. 217, 521 S.W.3d 123, 127 (2017); *Vickers v. State*, 117 A.3d 516, 520 (Del. 2015); *Commonwealth v. Lawson*, 90 A.3d 1, 7 (Pa. Super. 2014); *Counts v. State*, 338 P.3d 902

(Wyo. 2014). This Court has noted that Washington's POAA is "similar to state and federal legislation" in much of the country and that it is likely a persistent offender here would receive a similarly harsh sentence for a third serious offense in most jurisdictions. *Rivers*, 129 Wn.2d at 714.

iv. Punishment the defendant would receive for other crimes in Washington State.

Because all offenders convicted of three most serious offenses are sentenced to life in prison, Moretti would receive the same sentence if his current offense was for any similar most serious offense, based on his criminal history.

Therefore, under the *Fain* analysis, Moretti's sentence is proportionate to the crimes he committed and sentences that others would receive for similar crimes, and is consistent with the purpose of the POAA to deter crime and protect the public from repeat offenders.

c. This Court's Recent Holdings In Cases Involving Sentencing Juvenile Offenders Do Not Change The *Fain* Analysis.

This Court's recent holdings in cases involving sentencing juvenile offenders do not change the *Fain* analysis applicable to a POAA sentence. These cases do not undercut the legislature's authority to mandate a sentence of life imprisonment for an adult based on two prior adult convictions.

The Court in *State v. Houston-Sconiers* held that some mandatory provisions in the Sentencing Reform Act do not apply to juveniles who are being sentenced in the adult system. 188 Wn.2d 1, 21, 391 P.3d 409 (2017). This holding was based on an interpretation of recent United States Supreme Court decisions rooted in the Eighth Amendment, which held that death and mandatory life without parole (LWOP) will always be a disproportionate sentence for a crime committed before 18 years of age; a court never can impose death on a juvenile, and may impose LWOP only after consideration of the unique characteristics of youth. *Id.* at 18-21; *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (invalidating juvenile death penalty); *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407 (2012) (invalidating mandatory LWOP for juveniles). But these recent Eighth Amendment holdings apply only to juvenile sentencings, not to adults. These cases are not applicable to the prior most serious offenses in this case because all the relevant prior convictions occurred when Moretti was an adult and Moretti is challenging a sentence for crimes that he committed when he was 31-years old. Therefore, *Houston-Sconiers* is inapposite.

The *Fain* analysis in *Bassett, supra*, also does not affect the analysis in this case, because the Court there addressed only sentencing for a crime committed while a juvenile. The Court concluded that the

legislature's intent regarding sentencing juveniles for aggravated murder was for courts to consider whether diminished culpability justified a mitigated sentence. *Bassett*, 192 Wn.2d at 90. This is the opposite of the purpose of the POAA, which is to deter repeat offenders and segregate them from the rest of society. *Rivers*, 129 Wn.2d at 713.

By arguing that a POAA sentence is equivalent to sentencing a juvenile to LWOP, Moretti is implicitly asserting that his life sentence is punishment for the offense he committed when he was 20. But this Court rejected that premise in *Thorne*, which rejected a constitutional challenge to a persistent offender sentence, quoting from a decision that upheld a life sentence under the former habitual criminal law: "The life sentence contained in RCW 9.92.090 is not cumulative punishment for prior crimes. The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime." *State v. Thorne*, 129 Wn.2d at 776 (quoting *State v. Lee*, 87 Wn.2d 932, 937, 558 P.2d 236 (1976)).

The legislature is well aware of emerging juvenile brain science research and has incorporated that research into Washington law as it sees fit. See LAWS OF 2005, Ch. 437, § 1 ("The legislature finds that emerging research on brain development indicates that adolescent brains ... differ significantly from those of mature adults. It is appropriate to take these

differences into consideration when sentencing juveniles tried as adults."). The legislature specifically applied this research only to juveniles tried as adults. Moretti's disagreement with such policy choices is not a basis for a finding that his sentence is unconstitutional.

Moretti argues that in its analysis, this Court should consider details of his current and prior strikes and his personal characteristics in determining whether this sentence was unconstitutionally cruel, apparently relying on information that he only completed the eighth grade. Pet. Rev. at 6. As a preliminary matter, nothing in the record supports any claim that Moretti is low functioning or otherwise impaired because he only completed the eighth grade. Although one of Moretti's prior strikes, the Vehicular Assault, was a Class B offense, this Court already has concluded that application of the POAA to most serious offenses that are Class B offenses is not cruel punishment. *Witherspoon, supra* (second degree robbery); *Thorne*, 129 Wn.2d 736 (prior strike second degree robbery). A sentence under the POAA always will be greater than the presumptive range (unless the current crime is aggravated murder), and that is irrelevant in analyzing the legitimate policy of a recidivist statute. Likewise, Moretti's apparent lack of education does not render him immune from a life sentence after conviction for his third most serious offense. No mental defense was offered at trial, and there is no evidence

that his capacity to understand his offense was affected, when he brutally attacked two men and robbed Mr. Knapp, kicking and hitting him repeatedly with a weapon while he was lying defenseless on the ground.

Moretti's life sentence for Robbery in the First Degree and two counts of Assault in the Second Degree committed when he was 31-years old is not grossly disproportionate to the sentence of others who commit similar crimes and have a similar criminal history. His sentence does not offend the constitutional prohibition on cruel punishment.

d. Categorical Bar Analysis Is Not Applicable To Sentencing Adult Defendants Under The POAA.

For the first time in Washington history, this Court in *Bassett* applied a categorical bar analysis to a cruel punishment claim under article 1, section 14. 192 Wn.2d at 82-85. The Court explained that it would apply the categorical bar analysis used by the United States Supreme Court in *Graham v. Florida*[2] to the "unique type of claim" presented in that case, "based on the nature of the juvenile offender class." *Id*. at 82-83. The Court did not disturb the *Fain* analysis traditionally applied to determine whether a sentence is cruel punishment. *Id.* at 85.

The categorical bar analysis of *Bassett* should not be extended to this case, where the cruel punishment claim is not defined either by a class

[2] 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

of defendants or by a class of punishment. Even if it is applied, Moretti's constitutional claim fails under that analysis.

Categorical bar analysis begins with objective indicia of national consensus regarding the sentencing practice at issue. *Graham,* 560 U.S. at 62. Moretti has cited no consensus, trend, or a single case or statute that exempts adults from recidivist statutes because they were in their 20's when their first strike was committed. Moretti has cited no legal authority holding a person over 18 to be a juvenile or that s/he must be treated as one. The United States Supreme Court drew a line at age 18 for eligibility for a death sentence, noting that although the qualities that distinguish juveniles from adults do not disappear at that point, a line must be drawn and that is the point at which society has drawn the line between childhood and adulthood. *Roper v. Simmons,* 543 U.S. at 574. Indeed, federal courts have rejected categorical challenges to life sentences for recidivist offenders even where the first strike occurred when the defendant was a juvenile. See *United States v. Hoffman,* 710 F.3d 1228, 1233 (11th Cir. 2013); *United States v. Graham*, 633 F.3d 445, 462-63 (6th Cir. 2010); *United States v. Scott*, 610 F.3d 1009, 1018 (8th Cir. 2010); *United States v. Mays*, 466 F.3d 335, 340 (5th Cir. 2006).

The second step of the categorical bar analysis is the exercise of the court's judgment as to the severity of the crimes, the culpability of the

class of offenders at issue, and whether the challenged sentencing practice serves legitimate penological goals. *Graham*, 560 U.S. at 67-74. As to juvenile offenders, an LWOP sentence is considered particularly harsh because the culpability of a juvenile is less than an adult and the offender will spend more time in prison than an older defendant, and is considered disproportionate because it does not take into account the real possibility of rehabilitation for juveniles. *Id.* at 70-74. These considerations do not apply to a defendant being sentenced for his third adult conviction of a most serious offense (or here, his third, fourth, and fifth such convictions). An adult who is convicted of his third most serious offense enjoys no presumption of lessened moral culpability and has already enjoyed at least two opportunities for rehabilitation, after the convictions for the first and second strikes. RCW 9.94A.030(38)(a)(ii).

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Moretti's convictions for Robbery in the First Degree and two

counts of Assault in the Second Degree and his life sentence on all three convictions.

DATED this 21st day of March, 2019.

Respectfully submitted,

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