No. 53879-2-II

DIVISION TWO
COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Personal Restraint of

RAYMOND MAYFIELD WILLIAMS,

Petitioner.

REPLY BRIEF OF PETITIONER

Cowlitz County Cause No. 08-01-00735-6

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INTRODUCTION

When the Persistent Offender Accountability Act (POAA) was approved by voters in 1993, the existing statutory definition of "offender" meant that children prosecuted in adult court were swept under the broad reach of the POAA and treated the same as adults. We didn't know any better then. We know better now.

State v. Bassett, 192 Wn.2d 67, 428 P.2d 343 (2018), provides new grounds to find that outdated assumptions about "offenders" and culpability, which failed to understand that children are different, are constitutionally infirm when applied to strike offenses committed by children. *Bassett* changed the law, mandating categorical proportionality analysis for claims based on the culpability of an offender class.

The mandatory imposition of life without parole is cruel when applied to the class of offenders who, like Mr. Williams, was convicted of a strike offense as a child. To treat a strike offense committed by a child identically to a strike offense committed by an adult violates the promise of our constitution to protect against cruel punishment. No valid reason exists to require Mr. Williams to wait for someone to raise this issue on direct appeal. The time to correct this constitutional error is now.

The inviolate principle in post-conviction collateral review is the maintenance of "*unlimited access* to review in cases where there truly

exists a question as to the validity of the prisoner's continuing detention." *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 453, 853 P.2d 424 (1993) (emphasis added). Review is required because Mr. Williams is condemned to die in prison under a mandatory sentencing scheme that counts as a strike a crime committed when he was a child.

ARGUMENT

I. Mr. Williams's PRP Is Not Subject to the One Year Time Bar.

The POAA's mandatory life without parole sentence violates the substantive guarantee of article I, section 14 that punishment will be proportionate to the crime, when applied to the class of offenders serving life without parole based on a juvenile strike offense. Mr. Williams presents two separate exceptions to the time bar, each of which is sufficient on its own to allow consideration on the merits.

A. *Bassett* Changed Article I, Section 14 Jurisprudence in a Way that Is Material to Mr. Williams's Life Without Parole Sentence and Must Apply Retroactively Under RCW 10.73.100(6).

Bassett, 192 Wn.2d 67, constitutes a significant change material to Mr. Williams's sentence and has retroactive effect, both with respect to the specific rules and the larger purpose of each of the three elements of RCW 10.73.100(6). Pet'r Br. at 7, 37-43 (setting forth argument that *Bassett* meets criteria of RCW 10.73.100(6) and incorporating by reference the categorical and individual proportionality analysis set forth

earlier). *Bassett* established that the State's harshest punishment cannot be imposed based on juvenile conduct, and mandated that the categorical proportionality test be applied to resolve claims about the diminished culpability of children—the precise claim Mr. Williams asserts here: that the class of offenders serving life without parole based on a juvenile strike is less culpable than the class of offenders serving life without parole based on three adult strikes. And *Bassett*'s independent judgment analysis that juvenile life without parole serves no legitimate penological goals applies word-for-word to this sentencing context, where a juvenile strike contributes to LWOP as if it reflected adult-equivalent culpability.[1]

1. *Bassett Significantly Changes Proportionality Analysis and Is Material to Mr. Williams's LWOP Sentence Under the POAA*.

The "significant change language is intended to *reduce* procedural barriers to collateral relief in the interests of fairness and justice." *In re Pers. Restraint Yung-Cheng Tsai*, 183 Wn.2d 91, 104, 351 P.3d 138 (2015) (internal citations omitted) (emphasis in original). *Bassett* brought about three significant changes that are material to Mr. Williams's LWOP sentence and warrant access to the courts here—each of which is sufficient

[1] The argument under RCW 10.73.100(6) is based on *Bassett*. The State muddles the issue by citing to *In re Pers. Restraint of White*, 11 Wn. App. 2d 1035, 2019 WL 6492823 (2019), to rebut an argument not made by Mr. Williams. Resp't Br. at 8-10. Mr. Williams argued that the trend of cases—*State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), *Bassett*, 192 Wn.2d 67, and *State v. Gilbert*, 193 Wn.2d 169, 438 P.3d 133 (2019)—merits consideration under RCW 10.73.100(2). Pet'r Br. at 11-12. And *White* did not involve punishment flowing from juvenile conduct.

to exempt Mr. Williams's claim from the one-year bar. First, proportionality under article I, section 14 is changed, as *Bassett* announced that under article I, section 14, categorical proportionality analysis is appropriate to resolve a challenge to a statute's constitutionality when based on the culpability of an offender class. *Bassett*, 192 Wn.2d at 84-85.

The change is material because it fundamentally changes the analysis necessary to resolve the constitutionality of Mr. Williams's sentence. *Bassett*, 192 Wn.2d at 83-84. Before *Bassett*, there was no doctrinal pathway under article I, section 14 to require a court to consider the severity of a particular punishment as it related to the culpability of the offender class. With categorical proportionality, "[i]ssues of culpability, the severity of the punishment, and whether penological goals are served all allow the court to include youth-specific reasoning into the analysis." *Id.* at 83-84. Mr. Williams argues that those serving life without parole based on a juvenile strike are categorically less culpable than those serving LWOP based on three adult strikes. Pet'r Br. at 18-19.

Second, the determination in *Bassett* that article I, section 14 promises heightened protection against cruel punishment for juvenile crimes prosecuted in adult court is also a significant change material to Mr. Williams's sentence. *Bassett*, 192 Wn.2d at 78-82 (conducting *Gunwall* analysis and concluding broadly that article I, section 14 provides

heightened protection in juvenile sentencing). The *Bassett* Court noted that factor four of the *Gunwall* test focuses on "how our jurisprudence on juvenile sentencing has evolved to ensure greater protections for children." *Id.* ¶ 20. And *Bassett* noted that "the sixth factor also weighs in favor of interpreting article I, section 14 more broadly than the Eighth Amendment. While there may be some benefit to national uniformity for sentencing children, it is outweighed by the state policy considerations discussed under *the fourth factor, to grant juveniles special sentencing protections where appropriate*." *Id.* ¶ 24 (emphasis added). The heightened protection promised by article I, section 14, is material to resolution of Mr. Williams's claim, as the *Bassett* Court mandated that article I, section 14 broadly provide heightened protection in the juvenile sentencing context—i.e., when children are sentenced in adult court. The mandatory imposition of life without parole based in part on a juvenile strike is disproportionate in light of the heightened protection afforded by article I, section 14 when a juvenile punished in adult court is not differentiated from an adult.

Third, the heart of *Bassett*'s categorical proportionality analysis is a textbook significant change: the exercise of independent judgment that imposition of juvenile life without parole is cruel. The *Bassett* Court's determination that juvenile life without parole serves no legitimate penological goals is material, word for word, to the cruelty of imposing

life without parole based on a juvenile strike. Pet'r Br. at 27-32, 38-41.

The only significant change the State ascribes to *Bassett* is the invalidation of the *Miller* fix statute that permitted imposition of life without parole on offenders between the age of 16-18, and entirely ignores the significance of the adoption of the categorical proportionality test, the heightened protection of article I, section 14, and the salience of the independent judgment analysis in *Bassett* to Mr. Williams's claim. Resp't Br. at 8. The State's analysis is overly simplistic, ignores the multi-faceted nature of the *Bassett* decision, and does not address the heart of the significant change and materiality analysis presented in the opening brief.

2. *Retroactivity Is Not at Issue Where Punishment Violates the Substantive Guarantee Against Cruel Punishment.*

Though finality is generally the overriding consideration in deciding whether a ruling is retroactive, *Tsai*, 182 Wn.2d at 104 (citing *Danforth v. Minnesota*, 552 U.S. 264, 279–81, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008)), any interest in finality must give way where the punishment itself violates the substantive guarantee of article I, section 14 that punishment will not be cruel. *Cf. Montgomery v. Louisiana*, 136 S. Ct. 718, 731, 193 L. Ed. 2d 599 (2016), *as revised* (Jan. 27, 2016). "[A] court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became

final before the rule was announced." *Id.* The procedural barriers to retroactivity fall away where, as here, the punishment is unconstitutional. *Cf. State v. Gregory*, 192 Wn.2d 1, 36, 427 P.3d 621 (2018) (converting long final death sentences to life imprisonment).

Further, the State does not dispute that *Bassett* is retroactive, and rightly so. *See* Resp't Br. at 6-10. The categorial proportionality test is precisely designed to determine whether a class of offenders is being disproportionately punished due to the mitigating qualities of youth. This test must be applied to determine whether Mr. Williams's punishment is unconstitutional, because disproportionate punishment is never valid.

3. *Bassett Is a Significant Material Change to Individual Proportionality as Well.*

Should the Court decline to determine that *Bassett* is a significant change material to Mr. Williams's claim that the POAA is categorically disproportionate when applied to his offender class, then *Bassett* is a significant change material to Mr. Williams's claim that the POAA violates individual proportionality under article I, section 14 and *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980). *Bassett* established the heightened protection of article I, section 14 in the juvenile sentencing context. Further, *Bassett*'s critique of *Fain* invites consideration of the characteristics of the offender along with the nature of the offense, which

State v. Moretti, 193 Wn.2d 809, 832, 446 P.3d 609 (2019) acknowledged. *Bassett* opens the door to determine how the heightened protection of article I, section 14 in juvenile sentencing changes *Fain* proportionality analysis of punishment based on crimes committed by children.

B. Use of Juvenile Strike Offenses Is Unconstitutional As Applied to Mr. Williams and the Class of Which He Is a Part Under RCW 10.73.100(2).

Second, and alternatively, Mr. Williams's claim meets the time bar exception under RCW 10.73.100(2), because the POAA as applied to Mr. Williams or the class he represents is unconstitutional. Pet'r Br. at 5-6, 11-12 (discussing a constellation of cases, including *Bassett*, *Houston-Sconiers*, *Gilbert*, and *Fain*, that render use of a juvenile strike unconstitutional as applied to Mr. Williams and the class of which he is a part). The applicability of RCW 10.73.100(2) is coextensive with the merits of the constitutional argument—here, consideration of categorical and individual proportionality. For the reasons stated below in the merits section, *infra* at III.A, as well as in the opening brief, Pet'r Br. at 18-23, under the categorical proportionality test, Mr. Williams's claim is that no juvenile strike—not just his—may form the basis for LWOP under the POAA, due to the diminished culpability of all children. In the alternative, the POAA as applied to Mr. Williams is disproportionate under *Fain*.

The State provides no response to this interpretation of RCW

10.73.100(2), and instead responds that the plain language only permits a challenge to the second-degree assault statute, Mr. Williams's third strike. Resp't Br. at 7. This argument is too clever by a half. It would provide relief to those whose incarceration is unconstitutional only when the underlying conviction itself is infirm, but not to those who suffer from a cruel sentence. Consider if *Gregory* had been brought as a collateral challenge after Mr. Gregory's sentence was long final, with empirical research—not a single significant change in the law—revealing that Black defendants are 4.5 times more likely to receive the death penalty than white defendants. Under the State's interpretation, Mr. Gregory would have been time-barred from challenging the unconstitutional sentence imposed under RCW 10.95.030 because he wasn't directly challenging his conviction under RCW 10.95.020. This interpretation is untenable where the conviction itself mandates the unconstitutional result.

Here, Mr. Williams pleaded guilty to Assault 2, which is a "most serious offense" under RCW 9.94A.030(33); in conjunction with his two previous strikes, RCW 9.94A.030(38)(a), this triggered the court to "f[i]nd the defendant to be a Persistent Offender. RCW 9.94A.570," Pet'r Br., App'x A-6, which required imposition of LWOP. RCW 9.94A.570. The cruel sentence applied to Mr. Williams as a result of his being convicted of a "most serious offense," thus satisfying RCW 10.73.100(2).

The State's narrow interpretation contravenes our Supreme Court's interpretation of the time bar and its exceptions: "In streamlining the postconviction collateral review process, RCW 10.73.090 *et seq.* have preserved *unlimited access* to review in cases where there truly exists a question as to the *validity of the prisoner's continuing detention*." *Runyan*, 121 Wn.2d at 453 (emphasis added). Here, a question truly exists as to the validity of Mr. Williams's continuing detention, a question left open explicitly in *Moretti*, 193 Wn.2d ¶ 22 n.5 (reserving the question of the constitutionality of using a strike committed by a juvenile under POAA).

Further, the State's narrow interpretation is offered with no supporting case law. Resp't Br. at 7. The interpretation of RCW 10.73.100(2) is largely a matter of first impression,[2] and to the extent there is ambiguity in what RCW 10.73.100(2) contemplates, the rule of lenity applies. *State v. Jacobs*, 154 Wn.2d 596, 600–01, 115 P.3d 281 (2005) (if a statute is ambiguous, it must be interpreted in favor of the defendant absent legislative intent to the contrary).

II. Proportionality Review Under Article I, Section 14 Must Include All Strikes.

The State's argument that this Court can simply decline to engage in proportionality analysis—that cruel punishment review looks only at

[2] *Runyan*'s example of a challenge that would come under RCW 10.73.100(2), an unconstitutionally vague ordinance, did not address "as applied to the defendant's conduct." 121 Wn.2d at 445 (citing *Seattle v. Rice*, 93 Wn.2d 728, 612 P.2d 792 (1980)).

whether Mr. Williams was an adult at the time of his third strike—contradicts *Fain* and subsequent POAA decisions under article I, section 14, which unambiguously require proportionality review to include all offenses. *Fain*, 94 Wn.2d at 397-98 (examining "each of the crimes that underlies his conviction as a habitual offender"); *State v. Thorne*, 129 Wn.2d 736, 773-74, 921 P.2d 514 (1996), *abrogated on other grounds by Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (1996) (same); *State v. Manussier*, 129 Wn.2d 652, 677, 921 P.2d 473 (1996); (same); *State v. Rivers*, 129 Wn.2d 697, 713, 714, 921 P.2d 495 (1996) (discussing prior offenses under *Fain* factor 4); *see also Bassett*, 192 Wn.2d 84–85 (*Fain* adopted individual proportionality analysis because it fit the challenge Fain brought—that his sentence "was grossly disproportionate to his *crimes*") (emphasis added); *cf. Solem v. Helm*, 463 U.S. 277, 296-97, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) (examining closely both the instant and previous offenses that qualified Helm as a habitual offender); *Rummel v. Estelle*, 445 U.S. 263, 295, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980) (Powell, J., dissenting) (considering each of the victimless crimes underlying LWOP sentence). To limit proportionality analysis solely to the final "strike" under article I, section 14 would afford less protection than the Eighth Amendment, which is impermissible. *Gregory*, 192 Wn.2d at 36 (Johnson, J., concurring).

The State fails to address either *Fain* or federal proportionality cases that establish that proportionality review considers all conduct for which the recidivist punishment is imposed. Rather, the State's argument that a court may look only at the final "strike" relies upon a sentence in *Moretti*: "[b]ut our proportionality review focuses on the nature of the current offense, not the nature of past offenses." 193 Wn.2d at 832. However, it is unclear that former Chief Justice Fairhurst appreciated how this sentence, supported by no citations, if taken literally, would sub silentio reverse *Fain*, *Thorne*, *Manussier*, and *Rivers*. Usually, more is required to reverse 40 years of settled Washington jurisprudence.[3] And this Court is not bound to follow *Moretti* on that point, because *Moretti* did not actually address or consider the tension between its characterization of recidivist punishment and its duty under article I, section 14 and the Eighth Amendment to review all strikes. *See In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) ("Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in

[3] *See State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999) ("We will not overrule such binding precedent *sub silentio*."). Justice Fairhurst herself warned against sub silentio overruling of precedent. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) (citing *Studd*, 137 Wn.2d at 548) (where Court has "expressed a clear rule of law . . . we will not —and should not—overrule it sub silentio").

the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court.").

Instead, this unsupported sentence should be understood to speak to what has long been settled: that, for purposes of protections against double jeopardy and ex post facto laws, recidivist statutes are viewed as punishing only the qualifying offense and are insulated from challenges based on these specific constitutional protections. Pet'r Br. at 14-15. *But see Moretti*, 192 Wn.2d at 826 (citing *State v. Lee*, 87 Wn.2d 932, 558 P.2d 236 (1976), and *State v. LePitre*, 54 Wash. 166, 03 P. 27 (1909)) (characterizing recidivist punishment as punishment for the final strike).[4]

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[4] *Lee* and *LePitre* do not foreclose consideration of previous strike offenses; understood properly, they reflect only that recidivist statutes do not run afoul of due process protections or guarantees against double jeopardy or ex post facto laws. *Lee*, citing *State v. Miles*, 34 Wn.2d 55, 61-62, 207 P.2d 1209 (1949), rejected the proportionality argument in one sentence, stating "[t]he life sentence…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." *Lee*, 87 Wn.2d at 239 (citing *Miles*, 34 Wn.2d at 61-62). *Miles* conducted no proportionality analysis and upheld the habitual offender statute by citing two cases for the proposition that habitual offenders "are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted," 34 Wn.2d at 62 (citing *Graham v. West Virginia*, 224 U.S. 616, 623, 32 S. Ct. 583, 56 L. Ed. 917 (1912)), and that "punishment is for the new crime only," *id*. (citing *McDonald v. Commonwealth of Massachusetts*, 180 U.S. 311, 21 S. Ct. 389, 45 L. Ed. 542 (1901)).

Graham and *McDonald* did not involve Eighth Amendment challenges, but instead involved challenges based on double jeopardy, due process, and ex post facto challenges. *McDonald*, 180 U.S. 311 (rejecting challenge to habitual criminal statute based on the double jeopardy and ex post facto provisions because the "punishment is for the new crime only, but is the heavier if he is an habitual criminal"; no Eighth Amendment challenge brought); *Graham*, 224 U.S. at 623 (citing *McDonald*, 180 U.S. at 312-13) (rejecting challenge to habitual offender statute under due process and double jeopardy).

Similarly, in *LePitre*, 54 Wash. 166, the Court summarily dismissed claims based on double jeopardy, ex post facto, jury trial rights, or cruel and unusual punishment with a

Importing this characterization of recidivist punishment from a different constitutional doctrine to foreclose a challenge based on proportionality guarantees is improper. It would mean that once a court determines a statute is immune from challenge based on one constitutional doctrine, it is immune from challenge based on all other constitutional guarantees. This cannot be how courts conduct constitutional interpretation. Blind adherence to this characterization of recidivist punishment in the context of proportionality review would displace this Court's obligation to carefully examine all three strikes to ensure punishment is not cruel.[5]

Finally, *Moretti*'s reliance on the characterization of POAA punishment as punishment for the current offense, 192 Wn.2d at 826, was driven by the nature of the claims presented in that case. The petitioners had "not produced any evidence that their youth contributed to the commission of the instant offenses, *or even that youth contributed to their prior offenses*," *Id.* at 824 (emphasis added). Mr. Williams has presented abundant evidence regarding a childhood marked by multiple adverse

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single sentence: "It [the habitual criminal statute] merely provides an increased punishment for the last offense." *Id.* at 168 (citing secondary sources and *In re Miller*, 110 Mich. 676, 68 N.W. 990 (1896)). *Miller*, a two paragraph opinion, dismissed an ex post facto challenge to a statute entitling those without prior criminal history to a sentence reduction but not to those with prior criminal history. *Id.* at 676.

[5] Further, this characterization presupposes that *each* predicate strike "aggravates the guilt of the last conviction and justifies a heavier penalty for the crime." *Lee*, 87 Wn.2d at 239. But it is beyond dispute that a juvenile strike does not reflect adult equivalent culpability, because all children are less culpable than their adult counterparts. *Bassett*, 192 Wn.2d at 87. A strike offense committed by a child cannot aggravate the guilt of the last conviction nor justify a heavier penalty in the same way that an adult strike does.

childhood experiences that contributed to his first strike offense. Pet'r Br. at App'x H. And it is accepted that children as a class are categorically less culpable than their adult counterparts. *Bassett*, 192 Wn.2d ¶ 35. The record is therefore replete with evidence that both he individually, and the class of offenders he represents, is less culpable than offenders who committed all strikes as adults. *Moretti* explicitly reserved the question of the constitutionality of the use of a juvenile strike for another day. 193 Wn.2d ¶ 22 n.5. That day is here.

III. Use of a Juvenile Strike Offense to Support Life Without Parole Is Disproportionate.

The POAA is categorically unconstitutional as applied to a less culpable class of offenders—those who commit strike offenses as children and who are subsequently sentenced to die in prison in part because of that juvenile conduct. This as-applied challenge must be resolved through the application of categorical proportionality analysis, as it is that test that adequately considers the culpability of an offender class. *Bassett*, 192 Wn.2d at 90 (life without parole under RCW 10.95.030(3)(a)(ii) unconstitutional as applied to juveniles); *see also Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2442, 153 L. Ed. 2d 335 (2002) (death penalty unconstitutional as applied to juveniles); *accord State v. Teas*, 10 Wn. App. 2d 111, ¶¶ 63-65, 447 P.3d 606 (2019), *review denied*, 195 Wn.2d

1008, 460 P.3d 182 (2020) (applying categorical proportionality analysis to claim that the POAA as applied to an offender class was cruel). In the alternative, the POAA as applied to Mr. Williams as an individual is disproportionate under individual proportionality analysis.[6]

A. Categorical Framework.

Most of the State's response to the categorical proportionality argument is dedicated to discussing how other states and federal courts treat juvenile strikes. None of these Eighth Amendment cases are salient to this Court's interpretation of the Washington constitution's prohibition against cruel punishment. Both the federal and state cases, many of which were originally distinguished by Mr. Williams in the opening brief,[7] indicate only that courts have not meaningfully engaged with the issue. These cases inappropriately rely on the characterization of recidivist punishment as punishment for the current conviction only, evading the question of whether use of juvenile predicates implicates proportionality

[6] The State, Resp't Br. at 15, and this Court in *Teas*, 10 Wn. App. 2d ¶¶ 63-65, suggest that an as-applied challenge is coextensive with a claim based on individual proportionality. An as-applied challenge is simply the counterpart to a facial challenge; neither an as-applied nor facial challenge is a substantive constitutional test. As-applied challenges under article I, section 14 pertaining to the culpability of an offender class are resolved through categorical proportionality, whereas as-applied challenges pertaining to the specific circumstances of an individual are resolved through *Fain* proportionality.

[7] Pet'r Br. at 21-22 (discussing and distinguishing *United State v. Hoffman*, *United States v. Scott*, *United States v. Smalley*, *United States v. Graham*, *United States v. Mays*, *Counts v. State* (Wy.), *State v. Green* (S.C.), and focusing on the only Circuit Court to actually address proportionality and the use of juvenile strikes, *United States v. Howard*).

concerns. That characterization has been improperly imported into the proportionality context in federal cases and other state cases just as it has in Washington cases, *supra* n.4, based on the same original ex post facto and double jeopardy challenges to early recidivist statutes cited by Washington cases.[8] Other of the State's cases regarding national

[8] Follow the chain of citations, and you find that *United States v. Hunter*, 735 F.3d 172, 175 (4th Cir. 2013), relies on *United States v. Rodriquez*, 553 U.S. 377, 386, 128 S. Ct. 1783, 170 L. Ed. 2d 719 (2008), which relies on *Gryger v. Burke*, 334 U.S. 728, 732, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948), which in turn relies on *Graham v. West Virginia*, discussed *supra* n.4, and *Moore v. Missouri*, 159 U.S. 673, 676-77, 16 S. Ct. 179, 40 L. Ed. 301 (1895), which rejects a challenge to habitual criminal statute based on double jeopardy and summarily rejects the challenge based on cruel and unusual punishment in one sentence with a perplexing citation to *In re Kemmler*, 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 (1890), which found death by electrocution not cruel and unusual. *Hunter*, instead of engaging in substantive reasonableness review of a sentence imposed based on juvenile predicates under the Armed Career Criminal Act (ACCA), cited *Rodriquez*—which presented only a statutory interpretation question regarding predicates under the ACCA—for the rule that recidivist punishment "is a stiffened penalty for the latest crime." 735 F.3d at 175 (quoting *Rodriquez*, 553 U.S. at 386). And *Rodriquez* cites *Gryger*, which was a double jeopardy and ex post facto challenge to a recidivist statute, and *Gryger* in turn cites to *Moore* and *Graham*. *Gryger*, 334 U.S. at 729, 732 (citing *Moore* and *Graham*). *Hunter*'s reliance on *Rodriquez* for the rule that recidivist punishment is only for the current offense is problematic and inaccurate for the precise reasons the *Lee* rule is—it traces back to the original challenges to recidivist statutes in *Graham* and *Moore* based on double jeopardy and ex post facto protections. What might be true for double jeopardy and ex post facto is not true for a proportionality challenge.

The same holds for the other cases the State relies on. *See United States v. Edwards*, 734 F.3d 850, 853 (9th Cir. 2013) (noting that the sentence, 46 months, does not present the issue of prior juvenile convictions serving as a predicate for a life sentence); *United States v. Orona*, 724 F.3d 1297 (10th Cir. 2013) (rejecting categorical challenge to ACCA's use of juvenile convictions as predicates because no national consensus existed, and relying on *Rodriquez* rule—that recidivist punishment is for current offense only—in concluding punishment not disproportionate); *United States v. Banks*, 679 F.2d 505, 507-08 (6th Cir. 2012) (cursory rejection of categorical proportionality argument because "Supreme Court has yet to categorically prohibit courts from considering juvenile-age offenses when applying enhancements to an adult's conviction"; individual proportionality argument not raised by defendant); *see also People v. Porter*, 2019 COA 73, ¶ 18, 459 P.3d 710, 714, *cert. denied*, No. 19SC443, 2020 WL 1488153 (Colo. Mar. 23, 2020) (rejecting Eighth Amendment challenge to life sentence based on juvenile predicates because "enhanced sentences pursuant to recidivist sentencing statutes only

consensus were decided after *Roper* but before *Graham* and *Miller*, and are inherently limited as they predate the application of juvenile brain science outside of the death penalty to a wider variety of sentencing contexts.[9] Yet others are entirely inapposite as they did not involve proportionality challenges.[10]

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punish a defendant for the offense of conviction—not for the underlying prior offenses." (citing *Rodriquez*, 553 U.S. at 385)); *Price v. State*, 2019 Ark. 323, 8–9, 588 S.W.3d 1, 6 (2019) (finding no Eighth Amendment violation to use a juvenile predicate to support a life sentence, relying on its decision in *Wilson v. State*, 2017 Ark. 217 (2017); *Wilson v. State*, 2017 Ark. 217, 521 S.W.3d 123, 127 (2017) (affirming use of juvenile predicate because offender is punished with an enhanced sentence for his conduct as an adult (relying on *Hunter*, *Orona*, *Hoffman*, *Scott*, distinguished *supra* nn. 8-9); *Dolphus v. State*, 248 Ark. 799, 802-03, 45 S.W.2d 88 (1970) (summarily dismissing proportionality challenge because recidivist punishment is "'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" (citing *Oliver v. United States*, 290 F.2d 255, 256-57 (8th Cir. 1961) (citing *Gryger*, 334 U.S. at 732 (citing *Moore* and *Graham*))); *McDuffey v. State*, 286 So. 3d 364, 367 (Fla. Dist. Ct. App. 2019), *review denied*, No. SC20-22, 2020 WL 1909232 (Fla. Apr. 17, 2020) (rejecting proportionality challenge to use of juvenile predicates, because "100% of the punishment is for the offense of conviction" (citing *Rodriquez*, 553 U.S. at 386)).

[9] Pet'r Br. at 21-22 (distinguishing *Mays* and *Smalley*); *United States v. Feemster*, 483 F.3d 583, 584 (8th Cir. 2007), *cert. granted, judgment vacated*, 552 U.S. 1089, 128 S. Ct. 880, 169 L. Ed. 2d 718 (2008) (declining to extend *Roper* into recidivist sentencing context, but recognizing that adult offender with a juvenile predicate is less culpable than an adult offender with adult predicates), *on reh'g en banc,* 572 F.3d 455 (8th Cir. 2009) (post-*Gall*, affirming original downward departure based on juvenile predicate strike as valid exercise of discretion by original sentencing court); *United States v. Salahuddin*, 509 F.3d 858 (7th Cir. 2007) (declining to extend *Roper* to recidivist portion of ACCA that permitted juvenile convictions to serve as basis for sentence enhancements); *United States v. Wilks*, 464 F.3d 1240, 1242–43 (11th Cir. 2006) (same).

[10] *United States v. Rich*, 708 F.3d 1135 (10th Cir. 2013) (considering substantive due process challenge to ACCA where one predicate offense was a juvenile adjudication when Rich was 14 years old); *Moss v. United States*, No. CR491-176, 2014 WL 346758 (S.D. Ga. Jan. 30, 2014), *report and recommendation adopted*, No. CR491-176, 2014 WL 793646 (S.D. Ga. Feb. 25, 2014) (denying motion to vacate or set aside federal sentence because *Graham v. Florida* did not apply to preclude use of juvenile crimes to support recommended guidelines sentence); *Commonwealth v. Bonner*, 135 A.3d 592, 598 (Pa. Super. Ct. 2016) (declining to adopt a categorical rule against using prior juvenile adjudications when calculating a defendant's prior record score); *Vickers v. State*, 117 A.3d 516, 519 (Del. 2015) (denying due process challenge to use of juvenile

Nine states already forbid using a juvenile strike to serve as a predicate offense under recidivist schemes. Pet'r Br. at 20-23. When considered in conjunction with the large majority of jurisdictions that do not permit counting juvenile adjudications as predicate offenses, of which Washington is one, Pet'r Br. at 20 n.22, there is an indisputable consensus that adult consequences must not flow from childhood acts.

The State offers no response to the independent judgment analysis presented in Mr. Williams's opening brief, which set forth the reasons that a juvenile strike must not be treated as equivalent to an adult strike for purposes of retribution, incapacitation, deterrence, and rehabilitation, and explaining that those serving LWOP based in part on juvenile strikes are less culpable when compared to other POAA offenders. Pet'r Br. at 24-33.[11] Instead, the State simply regurgitates the analysis from *Moretti* and *Teas*, Resp't Br. at 34-37, which involved proportionality challenges based on adult strikes[12] and characterization of recidivist punishment as being

predicate); *Kearns v. State*, 48 P.3d 1090, 2002 WY 97 (2002) (challenge to recidivist challenge based on double jeopardy; no proportionality challenge presented; no juvenile predicates); *Commonwealth v. Johnson*, No. 1783 WDA 2017, 2018 WL 5725304 (Pa. Super. Ct. Nov. 1, 2018) (use of juvenile adjudications to calculate prior record score does not violate Eighth Amendment); *Commonwealth v. Burden*, No. 1892 MDA 2016, 2017 WL 4180224 (Pa. Super. Ct. Sept. 21, 2017) (same); *Commonwealth v. Campbell*, No. 206 WDA 2016, 2016 WL 5266639 (Pa. Super. Ct. Sept. 22, 2016) (same).

[11] Independent judgment also requires attention to the way long and life sentences have led to mass incarceration that does not advance legitimate penological goals. *See generally* Katherine Beckett & Heather Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State*, (Feb. 25, 2020).

[12] Due to ambiguity in *Teas* regarding when the first strike offense occurred, counsel did

only for the adult strike, which, as discussed above, is improper.[13] *Moretti* and *Teas* are inapplicable to *juvenile* strikes, where it is universally accepted that juvenile criminal conduct reflects inherently less culpability. Perhaps the State's failure to address the applicability of *Bassett*'s independent judgment analysis is because to do so yields only one result: that use of a juvenile strike offense is categorically disproportionate for the precise reasons that imposition of JLWOP is. Pet'r Br. at 24-33.

This Court's independent judgment about the valid penological goals of sentencing someone to die in prison based in part on conduct committed as a child can leave but one conclusion: such a practice is cruel and can no longer be countenanced. Such a decision does not undermine the POAA but rather places limitations on it to ensure its constitutionality in the wake of *Bassett* and its federal progenitors.

B. *Fain* Proportionality.

Two bedrock principles underlying proportionality analysis are that it serves as a check on cruelty, and that it must evolve over time. *See Fain*, 94 Wn.2d at 396 & 397 ("[p]roportionality is an illusive [sic] concept which has developed gradually in response to society's changes"

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not argue that LWOP was imposed based on *juvenile* strike; it is undisputed that the court did not address constitutionality of using a juvenile strike to support LWOP.

[13] For similar reasons, this Court's decision in *State v. Vasquez*, No. 36123-3-III, 2019 WL 2537939 (June 20, 2019), *review denied*, 194 Wn.2d 1005 (2019) (holding *Bassett* inapplicable to sentence imposed on 23-year-old convicted of murder), is inapposite.

and that it "'must draw its meaning from evolving standards of decency that mark the progress of a maturing society'" (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958))).

The *Fain* Court understood the perils of evaluating individual proportionality, appreciating that "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." 94 Wn.2d at 397 (citations omitted). The now-familiar factors provided objective standards to provide a reasoned assessment of proportionality. But *Fain* never stated that these four factors were the *only* factors that may be considered.

Three years after *Fain*, the U.S. Supreme Court expressly included the culpability of the offender as part of its analysis of the offense, in recognition that culpability is important in assessing proportionality. *See Solem*, 463 U.S. at 293 ("Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply."). *Solem* reveals that Washington courts' narrow focus on "the offense," to the exclusion of consideration of the culpability of the offender, is a deeply problematic departure from Eighth Amendment requirements.[14]

[14] Some courts mischaracterize *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), as overruling *Solem*. This stems from a part of the opinion by Justice Scalia joined only by Chief Justice Rehnquist. *Id*. at 985. In addition, the tension produced by the seemingly disparate outcomes in *Solem* and *Rummel* is resolved by

Consideration of the offender's culpability along with the offense itself would bring *Fain* proportionality into harmony with *Solem*. Even more importantly, consideration of the offender's culpability ensures that the *Fain* proportionality is animated by *Bassett*'s holding that heightened protection is afforded under article I, section 14 in the juvenile sentencing context. *Bassett*, 192 Wn.2d ¶ 25; *id.* at 90-91 (considering the fact of a juvenile's diminished culpability in its *Fain* analysis); *accord Moretti*, 193 Wn.2d at 832 (considering culpability of the offenders in *Fain* factor 1).

Mr. Williams's case regarding his diminished culpability are readily distinguishable from those in *Moretti*. First, *Moretti* made clear that it was "express[ing] no opinion on whether it is constitutional to apply the POAA to any offender who committed a strike offense as a juvenile and was convicted in adult court." 193 Wn.2d at 821 n.5. Mr. Williams's first strike occurred when he was 16, when he was homeless and suffering from drug addiction and severe mental health issues, which included having been hospitalized at least three times for attempted suicide. *See* Pet'r Br. at 2-3. These individualized mitigating factors are considered in conjunction with the truth that all "children are less criminally culpable than adults." *Bassett*, 192 Wn.2d at 87. None of the first strikes in *Moretti*

Solem's observation that Rummel, despite having a life sentence, "was likely to have been eligible for parole within 12 years of his initial confinement, a fact on which the Court relied heavily." *Solem*, 463 U.S. at 297, 297 n.25 (noting also that, in fact, Rummel was released "within eight months of the Court's decision in his case").

were committed as children. *Moretti*, 193 Wn.2d at 814-17.

Further, Mr. Williams's second and third strikes occurred when he was 23 and 28, still within the time during which neuro-developmental growth continues, *State v. O'Dell*, 183 Wn.2d 680, 691-92, 358 P.3d 359 (2015) (brain "continue[s] to develop well into a person's 20s"), unlike the petitioners in *Moretti*, whose last strikes were committed when they were 32, 41, and 41, *Moretti*, 193 Wn.2d at 814-17. Mr. Williams has not "continued to recidivate after . . . [his] brain[ ] . . . [was] fully developed" and has not "shown entrenched patterns of problem behavior." *Id.* at 832 (internal citations omitted). Instead, Mr. Williams has demonstrated a remarkable record of rehabilitation. Pet'r Br. at App'x H, ¶¶ 16-32.

Regarding the purpose of the POAA, which is to deter criminals who commit three most serious offenses and to incapacitate them by segregating them from the rest of society, *Moretti*, 193 Wn.2d at 832, nothing indicates that voters specifically intended to include strikes committed by children.[15] In 1993, the POAA was overlaid on top of existing statutes, including the definition of "offender," which included children convicted in adult court. The second factor requires recognition

[15] Even if voters had, courts ensure that voters or legislators act within constitutional bounds. *See, e.g.*, *State v. Furman*, 122 Wn.2d 440, 457, 858 P.2d 1092 (1993) (vacating death sentence of 17 year old, though all adult punishments were available to children tried in adult court); *Houston-Sconiers*, 188 Wn.2d at 21 (courts may disregard certain mandatory aspects of sentencing statutes when sentencing children); *Bassett*, 192 Wn.2d at 90 (though LWOP for children permitted by statute, cruel as applied to children).

that the very purposes of the POAA must be qualified by what we now know about children and their diminished culpability.

Third, the POAA is the most punitive form of recidivist punishment in the country,[16] as life without parole is mandatorily imposed after the third strike. Further, as discussed in the national consensus analysis in both the opening brief and *supra*, there is no consensus that it is fair, constitutional, or scientifically sound to use criminal acts committed by children as predicates in recidivist schemes.

Finally, life without parole is now the harshest punishment available in Washington. And if this fourth factor—the punishment meted out for other offenses in the same jurisdiction—is applied to Mr. Williams's first strike, rather than to the ultimate punishment, Pet'r Br. at 36, it is equally reflective of the cruelty of his sentence. The crime he was charged with when he was 16 was not subject to auto-decline. He was prosecuted in adult court because he waived his right to a decline hearing, hoping to receive better treatment in the adult system than in the juvenile system, where he had been severely mistreated. Pet'r Br., App'x H at ¶¶

[16] The State takes this to mean that Washington is the *only* jurisdiction that imposes LWOP. Resp't Br. at 17. The State misapprehends the comparison mandated by factor 3: the punishment an offender would receive in other jurisdictions. Washington and the other nine jurisdictions that impose LWOP are in the minority; the majority of jurisdictions with recidivist statutes imposes something far less punitive than LWOP. Pet'r Br. at 35 (citing Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. Rev. 581, 645 (2012) (chart explaining punishment imposed under each jurisdiction's recidivist statute).

12-14. A different court might not have accepted the waiver, recognizing the life-long consequences of prosecuting a child in adult court.[17]

Imposing the harshest punishment in Washington on Mr. Williams, based in part on a crime committed as a child, is grossly disproportionate.

IV. Mr. Williams Is Prejudiced by the Use of a Juvenile Strike.

The State does not dispute that Mr. Williams is prejudiced by serving an unconstitutional life without parole sentence. It is hard to fathom something more prejudicial, after *Gregory* and *Bassett*, than being sentenced to the state's harshest punishment under a scheme that treats criminal acts committed children as if they were fully culpable adults.

CONCLUSION

Mr. Williams respectfully requests the Court to remand to Cowlitz County Superior Court to vacate his life without parole sentence.

DATED this 8th day of June 2020.

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[17] Further, not all public defenders are equally skilled at representing children, particularly homeless and severely traumatized children. And a child with involved parents or a legal liaison would very likely be guided to stay in juvenile court, unlike Mr. Williams, a foster child who had no family or other caring adult looking out for him.

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on June 8th, 2020, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 8th day of June, 2020.

/s/ Jessica Levin
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