No. 47229-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SEAN A. THOMPSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The imposition of a sentence of life without the possibility of parole based upon the trial court's determination by a preponderance of the evidence that Mr. Thompson had two prior convictions for a "most serious offense" violated his right to a jury trial and to due process secured by the Sixth and Fourteenth Amendments and by Article I, sections 3 and 21.

2. The imposition of a sentence of life without the possibility of parole based upon the classification of Mr. Thompson's prior convictions for a most serious offense as a "sentencing factor" that need be proved by a preponderance of the evidence, rather than as an "element" that must be proved beyond a reasonable doubt, violated Mr. Thompson's right to equal protection secured by the Fourteenth Amendment and by Article I, section 12.

3. The imposition of a sentence of life without the possibility of parole, with no consideration of mitigating factors, such as Mr. Thompson's young age at the time he committed the predicate offenses, his lack of any convictions for a Class A felony, and the gross disparity between his standard range sentence and life, violated his protection against cruel and unusual punishment secured by the Eighth Amendment and by Article I, section 14.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The constitutional rights to due process and to jury trial guarantee a jury determination beyond a reasonable doubt for every fact that authorizes an increase in punishment. Was Mr. Thompson deprived of these rights when the trial court imposed a sentence of life without the possibility of parole, based on the court's own determination by a preponderance of the evidence that he had two prior convictions for a "most serious offense"?

2. A statue implicating a fundamental liberty interest violates equal protection when it creates classifications that are unnecessary to further a compelling government interest, such as the interest in punishing recidivists more harshly than first-time offenders. For some crimes, the fact of a prior conviction that elevates the punishment is classified as an "element" that must be proved to a jury beyond a reasonable doubt. For other crimes, however, such as those subject to sentencing pursuant to the Persistent Offender Accountability Act (POAA), the fact of a prior conviction for a most serious offense that elevates the punishment is classified as a "sentencing factor" that need only be proved by a preponderance of the evidence. Does the POAA violate equal protection by providing lesser procedural protections for prior convictions classified

as "sentencing factors" than those classified as "elements," even though the same government interest is served in both instances?

3. The Eighth Amendment prohibits cruel and unusual punishment and Article I, section 14 prohibits cruel punishment. Where Mr. Thompson was only twenty years old and twenty-two years old when he committed his predicate offenses, he has no convictions for a Class A felony, and he faced a standard range sentence of 33-43 months, did imposition of a mandatory sentence of a life without the possibility of parole constitute cruel punishment?

C. STATEMENT OF THE CASE

Sean A. Thompson was initially charged with assault in the first degree, which carries a maximum sentence of life with the possibility of parole. CP 1-3. Prior to trial, the State amended the charge to assault in the second degree, which carries a maximum sentence of ten years with the possibility of parole. CP 25-27. Following a jury trial, Mr. Thompson was convicted of assault in the second degree, as charged in the amended information. CP 106-107. Based on his offender score of '6', Mr. Thompson faced a standard range sentence of 33-43 months. CP 173. Nonetheless, the court sentenced Mr. Thompson to a term of life without the possibility of parole as a persistent offender, pursuant to RCW 9.94A.570, based on a judicial finding by a preponderance of the evidence

that he had two prior convictions for a "most serious offense." CP 174; 2/2/15 RP 43-44.

Additional facts are discussed in the relevant argument section below.

D. ARGUMENT

1. The trial court violated Mr. Thompson's right to a jury trial and due process when it imposed a sentence of life without the possibility of parole, in the absence of a jury finding beyond a reasonable doubt that he had two prior convictions for a "most serious" offense.

a. A criminal defendant has the constitutional right to a jury finding beyond a reasonable doubt of any fact that increases the minimum or maximum sentence.

The due process provisions of the federal and state constitutions guarantee a defendant the right to proof beyond a reasonable doubt of every fact essential to punishment. U.S. Const. amend. XIV; Art. I, § 3; *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A defendant also has the constitutional right to a trial by jury. U.S. Const. amend. VI; Art. I, § 21. Accordingly, the State must prove to a jury beyond a reasonable doubt any "fact" upon which it relies to increase punishment above the maximum sentence otherwise available for the crime charged. *Descamps v. United States*, __ U.S. __, 133 S.Ct. 2276,

2285-86, 186 L.Ed.2d 438 (2013); *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

b. Because two prior convictions were alleged to increase Mr. Thompson's minimum and maximum sentence to life without the possibility of parole, he was entitled to a jury determination beyond a reasonable doubt that he had two prior convictions for a "most serious" offense.

Based on Mr. Thompson's offender score of '6', he faced a standard range sentence of 33-43 months for the assault in the second degree.[1] CP 173. Nonetheless, the court sentenced Mr. Thompson to a term of life without the possibility of parole based on its finding that he had two prior convictions for a most serious offense.[2] Absent a jury determination beyond a reasonable doubt that Mr. Thompson had two prior convictions for a most serious offense, the life sentence was imposed in violation of his constitutional right to due process and jury trial.

A "persistent offender" is defined, in pertinent part, as a defendant who has a current conviction for a most serious offense, including assault in the second degree, and who has two prior convictions for a most serious offense. RCW 9.94A.030(38)(a). RCW 9.94A.570 provides, "Notwithstanding the statutory maximum sentence or any other provision

[1] Assault in the second degree is a Class B felony which carries a maximum sentence of ten years in prison. RCW 9A.20.021(1)(b), 9A.36.021(2)(a).

[2] A mandatory sentence to life increases both the minimum and the maximum sentence otherwise authorized by the Sentencing Reform Act.

of this chapter, a persistent offender shall be sentenced to a term of total confinement for life with the possibility of parole[.]"

The right to a jury trial applies not just to the essential elements of the crime charged, but also extends to facts labeled "sentencing factors," if those facts increase the minimum or maximum penalty faced by the defendant. *See, e.g.*, *Blakely*, 542 U.S. at 303-05 (Washington's Sentencing Reform Act unconstitutional insofar as it permitted a judge to impose an exceptional sentence above the standard range based upon facts that were not found by a jury beyond a reasonable doubt); *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (Arizona's death penalty scheme unconstitutional because a defendant could receive a sentence of death based upon aggravating factors found by a judge by a preponderance of the evidence); *Apprendi v. New Jersey*, 530 U.S. 466, 492-93, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); (New Jersey's "hate crime" legislation unconstitutional because it permitted the court to impose a sentence above the statutory maximum based on facts proven by a preponderance of evidence only, rather than a jury finding of those facts beyond a reasonable doubt); *Alleyne*, 133 S.Ct. at 2158 (federal sentencing scheme authorizing varying increased minimum sentences for use of a firearm in relation to a crime of violence depending on how firearm used requires a jury determination and proof beyond a reasonable doubt). In

each of these cases, the Court rejected the arbitrary classification of facts as either "sentencing factors" or "elements" of a crime. The dispositive question is one of substance, not form. "If a State makes an increase in defendant's authorized punishment contingent upon the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 530 U.S. at 602 (citing *Apprendi*, 530 U.S. at 482-83). Thus, a judge may impose a sentence solely based upon facts found by the jury or contained in a guilty plea, and not based upon additional findings. *Blakely*, 542 U.S. at 303.

In *Almendarez-Torres v. United States*, the Court rejected the petitioner's claim that recidivism should be treated as an element of the offense. 523 U.S. 224, 247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). However, this so-called "prior conviction exception" to proof beyond a reasonable doubt has been implicitly overruled by subsequent United State Supreme Court decisions.[3] In *Apprendi*, the Court characterized *Almendarez-Torres* as "at best an exceptional departure" from the historic practice of requiring the government to prove beyond a reasonable doubt

[3] Mr. Thompson recognizes that the Washington Supreme Court has declined to apply *Apprendi* in the context of prior convictions until the United States Supreme Court explicitly overrules *Almendarez-Torres*. *See State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003); *State v. Wheeler*, 145 Wn.2d 116, 120, 34 P.3d 799 (2001). However, the Court of Appeals is not bound by Washington Supreme Court cases that are inconsistent with United State Supreme Court precedents. *State v. Anderson*, 112 Wn. App. 828, 839, 51 P.3d 179 (2002).

every fact that exposes the defendant to an increased penalty, and noted, "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." 530 U.S. at 489.

Justice Thomas, a member of the five-justice majority in *Almendarez-Torres*, has since retreated from the "prior conviction exception." In *Apprendi*, decided only two years after *Almendarez-Torres*, Justice Thomas extensively reviewed the historic practice of requiring the government to prove every fact "of whatever sort, including the fact of a prior conviction," beyond a reasonable doubt. 530 U.S. at 501 (Thomas, J., concurring). Three years later, in *Shepard v. United States*, Justice Thomas wrote, "A majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." 544 U.S. 13, 27, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (Thomas, J. concurring). *See also Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.").

Even if *Almendarez-Torres* retains some precedential value, it is distinguishable from the present case on several grounds. First, in

Almendarez-Torres, the defendant admitted the prior convictions, whereas Mr. Thompson did not admit the prior convictions. 523 U.S. at 227. Second, the issue in *Almendarez-Torres* was the sufficiency of the charging document, not the right to a jury determination beyond a reasonable doubt at issue here. 523 U.S. at 247-48. Third, *Almendarez-Torres* considered the mere "fact of a prior conviction." 523 U.S. at 226. Here, however, the mere "fact" of prior convictions did not increase Mr. Thompson's punishment above the standard range; rather, it was the judicial determination that the prior convictions were "most serious offenses" that elevated the punishment. Fourth, the *Almendarez-Torres* Court noted the fact of prior convictions triggered an increase in the maximum *permissive* sentence only. 523 U.S. at 245. Here, by contrast, upon a finding that the prior convictions are for "most serious offenses," judges are statutorily required to impose a mandatory sentence of life without the possibility of parole, a sentence much higher than the top of the permissive standard range. RCW 9.94A.570. Thus, the constitutional issue here is not controlled by *Almendarez-Torres*, but, rather, resembles *Alleyne*, in which the Court held that any fact that increases a mandatory minimum sentence must be proved as an element. *Alleyne*, 133 S.Ct. at 2153-55*; accord State v. Dyson*, __ Wn. App. __, No. 32248-III, 2015 WL 4653226, at *7 (Div. III Aug. 6, 2015) (where mandatory minimum

sentence for first degree assault increased by allegation force used likely or intended to result in death, such allegation must be determined by jury beyond a reasonable doubt). To the extent *Almendarez-Torres* retains any precedential value, it is inapplicable to the present case.

The United States Supreme Court decisions in *Descamps*, *Alleyne*, *Shepard*, and *Apprendi* establish that the "prior convictions exception" does not apply to cases where the trial court intends to impose a sentence above the statutory maximum, pursuant to the POAA, absent a jury determination beyond a reasonable doubt that the defendant has two or more prior convictions for an offense that qualifies as a "most serious offense." This Court should revisit its interpretation of *Almendarez-Torres*, and conclude that Mr. Thompson had the constitutional right to a jury determination beyond a reasonable of the fact of two prior convictions for a most serious offense. In the absence of such a determination, this matter must be reversed and remanded for sentencing within the standard range.

2. The arbitrary classification of the persistent offender finding as a "sentencing factor" that need not be proved beyond a reasonable doubt violates the constitutional right to equal protection.

a. Because incarceration implicates a fundamental liberty interest, the classification of prior offenses as either "elements" of a crime or "sentencing factors" is subject to strict scrutiny.

The constitutional right to equal protection requires that similarly situated persons receive equal treatment with respect to the law. U.S. Const. XIV; Art. I, § 12; *Plyler v. Doe*, 457 U.S. 202, 212, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). When analyzing a classification that implicates fundamental liberty interests, courts apply "strict scrutiny" to determine whether the classification is necessary to serve a compelling governmental interest. *Plyler*, 457 U.S. at 217; *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). The liberty interest at issue here – physical liberty – is the most basic of fundamental rights. "[T]he most elemental of liberty interests [is] being free from physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004). Thus, any classification that unequally implicates that liberty interest is subject to strict scrutiny. *Skinner*, 316 U.S. at 541; *accord In re Detention of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (civil commitment statue subject to strict scrutiny because civil commitment constitutes "a massive curtailment of liberty").

b. The classification of a "most serious offense" as a "sentencing factor," rather than as an "element," violates equal protection, regardless of the standard of review.

Notwithstanding the above principles, Washington courts have applied only a "rational basis" scrutiny to equal protection challenges in the context of criminal sentencing. *See State v. Manussier*, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996); *State v. Thorne*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994), *abrogation on other grounds recognized by State v. Witherspoon*, 180 Wn.2d 875, 888, 286 P.3d 996 (2014). Under this lower level of scrutiny, a law violates equal protections if it is not rationally related to a legitimate governmental interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *State v. Smith*, 117 Wn.2d 263, 279, 814 P.2d 652 (1991).

Under either strict scrutiny or rational basis review, the classification at issue here violates equal protection because it is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

c. The classification of the persistent offender finding as a "sentencing factor," rather than as an "element," neither promotes nor is related to any government interest.

Our Legislature has determined that the government has an interest in punishing repeat offenders more severely than first-time offenders. Yet,

prior convictions that cause a significant increase in punishment are treated differently depending on whether the courts label the prior convictions as "elements" or as "sentencing factors." Where prior convictions that increase the maximum sentence are classified by judicial construct as "elements" of a crime, the convictions must be proved beyond a reasonable doubt. For example, violation of a no-contact order is punished as a felony, rather than as a gross misdemeanor, upon proof beyond a reasonable doubt of the "element" that the defendant had two prior convictions for violation of a no-contact order. RCW 26.50.110(1), (5); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Likewise, communication with a minor for immoral purposes is punished as a felony rather than as a gross misdemeanor, upon proof that the defendant had a prior conviction for a felony sexual offense. RCW 9.68A.090; *State v. Roswell*, 165 Wn.2d 186, 191-92, 196 P.3d 705 (2008). *See also State v. Chambers*, 157 Wn. App. 465, 475, 237 P.3d 352 (2010) (under former RCW 46.61.502(6), driving while under the influence punished as a felony, rather than as a gross misdemeanor, upon proof to a jury beyond a reasonable doubt of the "element" that the defendant had four prior convictions for driving while under the influence within the preceding ten years). But where, as here, prior convictions that increase the maximum sentence are classified by judicial construct as "sentencing factors," the

convictions are proved only by a preponderance of the evidence. *Smith*, 150 Wn.2d at 143 (two prior convictions for a "most serious" offense is a sentencing factor that need be proved by a preponderance of evidence only).

In *State v. Langstead*, the court concluded that there is no equal protection violation where the Legislature elects to classify the fact of a prior conviction as an element of certain offenses but as merely a sentencing factor for purposes of the POAA. 155 Wn. App. 448, ___, 228 P.3d 799, *review denied*, 170 Wn.2d 1009 (2010). The court distinguished *Roswell*, *supra*, on the grounds that the substantive crime in that case was a gross misdemeanor which was elevated to a felony by the fact of the prior conviction whereas Mr. Langstead's substantive crime was a felony in and of itself. *Id.* at 456.

This distinction is inapt. The equal protection analysis is properly focused on the difference in punishment. Thus, there is no rational basis to afford offenders such as Mr. Thompson less due process than offenders such as Mr. Roswell or Mr. Oster.

A similar arbitrary classification was invalidated for violation of the Equal Protection Clause in *Skinner*, where, under Oklahoma law, an offender was sterilized upon a third conviction for a specific type of offense. 316 U.S. at 541. The Court applied strict scrutiny to the law,

finding that sterilization implicated a "liberty" interest, even though it did not involve imprisonment. *Id.* The Court ruled that statute did not survive strict scrutiny because three convictions for crimes such as embezzlement did not result in sterilization whereas three convictions for crimes such a larceny did so result. *Id.* at 541-42. While the Court acknowledged that legislative classification of crimes is due deference, it declined to defer in that instance on the grounds, "[w]e are dealing with legislation which involved one of the basic civil rights of man. ... There is no redemption for the individual whom the law touches. ... He is forever deprived of a basic liberty." *Id.* at 540-41.

The same reasoning applies here. Freedom from physical detention by one's own government is one of the basic civil rights of man. *Hamdi*, 542 U.S. at 529. The legislation at issue here is designed to deprive offenders of this basic liberty based only upon proof by a preponderance of the evidence. Significantly, the Legislature has never labeled the prior convictions at issue in *Oster*, *Roswell*, and *Chambers* as "elements," nor has it labeled the prior convictions at issue here as "sentencing factors." Instead, the labels are the result of an arbitrary judicial construct, even though the government interest in each instance is exactly the same – to punish recidivists more severely.

As the Supreme Court has explained, "merely using the label 'sentence enhancement' to describe [one fact] surely does not provide a principled basis for treating [two facts] differently." *Apprendi*, 530 U.S. at 476.

> [A]ny possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding. Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." *Skinner*, 316 U.S. at 542. Accordingly, this Court should hold that the imposition of a sentence of life without the possibility of parole based on a finding of the necessary facts by a mere preponderance of the evidence violated Mr. Thompson's constitutional right to equal protection under the laws, and remand this matter for resentencing within the standard range.

3. A mandatory sentence of life without the possibility of parole, with no consideration of Mr. Thompson's youthfulness at the time he committed the predicate offenses, his lack of any convictions for a Class A felony, or the gross disparity between his standard range and life, constituted cruel and unusual punishment in violation of the Eighth Amendment and Article I, section 14.

a. A sentence that is disproportionate to the crime offends the constitutional prohibition of cruel punishment.

The federal and state constitutions prohibit imposition of a punishment that is disproportionate to the offense. *State v. Fain*, 94 Wn.2d 387, 396, 617 P.2d 720 (1980). The Eighth Amendment bars cruel and unusual punishment. Article I, section 14 bars infliction of cruel punishment only and is interpreted more broadly than the Eighth Amendment's prohibition of punishment that is both cruel and unusual. *State v. Roberts*, 142 Wn.2d 471, 505-06, 14 P.3d 713 (2000).

The principle that punishment must be proportionate to the offense is "deeply rooted and frequently repeated in common law jurisprudence" *Solem v. Helm*, 463 U.S. 277, 284, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). When considering whether a punishment is unconstitutionally cruel, courts rely on "evolving standards of decency that mark the progress of a maturing society," as determined by "an assessment of contemporary values concerning the infliction of a challenged sanction." *State v.*

Campbell, 103 Wn.2d 1, 31, 691 P.2d 929 (1984) (quoting *Trop v. Dulles*, 356 U.S. 89, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) and *Gregg v. Georgia*, 428 U.S. 153, 172-73, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)).

In *Thorne*, the defendant was convicted of robbery in the first degree and kidnapping in the first degree. 129 Wn.2d at 749-50. He had a prior conviction for robbery in the second degree and robbery in the first degree and he was sentenced to life without possibility of parole pursuant to the POAA. *Id.* at 751. On appeal, the Court determined that the defendant's sentence was not unconstitutionally cruel, but recognized, "there may be cases in which application of the Act's sentencing provision runs afoul of the constitutional prohibition against cruel punishment." *Id.* at 773 n.11. This is such a case.

b. Mr. Thompson's sentence of life without the possibility of parole was grossly disproportionate to his crime and unconstitutionally cruel.

Courts consider four factors when determining whether a statute is unconstitutionally cruel as applied: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received for the same offense in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. *Thorne*, 129 Wn.2d at 773 (citing *Fain*, 94 Wn.2d at 397). Under these four factors, Mr. Thompson's sentence was unconstitutionally cruel.

i. Nature of the offense.

Mr. Thompson was charged and convicted of assault in the second degree, a Class B offense which carries a maximum penalty of ten years in prison. CP 25-26; RCW 9A.20.021, 9A.36.021. Based on his offender score of '6', he faced a standard range sentence of 33-43 months. CP 173. The State initially charged Mr. Thompson with assault in the first degree, a Class A felony which carries a maximum sentence of life in prison with the possibility of parole. CP 1-2; RCW 9A.20.021, 9A.36.011. Assault in the first degree requires proof of intentional infliction of great bodily harm, whereas assault in the second degree requires proof a reckless infliction of substantial bodily harm only. *Compare* RCW 9A.36.011 *with* RCW 9A.36.021. By amending the charge to a lesser degree, the State was able to significantly reduce its burden of production for the substantive offense yet still secure the same sentence, life in prison without the possibility of parole, contrary to "evolving standards of decency."

The State presented evidence that Mr. Thompson and his childhood friend, Brock Nye, imbibed in a substantial amount of alcohol in the twenty-four hours leading up to the incident, during which time they picked up a young woman who joined the drinking. 12/8/14RP 277. The threesome went to Mr. Nye's home where Mr. Thompson and Mr. Nye both wanted to have sexual relations with the woman. 12/8/14 RP 277-78,

282-83, 333-34. An argument ensued in front of a fireplace with a raised hearth. 12/8/14 RP 284. Mr. Nye stood very close to Mr. Thompson and aggressively yelled at him to leave. 12/8/14 RP 286. Mr. Thompson refused and the two men began to fight. 12/8/14 RP 286. Mr. Nye suffered an injury to the back of his head that required eight staples, bruises to his back, and a broken finger. 12/8/14 RP 305-06, 307-08 313, 388. Mr. Nye acknowledged that he had a very spotty memory of the incident, but he insisted Mr. Thompson threw the first punch that started a "swinging contest." 12/8/14 RP 286, 341. He denied hitting his head on the raised fireplace hearth, and he "believe[d]" Mr. Thompson hit his head with a fireplace shovel. 12/8/14 RP 291, 342.

The responding officer, Deputy Brandon Myers, testified that Mr. Nye reported Mr. Thompson repeatedly hit him with the fireplace shovel. 12/9/14 RP 473, 511-12. He also testified that Mr. Nye smelled of alcohol. 12/9/14 RP 500. Mr. Thompson was arrested and the shovel was placed into evidence. 12/9/14 RP 427-28, 515.

The emergency room doctor, Dr. Michael Armstrong, testified that had no independent memory of Mr. Nye but his medical records indicate he treated Mr. Nye for a head trauma and broken finger and note, "beat up with shovel." 12/8/14 RP 382-83, 386. He also testified the head injury

was more consistent with being struck by a hard object than from hitting a hearth. 12/8/14 RP 390, 392-93.

On the other hand, Mr. Thompson testified that Mr. Nye threw the first punch. 12/10/14 RP 751. They grappled and Mr. Nye hit his head on the raised hearth as they both fell to the floor and the fireplace tools scattered. 12/10/14 RP 752, 774. Mr. Nye then grabbed for his throat and Mr. Thompson picked up the fireplace shovel and hit Mr. Nye on the back. 12/10/14 RP 755. In addition, the defense presented evidence that Mr. Nye reported to the emergency medical technician that he was the initial aggressor and threw the first punch causing pain in his hand. 12/10/14 RP 810. Further, an independent forensic scientist who reviewed the State's evidence testified the shovel did not have hair or skin as would be expected had it been used to strike a person and the hearth was the most likely source of Mr. Nye's head injury. 12/10/14 RP 684-85, 692.

In light of the undisputed evidence of significant alcohol consumption, the mutual grappling, and the evidence of incomplete self-defense,[4] the incident was not unusually egregious.

[4] See RCW 9.94A.535(1): "Mitigating Circumstances. (a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident."

ii. Legislative purpose.

The Legislature enacted the POAA with the express intent to impose "tougher sentencing" on "the most dangerous criminals." RCW 9.94A.555. Here, although Mr. Thompson has a criminal history, he has never been convicted of a Class A felony and he has never been to prison. CP 172-73; 2/2/15 RP 31. His two predicate offenses are robbery in the second degree, committed in August 2004, one week after his twentieth birthday, and assault in the second degree, committed in July 2007 when he was twenty-two years old. CP 173.

The United States Supreme Court has held "criminal proceedings that fail to take defendants; youthfulness into account at all would be [constitutionally] flawed." *Graham v. Florida*, 560 U.S. 48, 76, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper v. Simmons*, 543 U.S. 551, 574, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). In fact, "the brain does not reach full maturation until the age of 25." Michele Deitch et al., The Univ. of Tex. at Austin, *From Time Out to Hard Time: Young children in the Adult Criminal Justice System*, at 13 (2009). *See also State v. O'Dell*, No. 90337-9, 2015 WL 4760476, at *9 (Wash. Aug. 13, 2015) (a young adult defendant's youthfulness can support an

exceptional sentence below the standard range applicable to an adult felony defendant).

Based on Mr. Thompson's criminal history and his youth when he committed the predicate offenses, he can hardly be considered a "most dangerous criminal," deserving of the most severe punishment short of the death penalty.

iii. Comparable punishment in other jurisdictions.

In 1993, with passage of the POAA, Washington became the first state in the nation to enact a "three strikes" law. Since then, most states and the federal government have enacted a version of a "three strikes" law. *See Witherspoon*, 180 Wn.2d at 911 (Appendix of "Persistent Offender" Laws). In *Witherspoon*, the defendant's third strike offense was robbery in the second degree. *Id.* at 881. Based on a survey of the laws from other states regarding robbery in the second degree, the Court concluded:

> [T]here are only four states outside of Washington in which a conviction of second degree robbery as a "third strike" offense triggers a mandatory sentence of life without parole. ... Although these four states' treatment of similar crimes indicates that Washington is not alone in this area, ... this *Fain* factor weighs in favor of a finding of disproportionality.

Id. at 888.

iv. Punishment for other offenses in Washington.

Due to the current moratorium on implementation of the death penalty, a mandatory sentence of life without the possibility of parole is the most severe punishment for any offense in Washington. In fact, based on his conviction for assault in the second degree following a drunken brawl with his childhood friend over a woman whose name neither party could remember, Mr. Thompson received the same sentence as did Gary Ridgeway, who pleaded guilty to sixty-one counts of murder. *See State v. Yates*, 161 Wn.2d 714, 793, 168 P.3d 359 (2007). As recognized in the concurrence/dissent in *Witherspoon*, discussing the defendant's third strike was robbery in the second degree:

> In the non-POAA context, Washington punishes only one crime with a sentence of mandatory life without parole: aggravated first degree murder. ... In the non-POAA context, Washington imposes mandatory minimum sentences for only five offenses: aggravated and nonaggravated first degree murder, first degree assault involving "force or means likely to result in death or intended to kill the victim," rape in the first degree, and sexually violent predator escape. ... A person convicted of first degree murder faces a 20–year mandatory minimum, while a person convicted of first degree rape, first degree assault, or sexually violent predator escape faces a mandatory minimum of five years. For every other offense, the court may impose a sentence below the standard sentence range if "mitigating circumstances are established by a preponderance of the evidence." ...
>
> The gravity of Witherspoon's third strike offense must not be understated .... But neither should that offense amplified beyond all recognition. To punish it with a sentence greater

> than that imposed for the most brutal crimes—homicide, first degree assault, and first degree rape—is to disregard two central purposes of the SRA: justice and proportionality.

180 Wn.2d at 908-09 (internal citation omitted).

Similarly, here, the sentencing court lamented:

> This is a terribly sad case in so many different ways; the obvious being that Mr. Thompson is just 30 years old and is facing the rest of his life in prison. It gives me no joy to be in a position where I get to be the judge to sentence Mr. Thompson to life in prison. I would rather not be sentencing Mr. Thompson to anything at all and certainly would rather not be putting a young man of this age in prison for the rest of his life. This is a life that has been wasted, and it is terribly sad.

2/2/15 RP 44.

Because the POAA eliminates all judicial discretion, the sentencing court could not take into account Mr. Thompson's youth at the time he committed the two predicate offenses, his lack of a conviction for a Class A felony, the gross disparity between his standard range and life, the State's amendment of the charge to substantially reduce its burden of proof, or the mitigating circumstances attendant to the present offense. Under these circumstances, the sentence of life without the possibility of parole was disproportionate to the present offense and to Mr. Thompson's criminal history, and contrary to the goal of the POAA to severely punish and protect society from "the most dangerous criminals." Mr. Thompson's

sentence must be reserved and remanded for sentencing within the standard range and statutory maximum.

D. CONCLUSION

Mr. Thompson had the constitutional right to a jury determination beyond a reasonable doubt that he had two prior convictions for a most serious offense. Classification of prior convictions as a sentencing factor for purposes of the POAA, rather than as element, serves no legitimate governmental interest. In light of the nature of the current offense, Mr. Thompson's youth when he committed his two prior offenses, and his lack of any conviction for a Class A felony, imposition of a sentence to life without the possibility of parole was unconstitutionally cruel. For the foregoing reasons, Mr. Thomson requests this Court reverse his sentence and remand for sentencing within the standard range.

DATED this 3rd day of September 2015.

Respectfully submitted,

s/ Sarah M. Hrobsky

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Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 47229-5-II
v.	)	
	)	
SEAN THOMPSON,	)	
	)	
Appellant.	)	

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