Supreme Court No. 95510-7
COA No. 74962-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HUNG VAN NGUYEN,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Washington Cases

United States Supreme Court Cases

Other Jurisdictions

Statutes

A. IDENTITY OF PETITIONER/DECISION BELOW

Hung Van Nguyen requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Nguyen, No. 74962-5-I, filed January 16, 2018. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Did the trial court's decision to proceed with a trial despite defense counsel's reasonable concerns about Nguyen's competency violate constitutional due process and warrant review by this Court? RAP 13.4(b)(1), (3), (4).

2. Nguyen's guilty plea statement for one of the predicate convictions demonstrates on its face that the facts he admitted do not establish the elements of the crime. Did the trial court err in relying upon that conviction to impose a sentence of life without parole?

3. Where Nguyen was only 20 years old when he committed one of the predicate offenses, did imposition of a life sentence constitute cruel punishment in violation of the federal and Washington constitutions? RAP 13.4(b)(3), (4).

4. Does the Persistent Offender Accountability Act (POAA) violate the Equal Protection Clause? RAP 13.4(b)(3), (4).

5. Does the sentence of life without parole violate the Sixth and Fourteenth Amendments because it is based upon facts that were not proved to a jury beyond a reasonable doubt? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

One day in 2014, Hung Van Nguyen was staying at his friend Thu Nguyen's house.[1] RP 351. She asked him to leave but he refused. RP 325. She called the police, who arrived and persuaded Hung to leave. RP 326-28. The next morning, Thu left the house to take her son to school. RP 329-30. She returned home and went to her bedroom to take a nap. RP 331. According to Thu, Hung emerged from the bedroom closet with a knife in his hand and stabbed her several times. RP 331-38. When her friend Linh Truong came over and tried to intervene, he allegedly stabbed at her in the side. RP 338, 365-38. None of Thu's wounds was life threatening. RP 393-98, 406.

Hung was charged with one count of first degree assault of Thu, and one count of second degree assault of Truong, both with deadly weapon enhancements. CP 50-51.

---

[1] Although Hung Van Nguyen and Thu Nguyen have the same surname, they are not related. RP 318. In order to avoid confusion, they will be referred to by their given names in this petition.

In a pretrial hearing, defense counsel told the court he had concerns about Hung's "mental condition at present and also his future ability to assist counsel in his defense." RP 8. In prior cases, attorneys from the office had had similar concerns about Hung's competency. RP 8-9. After questioning Hung, the court ordered a competency evaluation. RP 9-10; CP 11-12.

Hung had a previous forensic mental health evaluation at Western State Hospital in February 2012. CP 28. At that time, he was determined to be in the below average range of intelligence with "borderline intellectual functioning IQ 70-85." CP 29.

Consistent with the earlier evaluation, the psychologist here found Hung's intellectual functioning was "below average to low average." CP 31. The evaluator noted Hung reported being hospitalized as a child in Vietnam after being hit in the head by a rock. CP 28. He was also hospitalized around 2007 or 2008 after being injured in a car accident. CP 2008. Finally, he reported being "jumped" and hit in the head sometime after 2012. CP 28.

The evaluator diagnosed Hung with "Intellectual Disability, Mild." CP 32. Hung was unable "to recall details related to his current legal situation." But the evaluator believed this was "volitional" and

not a function of cognitive impairment or underlying mood or thought disorder. CP 31-32. The evaluator concluded, "[w]hile Mr. Nguyen may be a difficult client to work with," he did not lack the capacity to assist in his defense. CP 33.

Counsel acknowledged the psychologist's findings but maintained he still had concerns about Hung's capacity. RP 27. Counsel pointed out the evaluator did not investigate Hung's history of head injury and its potential impact on his capacity. Counsel still doubted Hung's ability to assist counsel. RP 27-28.

Despite counsel's concerns, the judge found Hung competent to stand trial and assist counsel in his defense. RP 28-29; CP 23-33. Following a trial, the jury found Hung guilty as charged. CP 73-76.

At sentencing, the court imposed a sentence of life without the possibility parole under the POAA. RP 694-97. One of the predicate convictions was for first degree burglary, committed when Hung was only 20 years old. CP 10, 113.

At sentencing, counsel repeated his concerns about Hung's competency, stating his concerns "have remained with me during this entire matter." RP 696.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The trial court failed to give adequate deference to defense counsel's representations regarding Hung's lack of competency, in violation of constitutional due process.

The conviction of an accused person who is not competent to stand trial violates his constitutional right to a fair trial under the Fourteenth Amendment's Due Process Clause. State v. Mahaffey, 3 Wn. App. 988, 993, 478 P.2d 787 (1970); Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); U.S. Const. amend. XIV.

The constitutional standard for competency is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and to assist in his defense with a rational as well as factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). The two-part test for determining competency is: (1) whether the defendant understands the nature of the charges; and (2) whether he is capable of assisting in his defense. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001).

The failure to observe procedures adequate to protect the right to be tried only while competent is a denial of due process. State v. Heddrick, 166 Wn.2d 898, 904, 215 P.3d 201 (2009). Washington law

implements the requisite due process protections by statute, chapter 10.77 RCW. Id.; State v. Coley, 180 Wn.2d 543, 551, 326 P.3d 702 (2014). So long as a defendant maintains a challenge to competency, these statutory procedures are mandatory in order to satisfy due process. Heddrick, 166 Wn.2d at 909.

RCW 10.77.050 provides that "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." If there is reason to doubt the accused's competency, the court must order an expert to "evaluate and report upon the mental condition of the defendant." RCW 10.77.060(1)(a).

When competency is raised, the trial court must give "considerable weight" to counsel's opinion regarding his client's competency and ability to assist the defense. State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). Because defense counsel is usually the person with the closest contact with the defendant, his opinion regarding his client's competency is of substantial importance. City of Seattle v. Gordon, 39 Wn. App. 437, 441-42, 693 P.2d 741 (1985).

Even if the expert opines that the defendant is competent, the trial court may still disagree based upon the defendant's courtroom

behavior or his attorney's representations. Dougherty v. State, 149 So.3d 672, 678 (Fla. 2014).

Here, the court did not give adequate weight to counsel's representations regarding Hung's lack of competency. Counsel said repeatedly he did not think Hung had the capacity to assist him in his defense. RP 8, 27-28, 696. Counsel said Hung either did not have an adequate recall of the factual events underlying the charges, was not able to communicate those recollections to his attorney, and/or did not have an intellectual or emotional appreciation of the ramifications and consequences of the charges. See Gwaltney, 77 Wn.2d at 908.

Counsel disagreed with the psychologist's finding that Hung was competent. RP 27, 696. Counsel said his concerns "have remained with me during this entire matter." RP 696.

The court failed to give adequate weight to counsel's opinion. Lord, 117 Wn.2d at 901; Gordon, 39 Wn. App. at 441-42. The court should not have adopted the expert's opinion in the face of counsel's representations. Dougherty, 149 So.3d at 678. The court violated the necessary procedures meant to ensure Hung's constitutional right to be tried only while competent. Heddrick, 166 Wn.2d at 904, 909.

2. The trial court erred in relying upon Hung's 2011 conviction for second degree assault because it is constitutionally invalid on its face.

Before imposing a sentence of life without the possibility of parole under the POAA, the State must prove and the trial court must find the defendant has two prior convictions for "most serious offenses." RCW 9.94A.030(38)(a); RCW 9.94A.570; State v. Manussier, 129 Wn.2d 652, 682, 921 P.2d 473 (1996).

In imposing a sentence under the POAA, the court may not rely upon a prior conviction that is "constitutionally invalid on its face." Manussier, 129 Wn.2d at 682; State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986). "Constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude." Ammons, 105 Wn.2d at 187-88.

In determining whether a prior conviction is "invalid on its face," the court examines not only the judgment and sentence but also "those documents signed as part of a plea agreement." In re Pers. Restraint of Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000); In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 354, 5 P.3d 1240 (2000).

A guilty plea must be knowing, intelligent and voluntary. State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980); Boykin v.

Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); U.S. Const. amend. XIV; Const. art. I, § 3. A court may not impose a life sentence under the POAA if a predicate conviction demonstrates on its face that it was obtained as the result of a guilty plea that was not knowing, intelligent and voluntary. State v. Webb, 183 Wn. App. 242, 251, 333 P.3d 470 (2014).

In order for a guilty plea to be knowing, intelligent and voluntary, the conduct the defendant admits committing must actually constitute the offense charged or an offense included therein to which the defendant pled guilty. McCarthy v. United States, 394 U.S. 459, 466-67, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); In re Pers. Restraint of Keene, 95 Wn.2d 203, 209, 622 P.2d 350 (1981).

Hung was charged with and pled guilty to second degree assault by strangulation. CP 141; RCW 9A.36.021(1)(g). The statute provides, "[a] person is guilty of assault in the second degree if he or she . . . [a]ssaults another by strangulation or suffocation." RCW 9A.36.021(1)(g). "Strangulation" is defined elsewhere in the statute as "to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." RCW 9A.04.110(26).

The admitted facts in Hung's guilty plea statement do not satisfy the elements of the crime. Hung admitted "I did intentionally assault my sister . . . when I put my hand on her throat in [sic] attempt to strangle her." CP 160, 189. The guilty plea statement further states, "strangle means to cut off ability to breathe by pressing on airway/neck." CP 160, 189.

Hung did not admit facts sufficient to satisfy the elements of the charge because he admitted only "attempt[ing] to strangle" his sister. CP 160. The statute requires proof that the defendant *actually* "[a]ssault[ed] another by strangulation." RCW 9A.36.021(1)(g). Because Hung admitted only *attempting* to strangle rather than *actually* strangling, the facts he admitted do not constitute the offense charged and the plea was not knowing, intelligent and voluntary. Boykin, 395 U.S. at 244; McCarthy, 394 U.S. at 466-67; Keene, 95 Wn.2d at 209.

The trial court erred in relying upon the conviction t to impose a life sentence. Ammons, 105 Wn.2d at 187-88; Webb, 183 Wn. App. at 250-51.

3. A mandatory sentence of life without the possibility of parole, with no consideration of Nguyen's youthfulness at the time he committed one of the predicate offenses, amounts to cruel and unusual punishment in violation of the federal and state constitutions.

a. Article I, section 14 is more protective than the Eighth Amendment, requiring the punishment be proportionate to the crime.

It is well-established that article I, section 14 of the Washington Constitution is more protective than the Eighth Amendment. See State v. Witherspoon, 180 Wn.2d 875, 887, 329 P.3d 888 (2014); State v. Roberts, 142 Wn.2d 471, 506, 14 P.3d 713 (2000).

In State v. Fain, 94 Wn.2d 387, 402, 617 P.2d 720 (1980), the Court reversed a life sentence imposed under the former habitual offender statute because the three predicate crimes were all relatively minor. Id. The Court recognized that the United States Supreme Court had upheld a life sentence under similar circumstances, but ruled that article I, section 14 should be construed as more protective than the Eighth Amendment. Id. at 391-92.

While holding that article I, section 14 is more protective than the Eighth Amendment, Fain looked to federal constitutional jurisprudence as a starting point. The Court held our cruel punishment clause, like its federal counterpart, must be interpreted consistent with

"evolving standards of decency that mark the progress of a maturing society." Fain, 94 Wn.2d at 396-97 (quoting Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)). The Court also followed Eighth Amendment case law in concluding that article I, section 14 mandates *proportionate* punishment, meaning the punishment must be "commensurate with the crimes for which [the] sentences are imposed." Fain, 94 Wn.2d at 396 (citing, inter alia, Coker v. Georgia, 433 U.S. 584, 591-92, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) (prohibiting death penalty for crime of rape)).

Four factors determine whether a sentence is proportionate to the crime: (1) the nature of the offense; (2) the legislative purpose behind the sentencing statute; (3) the punishment imposed in other jurisdictions for the same offense; and (4) the punishment imposed for other offenses in the same jurisdiction. Fain, 94 Wn.2d at 397.

b. Under the Eighth Amendment, punishment must be proportionate not just to the crime but also the defendant and youth is a particularly relevant characteristic.

Fain and federal constitutional cases predating Fain focused on the requirement that punishment be proportionate to the offense. But later Eighth Amendment cases emphasize that punishment must also be proportionate to the defendant. See Thompson v. Oklahoma, 487 U.S.

815, 834, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (invalidating death penalty for children under 16 and stating "punishment should be directly related to the personal culpability of the criminal defendant"); Atkins v. Virginia, 536 U.S. 304, 314, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (invalidating death penalty for intellectually disabled defendants); Roper v. Simmons, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (invalidating death penalty for youth under 18).

In Roper, the Court explained that because juvenile brains are not fully developed, young people who commit crimes are both less culpable and more amenable to rehabilitation than older defendants, and sentences must reflect this difference. Roper, 543 U.S. at 570.

This proportionality principle extends to cases outside the capital punishment context. In Graham, the Court held that juveniles who commit non-homicide crimes may not be sentenced to life in prison without the possibility of parole. Graham v. Florida, 560 U.S. 48, 74-75, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). The Court explained there are "two subsets" of cases holding certain types of punishments categorically violate the Eighth Amendment: "one considering the nature of the offense, the other considering the characteristics of the offender." Graham, 560 U.S. at 60. The

characteristics of a youthful offender preclude mandatory lifetime imprisonment. Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (extending Graham to homicide cases). Only in the rarest circumstances, after a sentencing hearing at which the impact of youth on the particular individual is addressed, may a juvenile be sentenced to life in prison. Montgomery v. Louisiana, ___ U.S. ___, 136 S. Ct. 718, 733-34, 193 L.Ed.2d 599 (2016).

c. Youth is also an important characteristic to consider when sentencing adults under the Sentencing Reform Act.

This Court has also acknowledged the importance of considering age as a potential mitigating circumstance in sentencing adults under the Sentencing Reform Act. State v. O'Dell, 183 Wn.2d 680, 689, 358 P.3d 359 (2015). O'Dell reversed a young adult's sentence and remanded for consideration of whether his youth justified a sentence below the standard range. O'Dell, 183 Wn.2d at 698-99. The Court endorsed the data referenced in Roper, Graham, and Miller as well as other studies showing that "the parts of the brain involved in behavior control continue to develop well into a person's 20s." O'Dell, 183 Wn.2d at 691-92. Thus, age is relevant to sentencing not just for juveniles, but also for young adults. Id.

d. In light of recent developments, this Court should hold that a defendant's personal characteristics, including his age, must be considered in deciding whether a sentence violates article I, section 14.

The confluence of this Court's decision in O'Dell and the United States Supreme Court's decisions in Roper and its progeny suggest that a defendant's young age must be considered in evaluating whether a sentence violates article I, section 14. Although it is well-established that article I, section 14 is more protective than the Eighth Amendment, Washington courts have not yet had occasion to update the state constitutional standard in light of these significant developments. This Court should accept review and hold that punishment must be proportionate to the offense *and the offender* in order to comport with article I, section 14. RAP 13.4(b)(3), (4).

e. Hung's sentence of life without the possibility of parole violates the state and federal constitutions.

An evaluation of all relevant factors demonstrates that Hung's life sentence violates the state and federal constitutions. Hung was just 20 years old when he committed his first predicate crime. At that age, his mental and emotional development was far from complete. O'Dell, 183 Wn.2d at 691-92.

Other considerations also dictate reversal of this sentence. Not only was Hung just 20 years old when he committed his first strike, his second strike offense is for second degree assault, a class B felony. CP 119; RCW 9A.36.021. His presumptive sentence for the current offenses in the absence of the POAA is 178 to 236 months. CP 103. Yet he is serving the same sentence as defendants convicted of multiple counts of aggravated murder. See RCW 10.95.030(1). Finally, Hung's borderline intellectual functioning should also be considered.

4. The arbitrary labeling of a persistent offender finding as a "sentencing factor" that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); U.S. Const. amend. XIV. When analyzing an equal protection claim, the Court applies strict scrutiny to laws implicating fundamental liberty interests. Skinner v. Oklahoma, 316 US. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. Plyler, 457 U.S. at 217.

The liberty interest at issue here—physical liberty—is the prototypical fundamental right. "[T]he most elemental of liberty interests [is] in 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, strict scrutiny applies to the classification at issue. Skinner, 316 U.S. at 541.

Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. State v. Manussier, 129 Wn.2d 652, 672-73, 921 P.2473 (1996). Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Although the proper standard of review is strict scrutiny, the result of the inquiry is the same regardless of the lens applied. Under either strict scrutiny or rational basis review, the classification here is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

The Legislature determined that the State has an interest in punishing repeat criminal offenders more severely than first-time

offenders. For example, defendants who twice previously violated no-contact orders are subject to a significant increase in punishment for a third violation. RCW 26.50.110(5); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). And defendants who have twice previously been convicted of "most serious" (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW 9.94A.030(33); RCW 9.94A.570. But the prior offenses that cause the significant increase in punishment are treated differently simply by virtue of the arbitrary labels "elements" of a crime or "sentencing factors" which have been attached to them.

Where prior convictions that increase the maximum sentence available are termed "elements," they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for communicating with a minor for immoral purposes as a felony. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008); see also Oster, 147 Wn.2d at 146 (two prior convictions for violation of a no-contact order must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact order as a felony).

But where, as here, prior convictions that increase the maximum sentence available are termed "sentencing factors," they need only be proved to the jury by a preponderance of the evidence. See State v. Witherspoon, 180 Wn.2d 875, 892-93, 329 P.3d 888 (2014). This classification violates the Equal Protection Clause because the government interest in either case is *exactly the same*: to punish repeat offenders more severely.

5. The jury should have determined Nguyen's POAA status under the United States Constitution.

A criminal defendant has a right to a jury trial and may be convicted only if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amends. VI, XIV.

The Constitution requires a jury to find, beyond a reasonable doubt, any fact that increases a defendant's maximum possible sentence. Blakely, 542 U.S. at 301-02; Apprendi, 530 U.S. at 490. In Blakely, the Court held that an exceptional sentence imposed under

Washington's Sentencing Reform Act was unconstitutional because it permitted the judge to impose a sentence above the standard range based upon facts that were not found by the jury beyond a reasonable doubt. Blakely, 542 U.S. at 313-14.

Similarly, here, Nguyen's sentence of life without parole is unconstitutional because it exceeds the standard range and is based upon facts found by a judge by a preponderance of the evidence rather than by a jury beyond a reasonable doubt.

E. CONCLUSION

For the reasons provided, this Court should grant review.

Respectfully submitted this 12th day of February, 2018.

MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. HUNG VAN NGUYEN, Appellant.	No. 74962-5-I DIVISION ONE UNPUBLISHED OPINION FILED: January 16, 2018

LEACH, J. — Hung Van Nguyen appeals his convictions and his sentence. Nguyen challenges the trial court's competency determination. He also challenges his aggravated sentence of life without the possibility of parole under the Persistent Offender Accountability Act of the Sentencing Reform Act of 1981 (POAA)[1] based on multiple constitutional grounds. We reject his challenges and affirm.

BACKGROUND

At the time of the offense, Hung Van Nguyen had known Thu Nguyen and her boyfriend for almost 20 years. They had previously allowed Nguyen to stay at their home. In December 2014, Thu repeatedly called police because she had asked Nguyen to leave her home and he had refused. On December 12, 2014, Thu woke up from a nap to see Nguyen walking out of her bedroom closet with a

[1] Ch. 9.94A RCW.

knife. Nguyen stabbed Thu more than 10 times. Nguyen stopped stabbing Thu only when Thu's friend Linh Truong intervened. Nguyen also stabbed Truong in the side.

The State charged Nguyen with assault in the first degree of Thu and assault in the second degree of Truong. The court ordered a mental health evaluation. Consistent with the evaluator's conclusion, the court found Nguyen competent to stand trial. A jury found Nguyen guilty as charged. The court concluded that the State had proved Nguyen had committed two prior strike offenses and was a persistent offender under the POAA.[2] Nguyen's prior strike offenses include a 1994 conviction for first degree burglary and a 2012 conviction for second degree assault by strangulation. As required by the POAA, the court imposed a term of life in prison without the possibility of parole. Nguyen appeals his convictions and his sentence.

STANDARD OF REVIEW

Reviewing courts defer to the trial court's judgment of a defendant's competency.[3] We will reverse a trial court's competency decision only upon finding an abuse of discretion.[4] We review constitutional issues de novo.[5]

---

[2] RCW 9.94A.570.
[3] State v. Coley, 180 Wn.2d 543, 551, 326 P.3d 702 (2014).
[4] Coley, 180 Wn.2d at 551.
[5] State v. Langstead, 155 Wn. App. 448, 452, 228 P.3d 799 (2010).

ANALYSIS

Competency

Nguyen asserts that the trial court abused its discretion in ruling that he was competent to stand trial. "A defendant's competency is a necessary prerequisite for a fair criminal trial."[6] If a court has reason to doubt a defendant's competency, its failure to observe adequate procedures to determine competency violates the defendant's Fourteenth Amendment due process right.[7] Chapter 10.77 RCW provides the procedures necessary to determine competency.[8] "[S]o long as a defendant maintains a challenge to competency, the chapter 10.77 RCW procedures are mandatory to satisfy due process."[9] The trial court's compliance with these procedures satisfies the defendant's due process right.[10]

If a court has reason to doubt the defendant's competency, the statute requires that court to order an expert to "evaluate and report upon the mental condition of the defendant."[11] To establish competency in Washington, the expert must find that the defendant (1) understands the nature of the charges and (2) is capable of assisting in his defense.[12] The party challenging competency must prove that the defendant is incompetent by a preponderance of the evidence.[13]

---

[6] State v. Heddrick, 166 Wn.2d 898, 900, 215 P.3d 201 (2009).
[7] Heddrick, 166 Wn.2d at 904.
[8] Heddrick, 166 Wn.2d at 904.
[9] Heddrick, 166 Wn.2d at 909.
[10] Coley, 180 Wn.2d at 559.
[11] RCW 10.77.060(1)(a).
[12] In re Pers. Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001).
[13] Coley, 180 Wn.2d at 555.

Nguyen contends that the trial court did not give adequate weight to his counsel's representations about his lack of competency and thus violated the procedures it is required to follow to ensure him due process. We disagree.

The trial court followed the statutory procedures required by chapter 10.77 RCW to determine whether Nguyen was competent to stand trial. Nguyen's counsel raised concerns about Nguyen's competency. The State concurred in a request for a competency evaluation. The trial court granted the request. Dr. Deanna Frantz evaluated Nguyen and concluded that he was competent to stand trial. An expert opinion that a defendant is competent provides a reasonable basis for a trial court's conclusion that the defendant is competent.[14] The trial court held a competency hearing and, consistent with Frantz's opinion, found that Nguyen was competent to proceed.

During the competency hearing, Nguyen's counsel stated that he had concerns regarding Nguyen's capacity to assist counsel. Counsel noted that Frantz did not have access to medical records relating to a likely head injury. Nguyen asserts that the trial court should have accepted his counsel's opinion instead of Frantz's. He cites State v. Lord[15] for the proposition that the trial court must give "considerable weight" to defense counsel's opinion regarding his client's competency and ability to assist the defense. But this deference to counsel is relevant only when the court is making the initial determination on whether to grant

---

[14] State v. Lawrence, 166 Wn. App. 378, 389, 271 P.3d 280 (2012).
[15] 117 Wn.2d 829, 901, 822 P.2d 177 (1991).

a motion to determine competency, not when the court is ruling on the defendant's competency.

At the sentencing hearing, counsel repeated his concerns about Nguyen's competency. Counsel stated, "'[My] concerns have remained with me during this entire matter.'" But once the court makes a competency determination, it is not required to revisit competency unless "new information presented has altered the *status quo ante*."[16] Counsel's concerns did not provide new information requiring the court to revisit its competency determination. Thus, the trial court did not abuse its discretion when it decided that Nguyen was competent to stand trial.

Facial Validity of Prior Conviction

Nguyen next asserts that his 2012 conviction for second degree assault was not a qualifying offense under the POAA because the conviction is constitutionality invalid on its face. To impose a life sentence without the possibility of parole under the POAA, the defendant must have two prior qualifying convictions.[17] The court cannot consider a prior conviction that is unconstitutional on its face.[18] '"Invalid on its face' means the judgment and sentence evidences the invalidity without further elaboration."[19] Although the court may consider documents signed as part of a

---

[16] State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992).

[17] RCW 9.94A.570. "Persistent offender" is an offender who has been convicted in Washington of any felony considered a "most serious offense" in addition to two prior felonies in Washington considered "most serious offenses." RCW 9.94A.030(38)(a).

[18] State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986).

[19] In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002) (citing In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002)).

plea agreement in determining facial invalidity, they are relevant only in assessing the validity of the judgment and sentence.[20]

Nguyen pleaded guilty to second degree assault by strangulation in 2012. He claims that while the statute requires proof that the defendant actually assaulted another by strangulation, he admitted only to attempting to strangle the victim. He maintains that because he did not admit in his guilty plea statement the conduct that constitutes the offense, his plea was not knowing, intelligent, and voluntary and thus constitutionally invalid. We disagree.

Due process requires that a defendant's guilty plea be knowing, intelligent, and voluntary.[21] Whether the defendant establishes the factual basis for the offense in his guilty plea statement provides an indication of whether the plea was voluntary.[22] But any reliable information contained in the record can provide the factual basis for a plea and prove that the plea was voluntary.[23] Thus, we need not determine whether the facts Nguyen admitted in his guilty plea statement satisfy the elements of second degree assault by strangulation because failure to establish a factual basis in the guilty plea statement alone does not show that the plea was involuntary. And Nguyen fails to show that the record does not otherwise

---

[20] Hemenway, 147 Wn.2d at 532.

[21] In re Pers. Restraint of Hews, 108 Wn.2d 579, 590, 741 P.2d 983 (1987).

[22] Hews, 108 Wn.2d at 592 ("'The Constitution does not require the establishment in all cases of a factual basis for a guilty plea, but it does require that a plea be voluntary. Failure to establish a factual basis is likely to affect voluntariness.'" (citations omitted) (quoting United States v. Johnson, 612 F.2d 305, 309 (7th Cir. 1980))).

[23] In re Pers. Restraint of Keene, 95 Wn.2d 203, 210 n.2, 622 P.2d 360 (1980).

prove that he was aware of the elements of the crime. Thus, he does not establish that his plea was involuntary or that his judgment and sentence was facially invalid.[24] The trial court did not err in relying on Nguyen's 2012 conviction to aggravate his sentence under the POAA.

Cruel and Unusual Punishment

Nguyen also claims that a sentence of life without the possibility of parole violates the federal and state constitutions' prohibition against cruel and unusual punishment because he committed his first strike offense when he was only 20 years old. The Eighth Amendment to the United States Constitution[25] and article I, section 14 of the Washington Constitution[26] prohibit cruel punishment. This includes punishment disproportionate to the crime committed.[27] Nguyen cites a number of United States Supreme Court cases to support that life in prison without the possibility of parole is a disproportionate punishment for youth.[28]

---

[24] See Langstead, 155 Wn. App. at 457-58 (holding that Langstead failed to establish the facial invalidity of his judgment and sentence because the guilty plea form did not prove that he was not otherwise informed that an unlawful taking of property was an element of the offense).

[25] Solem v. Helm, 463 U.S. 277, 284, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983).

[26] State v. Manussier, 129 Wn.2d 652, 676, 921 P.2d 473 (1996).

[27] Solem, 463 U.S. at 284 (discussing the Eighth Amendment); Manussier, 129 Wn.2d at 676 (discussing article 1, section 14).

[28] See, e.g., Graham v. Florida, 560 U.S. 48, 74-75, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (holding that juveniles who commit a nonhomicide crime may not be sentenced to life in prison without the possibility of parole); Roper v. Simmons, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (holding unconstitutional imposition of the death penalty on offenders who were under the age of 18 when they committed their crimes).

But here, the trial court did not sentence Nguyen for his first strike offense that he committed when he was 20 years old; the court sentenced Nguyen for his third strike offense that he committed when he was 41 years old. In affirming a life sentence under the former habitual criminal law, our Supreme Court stated, "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."[29] Thus, neither the fact that Nguyen was 20 years old when he committed his first strike offense nor the constitutional limits on sentences imposed on juveniles is relevant. In addition, our Supreme Court has held that the mandatory sentence imposed on persistent offenders does not violate the state or federal constitutions.[30] The trial court did not err in imposing a term of life sentence under the POAA.

Equal Protection

Finally, Nguyen asserts that the POAA violates the equal protection clause of the United States Constitution.[31] The right to equal protection of the law requires that "persons similarly situated with respect to the legitimate purpose of the law be similarly treated."[32] Nguyen explains that when a prior conviction is an element of a crime rather than a basis for aggravating a sentence, the State must prove its existence to a jury beyond a reasonable doubt.[33] For example, the State must

[29] State v. Lee, 87 Wn.2d 932, 937, 558 P.2d 236 (1976).
[30] See State v. Witherspoon, 180 Wn.2d 875, 887-91, 329 P.3d 888 (2014).
[31] He makes an identical argument in his statement of additional grounds for review.
[32] State v. Shawn P., 122 Wn.2d 553, 560, 859 P.2d 1220 (1993).
[33] State v. Roswell, 165 Wn.2d 186, 189, 196 P.3d 705 (2008).

prove two prior convictions for violation of a no-contact order to a jury beyond a reasonable doubt to punish a current conviction for violation of a no-contact order as a felony because these prior convictions are elements of the crime.[34] But when prior convictions are aggravators that elevate the maximum sentence that a court may impose, as under the POAA, the State need only prove the prior convictions to a judge by a preponderance of the evidence.[35] Nguyen asserts that this distinction does not rationally relate[36] to the government's interest in punishing repeat criminal offenders more severely than first-time offenders.

We rejected this argument in State v. Langstead.[37] We held that "recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense."[38] Our Supreme Court has also affirmed that a rational basis exists for the difference in treatment between "an aggravating factor and a prior conviction element" because "[t]he prior conviction is not used to merely increase the sentence beyond the standard range

---

[34] Roswell, 165 Wn.2d at 196.

[35] Witherspoon, 180 Wn.2d at 893.

[36] Although Nguyen contends that the court should apply strict scrutiny, he concedes that Washington courts have applied rational basis review to equal protection claims related to sentencing under the POAA. See Manussier, 129 Wn.2d at 673-74 (explaining that because recidivists do not constitute a suspect or semisuspect class and because physical liberty is not a fundamental right, rational basis review is proper).

[37] 155 Wn. App. 448, 228 P.3d 799 (2010).

[38] Langstead, 155 Wn. App. at 456-57.

but actually alters the crime that may be charged."[39] We follow our decision in Langstead. The trial court did not err in imposing a life sentence under the POAA.

Right to a Jury and Due Process

In his statement of additional grounds, Nguyen appears to assert a violation of his Sixth and Fourteenth Amendment due process rights because the judge, and not a jury, found the existence of his two prior strikes for sentencing purposes under the POAA. But both the United States Supreme Court and the Washington Supreme Court have rejected this argument. We must follow their decisions.

The constitutional right to due process and a jury entitle a criminal defendant to a jury determination that he is guilty of every element of the crime beyond a reasonable doubt.[40] In Apprendi v. New Jersey,[41] the United States Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Consistent with Apprendi, the Washington Supreme Court has "repeatedly rejected" the argument that due process requires the fact of a prior conviction to be submitted to a jury for sentencing purposes.[42]

Here, Nguyen's prior convictions were not elements of his current offense. Instead, consistent with the POAA, the trial court considered Nguyen's prior strike

---

[39] Roswell, 165 Wn.2d at 192.
[40] Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).
[41] 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).
[42] State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007).

convictions as aggravating factors in sentencing. In accordance with well-established federal and Washington law, the fact that a judge, and not a jury, recognized Nguyen's prior convictions for sentencing purposes did not violate his Sixth Amendment or Fourteenth Amendment due process rights. The trial court did not err in imposing a life sentence without parole under the POAA.

CONCLUSION

We reject Nguyen's challenge to the trial court's competency determination and his constitutional challenges to his aggravated sentence under the POAA. We affirm.

Leach, J.

WE CONCUR:

Becker, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74962-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Donna Wise, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[donna.wise@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: February 12, 2018

WASHINGTON APPELLATE PROJECT

February 12, 2018 - 4:21 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	74962-5
Appellate Court Case Title:	State of Washington, Respondent v. Hung Van Nguyen, Appellant
Superior Court Case Number:	14-1-06738-7

The following documents have been uploaded:

- 749625_Petition_for_Review_20180212160932D1544716_7929.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.org_20180212_153625.pdf

A copy of the uploaded files will be sent to:

- Cindiecsr@yahoo.com
- donna.wise@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Maureen Marie Cyr - Email: maureen@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180212160932D1544716