

NO. 32188-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH HART,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Twenty-eight-year-old Joseph Hart suffers from schizophrenia and other mental illnesses. He was convicted of killing and assaulting another mentally ill patient with whom he was housed. The dual convictions violate double jeopardy because the legal and factual elements of assault were necessarily committed when the murder was accomplished. The crimes are the same in law and fact, and the assault conviction requires vacating.

Mr. Hart also received an unconstitutional sentence. The trial court was required to sentence Mr. Hart to life without parole without considering mitigating circumstances such as Mr. Hart's youthful offender status at the time of the two prior offenses and his serious mental illness. Because the sentence violates the Eighth Amendment and article I, section 14, it should be vacated and remanded for an individualized sentencing determination.

The sentence should also be remanded to vacate the legal financial obligations and to correct a scrivener's error.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding the second degree assault and second degree murder convictions were for separate and distinct acts.

2. Mr. Hart's convictions for second degree assault and second degree murder violate his constitutional right to be free from double jeopardy.

3. In light of Mr. Hart's young age at the time of the prior offenses, the clear weight of authority that youthful offenders must be treated differently by our criminal justice system, and his mental health issues, the imposition of a life sentence without the possibility of parole violates article I, section 14 of the Washington Constitution.

4. In light of Mr. Hart's young age at the time of the prior offenses, the clear weight of authority that youthful offenders must be treated differently by our criminal justice system, and his mental health issues, the imposition of a life sentence without the possibility of parole violates the Eighth Amendment and the right to fundamental fairness guaranteed by the Fourteenth Amendment to the federal constitution.

5. The imposed life without parole sentence is unconstitutional because the sentencing court was prohibited from making an

individualized determination, taking into consideration Mr. Hart's age and related circumstances as well as his mental health.

6. No evidence supports the preprinted finding that Mr. Hart "has the ability or likely future ability to pay the legal financial obligations imposed" in the judgment and sentence. CP 8 (FF 2.5).

7. The imposition of discretionary legal financial obligations should be vacated because the evidence did not show Mr. Hart has or likely will have the ability to pay.

8. The trial court erred in imposing legal financial obligations for the payment of expenses necessary to ensure Mr. Hart's right to a constitutionally guaranteed jury trial. CP 8 (FF 2.5).

9. The notation finding two strikes pursuant to the RCW 9.94A.030(33)(b)(i) (now codified at RCW 9.94A.030(37)(b)(i)), in addition to three strikes for most serious offenses, is a scrivener's error that should be corrected.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutions prohibit multiple convictions for the same act. Unless the Legislature evinces a clear intent that multiple punishments may be imposed, multiple convictions for the same act cannot lie if the offenses are the same in law and fact.

Do the convictions for second degree intentional murder and second degree assault violate double jeopardy where they are premised on an unbroken action of assault with a knife that resulted in the victim's death and where proof of intentional murder with the knife necessarily proved second degree assault?

2. The Washington Constitution prohibits cruel sentences, and the federal constitution prohibits sentences that are cruel and unusual. Research in adolescent neuroscience has confirmed that brain development and volitional control in juveniles continues well into the mid-twenties and, thus, the Supreme Court and courts in other jurisdictions have made plain that the constitution requires different sentencing schemes for youthful offenders that take into account their particular nature and culpability. Does a mandatory life without parole sentence violate article I, section 14 and the Eighth and Fourteenth Amendments where Mr. Hart was just 20 and 22 years old at the time of his prior most serious offenses?

3. In many cases, mental illness impairs an individual's ability to control his behavior, act rationally, and follow rules. Recidivism is also more common among the mentally ill because prison often exacerbates the disease. Despite a mentally ill offender's potentially

reduced culpability, Washington's persistent offender sentencing scheme does not allow the sentencing court to take mental illness into account when sentencing the mentally ill. Does a mandatory life without parole sentence for a mentally ill offender with two prior most serious offenses violate article I, section 14 and the Eighth and Fourteenth Amendments because the sentencing court was prohibited from considering the mitigating factor of Mr. Hart's severe mental illness?

4. Courts may not impose discretionary costs unless the defendant has a present or likely future ability to pay. Although the trial court found Mr. Hart indigent and sentenced him to life without parole in prison, and although no evidence of his ability to pay discretionary costs was presented, the court imposed \$24,204.27 in discretionary costs and fines. A sentencing court also has no authority to impose costs for expenses necessary to ensure a constitutionally guaranteed jury trial. Did the sentencing court err in ordering Mr. Hart to pay discretionary fees and costs because he did not have the ability to pay, his ability to pay was not considered and the costs largely include expenses necessary to a constitutional criminal trial?

5. Should the judgment and sentence be remanded to correct the notation finding two strikes pursuant to the RCW 9.94A.030(33)(b)(i) (now codified at RCW 9.94A.030(37)(b)(i)), in addition to three strikes for most serious offenses, which appears to be a scrivener's error?

D. STATEMENT OF THE CASE

Joseph Hart suffers from paranoid schizophrenia, antisocial personality disorder and polysubstance abuse. CP 55-56. When he was only 20 years old, he pled guilty to attempted first degree robbery. CP 29. At the age of 22, he pled guilty to assault in the second degree. CP 5, 16.

In March 2012, Mr. Hart was 27 years old and under the care of Lourdes Health Network for his mental illness. CP 5, 42 (finding of fact 12), 46-47 (stipulated fact 12). Lourdes housed him in a trailer park with two other mentally ill men. CP 45 (stipulated facts 1, 2), 46-47 (stipulated fact 12), 62. The evidence at a stipulated facts bench trial proved he murdered one of his roommates, Rodger Lincoln, with a knife. CP 41-102. For this act, he was convicted of second degree intentional murder and assault in the second degree. CP 5-15, 44 (conclusions of law 2-7).

Based on Mr. Hart's prior offenses, the court lacked discretion to impose any sentence other than life without parole. 2RP 38-39.¹ The court was without power to consider mitigating evidence such as age and attendant characteristics or mental health. *See id.*; 2 RP 36-38. Mr. Hart was sentenced to life without parole as a persistent offender, and, despite being found indigent for purposes of appeal, the court imposed over 24 thousand dollars in legal financial obligations. CP 5-15.

¹ The volumes of the verbatim report of proceedings are referred to as follows:

- 1RP refers to that volume of the verbatim report that begins with the arraignment hearing on March 13, 2012 and also transcribes April 24, 2012, August 7, 2012, March 5, 2013 and January 6, 2014.
- 2RP refers to that volume of the verbatim report that begins with a May 4, 2012 hearing and also transcribes August 27, 2013, October 8, 2013, November 21, 2013 (although the cover page lists this date as 2012), December 4, 2013, and January 14, 2014.
- 3RP refers to that volume of the verbatim report that transcribes the August 28, 2012 hearing.
- 4RP refers to that volume of the verbatim report that transcribes the October 16, 2012 hearing.

E. ARGUMENT

1. The multiple convictions of murder and assault for a single attack with a knife that resulted in death violates double jeopardy, requiring the lesser assault conviction to be vacated.

- a. The Washington and federal constitutions' double jeopardy provisions protect against multiple punishments for the same offense.

The double jeopardy clause of the federal constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. V; *see* U.S. Const. amend. XIV. Similarly, article I, section 9 of our state constitution guarantees “No person shall be ... twice put in jeopardy for the same offense.” Const. art. I, § 9. Washington gives its constitutional provision against double jeopardy the same interpretation that the United States Supreme Court gives to the Fifth Amendment. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). The double jeopardy clause protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011).

A defendant's right to be free from double jeopardy is violated if he is convicted of offenses that are identical both in fact and in law. *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005); see *State v. Adel*, 136 Wn.2d 629, 633, 965 P.2d 1072 (1998) (test from *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) is applied to determine double jeopardy violations when different statutory offenses are at issue).² The test is whether the two charged offenses arose out of the same act and, if so, whether the evidence supporting one offense is sufficient to sustain the conviction for the other offense. *Orange*, 152 Wn.2d at 815. Unless each offense, as charged, requires proof of an additional fact that the other offense does not require, convictions for both offenses violate double jeopardy. *Blockburger*, 284 U.S. at 304; *In re Pers. Restraint of Francis*, 170 Wn.2d 517, 523-24, 525, 527, 242 P.3d 866 (2010) (in applying this test, courts consider the offenses as charged and not in the abstract). The double jeopardy clause bars multiple convictions arising out of the same act even if concurrent sentences have been imposed. *State v. Calle*, 125 Wn.2d 769, 775, 888 P.2d 155 (1995).

² Our Supreme Court has held that the assault and murder statutes do not expressly disclose legislative intent as to whether the crimes constitute the same offense. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). Thus, the Court should proceed with the *Blockburger* test.

This Court reviews a double jeopardy claim de novo. *Freeman*, 153 Wn.2d at 770.

b. The charges in this case are the same in law and fact.

Mr. Hart's convictions for second degree murder and second degree assault arose from a single act, Mr. Hart's physical attack of Mr. Lincoln with a knife. The parties stipulated that witnesses saw Mr. Hart attacking Mr. Lincoln and standing over Mr. Lincoln's body while Mr. Lincoln had a knife stuck in his eye. CP 41-42 (FF 1-3, 6-10). An autopsy determined the cause of Mr. Lincoln's death was sharp force injury to his head and torso. CP 43 (FF 20). The trial court concluded Mr. Hart assaulted Mr. Lincoln with a deadly weapon, acted with intent to cause Mr. Lincoln's death, and did cause his death. CP 44. Although the court concluded the assault was "a separate and distinct act from the act resulting in Rodger Lincoln's death," no evidence supports that conclusion. CP 44.

Mr. Hart recognizes that two offenses are not the same in fact if one crime begins after the other is over. *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991). "If one crime is over before another charged crime is committed, and different evidence is used to prove the second crime, then the two crimes are not the 'same offense' and a

perpetrator may be punished separately for each crime without violating a defendant's double jeopardy rights." *Id.* However, here the same evidence supported each offense. There was no break in Mr. Hart's conduct to justify multiple convictions. *See* CP 41-42 (recounting witness reports). A single offense against a single victim can only result in a single conviction. *State v. Womac*, 160 Wn.2d 643, 650, 654-55, 160 P.3d 40 (2007) (where accused convicted of homicide by abuse, second degree felony murder, and first degree assault for death of his son, the two lesser charges must be vacated to comply with double jeopardy principles).

The State may not "divide a defendant's conduct into segments in order to obtain multiple convictions." *State v. Jackman*, 156 Wn.2d 736, 749, 132 P.3d 136 (2007). Furthermore, if the prosecution has to prove one crime in order to prove the other, entering convictions for both crimes violates double jeopardy. *Id.* In other words, entering convictions for two crimes violates double jeopardy if "it was impossible to commit one without also committing the other." *Id.*; *accord Orange*, 152 Wn.2d at 820 (attempted first degree murder and first degree assault are the same in law); *Womac*, 160 Wn.2d 643 at 654-56 (State concedes homicide by abuse and assault are same in law

and fact where committed against a single victim at the same time and place); *State v. Marchi*, 158 Wn. App. 823, 243 P.3d 556 (2010) (attempted first degree murder and assault of a child in the first degree are the same in law); *State v. Read*, 100 Wn. App. 776, 791-92, 998 P.2d 897 (2000) (convictions for second degree murder and first degree assault against the same victim violate double jeopardy because they are the same in law and fact).

To commit second degree assault of Mr. Lincoln, as charged, Mr. Hart had to intentionally assault Mr. Lincoln with a knife that was a deadly weapon. CP 109-10; RCW 9A.36.021(1)(c). To commit intentional second degree murder of Mr. Lincoln, the State had to show Mr. Hart intended to cause Mr. Lincoln's death with a knife. CP 109; RCW 9A.32.050(1)(a). By showing Mr. Hart intentionally caused Mr. Lincoln's death with a knife, the State necessarily proved Mr. Hart also intentionally assaulted Mr. Lincoln with a knife. *See Read*, 100 Wn. App. at 791-92 (holding convictions for second degree murder and first degree assault against the same victim for the same act violate double jeopardy because first degree assault was necessarily proven by showing intentional murder with a deadly weapon).

In short, the offenses of second degree assault and second degree murder are the same in law and fact as charged against Mr. Hart.

- c. Because it violates double jeopardy, the assault conviction must be vacated.

If two convictions violate double jeopardy protections, the remedy is to vacate the conviction for the lesser offense. *E.g.*, *Freeman*, 153 Wn.2d at 777. As the lesser offense, Mr. Hart's assault conviction should be vacated.

2. Requiring a sentence of life without parole for a 28-year-old mentally ill male who committed both predicates while his adolescent mind continued to develop, while he was particularly susceptible to outside influence, and while he lacked volitional control is cruel and unusual within the meaning of the Eighth Amendment and Article I, Section 14.

The United States Supreme Court has held that the Eighth Amendment prohibits the execution of the intellectually disabled and requires that the particulars of a juvenile offender's youthfulness be taken into account when determining an appropriate, proportional sentence. *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 2465, 183 L. Ed. 2d 407 (2012); *Atkins v. Virginia*, 536 U. S. 304, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). In addition to requiring an individualized sentencing determination, because youthful offenders are categorically different than adult offenders, they cannot be

sentenced to death and they cannot be sentenced to life without parole for non-homicide crimes. *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 82, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

Mr. Hart's life without parole sentence is unconstitutional under the Eighth Amendment and the more protective article I, section 14 because the sentencing court had no discretion to consider his youthful offender status at the time of his two predicate offenses as well as his mental illness. The sentence should be remanded for an individualized sentencing determination.

- a. Article I, section 14 bars cruel punishments, which is broader than the Eighth Amendment's ban on cruel and unusual punishments.

The Washington State and federal constitutions prohibit the imposition of sentences that are disproportionate to the offense. U.S. Const. Amend. VIII; Const. art. I, § 14; *State v. Roberts*, 142 Wn.2d 471, 505-06, 14 P.3d 713 (2000); *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980). Article I, section 14 prohibits cruel sentences. Const. art. I, § 14. This provision reaches more broadly than the federal constitution, which prohibits punishments if they are both cruel and unusual. *Id.*; *Roberts*, 142 Wn.2d at 505-06. These provisions require

an individualized sentencing determination, that takes into account the offender's age and related attributes, be made before a juvenile offender is sentenced to a severe term such as life without parole. *Miller*, 132 S. Ct. at 2465.

The principle that punishment must be proportionate to the crime is “deeply rooted and frequently repeated in common law jurisprudence.” *Solem v. Helm*, 463 U.S. 277, 284-86, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). When analyzing article I, section 14 and the Eighth Amendment, courts refer to “evolving standards of decency that mark the progress of a maturing society,” which in turn is 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); *Gregg v. Georgia*, 428 U.S. 153, 172-73, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)). Although a national consensus need not have emerged to hold a particular process—*e.g.*, mandatory life without parole sentencing—violates these constitutional provisions. *Miller*, 132 S. Ct. at 2471.

The Persistent Offender Accountability Act (POAA) defines a “persistent offender” as a defendant being sentenced for a “most

serious offense” who has two or more prior convictions for crimes that are also “most serious” offenses. RCW 9.94A.030(37)(a). The POAA was designed to punish serious, violent repeat offenders. Whenever the sentencing court concludes an offender is a persistent offender, the court must impose the sentence of life, and the offender is not eligible for parole or any form of early release. RCW 9.94A.570. Our Supreme Court recognizes that “there may be cases in which application of the Act’s sentencing provision runs afoul of the constitutional prohibition against cruel punishment.” *State v. Thorne*, 129 Wn.2d 736, 773 n. 11, 921 P.2d 514 (1996). This is that case.

Mr. Hart contends the POAA sentencing scheme, at least as applied here, violates both the Eighth Amendment and Article I, section 14. However, even if the Court disagrees as to the Eighth Amendment, our state constitution’s broader protections are not satisfied by imposing a mandatory life without parole sentence on youthful offenders. *See Roberts*, 142 Wn.2d at 505-06.

- b. Youthful offenders are constitutionally different from adults for purposes of sentencing.

It is now plain that our constitution dictates that “youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.” *Miller*, 132 S. Ct. at 2465. In fact,

“criminal procedure laws that fail to take defendants’ youthfulness into account at all would be [constitutionally] flawed.” *Graham*, 560 U.S. at 76. “[U]nder the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes.” *Bear Cloud v. Wyoming*, 294 P.3d 36, 41 (Wyo. 2013). Requiring an individualized sentencing determination for offenders suffering from mental disease and for youthful offenders does not excuse criminal behavior, it simply incorporates humanity into the sentencing process.

Youthfulness matters because youthful offenders are categorically less culpable than offenders whose brains have fully developed. “[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”—for example, in “parts of the brain involved in behavior control.” *Graham*, 560 U.S. at 68. Scientifically, youths are different in at least three fundamental ways. First, youthful offenders have a “‘lack of maturity and an underdeveloped sense of responsibility,’” leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). Second, they are more susceptible to outside pressures, negative influences, and psychological damage. *Roper*, 543

U.S. at 569; *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). Third, a youth's character is not as "well formed" as an adult's; his traits are "less fixed." *Roper*, 543 U.S. at 570.

As one psychology professor analogized, "[t]he teenage brain is like a car with a good accelerator but a weak brake. With powerful impulses under poor control, the likely result is a crash." 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) (quoting Temple University Professor Laurence Steinberg).³ Because their brains are still developing, youths age 18 and older "react based on emotional impulses rather than by thoroughly processing thoughts and ideas." Deitch et al., *supra*, at 14. Science and imaging studies of the human brain show these impulses continue into early adulthood as relevant areas of the brain continue to develop. Marsha Levick, et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment through the Lens of Childhood and Adolescence*, 15 U. Pa. J. L. & Soc. Change 285, 298-99 (2012). Put simply, they are less likely than mature adults to be able to restrain their own

³ Available at http://www.campaignforyouthjustice.org/documents/NR_TimeOut.pdf.

impulses. Deitch et al., *supra*, at 14. Studies show that “even when adolescents are familiar with the law, they still act as risk takers who magnify the benefits of crime and disregard the consequences associated with illegal actions.” *Id.* at 15.

In addition to acting with a developing brain, adolescents undergo hormonal changes and fluctuations that impact their behavior. “Testosterone, the hormone that has the most significant effect on the body and is most closely associated with aggression, increases tenfold in adolescent boys.” *Id.* “Such hormonal impairments reduce the decision-making capacity of young offenders.” *Id.*

As a result, a juvenile’s actions are less likely to be “evidence of irretrievabl[e] deprav[ity].” *Roper*, 543 U.S. at 570. Unlike their adult counterparts, juveniles or young adults who demonstrate an inability to control their behavior or act in a risky manner generally do so not because of an entrenched characteristic but because of developmental and hormonal changes that will subside with age. “Deciding that a ‘juvenile offender forever will be a danger to society’ would require ‘mak[ing] a judgment that [he] is incorrigible’—but ‘incorrigibility is inconsistent with youth.’” *Miller*, 132 S. Ct. at 2465 (quoting *Graham*, 560 U.S. at 72 (internal quotation omitted)). “It is difficult even for

expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”

Graham, 560 U.S. at 73 (citing *Roper*, 543 U.S. at 573). “The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” *Roper*, 543 U.S. at 570.

In light of the neuroscience and court opinions, which buttress “our commonsense understanding of youth,” “it is becoming clear that society is now beginning to recognize a growing understanding that mandatory sentences of imprisonment for crimes committed by [youthful offenders] are undesirable in society.” *Iowa v. Lyle*, ___ N.W.2d ___, 2014 WL 3537026, *9, 12 (July 18, 2014). “From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” *Roper*, 543 U.S. at 570. Thus, a life without parole sentence is particularly harsh when applied to a youthful offender because the sentence forswears rehabilitation altogether.

Miller, 132 S. Ct. at 2465; *Ohio v. Long*, 8 N.E.3d 890, 896 (Ohio 2014).

The Supreme Court has accordingly held it unconstitutional to sentence a juvenile offender to death. *Roper*, 543 U.S. at 578. The constitution outright “prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.” *Graham*, 560 U.S. at 82. Most significantly here, mandatory life-without-parole sentences are unconstitutional when imposed on juveniles. *Miller*, 132 S. Ct. at 2465. Only in a rare circumstance will a life without parole sentence be proportional for a youthful offender, and it is only constitutional if the sentencing court considered the individualized mitigating factors of the offender’s youth and attendant circumstances.

Just as *Miller* requires courts to undertake a careful, individualized inquiry before imposing a sentence of life without parole on juvenile homicide offenders, this Court should hold the POAA unconstitutional unless it enables sentencing courts to consider a youthful offender’s individualized circumstances before imposing a life without parole sentence for a third “most serious offense.” *Miller*, 132 S. Ct. at 2468.

- c. The *Miller* line of cases apply to Mr. Hart because he was 20 and 22 years old at the time he committed the predicate offenses.

While the holdings of *Miller*, *Roper* and *Graham* on their face apply to juveniles aged 18 and younger, their reasoning and the science are clear that the same principles apply to men up to at least age 25. The Supreme Court recognizes that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.” *Roper*, 543 U.S. at 574. In fact, “the brain does not reach full maturation until the age of 25.” Deitch et al., *supra*, at 13; accord Levick, et al., *supra* at 298-99 (discussing neuro-imaging research). The brain’s frontal lobe, which controls advanced functions including imagination, abstract thought, judgment of consequences, planning and controlling impulses, continues to develop into an individual’s early twenties. Deitch et al., *supra*, at 13-14. Though a steady decline in impulsivity begins in adolescence, it remains elevated into an individual’s mid-twenties. Levick, et al., *supra* at 295. Because it is cruel to apply mandatory life without parole sentences to juvenile offenders age 18 and younger and because the same developmental qualities apply to youthful offenders age 18 to 25, it is equally cruel to

subject a youthful offender to a sentence that does not take account of his individual characteristics.

Mr. Hart was youthful when he committed the two prior “most serious offenses” that subjected him to a mandatory life without parole sentence here. *See* CP 5, 16, 29 (Hart was 20 and 22 years old at time of prior offenses). If he had been tried as a juvenile for these offenses, they would not have counted as “most serious offenses” for purposes of the persistent offender sentencing laws. *State v. Saenz*, 175 Wn.2d 167, 173, 283 P.3d 1094 (2012). The exclusion of juvenile adjudications from the category of “most serious offenses” reflects the reasoning of *Miller*’s mandate for individualized sentencing determinations for youthful offenders. Youth are different and must be treated differently at sentencing. *See id.* Here, it was unconstitutional to circumscribe the sentencing court’s discretion to consider Mr. Hart’s youthful attributes when determining his sentence.

- d. Mr. Hart was entitled to an individualized sentencing determination also because he suffers from mental illness.

Mr. Hart’s mental illness also should have been taken into account under the individualized sentencing determination required by *Miller*. *See Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶¶ 108-09 (1989) (under international law, mental illness must be

considered when imposing a sentence just as youth and its attendant attributes must be considered). *Miller* requires the sentencing court to take into account a youthful offender's "background and emotional development" in assessing culpability. *Miller*, 132 S. Ct. at 2467 (quoting *Eddings*, 455 U.S. at 116). Mr. Hart's background includes that he suffers from mental illness. He is diagnosed with "a mental disease, Schizophrenia" as well as antisocial personality disorder and polysubstance abuse. CP 55-56, 61; *see* 2RP 36-37 (discussing seriousness of Hart's mental illnesses). He was under the care of mental health providers, and housed in a trailer with other mentally ill patients, when he committed the offense against one of his roommates. CP 62.

"Evidence regarding social background and mental health is significant, as there is a 'belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Douglas v. Woodford*, 316 F.3d 1079, 1090 (9th Cir. 2003) (quoting *Boyd v. California*, 494 U.S. 370, 382, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990) (internal quotation marks and emphasis omitted)).

Mr. Hart's mental health disease likely renders him less culpable. Schizophrenia is a major psychotic disorder, most typically characterized by the presence of a number of symptoms including thought disorder, hallucinations, delusions, loose associations, flat or inappropriate affect, disorganized behavior, and impaired cognitive abilities, including deficits in attention, concentration, motivation and judgment. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) (DSM-5); Heinrichs, R.W., *The Primacy of Cognition in Schizophrenia*, 60(3) *Am. Psychologist* 229 (2005). In addition to delusions or hallucinations, "[m]ood symptoms and full mood episodes are common in schizophrenia." DSM-5 at 101. Moreover, the diagnosis requires a markedly reduced level of functioning since onset in areas such as work, interpersonal relations, or self-care. DSM-5 at 99-100, 104.

Essential to understanding schizophrenia is that it is a psychotic disorder defined by the loss of attachment to reality, such that individuals cannot assess the accuracy of their own thoughts, perceptions and feelings about the real world, and such that they typically lack insight into their own illness. Cummings, J.L., & Mega, M.S., *Neuropsychiatry & Behavioral Neuroscience* (Oxford Univ.

Press 2003). A proclivity for violence is more frequent for younger males with the disease. DSM-5 at 101. Equally relevant to Mr. Hart, those that suffer from schizophrenia are more commonly victimized than those without the disease. DSM-5 at 101. Prior abuse and victimization is relevant under *Miller*'s individualized sentencing mandate. *Miller*, 132 S. Ct. at 2468; *People v. Gutierrez*, 171 Cal. Rptr. 3d 421, 324 P.3d 225, 264, 268-69 (2014) (construing requirements of *Miller* to include consideration of prior abuse and neglect, exposure to violence and susceptibility to psychological damage or emotional disturbance); see *Solem*, 463 U.S. at 292-94 (discussing non-exclusive set of factors sentencing courts should consider in making individualized determination). An individualized sentencing determination is particularly important in the case of schizophrenia because "no single symptom is pathognomonic of the disorder" and "[i]ndividuals with the disorder will vary substantially on most features." DSM-5 at 100. Individualized consideration is also critical because the affect of the disease is even more pervasive if it begins in childhood or adolescence. DSM-5 at 100.

Miller's reasoning logically extends to require consideration of mental illness when imposing a sentence as severe as life without

parole. Like the attributes of youthfulness, “[p]sychotic symptoms [of schizophrenia] tend to diminish over the life course.” DSM-5 at 102. But they can be strongest, and often first arise, during adolescence through the mid-30s. *Id.* The culpability and proportional sentencing of a mentally diseased individual may also be affected by the fact that prison is a particularly detrimental environment for those suffering from mental illness and may actually exacerbate their mental illness. Kasey Mahoney, *Addressing Criminalization of the Mentally Ill: The Importance of Jail Diversion and Stigma Reduction*, 17 Mich. St. U. J. Med. & L. 327, 334-36 (Spring 2013); Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders With Mental Illness* 53-134 (2003)⁴. The mentally ill, like Mr. Hart, are also more likely to recidivate once imprisoned. Mahoney, 17 Mich. St. U. J. Med. & L. at 337. The sentencing court should have had the opportunity to consider Mr. Hart’s current and prior offenses in light of these distinguishing characteristics.

“[I]ndividual culpability is not always measured by the category of the crime[s] committed.” *Woodson v. North Carolina*, 428 U.S. 280, 298, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). Sentencing all persons

⁴ Available at <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf>.

convicted of two prior most serious offenses to life without parole without any regard to the particular characteristics of the individual offender is “unduly harsh and unworkably rigid.” *Id.* at 293.

Although the United States Supreme Court has only required individualized sentencing determinations as a constitutional mandate in capital cases and for youthful offenders, Mr. Hart contends that his youthful status at the time of the two prior “most serious offenses” coupled with the severity of the punishment he faced—life imprisonment without the possibility of parole—compels similar treatment.

- e. The POAA violates the Eighth Amendment and article I, section 14 because it precludes individualized sentencing that takes youthfulness into account.

The United States Supreme Court requires “individualized sentencing for defendants facing the most serious penalties.” *Miller*, 132 S. Ct. at 2460. A punishment can only be proportional if the sentencing court may, and does, inquire into the facts and circumstances surrounding the youthful offender and his or her crimes. *See id.* at 2463-64; *Atkins*, 536 U.S. at 311 (punishment must be “graduated and proportioned” to the offense). Mandatory sentences for youthful offenders “prevent[] those meting out punishment from

considering a juvenile’s ‘lessened culpability’ and greater ‘capacity for change.’” *Miller*, 132 S. Ct. at 2460 (quoting *Graham*, 560 U.S. at 68, 74). *Miller* mandates that a youthful offender be afforded meaningful review and consideration by the sentencing court when selecting a proportional punishment.

Courts around the country have responded to the Supreme Court’s mandate. In *Bear Cloud*, the Wyoming Supreme Court invalidated its sentencing laws to the extent they required a lifetime sentence for a juvenile offender without consideration of “the factors of youth and the nature of the homicide at an individualized sentencing hearing.” 294 P.3d at 47. The California Supreme Court held that its courts could not give preference to a life without parole sentence when selecting sentences for juveniles who commit special circumstance murder. *Gutierrez*, 324 P.3d at 267-70. Instead, when sentencing such youthful offenders, California courts must make an individualized determination based on the particular characteristics of the offender and the offense. *Id.* Similarly, Ohio’s highest court requires that mitigating evidence of an offender’s youthful status and attendant circumstances be considered before determining whether aggravating factors outweigh it. *Long*, 8 N.E.3d at 898-99. It reversed a life without parole sentence

imposed without consideration of such mitigating circumstances. *Id.* Based on its state constitutional ban on cruel and unusual punishments, the Iowa Supreme Court recently declared unconstitutional all mandatory minimum sentences for any length of imprisonment for youthful offenders. *Lyle*, 2014 WL 3537026, at *1, 20-23. “The keystone of [the Iowa court’s] reasoning is that youth and its attendant circumstances and attributes make a broad statutory declaration denying courts” the discretion to impose individualized sentence “categorically repugnant” to the constitution. *Id.* at *21.

Like these courts, our Legislature has recognized the gross disproportionality in imposing harsh prison sentences on youth convicted of serious offenses by removing mandatory minimum sentences for juveniles. RCW 9.94A.540(3) (declaring mandatory minimum terms “shall not be applied in sentencing of juveniles tried as adults”). The Legislature also provided a mechanism for those youthful offenders sentenced under the prior scheme to demonstrate their rehabilitation and receive parole through the Department of Corrections, after serving 20 years. Laws of 2014, ch. 130, § 10 (adding new section to RCW 9.94A).

This Court should follow the lead of the Legislature and sister courts around the country and hold that a mandatory life without parole sentence under the POAA is unconstitutional because this State's statutory scheme precludes consideration of individual attributes of youthful offenders and the mentally ill. Because the sentencing court was prohibited from considering Mr. Hart's youthful offender status and mental illness as mitigating factors at sentencing, Mr. Hart's mandatory life without parole sentence violates the Eighth Amendment and article I, section 14. The sentence should be stricken and the matter remanded for a constitutional sentence. *See Graham*, 560 U.S. at 82.

- 3. The court's preprinted "finding" that Mr. Hart had the ability to pay over \$24,000 in discretionary costs is without support and should be vacated along with the imposed legal financial obligations.**

If the convictions are affirmed, this Court should strike the erroneous imposition of \$24,204.27 in discretionary court costs because the evidence did not show Mr. Hart has or likely will have the ability to pay, the judgment and sentence merely contains a preprinted statement on ability to pay, and the court found Mr. Hart indigent and sentenced him to a lifetime (without parole) in prison. CP 5-15; 2RP 35, 39; CP

___ (Sub #140 (order of indigency for appeal entered at sentencing)).⁵

This total represents \$1,837.78 in court costs, \$700 for court appointed attorney, \$21,566.49 for court appointed defense expert and other defense costs, and a \$100 domestic violence fine. CP 9.⁶

A sentencing court can only impose discretionary costs and fees if the evidence clearly supports a finding that the defendant has the ability to pay or likely will have the future ability to pay. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). This requirement is both constitutional and statutory. *Id.*; *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006).

“[E]stablished case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999). “This rule applies likewise to a challenge to the sentencing court’s authority to impose a sentence.” *State v. Hunter*, 102 Wn. App. 630, 633, 9 P.3d 872 (2000) (reviewing challenge to imposition of financial contribution to drug fund raised for

⁵ A supplemental designation of clerk’s papers has been filed, requesting the Superior Court transfer the order of indigency to this Court for inclusion in the clerk’s papers.

⁶ The \$200 criminal filing fee, the \$500 victim assessment, the \$100 DNA collection fee and the uncontested restitution order are not disputed here. CP 9; 2RP 39; *see, e.g., Curry*, 118 Wn.2d at 917 (victim assessment mandatory); *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory).

the first time on appeal). This Court has previously reviewed this type of sentencing issue for the first time on appeal, and should do so here. *See, e.g., State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011); *State v. Curry*, 62 Wn. App. 676, 678-79, 814 P.2d 1252 (1991); *State v. Baldwin*, 63 Wn. App. 303, 308-12, 818 P.2d 1116 (1991).⁷

The sentencing court erred in imposing \$24,204.27 in discretionary costs where the only evidence showed Mr. Hart lacks a present or likely future ability to pay that sum, or any sum. CP 8-9, ___ (Sub # 140 (indigency order)). The court found Mr. Hart indigent, appointed counsel on appeal, and sentenced him to life without parole. *See* CP 5-15, ___ (Sub # 140 (indigency order)). Further, the State presented no evidence to support Mr. Hart's present or likely future ability to pay. 2RP 35. The preprinted "finding," which proclaims the court considered Mr. Hart's financial situation and finds he has the current or likely future ability to pay this enormous sum, is without support. CP 8; *see* 2RP 39 (court provides no support for the imposition of financial obligations at sentencing).

⁷ The Washington Supreme Court is currently considering a case that raises the issue whether challenges to legal financial obligations may be raised for the first time on appeal. *State v. Blazina*, 174 Wn. App. 906, 911-12, 301 P.3d 492, *review granted*, 178 Wn.2d 1010 (2013) (oral arg. heard Feb. 11, 2014).

The \$700 for Mr. Hart's court appointed attorney and the \$21,566.49 in court appointed defense expert witness and other defense costs should be stricken on an additional ground. A trial court lacks authority to impose as costs "expenses inherent in providing a constitutionally guaranteed jury trial." RCW 10.01.160(2). Mr. Hart was constitutionally entitled to counsel in his criminal case. U.S. const. amend. VI; Const. art. I, § 22. Expert and investigative services are critical to ensure the effective assistance of counsel and an adequate defense. *In re Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Mason v. Arizona*, 504 F.2d 1345, 1351 (9th Cir. 1974). In our State, Criminal Rule 3.1(f) "incorporates constitutional requirements by recognizing that funds must be provided where necessary to an adequate defense." *State v. Kelly*, 102 Wn.2d 188, 200, 685 P.2d 564 (1984). The \$22,266.49 in costs for defense counsel, defense expert services, and other defense expenses violate RCW 10.01.160(2) because they constitute "expenses inherent in providing a constitutionally guaranteed jury trial."

Both because there is no support for the preprinted "finding" that Mr. Hart has the ability to pay and because over 22 thousand

dollars of the costs are statutorily prohibited, this Court should strike the discretionary costs imposed.

4. The scrivener's error in the judgment and sentence should be corrected.

If Mr. Hart's convictions and sentence are not reversed, the Court should remand for the trial court to correct a scrivener's error in the judgment and sentence. The State alleged, and Mr. Hart agreed, that his prior convictions amounted to two most serious offenses, which, together with his current convictions, subjected him to sentencing as a three-strikes offender under the POAA. 2RP 34-35, 37; CP 48 (stipulated finding #22), 109; *see* CP 16-40. The court so found, and that box is checked on the judgment and sentence. 2RP 38-39; CP 12, 44 (finding #22; conclusion #8). The box for a two-strikes sex offender lifetime without parole sentence, however, is also checked. CP 12. No evidence or allegation supports this sentence. Presumably, the box was checked in error, and the error should be corrected.

F. CONCLUSION

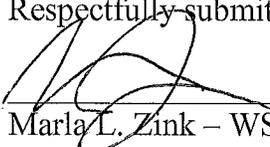
Because the assault conviction violated double jeopardy protections, it should be vacated.

The Court should also order several changes to Mr. Hart's sentence. First, it is cruel and grossly disproportionate to subject Mr.

Hart to a mandatory life without parole sentence that does not reflect consideration of his mental illness and youthful attributes at the time of the predicate prior offenses. Additionally, the discretionary costs should be stricken because the court failed to consider Mr. Hart's ability to pay, because the preprinted "finding" is unsupported, and because costs cannot be imposed for constitutionally guaranteed services and expenses. Finally, the court should remand to correct a scrivener's error that reflects imposition of a two-strikes sex offender sentence.

DATED this 19th day of August, 2014.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

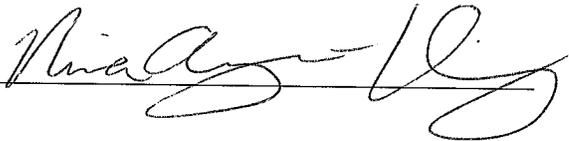
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 32188-6-III
)	
JOSEPH HART,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <input checked="" type="checkbox"/> | SHAWN SANT, PA
TIMOTHY DICKERSON, DPA
FRANKLIN COUNTY PROSECUTOR'S OFFICE
1016 N 4 TH AVE
PASCO, WA 99301 | <input checked="" type="checkbox"/>
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845637
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HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF AUGUST, 2014.

x 

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