

FILED  
Court of Appeals  
Division III  
State of Washington  
5/26/2020 1:30 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36213-2-III

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STATE OF WASHINGTON, Respondent,

v.

JEREMIAH SMITH, a.k.a. GLENN A. AKERS, Appellant.

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**APPELLANT'S BRIEF**

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## I. INTRODUCTION

Following a bench trial, the court convicted Jeremiah Smith<sup>1</sup> of four counts arising from the shooting death of Ceasar Medina at Northwest Associates (“NWA”), a Spokane head shop.<sup>2</sup> The trial court’s findings did not resolve disputed testimony presented at trial concerning the right of access of Smith’s co-defendant, Vatsana Muongkoth, to freely come and go from the building. Instead, the trial court relied upon *State v. Collins*, 110 Wn.2d 253, 751 P.2d 837 (1988) to conclude that even if Muongkoth had a license to enter the property, her license was implicitly exceeded by entering the building, assaulting occupants inside, and discharging a firearm. Because *Collins* does not support the trial court’s conclusion that Muongkoth’s license was implicitly limited, the trial court erred in concluding that Smith entered or remained unlawfully in NWA when he accompanied Muongkoth inside. Accordingly, the findings fail to support the convictions for first degree burglary and first degree murder by causing a death in the commission of a first degree burglary.

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<sup>1</sup> Because the Appellant refers to himself to counsel as “Jeremiah Smith” rather than by his apparent legal name, Glenn Akers, this brief will adopt his usage and refer to the Appellant as “Jeremiah Smith.” *See, e.g.*, I RP (Stovall) at 91.

<sup>2</sup> A “head shop” refers to a place that sells marijuana or marijuana accessories, including drug paraphernalia. I RP (Kerbs) 92.

At sentencing, defense counsel requested a mitigated sentence, citing Smith's age, troubled childhood, and his lesser involvement in initiating the events at NWA relative to Muongkoth. The court refused to consider an exceptional sentence, concluding that Smith was a persistent offender based upon his prior convictions. Because two of the prior convictions do not meet the statutory definition of a "most serious offense" (or "strike") because they were committed after a subsequent strike offense but before he was convicted of the subsequent offense, the sentence can only be sustained by counting as a strike a prior conviction committed when Smith was 17 years old. Basing a life without parole sentence upon conduct committed while Smith was a child is categorically disproportionate to his culpability and is unconstitutionally cruel under the Eighth Amendment to the U.S. Constitution and article I, section 14 of the Washington Constitution.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR NO. 1:** Insufficient evidence supports the conviction for first degree burglary where the findings and the evidence do not support a conclusion that Smith entered or remained unlawfully inside Northwest Associates.

ASSIGNMENT OF ERROR NO. 2: Insufficient evidence supports the conviction for first degree murder where the State failed to prove that Ceasar Medina's death was caused in the commission of first degree burglary.

ASSIGNMENT OF ERROR NO. 3: The life without the possibility of parole sentence violates the Eighth Amendment and Washington's article I, section 14 when it is necessarily premised upon a felony conviction committed when Smith was under 18 years of age.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

ISSUE NO. 1: Whether the trial court's findings support the inference that Muongkoth's privilege to enter NWA at will was implicitly limited.

ISSUE NO. 2: Whether the trial court correctly applied the reasoning of *State v. Collins* to the circumstances present in this case, where nothing but the commission of a crime is asserted as establishing a limitation on the right to enter or remain inside NWA.

ISSUE NO. 3: Whether conduct committed before the age of 18 is inherently less culpable than conduct committed as a mature adult, such that a persistent offender sentence is disproportionate when it is predicated upon a prior conviction committed as a juvenile.

#### **IV. STATEMENT OF THE CASE**

On May 25, 2015, Ruben Marmolejo was arguing with his mistress, Vatsana Muongkoth. I RP (Kerbs) 112, 114-15. Marmolejo was spending the day at Northwest Associates (“NWA”), a head shop in Spokane that sold smoking and vaping related items. I RP (Kerbs) 92, 116, 137, 182. NWA also had an arrangement with Anthony Baumgarden, who informally leased space in the shop to perform tattoo work in exchange for a share of his proceeds. I RP (Kerbs) 186, II RP 275-77, 291. That day, Marmolejo was getting a tattoo from Baumgarden. I RP (Kerbs) 116, II RP (Kerbs) 279.

The reason for Marmolejo and Muongkoth’s argument was over his wife’s discovery of the affair and his desire to terminate his relationship with Muongkoth, while she wanted him to leave his wife. I RP (Kerbs) 141-43. Muongkoth claimed Marmolejo told her he had left his wife but she found out he was lying. IV RP (Kerbs) 740. Text messages between the two that evening show Marmolejo complaining about Muongkoth being disrespectful and qualifying for “a side nigga” III RP (Kerbs) 524. In another text, Marmolejo accused Muongkoth of “fuckin around.” III RP (Kerbs) 527. During earlier fights, Marmolejo had threatened Muongkoth and her family with death, had threatened to burn down her family’s restaurant, had threatened to kill her dogs, had

thrown things at her, and had punched one man and argued with another due to jealousy over their suspected interest in Muongkoth. IV (Kerbs) 715-17, 725-28

Around 9:30 that night, Muongkoth drove to NWA and smashed the window of Marmolejo's BMW with a hammer, then drove away. I RP (Kerbs) 117-18, 187, II RP (Kerbs) 280, IV RP (Kerbs) 739-40. Marmolejo texted to her, "your [sic] done bitch watch." III RP (Kerbs) 532. As they continued to argue over Marmolejo's loyalty to the relationship, Marmolejo told Muongkoth, "U gonna [sic] see the worst of me I hope mommy and daddy have insurance," "the gallo<sup>3</sup> is in full affect [sic] on my hood," "You think u [sic] got my only heaters<sup>4</sup> lmfaio im [sic] waiting!" and "Come in im [sic] ready to die!!! Are you!!!!!" III RP (Kerbs) 533, 534, 538. Muongkoth, in the meantime, told Marmolejo that she hated him and was going to kill him. III RP (Kerbs) 531, 532, 536, 540, 541, 543.

Although it was late, Baumgarden was open for business giving tattoos. II RP (Kerbs) 212-13. Besides Baumgarden and Marmolejo, also

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<sup>3</sup> "Gallo" is Spanish for "Rooster." Marmolejo had the nickname "Rooster" connoting a fighting rooster. I RP (Kerbs) 164.

<sup>4</sup> "Heater" is street slang for a firearm. *See* <https://www.urbandictionary.com/define.php?term=heater> (last visited 5/19/2020).

present that night were Ruben Flores, the owner of NWA; Shane Zornes and Juan Cervantes, friends who hung out there, and Ceasar Medina, Marmolejo's 17-year old nephew who also hung out at the shop. I RP (Kerbs) 36, 42, 64-65, 116. After finishing tattoos for two women, Baumgarden sent Zornes to the store to get supplies. I RP (Kerbs) 122, 149, 189, II RP (Kerbs) 213, 290, 292. Flores was on the phone with his girlfriend in the office, where he could see the monitors displaying the feed from various security cameras around the shop. I RP (Kerbs) 189-90. When he saw Zornes return, he unlocked the back door when he saw two people running toward them and saw a black pistol. I RP (Kerbs) 190-91.

Flores and Zornes ran to alert the others that someone was coming and they had a gun. I RP (Kerbs) 123, 193, II RP (Kerbs) 281. Video surveillance showed two individuals get out of a car and enter through the back door. CP 5. Flores ran to hide in the office while a stranger holding a gun approached Medina, who placed his hands over his head and then got down on the floor in a prone position. CP 5, I RP (Kerbs) 193. The individual was a tall black male with slightly receding short hair and an athletic build, wearing dark pants and athletic shoes and a long-sleeved sweatshirt with the letters "J O R D A N" printed down the left arm. CP 5-6.

As the man held the gun to Medina's head, Baumgarden threw a propane torch at the man as hard as he could. CP 5, II RP (Kerbs) 283, 307. The man fired the gun towards the area the torch came from, then ran away in the opposite direction. CP 5, II RP (Kerbs) 284. Baumgarden ducked and ran to hide in the basement. II RP (Kerbs) 284. Medina got up and walked down the hallway from where the torch had been thrown. CP 5. The man then re-entered the area and went down the same hallway as Medina. CP 5. The video did not capture what happened in the hallway. The man was then seen running back into the frame the opposite direction and exiting through a bathroom. CP 5.

Flores saw the others coming out from their hiding places and emerged from his office. I RP (Kerbs) 194. Medina was standing by the tattoo room when he said, "I think I got hit," and Flores saw blood on his shirt. I RP (Kerbs) 195. Medina then fainted. I RP (Kerbs) 195. Marmolejo called 911. I RP (Kerbs) 125.

The video surveillance showed Marmolejo and Zornes having a conversation and all of them "bouncing" around the building. III RP (Kerbs) 586. Zornes grabbed some items and appeared to leave carrying something. III RP (Kerbs) 583. He was no longer at the shop when police arrived in response to the 911 call. I RP (Kerbs) 69, 91.

Ultimately, Marmolejo, Flores, and Baumgarden dragged Medina to Marmolejo's car to drive him to the hospital. I RP (Kerbs) 126, 195, II RP (Kerbs) 285. Police pulled the car over as it was leaving NWA and found Medina lying in the back seat, unresponsive and covered in blood. I RP (Kerbs) at 46-47, 54-55. Medina died from a gunshot wound to his neck and chest. II RP (Kerbs) 329.

Using the recovered surveillance video, police developed a still image of the black male suspect. CP 6. A community corrections officer identified the man as Jeremiah Smith from the still photo as well as the video. CP 6, III RP (Kerbs) 503-05. Police arrested Smith and found him wearing clothing similar to the individual seen in the surveillance video. III RP (Kerbs) 484-86. Investigators also seized his cell phone and retrieved text messages with Muongkoth as well as his girlfriend, Bobbi Stuhlmiller, from the time period close to the shooting. III RP (Kerbs) 487-88, 491-94.

Police initially spoke to Muongkoth about NWA's business, understanding that she was the bookkeeper as well as Marmolejo's girlfriend. CP 4. A few days after the shooting, Muongkoth told police she had been receiving threats and allowed police to search her phone. III RP (Kerbs) 514. Muongkoth denied knowing that Smith had recently

been released from prison or having any communication with him, and her phone did not contain any calls or messages with Smith. III RP (Kerbs) 497, 515. However, police recovered a text message from Smith's phone to Muongkoth's number on May 26, the day after the shooting, as well as a photograph of Smith and Muongkoth together that was taken just over four hours before the shooting. III RP (Kerbs) 488, 496, 497-98.

At that point, police obtained search warrants for the phone records of Stuhlmiller and Muongkoth. III RP (Kerbs) 499. Stuhlmiller's records showed a series of text messages with Smith around the time of the shooting. III RP (Kerbs) 491-94. About an hour after the shooting, Smith asked Stuhlmiller to come pick him up and gave an address next door to the home of Brittany Verzal. III RP (Kerbs) 493. Police knew that Muongkoth had gone to Verzal's house that same night. III RP (Kerbs) 493.

Muongkoth's phone records revealed 201 text messages with Smith between May 16 and May 27 of 2015, as well as Muongkoth's texts with Marmolejo the night of the shooting. III RP (Kerbs) 512, 519-21. At 11:21 that night, Muongkoth texted to Smith, "I wanna [sic] get his ass at the shop tho cause [sic] his shit there. But I dunno [sic]." II RP (Kerbs) 543. Smith replied, "He gone [sic] take us there anyways." III

RP (Kerbs) 544. Muongkhoth then told him, "Delete these messages." III RP (Kerbs) 544. Smith said, "Lets go to the shop then," and Muongkhoth replied, "Ok." III RP (Kerbs) 544. Muongkhoth sent no texts between 11:45 p.m. and 12:22 a.m., the time period when Medina was shot. III RP (Kerbs) 545. At 12:09 a.m., she placed a call to Verzal. III RP (Kerbs) 545-46. At 12:22 a.m., Smith texted Muongkhoth to turn on the news. III RP (Kerbs) 547.

At 12:47 a.m., Muongkhoth resumed texting to Marmolejo, eventually saying she had heard of a shooting at the shop and wanted to know if he was ok. III RP (Kerbs) 547-52. During this same time period, she told Smith to get rid of his sweater. III RP (Kerbs) 550. Smith told her not to say anything to anyone and said, "You said we was gone [sic] stay side by side." III RP (Kerbs) 550-51. Muongkhoth responded, "Baby hold on I promise. On Tay I got you . . . Chill. I got to see what's going on." III RP (Kerbs) 551. At 7:25, Muongkhoth told Smith, "Don't text back." III RP (Kerbs) 553. At 7:30 she told him, "I'll hit you up late." III RP (Kerbs) 553. They ceased all texting with each other after May 27. III RP (Kerbs) 554.

Police then arrested Muongkhoth and charged both her and Smith with first degree murder, first degree burglary, first degree assault, and

conspiracy to commit first degree robbery. III RP (Kerbs) 554, CP 104-05. Smith was also separately charged with unlawfully possessing a firearm and witness tampering.<sup>5</sup> CP 104. Muongkoth pled guilty to murder while Smith proceeded to trial, asserting defenses of excusable homicide, self-defense, and necessity. IV RP (Kerbs) 708-09, CP 241. Smith waived a jury and his case proceeded to trial before the bench. CP 242, 400; RP (McMaster) 4-7.

At trial, the court heard conflicting evidence about Muongkoth's relationship with NWA. Muongkoth testified that she was affiliated with the business along with Flores, Marmolejo, and Baumgarden and worked there sometimes performing tasks like collecting money, keeping accounting records, and ordering inventory. IV RP (Kerbs) 728-31. She described her affiliation as having "a business interest." IV RP (Kerbs) 734. She also testified that she had a key and could come and go from the business whenever she pleased. IV RP (Kerbs) 735.

Baumgarden's testimony corroborated her account, indicating that he would put the share of his tattoo money he paid for rent into an

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<sup>5</sup> Because the trial court acquitted Smith of this charge, its basis is not relevant to the issues presented on appeal and are not described in this brief.

envelope and Muongkhoth,<sup>6</sup> Flores, or “anyone on the other side of the shop” would collect it. II RP (Kerbs) 116. However, Marmolejo and Flores minimized her involvement. CP 402. Marmolejo denied that Muongkhoth worked at NWA and said she would be welcome there after hours if he was there, but otherwise she would not. I RP (Kerbs) 121-22. He also said that after smashing his windows, she wasn’t welcome in the shop and would have been told to leave. I RP (Kerbs) 174-75. Flores testified that he knew Muongkhoth and she would come into the shop on occasion but denied that she helped with the business. I RP (Kerbs) 188, II RP (Kerbs) 207. However, he contradicted Marmolejo’s testimony, saying that sometimes Muongkhoth came to the shop on her own and was welcome there, including after hours. II RP (Kerbs) 212. Flores did say that Muongkhoth would not be allowed in if she was coming to rob the store. II RP (Kerbs) 229.

Smith testified on his own behalf at trial. IV RP (Kerbs) 786. He described meeting Muongkhoth and developing a relationship with her and her daughter in 2008 until they broke up in 2013, when Muongkhoth got involved with Marmolejo. IV RP (Kerbs) 787-89. Smith spoke with Marmolejo once when he called Muongkhoth and Marmolejo answered

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<sup>6</sup> Vatsana Muongkhoth was also known as “Linnie.” I RP (Kerbs) 114.

her phone. Marmolejo threatened him and told him not to call again because Muongkoth was his girl. IV RP (Kerbs) 790.

In 2015, Smith ran into Muongkoth and began to spend time with her and her daughter again. IV RP (Kerbs) 791. Although Muongkoth wanted to get back to together with him, Smith was leery because of her involvement with Marmolejo, whom he believed to be a violent and dangerous person. IV RP (Kerbs) 791-94, 797. He learned from Muongkoth that Marmolejo carried guns and had shot someone in front of her. IV RP (Kerbs) 797. Due to these concerns, Smith wanted Muongkoth to handle the situation with Marmolejo and then they could consider their own relationship. IV RP (Kerbs) 797.

After spending the night together in a hotel, Smith and Muongkoth went to the car wash the next day. IV RP (Kerbs) 798-99. While moving things out of the way to vacuum her car, Smith found a duffel bag that contained guns and as much as a kilogram of cocaine. IV RP (Kerbs) 799-800. Smith confronted her about it and Muongkoth explained that she was holding the items for Marmolejo. IV RP (Kerbs) 800. Concerned about the items being in the car with Muongkoth's daughter and Muongkoth having no driver's license, Smith insisted that she take him home. IV RP (Kerbs) 800.

Later that night, around 10 p.m., Muongkoth called Smith in a panicked state and agreed to pick him up. IV RP (Kerbs) 800, V RP (Kerbs) 804. Muongkoth was frightened and told him she needed help, that Marmolejo was going to kill him, her, her daughter, and her dogs. V RP (Kerbs) 805. Muongkoth was trying to call Marmolejo to return the bag to him and be done. V RP (Kerbs) 806-07. Marmolejo agreed to meet them at a gas station but didn't show up, instead leading them on a goose chase to different places. V RP (Kerbs) 807. Knowing what was in the bag, Smith was worried that Marmolejo was going to try to blindside them or come after them. V RP (Kerbs) 808-09. Smith told Muongkoth to go home and offered to stand guard so that they could call each other if Marmolejo showed up. V RP (Kerbs) 809.

Eventually, Muongkoth suggested that they just go to the shop and Smith agreed, wanting a clean break with Marmolejo. V RP (Kerbs) 809-10. She picked him up in her roommate's car and drove to the shop but commented that she did not see Marmolejo's car so she kept going. V RP (Kerbs) 811. As they reached the corner she saw his car arriving, so she turned in and parked. V RP (Kerbs) 812. She then dug into the duffle bag, grabbed a gun, and took off running into the shop. V RP (Kerbs) 812-13. Smith grabbed a gun as well and followed her, trying to catch up.

V RP (Kerbs) 812-13. As he tried to grab her, he heard “shoot ‘em, shoot ‘em” followed by a gunshot. V RP (Kerbs) 813.

Muongkoth continued into the shop and Smith followed her, trying to physically grab her to remove her. V RP (Kerbs) 813-14. But when she escaped his grasp, he continued on inside. V RP (Kerbs) 814-15. Smith saw someone who appeared to be reaching under his shirt towards his waistband but got on the ground when he saw Smith’s gun. V RP (Kerbs) 815. Then Smith heard two more gunshots and ran away. V RP (Kerbs) 815. He denied intentionally firing his gun down the hallway but acknowledged that his gun went off as he fled. V RP (Kerbs) 816.

Smith had never been inside the shop before and as he ran, he got lost, eventually finding himself back where he started. V RP (Kerbs) 817. He still did not know where Muongkoth was in the building. V RP (Kerbs) 818. He went down a hallway with his gun drawn when he heard a shot and turned again to run away. V RP (Kerbs) 818. This time, he ran into Muongkoth and they left the shop together. V RP (Kerbs) 819. Smith denied shooting Medina or going there to take any property. V RP (Kerbs) 819-20. Other than the video showing Zornes leaving the shop carrying something, nothing was taken from the shop and police did not

recover any stolen property from Smith or Muongkoth. II RP (Kerbs) 230, III RP (Kerbs) 587.

The State contended that the physical evidence only supported two gunshots being fired and contended that a bullet defect in the hallway wall about four feet off the floor identified was where Medina was shot. II RP (Kerbs) 362, III RP (Kerbs) 592-93. The State also argued that the video surveillance footage showed only one firearm throughout the entire incident. IV RP (Kerbs) 612-13. However, Marmolejo told police that he had a .357 magnum pistol that he kept in a Crown Royal bag, and police found a Crown Royal bag just outside the back door of the shop. II RP (Kerbs) 390, 392, III RP (Kerbs) 584. Police also never learned what Zornes took with him from the shop, although they found his actions suspicious. I RP (Kerbs) 90-91, III RP (Kerbs) 583-84, 586-87, IV RP (Kerbs) 613.

Additionally, law enforcement followed up on a text message to Muongkoth saying “I took those to my mom’s” and recovered a firearm and cocaine, possibly supporting Smith’s allegation that Muongkoth had been holding guns and cocaine for Marmolejo. III RP (Kerbs) 588-89. A neighbor to NWA told a defense investigator that after witnessing Muongkoth striking Marmolejo’s car, he heard six gunshots and saw five

people come out of the shop and take off in a Suburban, also possibly corroborating Smith's claim that he and Muongkoth were shot at and someone else's bullet struck and killed Medina. IV RP (Kerbs) 661, 665-66, 676. The investigator examined the bullet defect in the wall at NWA where Medina was shot and found there was a clear shot from inside the tattoo room, where Marmolejo and several others hid. I RP 123, 193, IV RP (Kerbs) 671-72, 681.

The trial court made extensive findings in support of its verdict. CP 400-73. It concluded that even if Muongkoth had authority to enter NWA and invite Smith inside, her invitation was implicitly limited and exceeded by their actions that night. CP 412. Accordingly, it found Smith guilty of first degree burglary and further concluded that he caused Medina's death in the course of the crime, convicting him of first degree murder. CP 412-14. Additionally, it convicted Smith of first degree assault against Baumgarden and unlawfully possessing a firearm in the first degree. CP 415, 417. The trial court found insufficient evidence of an agreement between Smith and Muongkoth to rob NWA and acquitted him of conspiracy to commit robbery as well as a separate charge of witness tampering. CP 406, 417-18.

At sentencing, the State asserted the following prior convictions:

**2.2 Criminal History: (RCW 9.94A.626):**

	Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
1	ASSAULT 2	121708	VIOL	A	SPOKANE CO, WA	081710
2	BURGLARY 1	111609	VIOL	A	SPOKANE CO, WA	081310
3	ROBBERY 1 CONSP	111609	VIOL	A	SPOKANE CO, WA	081310
4	ROBBERY 1	072607	VIOL	A	SPOKANE CO, WA	041808
5	ASSAULT W/DANG WEAPON	111703		J	WAYNE CO, MI	122003

CP 506. Concluding that the first four offenses required a persistent offender sentence, the court sentenced Smith to life without the possibility of parole. CP 506, 507. Smith conceded his criminal history but asserted there were mitigating factors. VI RP (Kerbs) 1055-56. He pointed out that he was 29 years old at the time of sentencing and lost his father at a young age. VI RP (Kerbs) 1056. As a result, his childhood development took place in the streets of Detroit and led him into a life of crime. VI RP (Kerbs) 1056. However, the sentencing court observed, “[T]here’s only one thing the Court can do at sentencing.” VI RP (Kerbs) 1060. Finding that his prior convictions qualified him as a persistent offender, the court stated, “[T]he Court is required to impose a sentence of life imprisonment without the possibility of any type of parole.” VI RP (Kerbs) 1060-61.

Smith now timely appeals. CP 484.

## V. ARGUMENT

A. The evidence is insufficient to support the convictions for first degree burglary and first degree felony murder premised on the burglary, when the circumstances do not support an inference of a limitation on Muongkoth's license to enter and the trial court's interpretation of *State v. Collins* would convert every crime committed by a non-owner of property into a burglary.

To prove that Smith committed first degree burglary, the State was required to show that he entered or remained unlawfully in the NWA building. RCW 9A.52.020(1); CP 105. Similarly, to convict Smith of first degree felony murder, the State undertook to prove that during the commission of a first degree burglary, Smith caused Medina's death. RCW 9A.32.030(1)(c); CP 104. But Smith accompanied Muongkoth into the building, and Muongkoth claimed to be a partial owner of NWA with a key to the shop and the ability to come and go as she pleased. Accordingly, the trial court's verdict of guilt rests upon its conclusion that her authority to enter was implicitly limited and would not have extended to her actions in entering the building with a gun and assaulting the occupants inside. CP 412 ("Certainly, any alleged license granted by Mr. Flores to Ms. Muongkoth to enter or remain within Norwest Accessories or permit her to invite in others was not so broad as to allow

she and Mr. Akers to race up to the building during the hours of darkness while armed with firearms, enter the building, assault occupants within the building, and discharge a firearm.”).

The court’s conclusion that Muongkoth’s and Smith’s actions exceeded their authority rested upon its interpretation of *State v. Collins*, 110 Wn.2d 253, 751 P.2d 537 (1998). CP 412. But *Collins* is factually inapplicable to this case and its application to these facts puts it into conflict with other case law. Moreover, applying *Collins* to these circumstances is overbroad, transforming any criminal act performed by a person who is not a fee owner of the property into a burglary based upon an implied limitation on the right to be present that is exceeded by committing the crime. Because this interpretation cannot be sustained, Smith’s convictions for first degree burglary and first degree felony murder must be reversed and dismissed.

After a bench trial, a court is required to enter findings of fact and conclusions of law addressing the elements of the crimes and setting out the factual basis for each conclusion of law. CrR 6.1(d); *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). The reviewing court evaluates whether substantial evidence supports the findings of fact and whether the findings support the conclusions of law. *State v. Homan*, 181 Wn.2d 102,

105-06, 330 P.3d 182 (2014). Unchallenged findings of fact are treated as verities while conclusions of law are reviewed *de novo*. *Id.* at 106.

At issue in the present case is the trial court's conclusion that Muongkoth lacked authority to enter NWA, rendering Smith's entry with her unlawful. Notably, the trial court did not enter findings specifically resolving the factual dispute concerning Muongkoth's relationship to NWA, observing only that there was a dispute. CP 402. Thus, the court's findings fail to support its conclusions concerning her authority.

However, to the extent the trial court implicitly found that Muongkoth's authority derived from permission she received from Flores, its conclusion that she exceeded an implied limitation on her license to be present is unsupported by the pertinent case law.

"If a person is privileged to enter the building, then he cannot be convicted of burglary." *State v. Howe*, 116 Wn.2d 466, 469, 805 P.2d 806 (1991). Because an essential element of a burglary is unlawfully entering or remaining in a building, "[a] lawful entry, even one accompanied by nefarious intent, is not by itself a burglary." *State v. Irby*, 187 Wn. App. 183, 199, 347 P.3d 1103 (2015), *review denied*, 184 Wn.2d 1036 (2016).

At issue here is whether a lawful entry by one who has permission to do so

can ripen into an unlawful remaining by virtue of committing a crime inside.

In *Irby*, the defendant was known to visit the victim at his shop where there were no signs of forced entry. Once inside, he bludgeoned the victim and caused his death. But because he could have entered the property with the victim's permission, his act of bludgeoning the victim once inside did not convert the crime into a burglary. 187 Wn. App. at 199. Similarly here, if Muongkhoth had a key and was allowed to come and go from NWA at will with whomever she chose, the commission of crimes after entering NWA does not convert those crimes into a burglary.

Instead, the trial court's conclusion rests upon *Collins*. There, the defendant knocked on the door asking for a former occupant. The current resident saw that he had a slip of paper with a phone number on it and asked, "Wouldn't you like to call him, use the phone?" She led him inside to the phone and handed him the receiver but after calling, the defendant apparently did not receive an answer. At that point, he assaulted the residents, dragged them into a back bedroom, and assaulted them. 110 Wn.2d at 254-55.

The *Collins* Court held that the defendant had been invited in to use the telephone, and once he had done so, his license to remain there

expired. *Id.* at 255. It rejected the argument that possessing a criminal intent in itself renders the entering or remaining unlawful. *Id.* at 258. It also distinguished the circumstance when a tenant or other person is expressly excluded from certain parts of a property. *Id.* at 259. Under the circumstances present in *Collins*, a limitation on the defendant's invitation could be inferred from the fact that he was a total stranger, the resident offered only the use of the telephone, and she led him to it and handed it to him. *Id.* at 261. Consequently, "[n]o reasonable person could construe this as a general invitation to all areas of the house for any purpose." *Id.*

Notably, the *Collins* Court acknowledged that not all cases would support an inferred limitation and that applying its rule correctly would not convert "all indoor crimes into burglaries." *Id.* at 261-62. However, subsequent courts have rejected an interpretation of *Collins* that implied limitations on purpose support a burglary conviction, concluding that limitations may only be implied as to time and place. *See State v. Thompson*, 71 Wn. App. 634, 639, 861 P.2d 492 (1993); *State v. Miller*, 90 Wn. App. 720, 725, 954 P.2d 925 (1998) ("Washington courts have never held that violation of an implied limitation as to purpose is sufficient to establish unlawful entry or remaining."); *but cf. State v. Lambert*, 199 Wn. App. 51, 73, 395 P.3d 1080, *review denied*, 189 Wn.2d 1017 (2017).

Indeed, the mere “harboring of criminal intent” is not sufficient, in itself, to establish either the existence of an implied limitation or the revocation of any license or privilege to remain. *Miller*, 90 Wn. App. at 727. In *Miller*, the defendant went to an open car wash and there, using bolt cutters, broke into the coin boxes and stole the contents. *Id.* at 723. As in this case, it was argued that the owner would not grant permission to enter for the purpose of committing a crime. *Id.* at 724-25. But the *Miller* court observed that such a broad application of the *Collins* rule would elevate every shoplifting inside a building, as well as most other indoor crimes, to a burglary. *Id.* at 725.

The trial court’s interpretation of *Collins* here is analogous to the interpretation rejected by the Court of Appeals in *Miller*. Nothing in the trial court’s findings suggests the kind of limitation present in *Collins* is present here. In *Collins*, the defendant was a stranger, led to a specific place in a private home, and given permission to perform a specific act. Here, by contrast, NWA was a poorly managed shop in which a variety of people congregated at all hours engaged in both official business- and non-business-related activities. CP 402 (describing individuals “dallying around” the shop drinking beer and smoking marijuana); 401 (finding it “highly probable” that NWA sold synthetic marijuana”). The circumstances present here do not support the inference present in *Collins*

that the scope of permission to enter was limited in time and place. Instead, as in *Miller*, the trial court concluded that the commission of the criminal act was implicitly outside the scope of the license. But, as recognized in *Miller*, such a broad inference serves to convert any indoor crime into a burglary, so long as the defendant is not the owner of the property.

The circumstances present in this case, as reflected in the trial court's findings, do not support the application of an implied limitation as in *Collins*. Accordingly, the findings do not support the trial court's conclusion that Smith "unlawfully entered or remained within Northwest Accessories." CP 412. Because unlawful entry or remaining is an essential element of first degree burglary, the evidence is insufficient to support the conviction. And because the first degree murder conviction was premised upon its commission during a first degree burglary, both convictions must be vacated.

B. Smith's sentence of life imprisonment without the possibility of parole is unconstitutionally cruel under the Eighth Amendment and article I, section 14 of the Washington Constitution because it is necessarily predicated upon conduct committed while Smith was a juvenile and is consequently disproportionate to his culpability for all prior offenses.

In evaluating the constitutionality of recidivist sentences, the nature of each of the underlying convictions matters. Because convictions for conduct committed as a juvenile are categorically less reprehensible than similar convictions for adult conduct, a persistent offender sentence predicated upon juvenile conduct is disproportionate to the offender and the offense. Here, Smith's persistent offender sentence was necessarily predicated upon a crime committed when he was 17 years old and convicted in adult court. Accordingly, the life without parole sentence imposed is disproportionate to his culpability and violates the Eighth Amendment and article I, section 14 of the Washington constitution.

1. Under the statutory definition of a “persistent offender,” Smith’s conviction for first degree robbery committed when he was 17 years old is necessarily counted as one of his three strikes.

The sentencing court identified five prior convictions and determined that only the juvenile adjudication from Michigan did not qualify Smith for sentencing as a persistent offender. CP 506. Those convictions were:

**2.2 Criminal History: (RCW 9.94A.526):**

	Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
1	ASSAULT 2	121708	VIOL	A	SPOKANE CO, WA	081710
2	BURGLARY 1	111609	VIOL	A	SPOKANE CO, WA	081310
3	ROBBERY 1 CONSP	111609	VIOL	A	SPOKANE CO, WA	081310
4	ROBBERY 1	072607	VIOL	A	SPOKANE CO, WA	041808
5	ASSAULT W/DANG WEAPON	111703		J	WAYNE CO, MI	122003

CP 506. But under the statutory definition of a “persistent offender,” convictions 2 and 3 are not counted as strikes unless the 2007 robbery conviction is also counted as a strike. Accordingly, to support a persistent offender sentence, the first degree robbery must necessarily be counted. At the time of the crime on July 26, 2007, Smith was 17 years old. *See* CP 503 (identifying date of birth as December 22, 1989).

The Sentencing Reform Act requires a persistent offender to be sentenced to life without the possibility of release notwithstanding any

other sentencing provision or the statutory maximum for the crime. RCW 9.94A.570. As applicable here, a “persistent offender” is defined as an offender who:

(a)(i) Has been convicted in this state of any felony considered a most serious offense; and

(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; **provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.**

RCW 9.94A.030(38) (emphasis added).

A “most serious offense,” also termed a “strike,” includes any class A felony or conspiracy to commit a class A felony as well as second degree assault. RCW 9.94A.030(33). Under this definition, Smith’s prior convictions for second degree assault, first degree burglary, conspiracy to commit first degree robbery, and first degree robbery, as well as his current convictions for first degree murder, first degree burglary, and first degree assault, are all most serious offenses. *See* RCW 9A.52.020(2) (first degree burglary is a class A felony); RCW 9A.56.200(2) (first degree robbery is a class A felony); RCW 9A.32.030(2) (first degree murder is a

class A felony); RCW 9A.36.011(2) (first degree assault is a class A felony).

However, to qualify an offender as a persistent offender, the timing of the crimes and convictions matters. After determining that the prior convictions occurred before the present offense was committed, the court must then determine whether one of the earlier offenses was committed on a date that followed the date of the prior conviction. RCW 9.94A.030(38)(a)(ii); *State v. Brinkley*, 192 Wn. App. 456, 460, 369 P.3d 157, *review denied*, 185 Wn.2d 1042 (2016). Thus, strike offenses committed before the offender has been convicted of a strike do not qualify the defendant for persistent offender sentencing.

The timing of Smith's prior convictions for first degree burglary and conspiracy to commit first degree robbery disqualify them as "strikes" under these definitions, unless Smith's conviction for first degree robbery is counted. They were committed on November 16, 2009. CP 506. Although Smith had committed a first degree assault earlier, he was not convicted of that crime until August 17, 2010. CP 506. Accordingly, these convictions alone do not qualify Smith as a persistent offender. Only by relying upon the first degree robbery conviction, committed when Smith was 17 and entered on April 18, 2008, does Smith have a prior

strike offense for which he was convicted before committing a subsequent strike.

Accordingly, only by counting as a strike conduct Smith committed as a juvenile does he meet the statutory definition of a persistent offender. As such, evaluating the constitutionality of his life without parole sentence requires evaluation of the proportionality of the sentence to youthful misconduct.

2. The constitutionality of Washington's persistent offender sentencing scheme depends upon the proportionality of the sentence to all of the underlying convictions.

Sentences imposed in accord with Washington's persistent offender statute (and its precursor, the habitual criminal statute) have been previously challenged as unconstitutionally cruel under article I, section 14 of the Washington Constitution and the Eighth Amendment to the U.S. Constitution. *See, e.g., State v. Lee*, 87 Wn.2d 932, 558 P.2d 236 (1976); *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980); *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1986), *abrogated on other grounds by Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *State v. Manussier*, 129 Wn.2d 652, 921 P.2d 743 (1996); *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014). In this context,

Washington's constitution provides greater protection than the Eighth Amendment. *Witherspoon*, 180 Wn.2d at 887.

Although the legislature may decide to impose enhanced punishments on recidivists, "legislative authority is ultimately circumscribed by the constitutional mandate forbidding cruel punishment. *Fain*, 94 Wn.2d at 402. Under both the state and federal constitutional analysis, the primary limitation on the legislature is proportionality. *Id.* at 396. To evaluate proportionality, Washington courts consider four factors: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) punishments in other jurisdictions for the same offense, and (4) punishment in Washington for other offenses. *Witherspoon*, 180 Wn.2d at 887 (citing *Fain*, 94 Wn.2d at 397).

However, in the context of punishing recidivists, it is not only the current offense that matters, but the offender's history as a whole. Mandatory life sentences for recidivists are justified "not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." *Rummel v. Estelle*, 445 U.S. 263, 284-85, 100 S. Ct. 1133, 63 L.Ed.2d 382 (1980). Consequently, courts evaluating recidivist sentences consistently consider the proportionality of

the sentence to not only the current crime, but to the past qualifying crimes as well. *See, e.g., Fain*, 94 Wn.2d at 402 (“[W]e believe Fain’s sentence to be entirely disproportionate to the seriousness of his crimes.”); *Manussier*, 129 Wn.2d at 677 (“Each of the offenses underlying his conviction as a “persistent offender” is robbery.”); *Witherspoon*, 180 Wn.2d at 889, 890 (“Witherspoon’s earlier offenses were for first degree burglary and residential burglary with a firearm . . . Witherspoon was an adult when he committed all three of his strike offenses.”); *Rummel*, 445 U.S. at 284 (punishment is “based not merely on that person’s most recent offense but also on the propensities he has demonstrated over a period of time.”).

Thus, in considering whether Smith’s life without parole sentence is unconstitutionally cruel, the court considers the proportionality of the sentence not only to the current offense, but to the history that justifies it. The purpose of sentencing recidivists to life without parole are to deter repeat offenders and to segregate repeat offenders from the rest of society. *Rummel*, 445 U.S. at 284. Although these goals may be proportionately served by life sentences on those who commit crimes as adults, they cannot be reconciled with juvenile misconduct. Consequently, the Eighth Amendment and article I, section 14 prohibit imposing a life without parole sentence predicated on conduct committed as a child.

3. Because juveniles are categorically less culpable than adults, a life sentence premised upon conduct committed as a minor is unconstitutionally disproportionate to the offender's culpability.

*Fain* analysis is not the only framework for evaluating article I, section 14 claims. *State v. Bassett*, 192 Wn.2d 67, 82, 428 P.3d 343 (2018) (“[W]e are not bound to apply *Fain* to every cruel punishment claim under article I, section 14.”). Instead, a categorical bar analysis is more appropriate when the nature of the challenge is based upon the characteristics of a class. *See id.* at 83-84. Here, Smith has received a life without parole sentence based upon conduct he committed while still a child. Because the characteristics of youth undermine the rationale for the persistent offender sentence imposed in this case, a categorical bar analysis is appropriate.

Under a categorical bar analysis, the court first considers whether there is an emerging national consensus against the sentencing practice in question. *Bassett*, 192 Wn.2d at 83, 85-86 (examining trends in other states). Second, the court applies its own independent judgment in light of the standards expressed in its jurisprudence and its understanding of the text, history, and purpose of article I, section 14. *See id.* at 83.

That youthfulness decreases moral culpability is now well-established. *See Bassett*, 192 Wn.2d at 87. Juveniles tend to lack maturity and a fully developed sense of responsibility, leading to “impetuous and ill-considered actions and decisions.” *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1994)). Juveniles are more vulnerable than adults to peer pressure and other negative influences and external pressures, resulting in part from the fact that children generally have less control over their environment. *Id.* Lastly, the characters of juveniles are less fixed and their personalities more transitory than older, more developed adults. *Id.* at 570. As a result of these differences, juvenile misbehavior is less morally reprehensible than adult misbehavior, because it is expected and normal for juveniles to behave immaturely and irresponsibly. *Id.*

Because children are less morally culpable for their conduct, the case for retribution for youthful misbehavior is weakened. *Miller v. Alabama*, 567 U.S. 460, 472, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)). Similarly, youthful criminality is far more likely to be transient and inconsistent with a rationale that the conduct demonstrates the offender’s incorrigibility or propensity toward misconduct. *See id.* at

472-73; *Rummel*, 445 U.S. at 284-85. Consequently, juvenile crimes do not support the same harsh judgments and inferences as adult offenses might. See Barry C. Feld, *The Youth Discount: Old Enough To Do The Crime, Too Young To Do The Time*, 11 Ohio St. J. Crim. L. 107, 137 (2013) (“The [Supreme] Court’s jurisprudence of youth recognizes that juveniles who produce the same harms as adults are not their moral equals and do not deserve the same consequences for their immature decisions.”).

In recognition of this qualitative difference between juvenile crime and crimes committed as an adult, there is an “emerging national consensus against using adult convictions of juvenile offenders for sentencing enhancements.” Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. Rev. 581, 628 (2012). States that exclude crimes committed before age 18 as “strikes” in their recidivist statutes include Kentucky, New Mexico, North Dakota, New Jersey, and Wyoming. Ky. Rev. Stat. Ann. § 532.080(2)(b), (3)(b); N.M. Stat. Ann. § 31-18-23(C); N.D. Cent. Code § 12.1-32-09(1)(c); N.J. Rev. Stat. § 2C:44-3(a); Wyo. Rev. Stat. Ann. § 6-10-201(b)(3).

In addition, multiple states have raised the age to subject youthful offenders to adult court jurisdiction to 18, allowing more 16- and 17-year-

olds to remain in a juvenile court system. See Stephanie Tabashneck, “Raise the Age” Legislation: Developmentally Tailored Justice, 32 Crim. Just. 13, 17-18 (2018). Such movements recognize that treating juvenile crime as equivalent to adult crime can paradoxically entrench a criminal justice identity and lead to continued involvement with the criminal justice system. *Id.* at 15.

Finally, the U.S. Court of Appeals for the Fourth Circuit concluded it was substantively unreasonable to categorize a defendant as a “career offender” for purposes of enhancing his sentence when most of his convictions occurred between the ages of 16 and 18 and his adult convictions involved driver’s licensing issues. *U.S. v. Howard*, 773 F.3d 519, 528-32 (4th Cir. 2014). In reaching this conclusion, the *Howard* court relied upon *Miller*, *Graham*, and *Roper* to conclude that the defendant’s youthfulness at the time of the prior crimes mitigated his culpability for those offenses, which undermined the conclusion that he warranted an exceptional sentence at age 41. *Id.* at 532-33.

These decisions reflect and build upon the Supreme Court jurisprudence acknowledging that crimes committed under age 18 do not justify either the moral condemnation nor the inference of depraved character applicable to crimes committed over age 18. Because youthful

crimes are mitigated, they do not support the inference that an offender who commits additional crimes in young adulthood is a persistent criminal needing to be separated from society rather than rehabilitated. The “direction of change in this country” is moving away from treating crimes committed as a juvenile the same as crimes committed as an adult, and towards acknowledgment that offenders with extensive youthful histories are less culpable than offenders with extensive adult histories. Accordingly, a categorical bar analysis supports the conclusion that imposing a life sentence predicated on juvenile misconduct is unconstitutionally cruel to an adult who did not choose to experience difficulties in his developmental years.

4. Even under a *Fain* proportionality analysis, Smith’s sentence is unconstitutionally cruel because it subjects him to the harshest penalty allowed by law based upon less reprehensible conduct.

The factors articulated in *Fain* to evaluate whether an individual’s sentence is unconstitutionally disproportionate are (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) punishments in other jurisdictions for the same offense, and (4) punishment in Washington for other offenses. 94 Wn.2d at 397. Applying these factors

in the present case leads to the conclusion that Smith's life without parole sentence is disproportionate to his culpability and his risk to society.

(1) The nature of the offense. Murder is, without question, a serious offense. Yet, unaggravated murder does not in and of itself justify a sentence of life without the possibility of parole. *See* RCW 9.94A.515 (establishing seriousness level of XV for first degree murder), RCW 9.94A.510 (establishing minimum sentence of 20 years and maximum sentence of nearly 46 years for level XV crimes); *see also* RCW 10.95.030(1) (establishing life without parole as mandatory sentence for aggravated first degree murder). It is only because of Smith's history that his conviction deprives him of any prospect of release.

Because Smith's criminal record is the dispositive factor in fixing his sentence, the nature of his record matters. But for a crime committed at age 17, Smith would be facing a long sentence but would have hope for eventual re-entry into society. Although terrible, Smith's present crime is not so exceptional or remarkable as to justify his complete removal from the community, were it not for his record. Yet, even though his juvenile conviction renders him inherently less culpable than an offender who committed all of his strikes as an adult, he suffers the same fate.

(2) The legislative purpose behind the statute

As discussed above, the purpose of persistent offender sentencing is to segregate recidivist criminals who commit three most serious offenses from the rest of society. *Rummel*, 445 U.S. at 284; *Thorne*, 129 Wn.2d at 775. But even serious crimes committed as juveniles are less reprehensible than similar offenses by adults. Consequently, the case for imposing retributive punishment based on a juvenile strike is significantly diminished in light of the lesser blameworthiness of the offender. *See Miller*, 567 U.S. at 472.

To pass constitutional muster, punishments must be proportionate to both the offense and the offender. *Miller*, 567 U.S. at 469. Life without parole is now the harshest punishment that can be imposed in Washington for any crime. *See State v. Gregory*, 92 Wn.2d 1, 427 P.3d 621 (2018) (holding death penalty is unconstitutional as applied in Washington). An offender whose three strikes include juvenile conduct is not equivalent to an offender whose three strikes were all committed as an adult. Consequently, it is questionable that treating them both as equally culpable and equally as deserving of the harshest punishment available under the law serves a legitimate penological goal of incapacitation or

public safety. *See Bassett*, 192 Wn.2d at 83-84; *State v. Moretti*, 193 Wn.2d 809, 828, 446 P.3d 609 (2019).

(3) Punishments in other jurisdictions for the same offense

Washington has among the harshest three-strikes law in the nation. As discussed above in Section B3, four states preclude altogether the use of adult convictions for crimes committed as a juvenile as strikes. Maine and Oregon do not have a habitual offender laws except for repeat sex offenders. Me. Stat. T. 17-A § 1607; O.R.S. § 137.690. Kansas has a habitual offender law for persistent sex offenders and imposes increased sentences for repeat offenses of various crimes, but does not have a three-strikes law *per se*. Kan. Stat. § 21-6803; *see also* Kansas Sentencing Commission, *Kansas Sentencing Guidelines Desk Reference Manual 2018* at 51-56, *available online at* [https://www.sentencing.ks.gov/docs/default-source/2018-drm/2018-drm-final-text.pdf?sfvrsn=5f0fd3f\\_0](https://www.sentencing.ks.gov/docs/default-source/2018-drm/2018-drm-final-text.pdf?sfvrsn=5f0fd3f_0) (last visited May 26, 2020). Ohio does not have a three strikes law. *See generally* Ch. 2929 Oh. Rev. Stat.

Nearly all other states either provide for a more restrictive definition of a “strike” or of qualifying recidivism, shorter mandatory sentences, judicial discretion in sentencing, or the possibility of parole. *See* Alaska Stat. Ann. § 12.55.125(c)(4) (offenders convicted of a class A

felony are sentenced to 15-20 years for a third felony conviction); Ala. Code § 13A-5-9 (third conviction for class A felony requires life without parole sentence, but conspiracy and second degree assault are not class A felonies); Ark. Stat. Ann. § 5-4-501(c) (offenders convicted of a serious felony involving violence with one or more serious violent priors are sentenced to 40-80 years or life without parole; but first degree burglary and second degree assault are not serious felonies involving violence); Az. Stat. § 13-706 (third violent or aggravated felony shall be sentenced to life imprisonment but is eligible for commutation after serving at least 35 years); Cal. Penal Code § 667(e)(2)(A) (felony offenders with two or more prior serious or violent felony convictions receive indeterminate sentence with a minimum term of 25 years or three times the maximum term otherwise authorized for each subsequent felony conviction); Colo. Rev. Stat. § 18-1.3-801 (habitual criminals sentenced to life imprisonment with parole eligibility after 40 years); Conn. Gen. Stat. Ann. § 53a-40(j) (persistent dangerous felony offender with two prior convictions sentenced to indeterminate term); 11 Del. Code § 4214 (habitual offender sentenced to mandatory minimum term with judicial discretion to impose up to life, may petition for modification after serving minimum term); Fla. Stat. Ann. § 775.084(4) (three-time violent felony offender shall be sentenced to minimum term of life but the court may disregard requirement if it finds

such a sentence is not necessary for the protection of the public); Ga. Stat. Ann. § 17-10-7(b) (second offense for serious violent felony requires mandatory sentence of life without parole, but first degree burglary and second degree assault are not serious violent felonies); Haw. Rev. Stat. § 706-606.5 (repeat offenders sentenced to mandatory minimum terms); Ia. Code § 902.8 (habitual offender is not eligible for release before serving three years); Id. Stat. § 19-2514 (persistent violators sentenced to indeterminate sentence of at least five years to life); 730 IL.C.S. 5/5-4.5-95 (habitual criminal is sentenced to life imprisonment but is eligible for parole after serving 20 years); Ind. Code § 35-50-2-8(i)(I) (habitual offender convicted of murder receives an additional, non-suspendible fixed term of between six and 20 years); Md. Crim. Law § 14-101 (life without parole sentence required for fourth conviction of crime of violence; third conviction of crime of violence carries mandatory minimum sentence of 25 years); Mich. Stat. § 769.11 (life imprisonment may be imposed when third felony conviction is punishable by life imprisonment); Minn. Stat. § 609.1095 (third violent crime may allow aggravated sentence to be imposed without parole upon determination by fact-finder that offender is a danger to public safety); Mo. Stat. § 558.019 (establishing minimum terms that must be served before parole eligibility depending on number of prior felony convictions); Mont. Code Ann. § 46-

18-219(1)(b) (conviction of a third enumerated offense requires life in prison without parole, but first degree burglary and second degree assault are not comparable to enumerated offenses); Nev. Rev. Stat. Ann. § 207.012 (conviction of third enumerated felony shall be punished by life without parole, life with parole eligibility after 10 years, or 10-25 years); N. Car. Gen. Stat. Ann. § 14-7.7 (violent habitual felon with two violent felony priors must be sentenced to life without parole, but status as violent habitual felon requires separate indictment and jury finding); Neb. Rev. Stat. § 29-2221 (habitual criminal convicted for violent offenses punished by imprisonment for 25-60 years); N.H. Rev. Stat. § 651:6 (after jury finding of an enumerated aggravator, third felony conviction allows sentence of between 10 and 30 years; life without parole authorized only for repetitive violent sex offenses); N.Y. Penal Law § 70.08 (persistent violent offender sentenced to indeterminate sentence of up to life); Ok. Stat. T. 21 § 51.1 (third conviction for violent felony within 10 years of sentence punishable by 20 years to life); 42 Pa. C.S.A. § 9714(a)(2) (offender convicted of third crime of violence sentenced to minimum term of 25 years; judge may impose life without parole if it determines that 25 year sentence is insufficient to protect public safety); R.I. Gen. L. § 12-19-21 (habitual criminal sentenced to additional term up to 25 years on top of term for base crime); S.D.C.L. § 22-7-8 (upon conviction of fourth felony

with at least one prior crime of violence, sentence of life imposed); Tenn. Code Ann. § 40-35-120 (violent repeat offender sentenced to life without parole, but qualifying convictions do not include second degree assault or first degree burglary); Tex. Penal Code § 12.42(d); (third felony conviction punished by life or between 25 and 99 years); Utah Code Ann. § 76-3-203.5(2) (repeat violent offender with two prior violent convictions is rendered ineligible for probation and is considered aggravated in determining the length of incarceration by Board of Pardons and Parole); 13 Vt. Stat. Ann. § 11 (offender convicted of fourth felony may be sentenced to up to life); Vir. Code Ann. § 19.2-297.1 (offender convicted of third violent felony is sentenced to life without parole, but qualifying violent felonies do not include second degree assault or first degree burglary; however, persons sentenced under this section may petition for conditional release at age 60 or 65); W. Vir. Ann. Code § 61-11-18 (third conviction for crime punishable by confinement in penitentiary requires sentence of life, but defendant is not made ineligible for parole).

Indeed, only five states in addition to Washington require the imposition of a life sentence without parole based on a record similar to Smith's. La. Rev. Stat. § 15:529.1(3)(b) (third felony conviction for crime of violence requires life sentence without parole); M.G.L.A. 279 § 25 (habitual criminal who commits violent offense shall be sentenced to

statutory maximum); Miss. Code § 99-19-83 (habitual criminal with a prior crime of violence sentenced to life without parole); S. Car. Stat. § 17-25-45 (life without parole required for second most serious offense or third serious offense); Wis. Code § 939.62-2m (life without parole required for “persistent repeater” convicted of third serious felony). Consequently, the sentence imposed on Smith here would not be required, and potentially would not even be authorized, in the overwhelming majority of other states.

#### (4) Punishment in Washington for other offenses

As discussed above, life without the possibility of parole is now the harshest penalty available in Washington. Consequently, Smith’s punishment is disproportionate both to the seriousness of the crime and his characteristics as an offender.

Only two circumstances justify a life without parole sentence: (1) commission of aggravated murder when over the age of 18, and (2) a persistent offender sentence. RCW 10.95.030; RCW 9.94A.570. Smith’s punishment is therefore the same punishment imposed on individuals who commit murders where aggravating circumstances are proven, although such circumstances were neither alleged nor proven in his case. RCW 10.95.020.

Likewise, Smith’s punishment as a persistent offender is the same punishment imposed on “fully developed adult offenders” who commit all of their strikes in adulthood. *See Moretti*, 193 Wn.2d at 814. But Smith’s culpability is diminished relative to offenders who are adults when they commit their strike offenses. *Miller*, 567 U.S. at 472. Moreover, the transient nature of youthfulness undermines the conclusion that a childhood crime is indicative of a propensity for criminality developed over time. *Id.* at 472-73; *Rummel*, 445 U.S. at 284-85.

Lastly, and ironically, Smith’s youthful crime precludes consideration of the mitigating qualities of youthfulness in committing the present crime. But for the use of his conduct at 17 years old to qualify him as a persistent offender, Smith – who was 25 years old when he committed the current offenses – could have sought an exceptional downward sentence based on the challenging circumstances of his youth and the loss of his father at a young age mitigating his culpability. *See State v. O’Dell*, 183 Wn.2d 680, 695-96, 358 P.3d 359 (2015). Unlike the defendants in *Moretti*, who were adults when they committed their first strikes and in their 30s or 40s when they committed their third strike, Smith committed his third strike at an age when his brain may still be immature. 193 Wn.2d at 824 (“The brain isn’t fully mature at . . . 18,

when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.”)

All of these factors render Smith less culpable than other offenders subjected to life without parole sentences. Treating his crime at age 17 as equivalent to an adult strike is inconsistent with the evolving jurisprudence of youthfulness. He should not receive the same punishment as offenders who commit more serious crimes and whose recidivism extends throughout their adulthood. Accordingly, application of the *Fain* factors supports a conclusion that Smith’s sentence is disproportionately cruel under article I, section 14.

## VI. CONCLUSION

For the foregoing reasons, Smith respectfully requests that the court (1) VACATE and DISMISS his convictions for first degree burglary and first degree murder, (2) VACATE his sentence for life imprisonment without the possibility of parole, and (3) REMAND his case for resentencing within the sentencing guidelines for the remaining convictions.

RESPECTFULLY SUBMITTED this 26 day of May, 2020.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Jeremiah Smith, DOC #317655  
Washington State Penitentiary  
1313 N. 13th Ave.  
Walla Walla, WA 99362

And, pursuant to prior agreement of the parties, by e-mail through the Court of Appeals' electronic filing portal to the following:

Gretchen E. Verhoef  
Deputy Prosecuting Attorney  
SCPAAppeals@spokanecounty.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 26 day of May, 2020 in Kennewick,  
Washington.

  
\_\_\_\_\_  
Andrea Burkhart

**BURKHART & BURKHART, PLLC**

**May 26, 2020 - 1:30 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36213-2  
**Appellate Court Case Title:** State of Washington v. Jeremiah Smith, aka Glenn A. Akers  
**Superior Court Case Number:** 15-1-02459-1

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