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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JEREMIAH SMITH, a/k/a GLENN A. AKERS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Did the trial court properly find that Muongkoth and Smith lacked any authority to *enter* a business known as Northwest Accessories (NWA) on the eve of the murder when the record demonstrated that Muongkoth was only an occasional social guest?
2. Even assuming Muongkoth had some license to enter NWA on the night of the murder, did the trial court properly find that Muongkoth and Smith exceeded the scope of that license?
3. Is the defendant's constitutional challenge to his persistent offender sentence reviewable where it is not a manifest constitutional error?
4. Has the defendant demonstrated that the imposition of a life sentence for his third strike offense, in this case, the murder of a seventeen-year-old, is categorically barred under the state or federal constitution, where he has failed to demonstrate a national consensus against the use of adult strike offenses committed by juveniles and where, having been afforded previous opportunities for reform, a life without parole sentence advances legitimate penological goals?
5. Has the defendant demonstrated that his life sentence for murder predicated, in part, upon a prior strike offense adjudicated in adult court but committed when he was a juvenile is grossly disproportionate to the offenses committed?

II. STATEMENT OF THE CASE

The defendant, Jeremiah Smith, was charged by second amended information on November 10, 2015, with one count of first-degree felony murder predicated on first-degree burglary, first-degree burglary, conspiracy to commit first-degree robbery, first-degree assault, first-degree unlawful possession of a firearm, and tampering with a witness. CP 104-05.

The first-degree felony murder, first-degree burglary and first-degree assault were all charged with a firearm enhancement. *Id.* The matter proceeded to a bench trial before the Honorable John Cooney. The court found the defendant guilty of all charges except for conspiracy to commit first-degree robbery and tampering with a witness. CP 411-17.

Substantive facts – background.

Jeremiah Smith, also known as Glenn Akers and “King,” met Vatsana Muongkoth in approximately 2008. CP 400 (FF 1). They dated until approximately 2013, although they did not physically see each other after 2009.¹ CP 400 (FF 2). In 2013, Muongkoth met Ruben Marmolejo, and they began dating; however, Marmolejo was married to a woman in Moses Lake. CP 401 (FF 6-8). Marmolejo was an uncle to Ceasar Medina, the murder victim in this case, who was 17-years-old. CP 401 (FF 10-11). Medina lived with Marmolejo in Spokane. CP 401 (FF 11).

Ruben Flores founded a business called Northwest Accessories (NWA). CP 401 (FF 16). NWA sold pipes, glassware, apparel and, probably, synthetic marijuana. CP 401 (FF 17). NWA was poorly managed, and had no formal employees; Flores permitted multiple people to congregate at the shop, and assist with running the store, including

¹ In 2009, Smith, Muongkoth, and others were arrested for an armed burglary and Smith was ordered to serve an 80-month sentence. CP 377.

Muongkoth. CP 402 (FF 19-20). Within NWA, Anthony Baumgarden operated a tattoo business. CP 402 (FF 21).

In the weeks preceding May 26, 2015, Muongkoth and Smith resumed seeing each other; on May 24, 2015, they spent the night in a hotel. CP 402 (FF 24-25). The following morning, Smith found a bag containing firearms and cocaine in Muongkoth's Suburban; the contraband ostensibly belonged to Marmolejo. CP 402 (FF 25).

During the evening of May 25, 2015, multiple individuals congregated at NWA – Medina, Flores, Marmolejo and Baumgarden were there, as were Shane Zornes and Juan Cervantes; all were drinking beer or smoking marijuana, or both. CP 402 (FF 29). Muongkoth and Marmolejo argued by text message about Marmolejo's failure to leave his wife or Muongkoth's relationship with Smith; Marmolejo and Muongkoth threatened each other with violence. CP 402-03 (FF 30).

At approximately 9:30 p.m., a neighbor to NWA heard what he thought to be gunshots; what he heard was Muongkoth striking Marmolejo's BMW with a bat. CP 403 (FF 32-33). Later, Muongkoth and Smith decided to go to NWA; Smith claimed that they intended to return Marmolejo's contraband. CP 403 (FF 36). At 11:22 p.m., Muongkoth told Smith by text message, "delete these text messages." Smith replied at 11:23 p.m., "lets [sic] go to the shop then." CP 406 (FF 65). Smith and

Muongkboth did not use Muongkboth's Suburban, but rather drove her roommate's vehicle. CP 403 (FF 36).

During this time, Zornes and Flores returned to the shop in Marmolejo's BMW after an errand; immediately preceding their return, Smith and Muongkboth drove past NWA on Cora Avenue. RP 403 (FF 37). After passing the shop, Muongkboth and Smith noticed Marmolejo's BMW (occupied by Zornes and Flores) turn from northbound Monroe Street onto west Cora Avenue and park in the NWA lot. CP 403 (FF 37). Muongkboth circled the block and returned to NWA heading east on Cora; she parked hidden from view. CP 403 (FF 38).

Events occurring when Smith and Muongkboth entered NWA.

Muongkboth and Smith immediately exited the vehicle, leaving Marmolejo's contraband inside. CP 403 (FF 39). Both were armed with a firearm when they ran to the west entrance of NWA and entered the building. CP 403-04 (FF 39, 41). Just prior to their entry, Flores exited his office and went to NWA's lounge. CP 404 (FF 41). Suddenly, he and another individual darted out of the lounge into the sales area, rushing north to the long hallway before turning east down the long hallway. *Id.* Smith and Muongkboth emerged from the TV/lounge room into the sales area. CP 404 (FF 45). Surveillance video showed that as they entered the sales

area from the lounge, Smith grabbed Muongkoth and pulled her back into the lounge. *Id.*

Flores and Medina entered the sales area through the small hallway near the main sales entrance to investigate; while Medina remained in the sales area, Flores peeked into the lounge before suddenly turning and running into his office. CP 404 (FF 43). Twenty-four seconds after pulling Muongkoth into the lounge, Smith emerged with his gun drawn, and entered the sales area. CP 404 (FF 44-45). Medina, still in the sales area, was unable to hide or retreat; Smith approached him with his gun drawn and Medina slowly backed toward the small hallway while raising his hands over his head. CP 404 (FF 45-46). As Medina laid on the floor, Smith approached him, and placed his gun to Medina's head. CP 404 (FF 46).

Baumgarden, who had been in the tattoo room, heard someone yell, "get down"; Baumgarden looked into the sales area from the small hallway and observed Smith holding someone (Medina) at gunpoint. CP 404 (FF 47). Baumgarden threw a propane bottle at Smith with the intent of defending Medina. *Id.* In response, Smith aimed the gun down the small hallway and fired a single shot. CP 404 (FF 46, 48). Baumgarden retreated to the basement. CP 404 (FF 48). The shot fired by Smith struck the south wall of the hallway and exited the building through the wall, shattering an exterior light fixture. CP 405 (FF 50). Smith left Medina, jumped over a

display and fled into the bathroom, following Muongkoth. CP 405 (FF 51). Medina retreated down the small hallway. *Id.*

Thirty-two seconds after Medina was first placed into a prone position on the floor, Smith reentered the sales area through the lounge. CP 405 (FF 53). Smith walked through the sales area and into the small hallway with his gun raised, temporarily leaving the view of the surveillance cameras. *Id.* Smith then “sprung back” and left the sales room in the direction he had entered. *Id.*

Shortly after Smith and Muongkoth left the building, Baumgarden emerged from the basement, and found Medina on the floor near the tattoo room; a trail of blood led from the southeast hallway through the tattoo room and back into the hallway where Medina was located. CP 405 (FF 54-55). Marmolejo called 911. CP 405 (FF 57). Others within NWA appeared “preoccupied with something other than Medina,” and Zornes left the store before police arrived, carrying unidentified items. *Id.* The remaining individuals attempted to transport Medina to a hospital. CP 405 (FF 58). They were subsequently pulled over by police. *Id.*

Medina’s injury and ballistics.

Medina died – a bullet had entered the lower left side of his neck, striking veins, an artery, a lung, his collarbone and three ribs. CP 407 (FF 71). Dr. Howard, the medical examiner, opined that the injuries would

have caused Medina to collapse within seconds. CP 407 (FF 73). Howard testified that the bullet entry wound was higher than the exit wound – which meant that either Medina was in an upright position when a gun was fired at him in a downward direction or was bent forward toward the direction of the bullet. *Id.* It was likely that Medina was leaning forward to lay on the floor when he was shot.² CP 408 (FF 86).

Smith and Muongkoth's actions after leaving NWA.

At 12:22 a.m. on May 26, 2015, after Muongkoth and Smith had exchanged no text messages since 11:23 p.m. the preceding night, Smith texted Muongkoth, “turn on the news.” CP 406 (FF 66). Muongkoth also texted Marmolejo, making it known she was aware of the shooting. CP 406 (FF 67). Muongkoth texted Smith, telling him to get rid of his sweater. CP 406 (FF 68). Smith instructed her to calm down and to “not say nothing to no one.” *Id.* Later, Smith told his other girlfriend that he “tried to hit a lick that night but it went ba[d].”³ CP 407 (FF 69).

² Investigators searched NWA, and found no spent shell casings. CP 407 (FF 74). Other than the bullet defect in the small hallway (which occurred when Smith fired his gun toward Baumgarden) investigators found only one other defect located on the east wall in the small room that separated the small hallway from the long hallway; the defect was approximately four feet above the floor. CP 407 (FF 75). Video surveillance did not show anyone retrieving shell casings from the floor, making it likely that Smith was armed with a revolver – either a .357 magnum or .38 special, neither of which would eject shell casings. CP 407-08 (FF 78-82). At trial, Smith stipulated to knowingly possessing a firearm. CP 408 (FF 87).

³ The term “hit a lick” is slang for robbery. CP 407 (FF 69).

Procedural history.

The matter proceeded to sentencing on July 12, 2018. CP 512. The defendant's prior criminal history consisted of second-degree assault (2008 offense sentenced in 2010),⁴ first-degree burglary (2009 offense sentenced in 2010),⁵ conspiracy to commit first-degree robbery (2009 offense sentenced in 2010), and first-degree robbery (2007 offense sentenced in 2008).⁶ CP 506. For Medina's death, the court sentenced the defendant to life in prison without the possibility of early release as a persistent offender on counts 1, 2, and 3. CP 507.

⁴ The defendant was born on December 22, 1989. CP 360. The second-degree assault occurred on December 17, 2008, when the defendant was 18 years, 11 months and 360 days old. CP 360. For that offense, he was sentenced to 44 months in prison to run concurrently with the 2009 offenses. CP 364.

⁵ The 2009 first-degree burglary and conspiracy to commit first-degree robbery occurred on November 16, 2009, when the defendant was 19 years, 10 months and 340 days old. CP 373. For those offenses, the defendant was sentenced to 44 months and 80 months (including a 36-month firearm enhancement), respectively, to run concurrently to each other. CP 377.

⁶ This first-degree robbery occurred on July 26, 2007, and the defendant was sentenced on July 26, 2008. CP 386. At the time of this offense, the defendant was approximately 17 and one-half years old. CP 386. The defendant was sentenced in adult court, CP 386; was granted an exceptional sentence downward from the standard range of 31 to 41 months, CP 388, 536-38; and was ordered to serve 12 months confinement with 36 months of community custody, CP 392-93.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE STATE HAD PROVEN THE DEFENDANT COMMITTED FIRST-DEGREE BURGLARY, AND, THEREFORE, HAD COMMITTED FIRST-DEGREE FELONY MURDER PREDICATED UPON THAT BURGLARY.

On appeal, the defendant claims that the trial court's findings do not support the conclusion that he committed or attempted to commit first-degree burglary (or first-degree felony murder) because he did not unlawfully enter or remain within NWA. Following a bench trial, appellate review is limited to determining whether substantial evidence supports the challenged findings of fact and, if so, whether the findings of fact support the conclusions of law. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Unchallenged findings of fact are verities on appeal. *Id.* at 106. A defendant challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Substantial evidence exists when it is enough "to persuade a fair-minded person of the truth of the stated premise." *State v. Russell*, 180 Wn.2d 860, 866-67, 330 P.3d 151 (2014). Stated differently, substantial evidence is "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Deference is given to the trier of fact who resolves conflicting testimony,

evaluates witness credibility and decides the persuasiveness of material evidence. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989), *amended*, 113 Wn.2d 591 (1990), *opinion amended on reconsideration* (Apr. 13, 1990). In sufficiency claims, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The State may establish the elements of a crime by either direct or circumstantial evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). A trier of fact may rely upon circumstantial evidence alone, even if that evidence is also consistent with the hypothesis of innocence. *State v. Kovac*, 50 Wn. App. 117, 119, 747 P.2d 484 (1987).

In order to convict the defendant of first-degree felony murder as charged, the State was required to prove beyond a reasonable doubt that on or about May 26, 2015, Smith committed or attempted to commit first-degree burglary; that Smith or an accomplice caused the death of Medina in the course of or in furtherance of such crime or in immediate flight therefrom; that Medina was not a participant in the burglary or attempt to commit burglary; and these acts occurred in the State of Washington. CP 411 (CL 1); RCW 9A.32.030(1)(c). At issue here, is whether, based on

its findings of fact, the trial court properly concluded that the defendant committed or attempted to commit first degree burglary.

1. The trial court properly found that Muongkoth and Smith lacked any authority to enter NWA on the eve of the murder.

The defendant argues the evidence was insufficient to convict him of first-degree burglary, and, therefore, was insufficient to convict him of first-degree felony murder. He alleges that the trial court's lack of specific findings as to Muongkoth's relationship to NWA undercuts the court's conclusions of law that he unlawfully *entered* NWA. Br. at 21. Contrary to the defendant's claim, the court did resolve the conflict in the testimony to the extent necessary to find Muongkoth and Smith entered the building unlawfully. Specifically, the trial court found:

Northwest Accessories was not well managed. There were no formal employees, instead Mr. Flores *allowed* a number of people to congregate and assist him with running the store. Ms. Muongkoth was one of those individuals.⁷

Ms. Muongkoth claimed she kept the books, ordered inventory, and deposited revenue for the business. She asserts that she had full access to the shop, including possessing keys which allowed her access at any given time. Mr. Flores minimized her involvement with the business as well as her access to the shop.

⁷ The trial court's oral findings, which were incorporated by reference into the written findings, expressly found that Ms. Muongkoth "was one of the individuals who 'dawdled' [at the shop]." CP 418, 426.

CP 402 (FF 19-20) (footnote and emphasis added). As to Muongkoth's testimony, the trial court was "skeptical," finding she appeared to "continually impeach herself before ever being cross-examined." RP 1028.

Additionally, the court found:

By 11:22 PM on May 25, 2015, Mr. Akers and Ms. Muongkoth decided to go to Northwest Accessories to return Mr. Marmolejo's contraband, according to Mr. Akers...Ms. Muongkoth...parked facing east on the north side of Cora Ave. just west of Northwest Accessories. The vehicle was hidden from view from ... the shop.

Upon parking, Ms. Muongkoth and Mr. Akers immediately exited the car leaving headlights illuminated and Mr. Marmolejo's contraband inside. While armed, they both dashed toward the west entrance⁸ of Northwest Accessories.

...

Video surveillance showed Mr. Akers and Ms. Muongkoth enter Northwest Accessories through the west door. Just prior to their entry, Mr. Flores exited his office and went to the TV/lounge room. Suddenly, he and another individual darted out of the TV/lounge room into the sales area, rushed north to the long hallway, before turning east down the long hallway.

Mr. Akers and Ms. Muongkoth then emerged from the TV/lounge room into the sales area...In an apparent attempt to investigate, Mr. Flores and Mr. Medina entered the sales area...Mr. Flores peeked into the TV/lounge room before suddenly turning and scurrying into his office...Mr. Akers [reemerged from the TV/lounge area] with his gun drawn. Presumably, this is what caused Mr. Flores to run from the doorway of the TV/lounge.

CP 403-04 (footnote added).

⁸ The west entrance led into a bathroom, hallway, or TV room. Through the TV room or bathroom/hallway, the sales area could be accessed. RP 1004.

Contrary to Mr. Akers' testimony, those present at Northwest Accessories in the early morning hours of May 26, 2015, were not laying in wait...[s]urveillance video...show[ed] two young women who had been tattooed by Mr. Baumgarden calmly leaving the business through the east door. After these patrons exited, Mr. Medina walked over and locked the east door.⁹

CP 409 (footnote added).

From these facts, unchallenged on appeal, the court concluded:

Ms. Muongkoth lacked the authority to either enter and/or remain in Northwest Accessories or to grant Mr. [Smith] permission to enter and/or remain within Northwest Accessories. Even if the Court were to conclude that Mr. Flores granted Ms. Muongkoth license to enter Northwest Accessories at will and invite others, this authorization may be expressly or implicitly limited in scope. An invitee may exceed the lawful scope of an invitation and, at that point, have entered or remained within a building unlawfully. State v. Collins, 110 Wn.2d 253.

Certainly, any license granted by Mr. Flores to Ms. Muongkoth to enter or remain within Northwest Accessories or permit to her to invite in others was not so broad as to allow she and Mr. [Smith] to race up to the building during the hours of darkness while armed with firearms, enter the building, assault the occupants within the building and discharge a firearm.

Assuming Ms. Muongkoth had license to enter or remain within Northwest Accessories and invite in Mr. Akers, based upon the evidence presented, the scope of her perceived license and Mr. Akers' entry and remaining was exceeded; therefore, the court finds beyond a reasonable doubt that on or about May 26, 2015, Mr. Akers unlawfully entered or remained within Northwest Accessories.

CP 412 (CL 5-7) (emphasis added).

⁹ The public entrance was located on the east side of the building. That entrance lead to the southeast room which was the sales area. RP 1004.

The trial court's conclusions of law were two-fold: (1) that Muongkoth did not have the license to enter or to remain or invite Smith into the store and (2) *even assuming* she had license to enter or remain and invite Smith to enter, the scope of her license did not permit entry after the business closed, during nighttime hours, with firearms, to assault the occupants within. CP 412.

The defendant faults the court's first conclusion of law which determined that Muongkoth did not have any license to enter or remain within NWA or to permit entry to Smith on the eve of the murder, as unsupported by the court's findings of fact.¹⁰ Br. at 21. Contrary to this assertion, the trial court did not need to make more specific findings as to Muongkoth's relationship to NWA. The trial court specifically found Muongkoth was *allowed* by Flores to congregate with others at NWA.¹¹ CP 402. The trial court believed, based on the evidence, that Muongkoth had, in some capacity, previously assisted Flores in running the shop and had "dawdled" there. CP 402, 418, 426. Also telling is the trial court's *lack*

¹⁰ From this argument, the defendant claims that the court's verdict of guilt necessarily rested upon its conclusion that Muongkoth's authority to enter NWA or remain was implicitly limited by her conduct or that of Smith. Br. at 19.

¹¹ This finding was relevant to Muongkoth's past involvement and presence at NWA, not to her presence there on the night of the murder. There was no evidence that would indicate that Muongkoth planned to "assist with running the business" or engage in a social visit on the night of the murder; instead the occupants immediately fled from Muongkoth and Smith upon their entry into NWA.

of findings of fact and its findings of credibility. Based upon the evidence presented, the trial court did not find that Muongkoth had a key,¹² was permitted to enter NWA at will, was an employee, had a business interest in NWA as argued by defendant in summation, RP 948, was socially invited, or had any other privilege to enter the store on the eve of the murder absent Flores' express consent or invitation. CP 402. As the trier of fact, and unconvinced by Muongkoth's testimony, the court was free to reject her assertion that she possessed keys to NWA or was permitted unfettered access to the shop and the ability to invite visitors. The trial court did not err in concluding Muongkoth did not have authority to enter NWA on the night of the murder or to give Smith permission to do so based on its review of the evidence and credibility determinations.

In an apparent attempt to fully address the arguments raised by defense counsel in closing argument pertaining to Muongkoth's claimed license to enter NWA, RP 948, the trial court engaged in an extraneous discourse, assuming, without finding, that Muongkoth had license to enter NWA at will. CP 412. From that assumption, the trial court found that the scope of any license to enter was limited and/or revoked.

¹² The court declined to make this finding notwithstanding Muongkoth's "assertion" she had a key and full access to the shop, clearly rejecting this testimony. CP 402.

On appeal, the defendant disregards the trial court's primary conclusion (other than to give it passing treatment as unsupported by the findings of fact, Br. at 21) that Muongkoth (and Smith) lacked any authority to enter NWA or remain within, instead concentrating his argument on the propriety of the court's findings regarding a suppositional scenario. Because the trial court properly found that Muongkoth lacked authority to enter NWA on the eve of the murder, this Court need not reach the assigned error pertaining to the trial court's dictum which assumed that Muongkoth exceeded the scope of a hypothetical license to enter NWA.

2. Even assuming Muongkoth had a license to enter NWA, Muongkoth exceeded the scope of that license.

The defendant claims that the trial court erroneously found that Muongkoth's license "to be present" within NWA was limited or revoked. Br. at 21. He claims that, 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." Br. at 22. The defendant's argument fails.

First, the defendant's argument relies on Muongkoth's testimony that she had access to NWA and a key to permit entry at any time, testimony that was fully rejected by the trial court. Based on findings not made by the trial court, the defendant's argument presupposes that Muongkoth and Smith *lawfully entered* NWA and that Muongkoth's license to enter NWA

“at will” extended to her entry through the back door of the store, while the store was closed to the public, with gun in hand.¹³ It is the defendant’s argument that is unsupported by any evidence, not the court’s findings.¹⁴

Assuming, however, as the trial court did, that on the night of the murder, Muongkoth had license to enter Flores’ store at will with whomever she pleased, the defendant’s argument still fails.

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person therein. RCW 9A.52.020(1). In order to prove Smith was guilty of first degree felony murder as charged in the information, the State had to prove the commission of a first-degree burglary and that Medina’s death occurred in the course of or in furtherance of that burglary. RCW 9A.32.030(1)(c).

¹³ The trial court also rejected the contention that Muongkoth and Smith entered NWA to return contraband; the contraband was left in the car when Smith and Muongkoth “dashed” toward the back door of NWA while armed. CP 403, 409.

¹⁴ Again, the court stated that “even if it were to conclude that Mr. Flores granted Ms. Muongkoth license to enter Northwest Accessories at will and invite in others, his authorization may be expressly or implicitly limited in scope.” CP 412. The court referred to the license as “alleged” or “perceived,” making it clear that the court found no license existed. CP 412.

The term “enters or remains unlawfully” is defined in RCW 9A.52.010(3) in relevant part:

A person “enters or remains unlawfully” in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public.

Assuming for the sake of argument that Muongkoth had a license to enter the property and to invite Smith to enter at the time of the crime,¹⁵ the court relied on *State v. Collins*, 110 Wn.2d 253, for its conclusion Muongkoth and Smith exceeded the scope of any alleged license by entering the building, during hours of darkness, assaulting the occupants and discharging a firearm within. CP 412.

A “licensee” is a person who is privileged to enter or remain on property only by virtue of the possessor’s consent. *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986). This definition includes social guests. *Id.* An “invitee” is either a public invitee or a business visitor. *Id.* at 667 (citing Restatement (Second) of Torts § 332 (1965)). A “privilege to enter property” is perhaps more broadly defined. A privilege to enter

¹⁵ The statute provides a person enters or remains unlawfully when he is not *then* licensed, invited, or otherwise privileged to so enter or remain. RCW 9A.52.010(3). That means at the time of the entry or remaining, a person must be presently licensed, invited or privileged to do so, not at some past or future time.

property may derive from the consent of the possessor or may be given by law because of the purpose for which the actor acts. *Matter of Harvey*, 3 Wn. App. 2d 204, 216, 415 P.3d 253 (2018); Restatement (Second) of Torts § 167-211 (discussing examples of common law privileges to enter property). Different criminal rules and defenses have developed dependent on the nature of the property and the relationship of the defendant to that property. *See* Paul H. Robinson et al., 1 Crim. L. Def. § 110 (2019) (discussing rules and defenses applicable to property open to the public, abandoned property, and entry with consent).

When entry into a building is made with consent, “a defendant’s invitation to enter a building can be expressly or impliedly limited as to place or time, and a defendant who exceeds either type of limit, with intent to commit a crime in the building, engages in conduct that is ... burglarious.” *State v. Thomson*, 71 Wn. App. 634, 638, 861 P.2d 492 (1993). For example, if a victim is drugged by a perpetrator, her invitation to the perpetrator to enter her home is withdrawn as a matter of law. *State v. Lough*, 70 Wn. App. 302, 853 P.2d 920 (1993), *aff’d on other grounds*, 125 Wn.2d 847 (1995).

“Unlawful remaining” may¹⁶ occur when: “(1) a person has lawfully entered a [building] pursuant to license, invitation or privilege; (2) the invitation, license or privilege is expressly or impliedly limited; (3) the person’s conduct violates such limits; and (4) the person’s conduct is accompanied by intent to commit a crime in the dwelling.” *State v. Crist*, 80 Wn. App. 511, 514, 909 P.2d 1341 (1996) (citing *Thomson*, 71 Wn. App. 634). Intent to commit a crime in a building does not, by itself, render the defendant’s presence unlawful. *State v. Miller*, 90 Wn. App. 720, 725, 954 P.2d 925, 928 (1998). Additionally, it is a defense to burglary that the defendant reasonably believed that he had permission to enter; this defense negates the element of an unlawful entry. Seth A. Fine, 13A Wash. Prac., Criminal Law § 6:15 (3d ed.). This appears to be a determination to be made by the finder of fact.

In *Collins*, the defendant, a stranger to the victim, was invited into the victim’s home to use a telephone without an express qualification as to area or purpose. After using the telephone, he grabbed the residents,

¹⁶ “Unlawful remaining” may also be found where a person unlawfully enters the building or premises. *See State v. Allen*, 127 Wn. App. 125, 127, 110 P.3d 849 (2005). *Allen* specifically rejected an argument that the “unlawfully remains” means of committing burglary is restricted to factual situations in which there is an initially licensed entry but that permission is revoked or its scope exceeded. *Id.* at 133-35. Instead, when an individual enters unlawfully, that person has no permission to be inside, so any period of remaining is also unlawful. *Id.* at 133; *see also State v. Cordero*, 170 Wn. App. 351, 365, 284 P.3d 773 (2012).

dragged them into a bedroom, and raped and assaulted them. 110 Wn.2d at 255. *Collins* analyzed whether the element of “entering or remaining unlawfully” is satisfied where the accused receives an invitation into the premises which is not expressly qualified as to area or purpose and commits a crime while on the premises. *Id.* at 254. The court held that on a case-by-case basis, an implied limitation on the scope of an invitation or license may be recognized. *Id.* The court observed “[w]hile the formation of criminal intent per se will not always render the presence of the accused unlawful, that presence may be unlawful because of an implied limitation on, or revocation of, his privilege to be on the premises.” *Id.* at 258. The State argued that Collins both exceeded the physical scope of his invitation into the house (which was limited to the front room and did not include bedrooms) and exceeded the limited purpose for the entry – the use of the telephone. *Id.*

The *Collins*’ Court adopted the analysis in *State v. Schantek*, 120 Wis.2d 79, 353 N.W.2d 832 (Ct. App. 1984), a case in which a gas station attendant used a key provided to him by his employer to enter the gas station to take a bag of money. In that case, it was undisputed that the employer had not expressly restricted the defendant’s access to or presence on the property after business hours. Yet, under Wisconsin law, the court found the defendant’s presence on the property “nonconsensual”:

We do not pretend that the limits of Schantek's right to be on the premises can always be easily defined. Nor are we prepared to state that Schantek's presence on the employment premises beyond his hours of employment for some nonemployment purpose would always be nonconsensual. We do conclude, however, that the arrangement between Schantek and his employer clearly rendered certain presence inappropriate and thus beyond the limits of the employer's consent and Schantek's knowledge. A fair reading of the evidence does not allow for the strained conclusion that Benco gave Schantek all-encompassing consent to enter the premises at all times for all purposes-including criminal adventure.

Schantek, 120 Wis.2d at 85. In adopting this analysis, the *Collins*' Court stated, "[w]e find this persuasive, and adopt the Wisconsin Court's analysis. The record supports an inference that the invitation or license extended to Collins was limited to a specific area *and a single purpose*."¹⁷ 110 Wn.2d at 261 (emphasis added). In other words, Collins was invited into the residence to use the telephone in the front room, not to rape the victim in the bedroom.

Collins also cited *Hambrick v. State*, 174 Ga. App. 444, 447, 330 S.E.2d 383 (1985):

Although the disguised caller initially had Arrington's authority to enter and remain for a friendly visit, there was sufficient evidence, including testimony of the victim's struggle with Hambrick, to

¹⁷ Defendant cites to *Thomson*, 71 Wn. App. 634, and *Miller*, 90 Wn. App. at 725, for his argument that courts have rejected an interpretation of *Collins* that would permit implied limitations on purpose, concluding limitations may only be implied as to time and place. Br. at 23. To the contrary, our high court in *Collins* plainly stated that a limited license to enter or remain may be inferred on purpose as well. To the extent that the Court of Appeals opinions conflict with our Supreme Court's decision in *Collins*, *Collins* must be followed. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

create a jury question regarding whether the authority to remain ceased at the time the offensive, aggressive behavior began. When Hambrick's *ulterior purpose beyond the bounds of a friendly visit became known to Arrington*, who was the source of the authority, and he reacted against it, a reasonable inference could be drawn that the authority to remain ended. Arrington did not have to shout "Get out!" for this to be so. Yet Hambrick remained until he got possession of the money, far beyond the time at which the scope of the permission ended.

(Emphasis added.)

The *Collins*' Court further stated that the ability to infer a limitation or revocation of a privilege to be upon premises does not convert all indoor crimes into burglaries, as not all cases will support the inference that could be made from the *Collins* record. *Collins*, 110 Wn.2d at 261-62.

Even if Muongkoth had a license to enter the business, the record permits the inference that her invitation or license to enter or remain within NWA was limited in time and/or purpose. At best, and even *not* taking the facts in the light most favorable to the State, the record established she was permitted to enter NWA at will during the time she assisted Flores with the business or when she was a social guest. Yet, the defendant asks this Court to reach the "strained conclusion" that because Muongkoth may have been a social guest in the past, or had sometimes assisted with NWA business, that relationship with NWA and Flores gave her *carte blanche* to enter the premises, give permission to Smith to do the same, after hours, with intent to assault occupants inside with firearms. This interpretation makes little

sense. The scope of Muongkoth's license to enter NWA certainly was not a general invitation to bring whomever she liked to perpetrate an assault on NWA's occupants with firearms.

Further, the trial court could rationally infer that once Smith and Muongkoth raised their weapons inside NWA, causing the other occupants to scatter (rather than welcome them), Muongkoth and Smith exceeded the scope of any invitation to enter or remain. The court could also rationally infer that once Smith placed his gun to Medina's head during their first encounter, any license Muongkoth or Smith had to remain within NWA was implicitly revoked; remaining in NWA after that act and shooting at its occupants proved the first-degree burglary as well.

Smith claims Washington authority allows only an implied limitation as to time and place of entry, rather than purpose. Br. at 23. This assertion is clearly contrary to the plain language of *Collins*, discussed above. Further, in *State v. Lambert*, Division One of this Court stated that *Collins* stands for the proposition that a license to enter or remain may be limited as to time, place, or purpose and may be revoked, and must be decided on a case-by-case basis. 199 Wn. App. 51, 73, 395 P.3d 1080, *review denied*, 189 Wn.2d 1017 (Div. 1, 2017). The *Lambert* court found that a reasonable fact finder could find that the victim's invitation for the

defendant to enter and remain in their home was implicitly revoked when Lambert attacked him. *Id.* at 73-73.

Smith's reliance on *State v. Irby*, 187 Wn. App. 183, 347 P.3d 1103 (2015), is inapt. In *Irby*, the court analyzed an alleged jury unanimity error – whether the jurors were unanimous as to which act (of two separate acts) constituted first-degree burglary. *Id.* at 197. The defendant had entered the victim's shop, *potentially* with the victim's permission, as he had been a social visitor in the past, and bludgeoned the victim to death; he then broke into an upstairs bedroom and armed himself with the victim's guns. In reversing the conviction for first degree burglary, the court held that “[a] juror could have easily entertained a reasonable doubt as to the State’s claim that Irby burglarized the shop,”¹⁸ and, therefore, the unanimity problem was not harmless because it could not be said that “no rational trier of fact could have entertained a reasonable doubt that each incident established the crime.” *Id.* at 198-99.

In *Irby*, there was a possibility that entry was made with consent – the victim was dead, and, therefore, there was no evidence supporting

¹⁸ The court applied a harmless error test to determine whether the unanimity problem required reversal – “[s]uch an error is harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime.” The court further stated, “The fact that Irby bludgeoned Rock once he got inside [the shop] does not necessarily prove a burglary.” 187 Wn. App. at 199.

whether Irby was admitted to the shop with the victim's permission. The *Irby* court stated that the evidence did "not necessarily prove a burglary." Although not expressly discussed, because Irby was a unanimity case, not a sufficiency of the evidence case, the error was not harmless because the evidence did not conclusively establish a burglary; under the facts included in that opinion, *a jury could infer, but was not required to do so*, that any license to enter or remain was limited or revoked.

Here, however, the trial court made express findings as to the manner of entry into NWA; there was no likelihood, based on the video and record, that Muongkoth and Smith entered NWA on the night of the murder with Flores' consent. Thus, unlike in *Irby*, where a rational trier of fact *could* have believed that Irby entered or remained in the victim's shop with consent, and could have rejected the permissive inference that a license to remain was revoked when the bludgeoning began, here, the trier of fact explicitly rejected the contention that, if Muongkoth and Smith were licensed to enter NWA (by virtue of Flores' consent), that license would extend to an assaultive entry. That fact finding was solely within the province of the trial court to make.

Defendant complains that applying *Collins* to Smith's case is overbroad, "transforming any criminal act by a person who is not a fee owner of the property into a burglary based upon an implied right to be

present that is exceeded by committing the crime.” Br. at 20. This is inaccurate. First, even a fee owner may not have a license or privilege to enter property. The test of ownership in Washington is not legal title, but rather occupancy and possession at the time of the offense; in order to determine the lawfulness of a defendant’s presence upon property, the court turns to whether the defendant maintained a license or privileged occupancy of the premises. *State v. Wilson*, 136 Wn. App. 596, 606, 150 P.3d 144 (2007); *State v. Stinton*, 121 Wn. App. 569, 574, 89 P.3d 717 (2004). Since the law of burglary protects the dweller, the controlling question is occupancy rather than ownership. As a result, a person may be guilty of burglarizing one’s own property if that property is in the possession of another. *See* Seth A. Fine, 13A Wash. Prac., Criminal Law § 6:8 (3d ed.).

Further, application of *Collins* to this case does not place implied limitations on non-fee owners, such as lessees, who have both occupancy and possession of the premises at issue at the time of the alleged offense. It also does not place an implied limitation upon *public invitees* who lawfully enter or remain in the public areas of a store or facility during business hours, regardless of their criminal intent. *See Miller*, 90 Wn. App. 720. Contrary to those scenarios, Muongkoth and Smith did not have any credible possessory or occupancy interest in NWA; therefore, even if their entry was initially lawful pursuant to the consent of the owner, an implied

limitation on their presence or ability to remain may be implied. Further, Muongkoth and Smith did not enter NWA through the public entrance during business hours when the store was open to the public and so cases involving public invitees are inapplicable.

Lastly, the defendant's argument that an implied limitation upon consent cannot be predicated upon the purpose of the visit violates public policy. It is understandable that courts may be loathe to interpret *Collins* to elevate every shoplifting by a *public invitee* that occurs within the public areas of a building to a burglary. But, to hold that a jury can never infer that consent of a property owner or possessor to a *licensee* (present solely on the property by virtue of the consent of the occupier) cannot be impliedly revoked when the visitor acts outside the scope of that license, does not fully protect citizens and their dominion over typically private spaces or safety within. *See State v. Wentz*, 149 Wn.2d 342, 357, 68 P.3d 282 (2003) (Madsen, J. dissenting) ("burglary statutes are intended to proscribe and punish conduct involving the risk of harm or actual harm to property, as well as persons").

The trial court did not err in determining Muongkoth and Smith had no license to enter NWA property on the night in question. The court's findings support that conclusion. Further, the court did not err in concluding that any alleged license to enter NWA property was limited and/or revoked.

The court found that Muongkoth had previously been “allowed” to congregate at the store and “assist” Flores with running the store. Based on this finding, the court properly (albeit hypothetically) treated Muongkoth as an occasional social guest, “licensed to enter or remain” within NWA solely by Flores’ consent. CP 454. Even if Muongkoth had Flores’ consent to enter NWA as a social guest on past occasions, there was no evidence, whatsoever, that on the night of the murder, she had Flores’ consent to enter NWA; additionally, as stated by the trial court, any license was not so broad as to permit Muongkoth and Smith’s manner of entry and conduct with NWA on the night of the murder. Video surveillance showed Muongkoth and Smith parked their car a half a block from NWA, rushed into NWA with their guns at the ready, during nighttime hours, through the back door after the public doors had been locked and the final patrons had departed; upon their entry, the occupants of NWA attempted to flee or hide. Any license to enter NWA as a social guest impliedly did not extend to this manner of entry. Any license to enter or remain was also impliedly revoked as soon as Smith placed his gun to Medina’s head and shot his gun toward Baumgarden. The defendant’s argument fails.

B. SMITH WAS SENTENCED AS A PERSISTENT OFFENDER AT THE ADULT AGE OF 25; THAT SENTENCE COULD CONSTITUTIONALLY BE PREDICATED UPON AN ADULT

CONVICTION COMMITTED BY THE DEFENDANT AT THE AGE OF SEVENTEEN.

Smith next claims that his sentence of life without the possibility of parole violates the Eighth Amendment of the federal constitution and article I, section 14 of the state constitution because the trial court did not consider that his first strike offense was committed when he was seventeen and one-half years old;¹⁹ he claims that his youth at the time of his first offense renders his life sentence on his third strike offense constitutionally infirm. Br. at 24-30. He asserts that his sentence fails constitutional muster as it is both categorically cruel and grossly disproportionate to his offenses. These claims fail.

Standard of review, reviewability, and introduction.

An appellate court reviews alleged constitutional violations de novo. *State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012).

The constitutionality of the defendant's adult persistent offender sentence was not raised below, and, in fact, defense counsel agreed that a life sentence was proper under the statute, only requesting to reserve any theoretical constitutional issues for appeal. RP 1055-57. Thus, this issue raised for the first time on appeal is only reviewable if it is a manifest error affecting a constitutional right. RAP 2.5(a). This alleged constitutional error

¹⁹ Smith's date of birth is December 22, 1989. CP 1.

is not manifest, i.e., obvious on the record or plain and indisputable. *See State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). As further discussed below, our Supreme Court has rejected constitutionality challenges to sentencing of adult offenders predicated on “youthful” first strikes, and has noted other jurisdictions have upheld persistent offender-type sentencing even when a predicate offense is a juvenile offense. *State v. Moretti*, 193 Wn.2d 809, 822-23, 446 P.3d 609 (2019) (citing *Wilson v. State*, 2017 Ark. 217, 521 S.W.3d 123, 127 (2017); *Vickers v. State*, 117 A.3d 516, 520 (Del. 2015)); *Commonwealth v. Lawson*, 90 A.3d 1, 7 (Pa. Super. 2014); *Counts v. State*, 338 P.3d 902 (Wyo. 2014); *U.S. v. Hoffman*, 710 F.3d 1228, 1233 (11th Cir. 2013); *U.S. v. Scott*, 610 F.3d 1009, 1018 (8th Cir. 2010); *U.S. v. Mays*, 466 F.3d 335, 340 (5th Cir. 2006). This Court should decline review as the error alleged is not manifest.

Even if this Court does review the alleged error, the defendant’s sentence is constitutional. The legislature has near plenary authority to define crimes and punishments. *State v. Varga*, 151 Wn.2d 179, 193, 86 P.3d 139 (2004). Whenever a sentencing court concludes an offender is a “persistent offender,” the court must impose a life sentence, and the offender is not eligible for any form of early release. RCW 9.94A.570.

The Washington Supreme Court has repeatedly upheld Washington's persistent offender law against both federal and state constitutional challenges under the Eighth Amendment and article I, section 14. *See Moretti*, 193 Wn.2d 809; *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014); *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996); *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996); *State v. Manussier*, 129 Wn.2d 652, 677, 921 P.2d 473 (1996).

The Eighth Amendment to the federal constitution bars cruel and unusual punishment while article I, section 14, of the state constitution bars cruel punishment. *Witherspoon*, 180 Wn.2d at 887. Our Supreme Court has held that article I, section 14, is often more protective than the Eighth Amendment when evaluating both the proportionality of the POAA, and juvenile sentencing. *Id.*; *State v. Bassett*, 192 Wn.2d 67, 82, 428 P.3d 343 (2018). Therefore, if Smith's life sentence does not violate the more protective state constitutional provision, no need exists to further analyze the sentence under the Eighth Amendment. *Id.*

In *Moretti*, 193 Wn.2d 809, our Supreme Court analyzed the constitutionality of a POAA sentence for an adult offender, predicated upon at least one strike offense committed by the defendant as a "youthful offender" (a young adult over the age of 18), finding no violation. Division Two of this Court recently analyzed whether an adult POAA sentence

predicated upon an earlier POAA offense committed as a juvenile violates article 1, section 14, of the Washington Constitution, also finding no violation. *State v. Teas*, 10 Wn. App. 2d 111, 131, 447 P.3d 606 (2019), *review denied*, 195 Wn.2d 1008 (2020). This Court should follow the logic of *Moretti*, *Teas* and other jurisdictions and find no constitutional violation in the defendant's life without the possibility of parole sentence.

1. Overview of POAA sentencing and juvenile declines.

Under RCW 9.94A.570, a persistent offender *shall* be sentenced to life in prison without the possibility of release. The purpose of the POAA is to improve public safety by placing the most dangerous criminals in prison; reduce the numbers of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and offenders can understand; and restore public trust in our criminal justice system. RCW 9.94A.555(2)(a)-(d).

A persistent offender is one who is convicted of a most serious offense²⁰ and has been convicted as an “offender” on at least two separate occasions of felonies that are also most serious offenses.

²⁰ Here, the defendant's current convictions for first-degree murder, first-degree burglary and first-degree assault are most serious offenses, both because those crimes are defined as most serious offenses as Class A offenses, and because any felony with a deadly weapon verdict is a most serious offense. RCW 9.94A.030(33)(a), (t), RCW 9A.20.021(1)(a), RCW 9A.32.030(2), RCW 9A.52.020(2), RCW 9A.36.011(2).

RCW 9.94A.030(37)(a). As defined in RCW 9.94A.030(34) an “offender”

means, in relevant part:

a person who has committed a felony established by state law and is eighteen years of age or older or *is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110.*

(Emphasis added.)

Thus, a person under the age of 18 is an “offender” if the juvenile court has declined jurisdiction over that person pursuant to RCW 13.40.110 or if the crime falls automatically under the jurisdiction of the adult court pursuant to RCW 13.04.030. Once an adult court exercises jurisdiction over a juvenile offender, that person is no longer considered a juvenile over which the juvenile court has future jurisdiction. *See* RCW 13.40.020 (14); *State v. Sharon*, 100 Wn.2d 230, 231, 668 P.2d 584 (1983).

Here, the defendant’s criminal history consisted of second-degree assault, first-degree burglary, first-degree conspiracy to commit robbery and first-degree robbery. The 2009 first-degree burglary and conspiracy to commit first-degree robbery occurred on November 16, 2009, when the defendant was 19 years, 10 months and 340 days old. CP 373. The second-degree assault occurred on December 17, 2008, when the defendant was 18 years, 11 months and 360 days old. CP 360. For his 2008 and 2009 offenses, the defendant was sentenced on the same date. CP 506.

The defendant's first predicate offense, first-degree robbery, occurred on July 26, 2007, and the defendant was sentenced on April 21, 2008. CP 386. At the time of that offense, the defendant was approximately 17 and one-half years old. CP 386. Under then-existing law, first-degree robbery was subject to automatic adult jurisdiction under RCW 13.04.030.²¹ Laws of 2005 ch. 290 § 1. The defendant was sentenced in adult court, CP 386; was granted an exceptional sentence downward from the standard range of 31 to 41 months, CP 388, 536-538; and was ordered to serve 12 months of confinement with 36 months of community custody, CP 392-93. The State agrees with the defendant that the 2007 first-degree robbery, sentenced in adult court, was a necessary predicate conviction for POAA sentencing on the current offense.

2. Constitutionality of automatic adult jurisdiction law.

In *State v. Watkins*, the appellant challenged the constitutionality of former RCW 13.04.030(1) on due process grounds arguing that due process requires that all juveniles receive an individualized hearing before the juvenile court may decline jurisdiction. 191 Wn.2d 530, 537, 423 P.3d 830 (2018). Our Supreme Court held that “automatic decline comports with

²¹ In 2018, after the commission of the instant offenses, but before the defendant's sentencing, first-degree robbery was removed from the list of offenses subject to automatic adult jurisdiction for 16 and 17-year-old defendants. Laws of 2018 ch. 162 §§ 1-2 (Section 1 effective on June 7, 2018, and expired on July 1, 2019; Section 2 effective on July 1, 2019).

procedural due process.” *Id.* at 542. Juveniles have no constitutional right to be tried in juvenile court. *Id.* at 541. Automatic declination of juvenile court jurisdiction does not violate substantive due process because “adult courts have discretion to consider the mitigating qualities of youth and sentence below the standard range in accordance with a defendant’s culpability.” *Id.* at 542-43. Finally, our Supreme Court held that recent developments in jurisprudence regarding sentencing for juveniles and youthful offenders, such as *Houston-Sconiers*, did not undermine longstanding precedent regarding the constitutionality of the juvenile decline law. *Id.* at 543-46.

The defendant’s 2007 sentencing ostensibly comported with this principle, although it occurred long before our Supreme Court’s decision in *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). The sentencing court granted the defendant’s request for an exceptional sentence downward, notwithstanding the State did not agree to jointly recommend such a sentence. CP 388-89.²² Perhaps ahead of its time, the superior court considered and granted the defendant’s request for an exceptional downward sentence based upon family difficulties and his youth. CP 537-

²² The defendant’s statement on plea of guilty merely said the State “would not oppose a request for an exceptional sentence down” and “would not appeal an exceptional sentence.” RP 530.

38. It was during the 2007 sentencing that the superior court properly considered the defendant's youthfulness at the time of the crime. The defendant is not entitled to additional consideration of his youthfulness for a crime he committed in 2007 during the sentencing on his third strike offense, committed eight years later on a first-degree murder. *See Witherspoon*, 180 Wn.2d at 888-89 (quoting *Rivers*, 129 Wn.2d at 714-15 ("The life sentence contained in RCW 9.92.090 is not cumulative punishment for prior crimes. The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime"))).

3. At the time of his third strike, when he shot and killed a seventeen-year-old, Smith was 25-years-old and was a fully developed adult offender who had been provided opportunities for rehabilitation.

At age 25, the defendant committed first-degree murder, first-degree burglary, and first-degree assault, all while armed with a firearm. Even though he had an opportunity to retreat from NWA before senselessly executing Medina, he failed to take that opportunity. Smith had previously been convicted of violent offenses occurring when he was 18 and 19 years old – second-degree assault,²³ first-degree burglary and conspiracy to

²³ Defendant refers to this conviction as either a second-degree assault or a first-degree assault. Br. at 28-29. References to this offense as a first-degree assault must be a scrivener's error.

commit first-degree robbery, and, before that, had been convicted of first degree robbery for an offense committed when he was 17 and one-half years old.

In this case, the record establishes the escalating nature²⁴ of the defendant's behavior, uncured by his previous opportunities for reform.²⁵ The invasion of NWA and subsequent murder of Medina were deliberate acts, despite Smith's ample opportunity to flee when it appeared that the burglary had gone awry. The record also establishes that since Smith was 18-years-old, he had associated, not with other youth, but had been incarcerated with adult offenders (for 80 months on his 2010 convictions).

Further, social science would counsel that, at the time of the NWA murder, Smith was a fully developed adult. The science undergirding

²⁴ Because no specific argument was made below as to the disproportionality of the defendant's sentence, none of the facts from the defendant's other strike offenses are before this Court; Commissioner Wasson denied the State's motion to supplement the record with the probable cause affidavits from the prior strike offenses. Regardless, it is plain that Smith's final strike was the most violent of all of his offenses – he committed first-degree murder, first-degree burglary and first-degree assault in addition to various other offenses.

²⁵ For his 2007 first-degree robbery, the defendant was sentenced on April 18, 2008, to an exceptional sentence downward based, in part, on his youthfulness, with 12 months incarceration and 36 months of supervision. CP 388-93. Then, while supervised, in December 2008, the defendant committed a second-degree assault. Before that matter was adjudicated and while supervised, the defendant committed first-degree burglary and conspiracy to commit first-degree robbery November 16, 2009, and was sentenced to 80 months in custody and 18 months of community custody. CP 373-79. At the time of his current offenses, he was still supervised, CP 517, and in violation of his previous judgment, having been ordered in 2010 not to have any contact with Muongkoth while supervised, CP 379.

Miller,²⁶ *Houston-Sconiers*,²⁷ and *O’Dell*,²⁸ as applicable to juvenile or youthful offenders, is unavailing to Smith, who was over the age of 25 when he committed first degree murder. The science in this area has been synthesized by law professor Elizabeth S. Scott and psychologist Laurence Steinberg, whose work was cited extensively by the Supreme Court in *Roper*. Per Scott and Steinberg, social scientists recognize that *juveniles* achieve the ability to use adult reasoning by mid-adolescence, but lack the ability to properly assess risks and engage in adult-style self-control. Elizabeth S. Scott & Laurence Steinberg, RETHINKING JUVENILE JUSTICE 34 (2008); Elizabeth S. Scott & Laurence Steinberg, BLAMING YOUTH, 81 Tex. L. Rev. 799, 812-13 (2003). Research also suggests that *teens* are more responsive to peer pressure between childhood and early adolescence. “This susceptibility peaks around age 14 and declines slowly during the high school years.” BLAMING YOUTH at 813-14. Furthermore, studies show, in general, there are “gradual but steady increases in individuals’ capacity for

²⁶ *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (mandatory life sentences for juveniles).

²⁷ *Houston-Sconiers*, 188 Wn.2d 1, involved juvenile defendants tried as adults for a robbery committed when they were 16 and 17 years old, during which they robbed other children of candy.

²⁸ *State v. O’Dell* involved the consideration of the mitigating qualities of youthfulness for a legally adult offender who was 18 years and 10 days old when he committed second degree rape of a child, a 12-year-old with whom he had consensual sex. 183 Wn.2d 680, 683-84, 358 P.3d 359 (2015).

self-direction throughout the *adolescent* years, with gains continuing through the final years in high school.” *Id.* at 815 (emphasis added). “Impulsivity, as a general trait, increases between middle adolescence and early adulthood and declines soon thereafter.” *Id.* at 815.

In that regard, adolescents and adults differ in their ability to regulate their own behavior and control their impulses. Risk-taking and sensation-seeking peak around 16 or 17 and then decline in adulthood. Barry C. Feld, ADOLESCENT CRIMINAL RESPONSIBILITY, PROPORTIONALITY, AND SENTENCING POLICY: *ROPER, GRAHAM, MILLER/JACKSON*, AND THE YOUTH DISCOUNT, 31 *Law & Ineq.* 263, 286 (2013). “Youths’ ability to resist peer influences approaches that of adults in their late teens and early twenties.” *Id.* at 291. Importantly, one commentator has suggested:

Just as risk taking peaks during adolescence, studies that have been conducted in different historical epochs and in countries around the world have found that crime engagement peaks at about age seventeen (slightly younger for nonviolent crimes and slightly older for violent ones), and declines significantly thereafter. Longitudinal studies have shown that the majority of adolescents who commit crime desist as they mature into adulthood. Only a small percentage --generally between five and ten percent--become chronic offenders or continue offending during adulthood.

Elizabeth Cauffman, et. al., HOW DEVELOPMENTAL SCIENCE INFLUENCES JUVENILE JUSTICE REFORM, 8 *UC Irvine L. Rev.* 21, 26 (2018) (footnotes omitted).

Brain structure and function (brain mapping) studies assert that there is still growth in parts of the brain associated with decision-making and

judgment *up to 25 years old*. See Jay Giedd, BRAIN DEVELOPMENT, IX: HUMAN BRAIN GROWTH, 156 Am. J. Psychiatry 4 (1999). However, this theory has limitations. In 2009, one commentator noted:

The most significant current limitation of developmental neuroscience is its inability to inform individual assessment. Imaging studies that show group trends in structural maturity--such as relative levels of myelination in prefrontal cortex--do not show that all individuals in the group perfectly reflect the trend. Normal brains follow a unique developmental path bounded roughly by the general trajectory; that is, while all humans will pass through the same basic stages of structural maturation at more or less the same stages of life, the precise timing and manner in which they do so will vary. Moreover, such variation cannot be detected or interpreted in any legally meaningful way. Neither structural nor functional imaging can determine whether any given individual has a "mature brain" in any respect, though imaging might reveal gross pathology. Researchers therefore consistently agree that developmental neuroscience cannot at present generate reliable predictions or findings about an individual's behavioral maturity.

Terry A. Maroney, THE FALSE PROMISE OF ADOLESCENT BRAIN SCIENCE IN JUVENILE JUSTICE, 85 Notre Dame L. Rev. 89, 146 (2009) (footnote citations omitted).

In a 2016 article, summarizing some recent behavioral and neural findings on cognitive capacity in "young adults," members of the MacArthur Research Network on Law and Neuroscience conducted a study showing that, relative to control groups comprised of adolescents aged thirteen to seventeen and adults aged 22 to 25, young adults aged 18 to 21 showed diminished cognitive capacities similar to the adolescent group

when they are in emotionally charged situations.²⁹ Alexandra O. Cohen, et al., *WHEN DOES A JUVENILE BECOME AN ADULT? IMPLICATIONS FOR LAW AND POLICY*, 88 *Temple L. Rev.* 769, 786 (2016). The publishers of the study remarked that:

[F]ew studies have focused specifically on behavioral and brain changes in eighteen – to twenty-year-olds relative to older adults and teens. The few studies that have examined motivational and social influences on cognitive capacity in young adults have used varying age ranges and produced mixed results.

Id. at 785. Importantly, the study also found that “the mere presence of a peer can lead to increased risk-taking in teens that is not typically observed in individuals over eighteen.” *Id.* at 781.

While supervised on community custody, having recently completed an 80-month sentence, Smith coldly and needlessly murdered Medina, a 17-year-old who was apparently unarmed. This murder evidences Smith is an individual who failed to take advantage of rehabilitative efforts during his incarceration and periods of community supervision, and has continued to violently reoffend. The defendant’s conduct in this case is not evidence of a “youthful” brain; Smith’s crime does not reflect immaturity, impetuosity, rashness or any other “hallmark quality” of youth. It was the

²⁹ Treating 21- to 25-year-olds as the control group, the study did not undertake any further comparison between the group of adults aged 22 to 25 and other adults aged over 25.

deliberate act of a fully-adult offender. It is for *this* final sentence for a *fully adult* offense that the defendant was ordered to serve life in prison without the possibility of parole, not for his other strike offenses committed as a juvenile sentenced in adult court or as a “youthful offender.”

4. A life sentence for a 25-year-old recidivist is not categorically barred under the federal or state constitution even when that sentence is predicated on a strike offense committed while the defendant was a juvenile but adjudicated in adult court.

In *Bassett*, 192 Wn.2d at 82, and *Moretti*, 193 Wn.2d 809, our Supreme Court engaged in a “categorical bar” analysis to determine whether certain sentencing provisions violated article I, section 14’s prohibition on cruel punishment. This analysis was developed to address categorical cruel punishment claims based on the nature of the offense or the characteristics of the offender. *Bassett*, 192 Wn.2d at 84 (citing *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (barring life without parole sentences for juveniles convicted of nonhomicide offenses)).

- a. There is no national consensus against using an adult conviction for an offense committed while a juvenile.*

The first step in the categorical bar analysis is to determine whether there is a national consensus against the sentencing practice at issue. *Moretti*, 193 Wn.2d at 821 (citing *Bassett*, 192 Wn.2d at 85). To make this determination, the court considers “objective indicia of society’s standards

as expressed in legislative enactments and state practice.” *Id.* The burden is on the defendant to demonstrate a national consensus exists. *Id.* Here, the defendant relies on four states that have excluded crimes committed before the age of 18 to establish a “strike” under their recidivist statutes. Br. at 35. He also argues that some 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.” Br. at 35-36. Lastly, the defendant cites a single federal case that 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. Br. at 36 (citing *U.S. v. Howard*, 773 F.3d 519, 528-32 (4th Cir. 2014)). The precedent cited by defendant does not demonstrate a national consensus.

First, regarding defendant’s citation to *Howard*, that decision was limited to its facts. 773 F.3d at 535. It involved a trial court’s discretionary decision to impose a life sentence for drug and firearm possession offenses; the federal district court imposed an upward departure of life from a standard range sentence of 180-181 months (including mandatory 60-month enhancement). *Id.* at 528. The Fourth Circuit stated the discretionary decision to treat the defendant as a career offender was “manifestly

unreasonable” based on “stale convictions” as a juvenile for selling cocaine to a police officer and voluntary manslaughter. *Id.* at 529. The court found that the district court abused its discretion by giving too much weight to the defendant’s juvenile criminal history, citing brain development jurisprudence. *Id.* at 531. It also found that Howard’s likelihood of recidivism was substantially lower than suggested by the district court at sentencing. *Id.* at 532-33. Even the prosecutor twice encouraged the court to impose a significantly-less-than-life sentence. *Id.* at 533. Limiting the case to its facts, *id.* at 535, the Fourth Circuit did not hold that juvenile offenses could *never* be used to justify an upward departure from the sentencing guidelines. *See also U.S. v. Lawrence*, 349 F.3d 724 (4th Cir. 2004) (district court properly predicated de facto career offender status on, among other factors, defendant’s “extensive juvenile record”).

Unlike Howard, a 41-year-old drug dealer who was ordered to serve a life sentence for offenses that, in Washington State would never be punishable by life in prison, Smith’s criminal history was neither stale, nor demonstrative of a person capable of rehabilitation. Further, Smith’s history, whether juvenile or not, hardly compares to the offenses for which Howard was convicted more than 20 years before being sentenced to life in prison for drug offenses. *See* 773 F3d at 535 n. 12 (“It seems quite apparent that the court was concerned that Howard’s decades-old homicide

conviction, which in the representation of the prosecutor, had been ‘pled down’ to manslaughter...specially justified, or at least warranted, harsh sentencing treatment in this case. Without passing on the propriety of that apparent choice, we simply observe that Howard was not charged, convicted, or sentenced in this case for any assaultive or other physically violent behavior”). Unlike Howard, Smith was charged with and repeatedly convicted of assaultive and violent offenses over the span of only eight years (during which he spent a significant time incarcerated).

Contrary to defendant’s contention that national consensus supports his contention that his sentence is cruel, *Moretti* noted that there is *no national consensus* that recidivist statutes allowing the use of prior adult strikes committed when the defendant was a young adult or juvenile offender constitute unconstitutional punishment.³⁰ The Court stated:

A review of the case law shows that many state courts have held that when sentencing an adult recidivist, *it is not cruel and unusual to consider strike offenses committed when the offender was not just a young adult, but a juvenile. See, e.g., Counts*, 338 P.3d 902 (holding that it was constitutional to sentence an adult to life in prison as a habitual offender even though one of his prior qualifying felony convictions was committed at age 16); *State v. Green*, 412 S.C. 65, 85-87, 770 S.E.2d 424 (Ct. App. 2015) (holding that it was constitutional to impose a life without parole sentence on adult recidivist whose prior strike was committed at age 17). *Similarly,*

³⁰ *Moretti* noted that states nationwide overwhelmingly prohibit the use of *juvenile* offenses to drastically enhance later sentences under recidivist schemes, but the POAA already prohibits the use of juvenile *adjudications* as strike offense. 193 Wn.2d at 821 (citing RCW 9.94A.030(35)).

federal courts have routinely found that it does not violate the Eighth Amendment to impose mandatory minimum sentences on adult recidivists whose prior crimes were committed not just as young adults, but as juveniles. See, e.g., United States v. Hoffman, 710 F.3d 1228, 1233 (11th Cir. 2013) (“Nothing in *Miller* suggests that an adult offender who has committed prior crimes as a juvenile should not receive a mandatory life sentence as an adult, after committing a further crime as an adult.” (emphasis omitted)); *United States v. Scott*, 610 F.3d 1009, 1018 (8th Cir. 2010) (“Scott was twenty-five years old at the time he committed the conspiracy offense in this case [and was sentenced to a mandatory term of life without parole]. ... The [Supreme] Court in *Graham* did not call into question the constitutionality of using prior convictions, juvenile or otherwise, to enhance the sentence of a convicted adult.”); *United States v. Mays*, 466 F.3d 335, 340 (5th Cir. 2006) (affirming a mandatory sentence of life without parole imposed on an adult recidivist who committed his first strike offense at age 17 and explaining that “[t]here is not a national consensus that a sentencing enhancement to life imprisonment based, in part, upon a juvenile conviction contravenes modern standards of decency”).

Moretti, 193 Wn.2d at 822–23 (emphasis added). Similarly, in *Teas*, Division Two of this Court recognized the lack of any national consensus in this area, observing several jurisdictions have “rejected this very argument.” 10 Wn. App. 2d at 134 (2019) (citing *Wilson v. State*, 521 S.W.3d 123 (Ark. 2017); *Commonwealth v. Bonner*, 135 A.3d 592 (Pa. Super. Ct. 2016); *Vickers*, 117 A.3d 516; *Counts*, 338 P.3d 902).

Other state cases support *Moretti* and *Teas*’ conclusion. See e.g., *State v. Bush*, 733 So.2d 49, 54 (La. 1999) (the fact that the defendant would have been treated as a juvenile under Louisiana law for prior offense did not preclude the use of that offense as a predicate felony for purposes of

recidivist statute); *Mullner v. State*, 406 P.3d 473 (Nev. 2017) (citing *U.S. v. Graham*, 622 F.3d 445, 455-61 (6th Cir. 2010)) (Prior adult conviction resulting from an offense committed as a minor could be used for habitual criminal sentencing); *State v. Rideout*, 933 A.2d 706 (Vt. 2007) (“The mere fact that his sentence for crimes committed as an adult has been affected by *adult convictions obtained while he was a minor* does not by itself bring his sentence within *Roper’s* narrow protective ambit. A defendant sentenced as a recidivist or habitual criminal is not punished again for his prior crimes, but rather receives an enhanced sentence for the present offense. *See, e.g., Witte v. United States*, 515 U.S. 389, 400, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995)” (emphasis added)).

Further, other states’ recidivist statutes also permit the use of predicate offenses committed while the offender was under the age of 18. *See e.g.,* Ariz. Rev. Stat. Ann. § 13-706 (prior offense includes one committed by a person 18 years of age or who has been tried as an adult); Cal. Penal Code §§ 667.7, 667.75 (“prior prison term” as used in recidivist statutes includes “a commitment to the Department of Youth Authority after conviction for a felony”); N.C. Gen. Stat. § 14-7.1 (for purposes of certain habitual felon statutes, felonies committed before the age of 18 shall not constitute *more than one* felony conviction); Tenn. Ann. Code § 40-35-120(e)(3) (providing the circumstances under which a conviction for an act

by a juvenile may be considered a prior conviction for purposes of repeat violent offender statute); Tex. Penal Code Ann. § 12.42(f) (defining “final conviction” under repeat and habitual offender statute to include certain juvenile convictions).

The defendant has not proven a national consensus against the use of an adult conviction for conduct that a defendant committed while under the age of 18. Here, the sentencing court did not use a juvenile *adjudication* as a predicate offense for the defendant’s persistent offender sentence. Instead, the court used an *adult conviction*, committed when the defendant was a juvenile but for which the defendant was sentenced in adult court under the constitutional operation of the juvenile declination statute. Although *Houston-Sconiers* would require judicial discretion at sentencing for the adult conviction committed when the defendant was a juvenile (and the defendant, in fact, received a mitigated exceptional sentence for his first strike offense based upon his youth), neither it, nor any other precedent, leads to the conclusion that the later use of that offense as a predicate offense for the persistent offender law violates the constitutional prohibition on cruel punishment.

b. This Court's independent judgment should counsel that concerns raised by juvenile brain science are not present here.

The second step in the categorical bar analysis requires this Court to exercise its independent judgment. *Bassett*, 192 Wn.2d at 87. The court considers “the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question” and “whether the challenged sentencing practice serves legitimate penological goals.” *Id.* (quoting *Graham*, 560 U.S. at 67).

In short, and as above, the defendant's instant offense reflects no degree of transient immaturity or reduced culpability that might be associated with offenses committed by juveniles. *See id.* at 87-88. The defendant has had two prior opportunities to reform, and has failed both times, with his violent behavior escalating to the murder of a juvenile for no discernible reason. The developmental science undergirding *Miller* and its progeny do not apply to Smith, a fully adult offender at the time of his third, and final strike offense, an offense which had the highest seriousness level in Washington State other than aggravated murder. RCW 9.94A.515.

In *Bassett*, our Supreme Court observed that the penological goals of retribution, deterrence, rehabilitation and incapacitation are not served by a life sentence imposed upon a juvenile – even one who commits a terrible crime. 192 Wn.2d at 88-89. In *Moretti*, however, which is more

similar to Smith's case, our Supreme Court observed that the consolidated defendants were

fully developed adults who were repeatedly given opportunities to prove they could change. [They] each committed a most serious offense, were sentenced and released, then committed another most serious offense, were sentenced and released, and then chose to commit yet another most serious offense. It was their decisions to commit their third most serious offenses that triggered the mandatory sentences of life without the possibility of parole. The POAA gives offenders a chance to show that they can be reformed, but the petitioners failed to do so.

193 Wn.2d at 825.

Further, our Supreme Court acknowledged that:

an offense committed by a repeat offender is often thought to reflect greater culpability and thus to merit greater punishment. Similarly, a second or subsequent offense is often regarded as more serious because it portends greater future danger and therefore warrants an increased sentence for purposes of deterrence and incapacitation.

Id. at 826 (citing *U.S. v. Rodriguez*, 553 U.S. 377, 385, 128 S.Ct. 1783, 170 L.Ed.2d 719 (2008)).

The main purposes of the POAA are “deterrence of criminals who commit three ‘most serious offenses’ and the segregation of those criminals from the rest of society.” *Witherspoon*, 180 Wn.2d at 888. Unlike Bassett, whose lifelong incarceration did not serve valid penological goals because of his youth, Smith was an *adult* offender who had three times been convicted of most serious offenses. Like Moretti, Nguyen and Orr, Smith was provided ample opportunities for rehabilitation which failed. His failure

to reform would indicate that he, unfortunately, poses an egregious and immutable danger to society, the remedy for which is incapacitation. This Court should hold that article I, section 14 does not categorically prohibit imposing a life without parole sentence on a fully developed adult offender who committed one of their prior strike offenses as a juvenile who was declined into adult court for the adjudication of their first strike. Such offenders have generally been provided opportunities to change, and where they do not, prolonged incarceration is justified to keep the community safe.

5. The defendant's sentence was proportionate to his crimes and was not cruel under article I, section 14, of the state constitution.

The defendant also argues that his persistent offender sentence violates article I, section 14, under the rubric set forth in *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980). The defendant's life without the possibility of parole sentence is not "grossly disproportionate" to the offenses under the *Fain* factors: "(1) the nature of the offense; (2) the legislative purpose behind the habitual criminal statute; (3) the punishment defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction." 94 Wn.2d at 397. As an initial note, unlike Smith, in none of the major Supreme Court cases in which our Court has upheld the three strikes law against disproportionality attacks, was the defendant convicted

of a third strike offense for first-degree murder and other various offenses. See *Moretti*, 193 Wn.2d 809 (first-degree robbery and second-degree assault, first and second-degree assault, and first-degree burglary and second-degree assault); *Witherspoon*, 180 Wn.2d 875 (second-degree robbery); *Thorne*, 129 Wn.2d 736 (first-degree robbery and kidnapping); *Rivers*, 129 Wn.2d 697 (second-degree robbery); *Manussier*, 129 Wn.2d 652 (first-degree robbery).

First Fain Factor: Nature of the Offense.

Smith was convicted of first-degree murder, first-degree burglary, first-degree assault (of a different victim than the murder victim); each offense was alleged and proven to have been committed with a firearm. These offenses were all class A offenses, and were, in and of themselves punishable by confinement of up to a term of life imprisonment. RCW 9A.20.021(1)(a), RCW 9A.32.030(2), RCW 9A.52.020(2), RCW 9A.36.011(2).

As noted in *Moretti*, the first *Fain* factor “demands consideration of not only the nature of the crime but also the culpability of the offender who committed it.” 193 Wn.2d at 832 (internal quotations omitted). Here, as in *Moretti*, the defendant has failed to demonstrate “that [his] culpability was reduced when [he] committed the instant offenses. Far from showing that as the years go by...[his] deficiencies will be reformed, the defendant has

continued to recidivate after [his] brain [was] fully developed and [has] shown entrenched patterns of problem behavior.” *Id.* (internal quotation marks omitted; ellipsis in original). Furthermore, Smith has not only continued to recidivate, but has also demonstrated escalating violent behavior, culminating in the death of a 17-year-old youth. The defendant’s prior periods of incarceration and community custody³¹ afforded him chances to reform – opportunities he failed to seize, almost immediately reoffending while being supervised. This factor indicates that the sentence is not grossly disproportionate.

Second Fain Factor: Legislative Purpose of the Statute.

In *Rivers*, our Supreme Court recognized that “the purposes of the persistent offender law include deterrence of criminals who commit three ‘most serious offenses’ and the segregation of those criminals from the rest of society.” 129 Wn.2d at 713; *see also Thorne*, 129 Wn.2d at 774-75. This purpose is served by incarcerating Smith, whose recurrent, escalating, and violent behavior is a serious threat to the public. Efforts to supervise and rehabilitate Smith have clearly failed.

³¹ The defendant was being supervised on community custody at the time he committed the current offenses. CP 517.

Third Fain Factor: Punishment in other Jurisdictions.

The third *Fain* factor is the punishment that the defendant would have received in other jurisdictions. *Rivers*, 129 Wn.2d at 714. The defendant cites to four states “that preclude altogether the use of adult convictions for crimes committed as a juvenile as strikes.” Br. at 40. As discussed above, however, a number of other states allow the use of juvenile strikes, at least in some capacity, for recidivist statutes.

The defendant also cites to a number of other states that he claims have a more restrictive legislative definition of “strike” or of qualifying recidivism, shorter mandatory sentences, judicial discretion in sentencing, or the possibility of parole. Br. at 40. But, the question under *Fain*, is whether the sentence is “grossly disproportionate,” not whether it differs slightly.

Our Supreme Court has noted that Washington’s POAA is “similar to state and federal legislation” in much of the country and that it is likely a persistent offender here would receive a similarly harsh sentence for a third serious offense in most jurisdictions. *Rivers*, 129 Wn.2d at 714. The defendant’s sentence is similar enough to other state’s sentencing legislation and practices so as not to be “grossly disproportionate.”

Fourth Fain Factor: Punishment in this Jurisdiction:

The fourth *Fain* factor is the punishment meted out for other offenses in the same jurisdiction. *Rivers*, 129 Wn.2d at 714. In Washington, all adult offenders convicted of three “most serious offenses” are sentenced to life in prison without the possibility of release under the POAA. Even if Smith had not been sentenced as a persistent offender, his sentencing would have resulted in a significant sentencing range (assuming the court did not grant an exceptional sentence downward):

Standard Range for First Degree Murder (of Medina) with an Offender Score of “9” ³²	RCW 9.94A.510; 9.94A.530,	411 - 458 months (34.25 months to 45.66 months)
Standard Range for First Degree Assault (on Baumgarden) with an Offender Score of “0”	RCW 9.94A.589(1)(b); RCW 9.94A.510; RCW 9.94A.515	93 - 123 months (7.75 to 10.25 years)
Firearm Enhancement(s) for Subsequent Firearm Offense ³³	RCW 9.94A.530(1); RCW 9.94A.533(3)(a), (d), (e).	30 years (Three consecutive 10-year enhancements for Counts 1, 2, 3.)
Total Incarceration (exclusive of other current offenses that need not be sentenced consecutively)		864 - 941 months (72 to 78.4 years)

³² For purposes of this argument, the State assumes that the defendant was sentenced, not as a persistent offender, but rather, with an offender score of “9.” Each of his four prior offenses, as violent offenses, would have counted as 2 points, totaling 8 points. Smith was supervised on community custody at the time of the current offenses, adding an additional point to his offender score, totaling 9.

³³ The defendant’s 2009 offenses included a deadly weapon enhancement. CP 377.

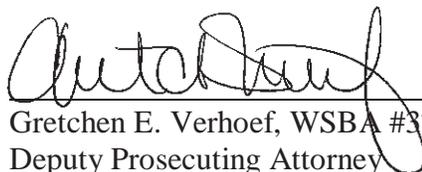
Therefore, even if the defendant were not subject to the persistent offender sentencing, he would have been subject to a de facto life sentence. His sentence of life without the possibility of parole is not “grossly disproportionate” so as to violate article I, section 14, of the Washington Constitution. This claim fails.

IV. CONCLUSION

The State respectfully requests this Court affirm the trial court’s judgment and sentence. Sufficient evidence existed to find Smith unlawfully entered or remained within NWA, and therefore, sufficient evidence existed for his first-degree felony murder conviction predicated upon first degree burglary. The defendant’s sentencing arguments, if manifest and reviewable, fail; his life sentence, predicated, in part, upon an adult conviction for an armed robbery committed when he was seventeen years old, does not violate our state prohibition on cruel punishment.

Dated this 20 day of August, 2020.

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Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH SMITH, a/k/a JEREMIAH
AKERS,

Appellant.

NO. 36213-2-III

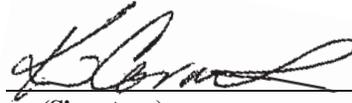
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 20, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
andrea@2arrows.net

8/20/2020
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

August 20, 2020 - 10:20 AM

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Superior Court Case Number: 15-1-02459-1

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