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NO. 95263-9 (CONSOLIDATED)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HUNG VAN NGUYEN,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. Nguyen was 41 years old when he committed the crimes of first degree assault with a deadly weapon and second degree assault with a deadly weapon. Each of those crimes constituted a third strike under the Persistent Offender Accountability Act (POAA) and, as a result, Nguyen received a mandatory sentence of life without parole for each. Is that sentence punishment for violent conduct by a recidivist adult, rendering his age at the time of the earliest strike irrelevant, and requiring rejection of Nguyen's argument that the sentence violates this State's constitutional prohibition on cruel punishment because Nguyen was 20 years old when he committed his first strike?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Hung Van Nguyen, was charged with assault in the first degree of Thu Thi Nguyen and assault in the second degree of Ngoc Linh Truong, both occurring on December 12, 2014. RCW 9A.36.011; RCW 9A.36.021; CP 50-51. A deadly weapon enhancement was charged as to both counts. RCW 9.94A.533(4); CP 50-51. The Honorable LeRoy McCullough presided over a jury trial that began November 30, 2015. RP

48.¹ The jury found Nguyen guilty as charged. CP 73-76. The court concluded that the State had proved Nguyen was a persistent offender and imposed a term of life in prison on each count pursuant to RCW 9.94A.570. CP 102-08; RP 696-97.

The convictions were affirmed by the Court of Appeals. State v. Nguyen, 2 Wn. App. 2d 1001 (No. 74962-5-I) (2018) (unpublished). This Court granted review only on the issue of whether the persistent offender sentence violates the state or federal prohibition against cruel punishment. The Court consolidated this case with State v. Orr, 3 Wn. App. 2d 1039 (No. 34729-0-III) (2018); and State v. Moretti, 1 Wn. App. 2d 1007 (No. 47868-4-II) (2017).

2. SUBSTANTIVE FACTS

In summary, these crimes occurred when defendant Hung Nguyen repeatedly stabbed victim Thu Nguyen² on December 12, 2014, and then stabbed her friend, Linh Truong, when Truong interrupted that ongoing assault. RP 329-40.

¹ The Report of Proceedings is in consecutively numbered volumes, and is referred to in this brief simply by page number.

² Victim Thu Nguyen will be referred to by both first and last name throughout this brief, as part of an effort to avoid confusion with the defendant.

Thu Nguyen had known defendant Nguyen for years, although they are unrelated. RP 316, 318. Thu Nguyen and her boyfriend were friends with Nguyen and she had previously allowed Nguyen to stay at their home when he had nowhere else to go. RP 316-17. During the ten days preceding the stabbing, Thu Nguyen repeatedly called police because she had asked Nguyen to leave her home and he refused. RP 318-26. The police responded to the home but were little help. RP 318-20, 323-24. On December 10 and again December 11, Nguyen left Thu Nguyen's property after police responded, but each day he came back, pleading to be let in. RP 326-28. Thu Nguyen did not open the door. RP 326-28.

When Thu Nguyen got up on December 12, she did not see Nguyen outside. RP 329. She took her son to school, leaving her sleeping four-year-old grandson alone in the house. RP 314-15, 329-30. After she returned home, she laid down on her bed with her grandson for a nap. RP 330-31.

Thu Nguyen woke when she heard a noise, and saw Nguyen emerging from her bedroom closet, knife in hand. RP 331-32. Asked what he was doing, Nguyen said, "I come here to kill you, what else?" RP 332. He stabbed Thu Nguyen in the stomach and she began to plead for mercy. RP 333. He again said he was going to kill her, and said, "I hate you, it's cold outside and you left me outside in the cold." RP 333-34.

Nguyen said that he would kill Thu Nguyen, wait for her children and her boyfriend to come home and kill them too. RP 334.

Thu Nguyen threw a blanket at Nguyen's face, pushed him away, then ran out of the bedroom. RP 334-35. He caught her as she ran out and stabbed her in the back. RP 336. Thu Nguyen jumped over the stairway handrail to get downstairs to escape, but Nguyen caught up with her downstairs. RP 336-37. As Thu Nguyen struggled to get away, Nguyen stabbed her repeatedly, all over her body. RP 337. Nguyen continued stabbing Thu Nguyen after she fell to the living room floor. RP 338.

By chance, Thu Nguyen's friend Linh Truong arrived at the door at this moment. RP 338, 362-64. When Truong knocked, Thu Nguyen screamed for help; Truong came in and saw Nguyen on top of Thu Nguyen, holding her down with one hand and holding a large knife in the other. RP 339, 364-65, 368. As the two struggled, Truong threw a chair at Nguyen. RP 339, 366-67. Truong missed Nguyen, but he got off Thu Nguyen – he turned and stabbed Truong in the side. RP 339, 367-68. Thu Nguyen took that opportunity to escape out the front door, and collapsed in the street. RP 340, 354, 367-70. Truong followed Thu Nguyen out and called 911. RP 369-70.

Police entered the house and found Nguyen in an upstairs bedroom, with bloody hands. RP 144-46, 180-82, 215-16. Truong

identified him as the assailant. RP 146, 371, 436. At trial, both Thu Nguyen and Truong identified Nguyen as the man who stabbed them. RP 316, 333, 339, 360, 365, 367.

Medics transported Thu Nguyen to the hospital, where she was treated for her injuries, including a stab wound to her head that penetrated her skull, a deep knife wound to her back that required multiple layers of sutures, and multiple lacerations to her chest. RP 342-46, 394-98, 400-03. She had a knife wound to one hand that left it still impaired by the time of trial, almost a year later. RP 397. Truong also received stitches for her stab wound. RP 411.

3. FACTS RELATING TO SENTENCING

Nguyen committed the current crimes, first degree assault with a deadly weapon and second degree assault with a deadly weapon, on December 12, 2014, when he was 41 years old. CP 102, 107. Nguyen's birthdate is July 30, 1973. CP 107.

Nguyen committed the crime of first degree burglary on June 11, 1994, when he was 20 years old. CP 113. He was sentenced on October 14, 1994. CP 113-15. Nguyen committed the crimes of second degree assault – domestic violence and felony harassment – domestic violence on

September 16, 2011, when he was 38 years old. CP 119. He was sentenced on April 20, 2012. CP 122.

C. ARGUMENT

1. NGUYEN’S LIFE SENTENCE DOES NOT VIOLATE THE STATE CONSTITUTIONAL PROHIBITION OF CRUEL PUNISHMENT.

Nguyen asserts that the life sentence imposed for these crimes committed when Nguyen was 41 years old amounts to cruel punishment under the Washington Constitution, article I, section 14.³ WASH. CONST. art. I, § 14. Nguyen was sentenced as a persistent offender and claims the sentence is disproportionate to his crimes because of his youth when he committed his first strike offense. That argument is meritless because the sentence imposed is not cumulative punishment for a series of crimes, but solely punishment for Nguyen’s current convictions.

Under RCW 9.94A.570, a persistent offender shall be sentenced to life in prison without the possibility of release. A persistent offender is one who has been convicted of a most serious offense and has two prior

³ Nguyen has not claimed a violation of the federal prohibition on cruel and unusual punishment. U.S. CONST. amend. VIII. The United States Supreme Court has overturned a term of imprisonment for an adult offender as a violation of the Eighth Amendment in only one case, *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), where a life sentence was imposed on a habitual offender for writing a bad check, and whose criminal record did not include any crimes of violence.

felony convictions on separate occasions that are also most serious offenses, and at least one of those previous convictions occurred before the commission of any of the other previous convictions for a most serious offense. RCW 9.94A.030(38)(a). Both of Nguyen's current convictions are most serious offenses, both because the specific crimes (first degree assault and second degree assault) are most serious offenses and because any felony with a deadly weapon verdict is a most serious offense. RCW 9.94A.030(33)(a), (b), (t); RCW 9A.36.011 (first degree assault is a Class A felony). Nguyen's two prior convictions for most serious offenses are a 1994 conviction for first degree burglary, and a 2012 conviction for second degree assault. CP 113, 119; RCW 9.94A.030(33)(a), (b); RCW 9A.52.020(2) (first degree burglary is a Class A felony).

The legislature has near plenary authority to define crimes and punishments. State v. Varga, 151 Wn.2d 179, 193, 86 P.3d 139 (2004). The Washington Supreme Court has repeatedly upheld Washington's persistent offender statute against both federal and state constitutional challenges. See 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). Nguyen's argument has been rejected by the Court of Appeals in all three consolidated cases before this

Court and in a Division Three published opinion, State v. Hart, 188 Wn. App. 453, 353 P.3d 253 (2015).

- a. There Is No Basis To Apply Broader State Constitutional Protection To A Cruel Punishment Claim That Is Based On Relative Youth At The Time A Prior Adult Offense Was Committed.

Whether the State constitutional prohibition on cruel punishment provides greater protection than the Eighth Amendment in a particular instance requires analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Washington’s cruel punishment clause often provides greater protection, but not always. State v. Bassett, 192 Wn.2d 67, 78-79, 428 P.3d 343 (2018). Parties are “required to explain why enhanced protections are appropriate in specific applications.” Id. at 79 (quoting State v. Ramos, 187 Wn.2d 420, 454, 387 P.3d 650 (2017)).

This Court recently conducted a Gunwall analysis in the context of sentences of life without parole imposed on juveniles, concluding that greater protection was warranted in that instance. Bassett, 192 Wn.2d at 78-82. Factors one through three of that analysis focus on textual differences in the constitutional language and always support broader state protection based on Washington’s prohibition on “cruel punishment” while the federal prohibition is on “cruel and unusual punishment.”

Bassett, 192 Wn.2d at 80. The fifth factor of any Gunwall analysis always points to an independent state analysis, based on the structural difference between the two constitutions.⁴ Id. at 82.

The fourth Gunwall factor is an analysis of how preexisting state law bears on granting distinct state constitutional rights. Gunwall, 106 Wn.2d at 61. In Bassett, the Court concluded that this factor weighed in favor of an independent state interpretation because the Court and the state legislature have recognized that “children warrant special protections in sentencing.” Bassett, 192 Wn.2d at 81. The sixth Gunwall factor is whether the matter is of particular state interest or there is a need for national uniformity. Gunwall, 106 Wn.2d at 61. The Court in Bassett concluded that this factor weighed in favor of an independent state interpretation because of the state policy to grant juveniles special protection as to sentencing, when appropriate. Bassett, 182 Wn.2d at 82.

The state constitutional analysis applied in Bassett is not applicable to a sentence imposed for a crime committed by a 41-year-old man. The court in Bassett noted that it was conducting the required Gunwall analysis “in the specific context of challenges to juvenile life without parole sentences.” 192 Wn.2d at 79. The court’s justification for the greater

⁴ The structural difference is that “the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State’s power.” State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

protection applied in that case was specific to sentencing children. The legislature has drawn a line between juveniles and adults at age 18,⁵ and the State constitution does not provide justification to move that line.

Only one Washington case has concluded that the age of an adult defendant may be relevant to sentencing. State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015). In O'Dell, the court held that youth alone is not a basis to impose an exceptional sentence below the presumptive range, but that youth might be relevant as a mitigating circumstance justifying a lesser sentence under RCW 9.94A.535, if it affected whether a defendant had the capacity to appreciate the wrongfulness of his conduct or to conform his behavior to the law. Id. at 695-99. O'Dell has no relevance to a sentence imposed for crimes committed when a defendant is no longer youthful, because the term of sentence imposed for prior offenses is irrelevant to the appropriate sentence for the current crimes – only the fact of the earlier convictions plays any role in the current sentence.

Even if the Gunwall analysis in Bassett were extended to provide protection to a person who is sentenced for a crime committed as a young adult, there is no logical justification to extend special protection based on

⁵ RCW 13.40.020(15) (juvenile if under 18); RCW 26.28.010 (18 is age of majority).

youth to Nguyen, a person who was 41 when he committed the crimes being sentenced.

b. Analyzed Under State v. Fain, The Sentences Are Not Disproportionate To The Crimes.

Analysis of whether a sentence constitutes cruel punishment under the State constitution traditionally has been conducted using the analysis adopted in State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980). That court recognized that in a proportionality analysis, “courts have sought to use objective standards to minimize the possibility that the merely personal preferences of judges will decide the outcome of each case.” Id. at 397. It adopted a proportionality analysis that requires consideration of four factors: (1) the nature of the crime; (2) the legislative purpose behind the sentencing statute; (3) the punishment the defendant would have received in other jurisdictions for the same crime; and (4) the punishment for other crimes in Washington state. Id. at 397; Witherspoon, 180 Wn.2d at 887.

The nature of the offense. Nguyen received a life sentence under the POAA for both first degree assault with a deadly weapon and second degree assault with a deadly weapon, each involving a separate victim. CP 50-51, 102-08. Both crimes are violent offenses that caused serious injury to the victims. RP 342-46, 394-98, 400-03, 411. The Court of

Appeals has rejected a cruel punishment challenge to a life sentence as a persistent offender based on a current conviction of second degree assault. State v. Ames, 89 Wn. App. 702, 709-10, 950 P.2d 514 (1998).

The legislative purpose of the sentencing statute. “[T]he purposes of the [POAA] include deterrence of criminals who commit three ‘most serious offenses’ and the segregation of those criminals from the rest of society.” Rivers, 129 Wn.2d at 713 (quoting State v. Thorne, 129 Wn.2d 736, 775, 921 P.2d 574 (1996)). This purpose is served by incarcerating Nguyen, whose violent behavior is a threat to the public.

Punishment the defendant would receive in other jurisdictions.

To this point, Nguyen has provided no argument as to how his crimes would be punished in other jurisdictions. However, other states have rejected cruel punishment challenges and upheld life sentences for recidivist offenders even where the first strike offense occurred when the defendant was a juvenile. E.g., 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). This 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.

Punishment the defendant would receive for other crimes in Washington State. Because all offenders convicted of three most serious offenses are sentenced to life in prison, Nguyen would receive the same sentence if his current offense was for any similar most serious offense, based on his criminal history.

Thus, under the Fain analysis, Nguyen's sentence is proportionate to the crimes he committed and sentences that others would receive for similar crimes, and is consistent with the purpose of the POAA to deter crime and protect the public from repeat offenders.

- c. This Court's Recent Holdings In Cases That Address Sentences For Juvenile Offenders Do Not Change The Fain Analysis.

This Court's recent holdings in cases involving sentencing juvenile offenders do not change the Fain analysis applicable to a POAA sentence. These cases do not undercut the legislature's authority to mandate a sentence of life imprisonment for an adult based on two prior adult convictions of most serious offenses.

The Court in State v. Houston-Sconiers held that some mandatory provisions in the Sentencing Reform Act do not apply to juveniles who are

being sentenced in the adult system. 188 Wn.2d 1, 21, 391 P.3d 409 (2017). That holding was based on an interpretation of recent United States Supreme Court decisions rooted in the Eighth Amendment, which held that death and mandatory life without parole (LWOP) will always be a disproportionate sentence for a crime committed before 18 years of age; a court never can impose the death penalty on a juvenile, and may impose LWOP only after consideration of the unique characteristics of youth. Id. at 18-21; Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (invalidating juvenile death penalty); Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (invalidating mandatory LWOP for juveniles). But these recent Eighth Amendment holdings apply only to juvenile sentencings, not to adults. These cases are not applicable to the prior most serious offenses in this case because Nguyen committed those prior crimes when he was an adult and Nguyen is challenging a sentence for crimes that he committed when he was 41 years old. Thus, Houston-Sconiers is inapposite.

The Fain analysis of the Court in Bassett, supra, also does not affect the analysis in this case, because the Court there addressed only sentencing for a crime committed while a juvenile. The Court concluded that the legislature's intent regarding sentencing juveniles for aggravated murder was for courts to consider whether diminished culpability justified

a mitigated sentence. Bassett, 192 Wn.2d at 90. This is the opposite of the purpose of the POAA, which is to deter repeat offenders and segregate them from the rest of society. Rivers, 129 Wn.2d at 713.

The Court in Miller focused on the immaturity of youth, the harshness of sentencing a juvenile offender to a sentence of LWOP, and the recognition that juveniles have a real possibility of rehabilitation. 567 U.S. at 471-78. These factors do not apply to a person sentenced for a crime that he committed at 41 – he is not immature, will not spend longer in prison than others sentenced to LWOP, and by continuing to commit repeated violent crimes, he has proven that he will not be rehabilitated.

By arguing that a POAA sentence is equivalent to sentencing a juvenile to life in prison, Nguyen is implicitly asserting that his life sentence is punishment for the offense he committed when he was 20. But this Court rejected that premise in Thorne, which rejected a constitutional challenge to a persistent offender sentence, quoting from a decision that upheld a life sentence under the former habitual criminal law: “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.” State v. Thorne, 129 Wn.2d at 776 (quoting State v. Lee, 87 Wn.2d 932, 937, 558 P.2d 236 (1976)).

The legislature is well aware of emerging juvenile brain science research and has incorporated that research into Washington law as it sees fit. See LAWS OF 2005, Ch. 437, § 1 (“The legislature finds that emerging research on brain development indicates that adolescent brains ... differ significantly from those of mature adults. It is appropriate to take these differences into consideration when sentencing juveniles tried as adults.”). The legislature specifically applied this research only to juveniles tried as adults. Nguyen’s disagreement with the legislature’s policy choices is not a basis for a finding that his sentence is unconstitutional.

Nguyen argues that in its analysis, the Court should consider details of his current and prior strikes and his personal characteristics in determining whether this sentence was unconstitutionally cruel: that one prior strike was a Class B felony, that the applicable presumptive sentence if this were not his third strike was less than life,⁶ and that he has relatively low intellectual abilities. Pet. Rev. at 15-16. As a preliminary matter, nothing in the record supports Nguyen’s claim that he has “borderline intellectual functioning.” Pet. Rev. at 16. The only expert

⁶ The presumptive range for first degree assault is not 178-236 months, as Nguyen claims, it is actually 214-272 months. The two deadly weapon enhancements, 24 months on Count 1 and 12 months on Count 2, must be added to the sentence range, and they run consecutively to each other. RCW 9.94A.515 (seriousness level of first degree assault is XII); RCW 9.94A.510 (base range is 178-236 months); RCW 9.94A.533(4) (deadly weapon enhancements).

who evaluated his intellectual functioning stated that it appeared to be “in the below average to low average range.” CP 31. Although one of Nguyen’s prior strikes was a Class B offense, this Court already has concluded that application of the POAA to most serious offenses that are Class B offenses is not cruel punishment. Witherspoon, supra (second degree robbery); Thorne, 129 Wn.2d 736 (prior strike second degree robbery). A POAA sentence always will be greater than the presumptive range (unless the current crime is aggravated murder) and that is irrelevant in analyzing the legitimate policy of a recidivist statute. Likewise, Nguyen’s possibly lower than average intelligence does not render him immune from a life sentence after conviction for his third most serious offense. No mental defense was offered, and there is no evidence that Nguyen’s capacity to understand his offense was affected, as Nguyen told Thu Nguyen that he would kill her because she left him outside, and that he would wait for her family and kill them when they arrived home. RP 332-34.

Nguyen’s life sentence for first and second degree assaults with a deadly weapon committed at 41 years old is not disproportionate to the sentence of others who commit similar crimes and have a similar criminal history, and it does not offend the Washington constitutional ban on cruel punishment.

d. Categorical Bar Analysis Is Not Applicable To Sentencing Adult Defendants Under The POAA.

For the first time in Washington history, this Court in Bassett applied a categorical bar analysis to a cruel punishment claim under article 1, section 14. 192 Wn.2d at 82-85. The Court explained that it would apply the categorical bar analysis used by the United States Supreme Court in Graham v. Florida⁷ to the “unique type of claim” presented in that case, “based on the nature of the juvenile offender class.” Id. at 82-83. The Court did not disturb the Fain analysis it has traditionally applied to determine whether a sentence is cruel punishment. Id. at 85.

The categorical bar analysis of Bassett should not be extended to this case, where the cruel punishment claim is not defined either by a class of defendants or by a class of punishment. Even if it is applied, Nguyen’s constitutional claim fails under that analysis.

Categorical bar analysis begins by considering objective indicia of national consensus regarding the sentencing practice at issue. Graham, 560 U.S. at 62. Nguyen has cited no consensus, trend, or a single case or statute that exempts adults from recidivist statutes because they were in their 20’s when a prior strike was committed. Nguyen has cited no legal

⁷ 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

authority holding a person over 18 to be a juvenile or holding that a person over 18 must be treated as a juvenile. The United States Supreme Court drew a line at age 18 for eligibility for a death sentence, noting that although the qualities that distinguish juveniles from adults do not disappear at that point, a line must be drawn and that is the point at which society has drawn the line between childhood and adulthood. Roper v. Simmons, 543 U.S. at 574. Indeed, federal courts have rejected categorical challenges to life sentences for recidivist offenders even where the first strike occurred when the defendant was a juvenile. E.g., United States v. Hoffman, 710 F.3d 1228, 1233 (11th Cir. 2013); United States v. Graham, 622 F.3d 445, 462-63 (6th Cir. 2010); United States v. Scott, 610 F.3d 1009, 1018 (8th Cir. 2010); United States v. Mays, 466 F.3d 335, 340 (5th Cir. 2006).

The second step of the categorical bar analysis is the exercise of the court's judgment as to the severity of the crimes, the culpability of the class of offenders at issue, and whether the challenged sentencing practice serves legitimate penological goals. Graham, 560 U.S. at 67-74. As to juvenile offenders, an LWOP sentence is considered particularly harsh because the culpability of a juvenile is less than an adult and the offender will spend more time in prison than an older defendant, and is considered disproportionate because it does not take into account the real possibility

of rehabilitation for juveniles. Id. at 70-74. These considerations do not apply to a defendant being sentenced for his third adult conviction of a most serious offense (or here, his third and fourth such convictions). An adult who is convicted of his third most serious offense enjoys no presumption of lessened moral culpability and has already enjoyed at least two opportunities for rehabilitation, after the convictions for the first and second strikes. RCW 9.94A.030(38)(a)(ii).

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Nguyen's sentence.

DATED this 29th day of March, 2019.

Respectfully submitted,

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