SUPREME COURT NO. 96393-2

NO. 49474-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CLEON MOEN,

Petitioner.

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

The Honorable Michael H. Evans, Judge

PETITION FOR REVIEW

E. RANIA RAMPERSAD
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E. Madison Street
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Cleon Moen asks this Court to grant review of the court of appeals' published decision in State v. Moen, No. 49474-4-II, 4 Wn. App. 2d 589, 422 P.3d 930 (2018), filed July 31, 2018 (Appendix A).[1]

B. ISSUES PRESENTED FOR REVIEW

This case presents the question of whether a statute mandating life in prison without the possibility of release is categorically barred by cruel punishment prohibitions where applied to a class of offenders: elderly defendants suffering from dementia.

1. Is this Court's review warranted under RAP 13.4(b)(3) to determine a significant issue of constitutional law, i.e. whether RCW 10.95.030(1), mandating life in prison without release, violates article I, section 14 and the Eighth Amendment, where applied to elderly defendants diagnosed with dementia?

2. Is this Court's review warranted under RAP 13.4(b)(4) because the case involves an issue of substantial public interest, particularly given Washington's aging population?

[1] Moen's motion to extend time to file this Petition is currently pending before the Clerk of the Washington Supreme Court. (Appendix B).

C. STATEMENT OF THE CASE

1. Charges

The State charged Cleon Moen with aggravated first-degree murder – DV, of his wife Michelle Moen. CP 46; RP 192. Moen pled not guilty and the case was tried by a jury.

2. Undisputed Trial Evidence

Undisputed evidence established the following. Moen was born in 1942 and had lived a crime-free life for over 70 years. RP 1547; CP 117. He and his wife Michelle had been happily married for 30 years. RP 804, 1236. Moen was a respected member of the community, a veteran, father, grandfather, and great-grandfather, and volunteer with the local Boy Scouts, veteran's group, and wild horses association. RP 803-05, 1135. After his son died of brain cancer, Moen began to exhibit personality and behavioral changes. RP 1142, 1180-82, 1336. Moen was treated for depression. RP 813. His wife suspected him of having an affair. RP 583-84, 815. Moen believed Michelle was suffering from mental illness. RP 814-15. They began to have marriage problems. RP 351.

In June 2014, police were called to the Moen residence to investigate a report of domestic violence. RP 266-67. Moen was arrested and charged with assault 4 – DV. RP 269; Exh. 213. Michelle testified against him at trial. RP 270, 279. The trial resulted in a hung jury. RP 279. Immediately

after the trial, Moen shot himself in the face with a shotgun in the court parking lot. RP 284-87. A suicide note to his family was later discovered, in which he pleaded with them to get help for Michelle because he believed she had mental health issues. RP 718-20, 812, 830. He was hospitalized and suffered substantial disfigurement. RP 1194-95.

Computerized Axial Tomography ("CAT" or "CT") scans of his brain were taken which showed no obvious brain injury from the gunshot wound, but did show general brain atrophy within normal parameters for his age, as well as more significant brain atrophy in the frontal lobes. RP 1191-92, 1194, 1200-01.

Divorce proceedings were initiated. RP 298-99. Occupancy of the family residence was awarded to Michelle and Moen moved out. Exh. 202; RP 291-92, 783-84, 1372. On September 5, Moen covertly entered the property, spent the night in his mother's trailer, and entered the residence the next morning when Michelle was out. RP 554-56, 932. He waited for her to return, assaulted her with an ax and his fists, and strangled her with a hair dryer cord and wire, resulting in her death. RP 554-56, 662-63, 904. He then attempted suicide by asphyxiation in a pumphouse behind the residence, but was arrested and hospitalized. RP 78, 556.

In a recorded statement, Moen told police, "[I]t's all premeditated, I planned the whole fucking thing." RP 932.

3. Disputed Evidence of Mental Infirmity

The primary issue in dispute was Moen's mental state at the time of the crime. The defense argued for diminished capacity on the basis of a dementia diagnosis. RP 1515. The State argued Moen was capable of intent and premeditation. RP 1523-24, 1533-34.

Defense expert Dr. Hasan Ozgur, a medical physician who specialized in radiology, testified that he observed frontal lobe atrophy in the CAT scans of Moen's brain, and this was an indicator of dementia. RP 1195-96. However, he stated that as a radiologist, he was not qualified to diagnose Moen with dementia, particularly without more information regarding Moen's behavior. RP 1200-01.

Defense expert Dr. Robert Stanulis, a psychologist specializing in gerontology, diagnosed Moen with frontal temporal dementia. RP 800, 810, 812. He explained frontal temporal dementia affects the frontal lobes, and symptoms involve personality changes, a lack of empathy, and less obvious short-term memory and learning problems. RP 818. Dr. Stanulus testified that Moen was perseverating or obsessing over the idea that he had to harm his wife in order to get her taken to the hospital to obtain treatment for her mental illness, and that this was an example of the "disordered thinking" typical of a diagnosis of frontal temporal dementia. RP 822-24, 827.

The CAT scan showing frontal lobe atrophy, Moen's family members' observations regarding changes in behavior, and Michelle's accusations of an affair all supported the diagnosis. RP 806-07, 810. Dr. Stanulis testified that in his opinion, Moen's mental illness was the source of his diminished capacity, and also Moen objectively did not have a premeditated intent to kill Michelle, only a delusional intent to harm her in order to help her. RP 831-32. Dr. Stanulis believed Moen told police the killing was premeditated because it furthered his original plan of suicide; having been interrupted by police, he hoped to commit suicide at the hands of the State via the death penalty. RP 828; also RP 102.

Moen's daughter testified that in 2014, she believed her father was having a "complete psychotic break" after his release from the hospital for self-inflicted gunshot wounds. RP 1176. She noted other behaviors that were out of character, including his requests for gambling money. RP 1182. Neighbors and friends similarly testified they were shocked to learn of Moen's suicide attempt outside the courthouse, because it was totally out of character. E.g. RP 1081, 1100.

The State offered the testimony of Dr. Ray Hendrickson, a forensic psychologist at Western State Hospital, as a rebuttal witness. RP 1277-1364. Dr. Hendrickson stated in his report there was "ample information" to suggest Moen was suffering at the time of the offense from "symptoms

of depressive disorder or mood dysregulation and possible symptoms of a neurocognitive disorder." RP 1340. He conducted a diminished capacity evaluation of Moen and ultimately diagnosed him with "adjustment disorder" and made a "historic diagnosis of major depressive disorder" that was in remission at the time of the evaluation. RP 1295-96.

Dr. Hendrickson testified Moen displayed no indication of dementia, which he initially defined as "overall memory difficulty." RP 1297. However, Dr. Hendrickson later agreed that the medical community recognized several types of dementia with a wide variety of symptoms, including neurocognitive impairment, interference with the organization of thoughts and thought processes, difficulty with language (i.e. "aphasia"), poor judgment, underestimation of risks, aggression and frustration, suicidal tendencies, lack of inhibition leading to inappropriate comments and behaviors, delusions involving themes of persecution, and personality changes, among others. RP 1348-55. He also agreed that while dementia is progressive overall, individuals with dementia often will move in and out of lucidity and coherence. RP 1357. Dr. Hendrickson also agreed that dementia is most often, though not exclusively, associated with the elderly. RP 1354. Finally, he agreed that even professionals have difficulty differentiating between individuals with major depressive disorder and those with dementia, particularly as the two often occur together. RP 1355.

Dr. Hendrickson explained Moen "certainly wasn't saddened by ... how he described the event" but rather discussed it "matter-of-fact" except that he laughed at the police use of what he described as "this funny, little robot" that was sent into the pumphouse to look for him. RP 1308. Moen also varied his story only in minor details, including whether or not he acknowledged Michelle was deceased at the time he left for the pumphouse. RP 1309. Dr. Hendrickson testified that according to his notes, Moen's daughter, Shelly Moen, had told him Moen had been treated for depression, she had noticed changes in his behavior, and he was "saying weird ass shit," but that she worked with dementia patients as a nurse's assistant and did not believe Moen was demented. RP 1336-37. Shelly Moen testified she did not recall making any such statement to Dr. Hendrickson. RP 1185.

Ultimately, Dr. Hendrickson concluded that despite Moen's diagnoses, he retained the ability to intend, premeditate, and make adjustments to his plans, and so did not qualify for the diminished capacity defense under law. RP 1313-18, 1320-21.

4. Closing Argument & Verdict

In closing, the defense argued for a diminished capacity defense, that Moen's condition had interfered with his ability to form intent or premeditated intent. RP 1513-14. The defense also argued Moen did not intend to kill Michelle, only to harm her as a result of his delusional belief

that Michelle, not he, suffered from mental illness, and the only way to get her help was to injure her enough that she would need to be treated at a hospital. RP 1508-09.

The State countered that the jury need not decide whether Moen had a mental illness. RP 1484. Where Moen was of sufficiently sound mind to understand, intend and premeditate the killing, a diminished capacity defense should be rejected, despite any mental health diagnoses. RP 1523-24, 1533-34.

The jury rejected Moen's diminished capacity defense and found him guilty of aggravated first-degree murder-DV. RP 1536-37; CP 103-06.

5. Sentencing Hearing

At sentencing, the State argued that because it was not seeking the death penalty, the statute required a sentence of life in prison without the possibility of release. RP 1568-69 (citing RCW 10.95.030(1)). The defense agreed that the statute mandated life in prison without consideration of mitigating factors, but argued the statute as applied to Moen violated prohibitions on cruel punishment. RP 1581. Just as Washington jurisprudence required consideration of mitigating factors before sentencing a juvenile or person with intellectual disabilities to life in prison or death, constitutional protections required similar treatment of an elderly person with mental infirmities. RP 1581.

Several witnesses spoke on behalf of Michelle Moen. RP 1547-67. Moen allocuted in a rambling fashion, describing intimate details of his thirty-year marriage to Michelle, but did emphasize that he did not plan the killing. RP 1584-99.

The sentencing court noted it did not hear an apology or "any ounce of remorse" from Moen. RP 1600. Moen inappropriately interrupted the judge, saying, "I totally loved her." RP 1600. The court disagreed stating, "That is not true." RP 1603.

The court noted that evidence of mental issues had been presented, but found "there is no ambiguity in the law." RP 1603. The Legislature had removed all discretion, and prohibited consideration of mitigating evidence in cases where the defendant did not have an intellectual disability (as defined per statute) and was not a juvenile. RP 1602-03. The court also concluded constitutional prohibitions on cruel punishment did not apply to cases with "a strong showing of premeditation and absolute lack of any compassion," and so the court lacked authority to consider mitigation. RP 1603.

The court stated Moen "paused, he thought calmly, and he took action" and concluded by stating he was "heartless, cowardly, small and savage," and had "zero right" to any freedom, and so was sentenced to life in prison without the possibility of parole. RP 1603-04; CP 119. The

sentencing court remarked to Moen, "you rightfully will die in prison, cold and alone." RP 1603-04.

6. Appellate Arguments & Decision

On appeal, Moen argued the following. Where the State did not seek the death penalty, RCW 10.95.030 required imposition of a life sentence without the possibility of parole, and removed from the sentencing court any discretion to consider mitigating circumstances warranting a reduced sentence. Br. App. at 31. However, as applied to Moen, an elderly man suffering from age-related mental infirmities, this statute violates the Washington and federal constitutional prohibitions on cruel punishment. Br. App. at 31 (citing U.S. CONST., AMENDS. VIII, XIV; WASH. CONST., ART. I, § 14).

Although art. I, §14 is more protective, Washington Courts have borrowed from federal jurisprudence to establish frameworks to evaluate the State and federal prohibitions of "cruel" punishments. Br. App. at 31 (citing State v. Bassett, 198 Wn. App. 714, 733, 394 P.3d 430 (2017); State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996) (additional citations omitted)). U.S. Supreme Court and Washington courts have recognized four broad categories of protected classes of offenders and sentences: persons with intellectual disabilities, juveniles, death penalty sentencing, and sentences to life in prison without the possibility of release.

Br. App. at 33. Elderly persons with age-related mental infirmities are a class of offender similarly situated to juveniles and persons with intellectual disabilities. Id. As such, art. I, §14 and the Eighth Amendment categorically bar the imposition of life in prison without the possibility of release on vulnerable elders with dementia. Id.

In the alternative, Moen argued at a minimum, courts must consider age and mental-health-related mitigating circumstances before imposing life without parole on individuals potentially belonging to this class. Id.

In response, the State argued Moen's sentence was not unconstitutional arguing (1) the correct standard to evaluate constitutionality is proportionality, and Moen's punishment was proportional to his crime, (2) the class of offenders identified by Moen is dissimilar to juveniles, and (3) Moen's claim to dementia was factually weak. Br. Resp. at 34-35.

The State emphasized that juveniles have the capacity to reform their character whereas those with dementia do not. Br. Resp. at 38-40, 47-48. The State argued proportionality analysis should apply, not the categorical bar approach, which it argued was relevant only to juveniles. Br. Resp. at 43-44. Applying a proportionality analysis, the State also reasoned "unlike a juvenile for whom a sentence of life without parole may

be considered especially harsh, the older an adult is, the less harsh such a sentence would be." Br. Resp. at 45.

In response to Moen's two-step categorical bar analysis, the State argued where there is no national consensus recognizing elders with dementia as a protected class, the sentence could not offend Washington's Constitution. Br. Resp. at 47. The State relied on selected trial testimony to argue where there was no evidence of memory loss, Moen did not have dementia, and the jury agreed because it rejected his diminished capacity claim. Br. Resp. at 48.

In his Reply Brief, Moen argued recent jurisprudence requires consideration of mitigating circumstance for juveniles and suggests this reasoning extends to adults with broadly defined intellectual disabilities. Br. App. at 6. Taken together, the recent decisions provide strong support for the proposition that sentencing courts must, at a minimum, consider mitigating evidence before sentencing anyone potentially belonging to a vulnerable class to life in prison without parole. Br. App. at 6 (citing State v. Houston-Sconiers, 188 Wn.2d 1, 21, 24-26, 391 P.3d 409 (2017); see In re Personal Restraint of Davis, 188 Wn.2d 356, 362-67, 395 P.3d 998 (2017)). In Davis, the U.S. Supreme Court held Washington's overly restrictive definition of intellectual disability was potentially unconstitutional, but found the sentence valid where the jury considered his

intellectual disability-related mitigating circumstances. Br. App. at 7 (citing Davis, 188 Wn.2d at 362-67). In Houston-Sconiers, this Court held sentencing courts "must consider mitigating qualities of youth at sentencing" and have discretion to deviate from statutory sentencing ranges and sentencing enhancements. Br. App. at 6-7 (citing Houston-Sconiers, 188 Wn.2d at 21, 24-26.

In response to the State, Moen argued juveniles and elderly share many traits in common. Br. App. at 7-9. Advanced age is often accompanied by a decline in mental capacity, and in a non-trivial number of cases, dementia affecting personality, judgment, and other higher-order brain functions. Br. App. at 9. Moen reasoned it is undisputed there are exceptions. Br. App. at 10. Some individuals are mentally sharp into their hundreds, just as some 10-year-olds possess exceptional maturity. Br. App. at 10. This does not negate the reality that youth is often accompanied by a lack of maturity and advanced age is often associated with declining mental capacity. Br. App. at 10.

Courts have balanced this reality with the variety of individual human experiences. Br. App. at 10. The result has been a categorical bar of extreme sentences—the death penalty and life in prison without the possibility of release—coupled with a requirement that in all other cases, sentencing courts must give meaningful consideration to age-related

characteristics, regardless of statutory mandates. Br. App. at 10. (citing Roper, 543 U.S. at 568; Bassett, 198 Wn.2d at 743; O'Dell, 183 Wn.2d at 698-99).

Moen argued this Court should, at a minimum, adopt the approach used in O'Dell, and determine first whether a defendant potentially belongs to a particular class warranting protection, and second, must consider the defendant's related mitigating circumstances. Br. App. at 10-11 (O'Dell, 183 Wn.2d at 698-99). Such an approach would also avoid the problem of an overly rigid definition for the class "elderly," given that strict class definitions have been found constitutionally problematic. Br. App. at 10 (citing Hall v. Florida, __ U.S. ____, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014) (holding intellectual disability could not be rigidly defined)).

Moen also argued the jury's rejection of his diminished capacity defense did not preclude his dementia diagnosis. The jury was asked to answer whether he retained the capacity to form premeditated intent. Br. App. at 11-12. Expert testimony at trial supported the conclusion that Moen's mental condition did not interfere with his capacity to form premeditated intent, but rather caused him to form intent to harm his wife out of a delusional belief that it was necessary to get her medical help. Br. App. at 12 (citing RP 810-12). There was ample evidence in the record of Moen's frontal lobe dementia diagnosis and its effects on his high-order

reasoning, yet the court declined to consider any mitigating circumstances at sentencing. Br. App. at 17.

Division Two affirmed Moen's sentence. State v. Moen, 4 Wn. App. 2d 589, 592, 422 P.3d 930 (2018). The court did not reach the federal claim and reasoned art. I, § 14 does not categorically bar the sentencing of a defendant with dementia to life in prison without release. Id. at 597.

The court rejected the State's reasoning that the proportionality test should apply. Id. at 600 (citing State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980)). Under step one of the categorical bar approach, the court determined there was no national consensus that the elderly, infirm, or dementia patients could not be sentenced to death or life in prison. Id. at 601-02. The court briefly relied on the jury's rejection of Moen's diminished capacity defense at trial, and summarily dismissed his claim that dementia patients as a class are less morally culpable than other adult offenders. Id. at 601-02.

The court then distinguished elderly dementia patients as a class from juveniles, reasoning there was no evidence of reduced culpability or ability to reform. Id. at 602. The court rejected comparison of the class with intellectual disabilities, reasoning that line of cases applied only to the death penalty. Id. at 603.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER CRUEL PUNISHMENT PROTECTIONS PRECLUDE THE IMPOSITION OF MANDATORY LIFE SENTENCES ON ELDERLY PERSONS WITH DEMENTIA.

This case presents the issue of whether cruel punishment prohibitions articulated in article I, section 14 of the Washington Constitution and the Eighth Amendment to the U.S. Constitution, categorically bar the mandatory imposition of a life sentence without the possibility of release on an elderly person with dementia.

Under the theory articulated by the State and accepted by the court of appeals, the trial court's sentencing of Moen to life in prison without the possibility of release, where he "rightfully will die in prison, cold and alone," was a constitutionally valid sentence. RP 1603-04 (quote from sentencing court). This is despite significant expert testimony at trial establishing that while Moen was still capable of planning and intending the crime (and so, as the jury found, he did not qualify for a diminished capacity defense), his motivation to commit the crime arose out of his dementia.

The decision of the court of appeals warrants review by this Court because the issue presents a novel and significant question of constitutional magnitude and of substantial public interest.

1. This case presents a significant question of constitutional law under RAP 13.4(b)(3).

This case presents a significant question of constitutional law, involving cruel punishment prohibitions articulated in article I, section 14 of the Washington Constitution and the Eighth Amendment to the U.S. Constitution. (RAP 13.4(b)(3)). The issue in this case is whether principles against cruel punishment categorically bar mandatory sentencing of vulnerable elders suffering from dementia to life in prison without the possibility of release. This Court should accept review under RAP 13.4(b)(3).

2. This case presents an issue of substantial public interest under RAP 13.4(b)(4).

The court of appeals' decision in Moen's case is published. As such, it represents binding authority on Washington Courts in Division Two, and carries substantial persuasive weight in other Washington courts. In addition, given that step one of the categorical bar analysis involving a national consensus, this case has the potential to influence state and federal cases across the nation.

Additionally, although the precise issue of mandatory sentencing for aggravated first degree murder is likely to be rare, the broader issue presented—constitutional limits on sentencing of vulnerable elders with

dementia—is likely to affect a large number of Washingtonians and warrants treatment by this Court.

Nationwide, "dementia cases in people 65 and older are projected to reach 7.1 million by 2025."[2] In Washington State alone, over 107,000 residents were documented as having "Alzheimer's disease or other dementias" as of 2016, and "that number is expected to more than double" in the next quarter century.[3] Washington State's mental health system is already overtaxed and ill-equipped to care for such individuals, particularly for those with "late-stage dementia, when behavioral problems can become worse."[4] Inevitably, some of these individuals will find themselves in the criminal justice system as a result of their condition, and issues involving sentencing boundaries for this class of offenders will become more frequent.

Both because this case is published, and because it involves a rapidly expanding class of offenders in Washington, it presents an issue of

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[2] THE SEATTLE TIMES, "Groundbreaking option in Washington state could let dementia patients refuse spoon-feeding," at ¶31 (originally published 10/11/2017), available at https://www.seattletimes.com/seattle-news/health/new-groundbreaking-instructions-out-of-washington-state-could-let-dementia-patients-refuse-spoon-feeding/ (last visited 10/17/2018).

[3] THE SEATTLE TIMES, "Dementia, Alzheimer's cases are on the rise, but is Washington state ready for them?," (hereinafter "Dementia") at ¶ 3 (originally published 06/26/2016), available at https://www.seattletimes.com/seattle-news/health/showdown-at-western-state-puts-spotlight-on-dementia/ (last visited 10/17/2018).

[4] "Dementia," supra n. 2, at ¶ 29 (quote), 27-33.

substantial public interest. This Court should accept review under RAP 13.4(b)(3) and (4).

E. CONCLUSION

For the aforementioned reasons, Moen respectfully asks this Court to grant review under RAP 13.4(b)(3), and (4).

DATED this 19th day of ~~May~~ Oct., 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

E. RANIA RAMPERSAD
WSBA No. 47224
Office ID No. 91051

Attorneys for Appellant

Appendix A

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Washington State
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Division Two

July 31, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CLEON ORVILLE MOEN, Appellant.	No. 49474-4-II PUBLISHED OPINION

WORSWICK, J. — Cleon Orville Moen appeals his conviction for aggravated first degree murder and his sentence to mandatory life imprisonment without the possibility of parole. Moen argues that the trial court abused its discretion by denying his midtrial motion to excuse a juror and that his sentence under RCW 10.95.030(1) violates the constitutional prohibition against cruel punishment. Moen raises several additional issues in his Statement of Additional Grounds (SAG) for Review. We affirm Moen's conviction and sentence.

FACTS

I. BACKGROUND

In 2014, Moen was charged with fourth degree assault against his wife, Michelle.[1] Michelle testified at the trial. The trial resulted in a hung jury. Immediately after the trial, Moen attempted to commit suicide by shooting himself in the head with a shotgun in the courthouse parking lot. Moen sustained a number of injuries as a result of the gunshot.

[1] We refer to Michelle Moen by her first name to avoid confusion and intend no disrespect.

Soon after, Moen filed for divorce and moved out of the residence he shared with Michelle. Later, Michelle filed a motion to hold Moen in contempt for failing to make required property and maintenance payments. After Moen was served with notice of Michelle's motion, he hid in a trailer located on Michelle's property. Moen waited for Michelle to leave the home and broke into the residence. When Michelle returned, Moen struck her in the head with an axe. A struggle ensued, and Moen strangled Michelle to death with an electrical cord.

After strangling Michelle, Moen attempted to commit suicide by asphyxiating himself. The police apprehended Moen, and the State charged him with aggravated first degree murder.[2] Moen was 73 years old.

II. TRIAL

At trial, witnesses testified to the above facts. During a break on the first day of trial, juror 4 notified the bailiff that Moen's family had contacted her to establish long-term care for Moen after his gunshot injuries. Juror 4 was the executive director of an assisted living facility. The trial court questioned juror 4:

> THE COURT: Okay. So why don't you tell us what happened or what information you learned . . . .
> JUROR: I don't recall if it was the family that first came to us or if we received paperwork from the hospital with medical information about the gunshot wound. I didn't realize that until it was mentioned this morning that there was a gunshot wound. And the family did come in shortly after that looking for placement. I only met family. We did not take him. We didn't feel that that was the right care for him.
> THE COURT: Okay. So the family that came in, do you remember who the family members were?
> JUROR: I don't, no.

[2] RCW 9A.32.030(1)(a); *see* RCW 10.95.020(8), (11), (14); former RCW 9.94A.533(3), (4) (2015).

> THE COURT: How many people, any idea?
> JUROR: I want to say it was one, maybe two.
> THE COURT: Maybe two people? And do you have an estimate about the time that you spent with them?
> JUROR: Maybe a half-hour, if that.
> THE COURT: Okay. And do you recall any information that they may have shared related to why the care needed to be or just any background information?
> JUROR: The only thing that I recall is that the family was looking for placement because of the gunshot wound.
> . . . .
> THE COURT: . . . [D]id you gain information or learn any information about Mr. Moen, the circumstances of how the gunshot was inflicted or the circumstances surrounding it?
> JUROR: Just that it happened outside the courthouse.
> . . . .
> [MOEN]: . . . Because it was Mr. Moen's family members, I mean, would you feel now that you'd have to convict him because you'd have to bend over backwards to show neutrality?
> JUROR: No.
> [MOEN]: You can still keep an open mind on it?
> JUROR: Yes.

3 Verbatim Report of Proceedings (VRP) at 317-19. Juror 4 also stated that she was able to decide the case based on the facts and evidence.

Moen moved to excuse juror 4, arguing that she could not be impartial because she had met Moen's family members and because she would convict Moen to prove her impartiality. The trial court denied Moen's motion. The trial court determined that juror 4 did not demonstrate bias or prejudice because she stated that she would be able to keep an open mind throughout trial. The trial court also noted that juror 4 had limited contact with Moen's family and could not recall anything of substance.

Moen asserted a diminished capacity defense at trial. Moen's expert witness, Robert Stanulis, diagnosed Moen with frontal temporal dementia and testified that Moen's symptoms

were more consistent with dementia than a personality disorder. Stanulis also stated that those with dementia suffer from memory problems, personality changes, and disordered thinking. The State's expert witness, Ray Hendrickson, diagnosed Moen with adjustment disorder and a history of major depressive disorder.

The jury found Moen guilty of aggravated first degree murder.

III. SENTENCING

At sentencing, Moen requested that the trial court impose an exceptional downward sentence because his dementia diagnosis was a mitigating circumstance. Moen argued that although RCW 10.95.030(1) prescribes a mandatory life sentence without the possibility of parole, a life imprisonment sentence constituted cruel punishment under the federal and state constitutions because Moen had been diagnosed with dementia.

The trial court denied Moen's request, determining that a sentence of life imprisonment was not cruel punishment and that any consideration of mitigating circumstances was barred by RCW 10.95.030(1). The trial court subsequently sentenced Moen to mandatory life imprisonment without the possibility of parole under RCW 10.95.030(1). Moen appeals.

ANALYSIS

Moen argues that the trial court abused its discretion by denying his midtrial motion to excuse juror 4 and that his sentence under RCW 10.95.030(1) violates the constitutional prohibition against cruel punishment. We disagree.

I. MOTION TO EXCUSE JUROR

Moen argues that the trial court abused its discretion in denying his midtrial motion to excuse juror 4 because the juror failed to disclose that she met with members of Moen's family to discuss long-term care.[3] We disagree.

We review a trial court's decision about whether to excuse a juror for an abuse of discretion. *State v. Depaz*, 165 Wn.2d 842, 852, 204 P.3d 217 (2009). The trial court is best able to observe the juror's demeanor and, based on that observation, interpret and evaluate the juror's answers to determine the juror's impartiality. *State v. Davis*, 175 Wn.2d 287, 312, 290 P.3d 43 (2012). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. *Depaz*, 165 Wn.2d at 852.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to a criminal trial by an impartial jury. *State v. Yates*, 161 Wn.2d 714, 742, 168 P.3d 359 (2007). A trial court is required to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness by reason of bias or prejudice. RCW 2.36.110. "The question for the judge is whether the

[3] Moen suggests that juror 4 demonstrated implied bias because she had an affinity within the fourth degree to Moen. A juror must be excluded when she demonstrates implied bias. *State v. Slert*, 186 Wn.2d 869, 877, 383 P.3d 466 (2016). RCW 4.44.180(1) provides four bases by which a juror may be excluded for implied bias, including a juror's "[c]onsanguinity or affinity within the fourth degree to either party." But juror 4 did not have any relation to Moen. *See State v. Boiko*, 138 Wn. App. 256, 264, 156 P.3d 934 (2007). Moreover, RCW 4.44.180 does not provide that a juror's knowledge of a case demonstrates implied bias. Accordingly, juror 4 did not demonstrate implied bias under RCW 4.44.180(1).

challenged juror can set aside preconceived ideas and try the case fairly and impartially." *Hough v. Stockbridge*, 152 Wn. App. 328, 341, 216 P.3d 1077 (2009).

Moen relies on *State v. Cho*, 108 Wn. App. 315, 30 P.3d 496 (2001), to support his argument that juror 4 failed to disclose material information and exhibited bias. However, *Cho* is distinguishable. In *Cho*, a juror did not disclose that he was a retired police officer during voir dire. 108 Wn. App. at 319. The juror's answers during voir dire "raise[d] a troubling inference of deliberate concealment." 108 Wn. App. at 327. The *Cho* court determined that it could presume the juror's bias because he deliberately construed his answers during voir dire to conceal that he had been employed as a police officer. 108 Wn. App. at 328.

Here, there is no inference that juror 4 deliberately concealed any facts. During voir dire, the jury was not offered any information regarding Moen's attempted suicide. In addition, juror 4 informed the bailiff of the potential conflict soon after hearing trial testimony regarding Moen's attempted suicide and resulting injuries.

The trial court examined juror 4 about any potential bias, and juror 4 unequivocally stated that she would decide the case fairly, based on the facts and evidence presented. Juror 4 did not demonstrate bias or prejudice. Accordingly, the trial court's decision not to excuse juror 4 was based on tenable grounds, and the court did not abuse its discretion.

II. CRUEL PUNISHMENT

Moen argues that RCW 10.95.030(1), which requires that a defendant convicted of aggravated first degree murder be sentenced to mandatory life imprisonment without the possibility of parole, is unconstitutional because the statute violates article I, section 14's

prohibition against cruel punishment. Specifically, Moen argues that the cruel punishment clause of both the federal and state constitutions categorically bars those with dementia from being sentenced under RCW 10.95.030(1).[4] We disagree. Sentencing a defendant with dementia to mandatory life imprisonment without the possibility of parole under RCW 10.95.030(1) is not categorically barred by article I, section 14's prohibition against cruel punishment.

A. *Legal Principles*

The constitutionality of a statute is a question of law that we review de novo. *State v. Abrams*, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008). We presume that a statute is constitutional. 163 Wn.2d at 282. The party challenging the statute bears the burden of proving its unconstitutionality beyond a reasonable doubt. 163 Wn.2d at 282.

RCW 10.95.030(1) provides that "any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole." RCW 10.95.030(1) does not give a trial court discretion to consider mitigating factors and depart from the prescribed life sentence. *State v. Meas*, 118 Wn. App. 297, 306, 75 P.3d 998 (2003).

Article I, section 14 of the Washington Constitution prohibits "cruel punishment." *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014). Similarly, the Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. 180 Wn.2d at 887.

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[4] Moen argues that it is cruel to sentence "elderly persons with age-related mental infirmities" to mandatory life imprisonment without the possibility of parole under RCW 10.95.030(1). Br. of Appellant at 33. Moen alleges that he suffers from the age-related mental infirmity of dementia. As a result, we address only the narrow issue of whether it is cruel to sentence a person diagnosed with dementia to mandatory life imprisonment without the possibility of parole.

Washington's constitutional provision is more protective than its Eighth Amendment counterpart. 180 Wn.2d at 887.

A defendant's sentence is considered cruel "when it is grossly disproportionate to the crime for which it is imposed." *State v. Morin*, 100 Wn. App. 25, 29, 995 P.2d 113 (2000). A defendant may challenge the proportionality of his sentence in two different ways.[5] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 2021, 176 L. Ed. 2d 825 (2010). First, a defendant may argue that his sentence is grossly disproportionate given the circumstances of that particular defendant. 130 S. Ct. at 2021. Federal courts refer to this type of challenge as an "as-applied" challenge. *See United States v. Shill*, 740 F.3d 1347, 1355 (9th Cir. 2014); *United States v. Cobler*, 748 F.3d 570, 575 (4th Cir. 2014). When reviewing an as-applied challenge, we compare the defendant's sentence to (1) the gravity of the defendant's offense and the harshness of the penalty, (2) sentences for other offenses in the same jurisdiction, and (3) sentences for similar offenses in other jurisdictions. *Graham*, 130 S. Ct. at 2022; *see Cobler*, 748 F.3d at 576.

Second, a defendant may assert a categorical challenge, arguing that an entire class of sentences is disproportionate based on "the nature of the offense" or the characteristics of a class of offenders. *Graham*, 130 S. Ct. at 2022. When a defendant raises a categorical challenge to his sentence, we conduct a two-step analysis. *See* 130 S. Ct. at 2022. First, we consider "'objective indicia of society's standards, as expressed in legislative enactments and state

[5] "Although the federal courts' interpretations of federal law are not binding on this state's interpretation of parallel state laws and constitutional provisions, the opinions of the United States Supreme Court 'are nevertheless important guides on the subjects which they squarely address.'" *State v. Fortune*, 128 Wn.2d 464, 474-75, 909 P.2d 930 (1996) (quoting *State v. Gunwall*, 106 Wn.2d 54, 61, 720 P.2d 808 (1986)).

practice' to determine whether there is a national consensus against the sentencing practice at issue." 130 S. Ct. at 2022 (quoting *Roper v. Simmons*, 543 U.S. 551, 572, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)). We also consider actual sentencing practices in our consensus inquiry. 130 S. Ct. at 2023.

Then, we look to "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." *Kennedy v. Louisiana*, 554 U.S. 407, 128 S. Ct. 2641, 2650, 171 L. Ed. 2d 525 (2008). We also exercise our independent judgment and consider the culpability of the defendants at issue in light of their crimes and characteristics, as well as the severity of the sentence at issue. *Graham*, 130 S. Ct. at 2026.

B. *Categorical and As-Applied Challenges*

As an initial matter, the State argues that we should analyze Moen's argument as an as-applied challenge to his sentence, the standard of which is detailed in *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980). We disagree.

In *Fain*, the defendant argued that his life sentence under the habitual offender statute was unconstitutional because it constituted cruel punishment under article I, section 14 of the state constitution and was disproportionate to the nature of his crimes. 94 Wn.2d at 390-91, 402. The Washington Supreme Court held that courts are to consider four factors when determining whether a defendant's sentence is proportional to the specific set of facts in his case. 94 Wn.2d at 396-97. The four factors are: "(1) the nature of the offense; (2) the legislative purpose behind the . . . 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.

Fain is inapposite here. The *Fain* court addressed whether the defendant's life imprisonment sentence was disproportionate given the circumstances of the particular defendant's crime. As a result, the defendant brought an as-applied challenge to his sentence. *See Graham*, 130 S. Ct. at 2022. Moen's argument on appeal is wholly different from an as-applied challenge. Moen does not argue that his sentence is disproportionate only because he was diagnosed with dementia. Instead, Moen argues that, as a rule, it is unconstitutional to sentence *a class of defendants*, those suffering from dementia, to mandatory life imprisonment. Accordingly, Moen raises a categorical challenge to his sentence. *See* 130 S. Ct. at 2022.

Because Moen "challenges a sentencing statute as applied to a class of [defendants], rather than solely the constitutionality of his sentence alone, the categorical approach is necessary." *State v. Bassett*, 198 Wn. App. 714, 738, 394 P.3d 430 (2017). Thus, we reject the State's argument, and we review Moen's argument as a categorical challenge to his mandatory life imprisonment sentence.

C. *Categorical Challenge Analysis*

The two-step analysis for a categorical challenge requires us to consider (1) objective indicia of society's standards to determine whether there is national consensus against sentencing those with dementia to mandatory life imprisonment and (2) our own understanding of the prohibition of cruel punishment. *See Graham*, 130 S. Ct. at 2022, 2026. We hold that sentencing a defendant with dementia to mandatory life imprisonment without the possibility of

parole under RCW 10.95.030(1) is not categorically barred by article I, section 14's prohibition against cruel punishment.

Moen does not provide any legislative enactments or state practices regarding sentencing those with dementia to mandatory life imprisonment without the possibility of parole. And our review of other jurisdictions' statutes and case law shows that there is no national consensus against sentencing those with dementia to life imprisonment. Rather, several jurisdictions have held that it is not cruel or unusual to sentence an elderly defendant with infirmities to either death or life imprisonment. *Allen v. Ornoski*, 435 F.3d 946, 954 (9th Cir. 2006) (holding that the Eighth Amendment does not forbid execution of "elderly and infirm" death-row inmates); *Commonwealth v. Green*, 406 Pa. Super. 120, 122, 593 A.2d 899 (1991) (holding that sentencing an elderly defendant who suffers from a number of infirmities to life imprisonment does not violate the prohibition against cruel and unusual punishment).

Moreover, in our independent judgment, sentencing a defendant diagnosed with dementia to mandatory life imprisonment is not cruel punishment under article I, section 14. Washington courts have historically held that it is not cruel to sentence a defendant convicted of aggravated first degree murder to a mandatory sentence of life without the possibility of parole. *In re Pers. Restraint of Snook*, 67 Wn. App. 714, 720, 840 P.2d 207 (1992). Moen suggests that those diagnosed with dementia are less morally culpable. However, the jury rejected Moen's diminished capacity defense at trial. Even assuming that those with dementia are less culpable due to mental deficiencies, Moen has not shown that it is cruel to imprison such a defendant for the remainder of his life.

Moen argues that we should extend our holding in *Bassett* to defendants who have been diagnosed with dementia because both juveniles and those with dementia "have difficulty regulating impulse control, are poor at estimating risks, and engage in ill-considered behavior." Br. of Appellant at 38-39. But Moen's comparison of those with dementia to juveniles is unavailing.

In *Bassett*, we determined that juvenile defendants are categorically barred from being sentenced to life imprisonment without the possibility of parole under RCW 10.95.030(3)(a)(ii). 198 Wn. App. at 744. Precedent establishes that juveniles are constitutionally different than adults for purposes of sentencing because juveniles have diminished culpability and greater prospects for reform. *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012). Juveniles have "a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking." 132 S. Ct. at 2464 (quoting *Roper*, 125 S. Ct. at 1195). Juveniles also have a greater capacity to change and reform their deficiencies than adults. 132 S. Ct. at 2464-65.

Moen's argument is unpersuasive because he fails to show that those who suffer from dementia similarly have diminished culpability. Juveniles are precluded from mandatory life sentences in part because of their prospects to rehabilitate as their brains develop. But Moen does not argue that defendants diagnosed with dementia may improve their mental conditions or be rehabilitated. In addition, Moen does not demonstrate that the moral culpability of those with dementia is lessened by virtue of their illness.

Moen's citation to cases prohibiting death sentences for those with intellectual disabilities is similarly unpersuasive because Moen was not sentenced to death. A number of jurisdictions have affirmed sentences of life imprisonment without parole for intellectually disabled or brain damaged defendants. *Commonwealth v. Jones*, 479 Mass. 1, 18, 90 N.E.3d 1238 (2018) (holding that it is not cruel and unusual punishment to sentence a defendant who has been diagnosed with a developmental disability to life in prison without the possibility of parole); *Baxter v. Mississippi*, 2012-KA-01032-COA, 177 So. 3d 423, ¶ 83 (Miss. Ct. App. 2014) (stating that the defendant's "intellectual disability only precluded the death penalty, not life imprisonment without parole"), *aff'd*, 2012-CT-01032-SCT, 177 So. 3d 394 (Miss. 2015). These decisions implicitly recognize that it is not unconstitutional to sentence a defendant with mental deficits to prison for the remainder of his life.

Moen fails to meet his burden in showing that RCW 10.95.030(1) is unconstitutional. Consequently, we hold that sentencing a defendant with dementia to mandatory life imprisonment without the possibility of parole under RCW 10.95.030(1) is not categorically barred by article I, section 14's prohibition against cruel punishment.[6]

D. *Consideration of Mitigating Circumstances*

Moen also briefly argues that the trial court erred by failing to consider his dementia as a mitigating circumstance during sentencing. A trial court's discretion to impose a sentence is

[6] Because we determine that Moen's mandatory life imprisonment without the possibility of parole does not violate article I, section 14 of the state constitution, we do not further analyze Moen's sentence under the Eighth Amendment. *Witherspoon*, 180 Wn.2d at 887.

limited to that granted by the legislature. *State v. Soto*, 177 Wn. App. 706, 713, 309 P.3d 596 (2013). As stated above, RCW 10.95.030(1) does not give the trial court discretion to consider mitigating factors and depart from the prescribed life sentence. *Meas*, 118 Wn. App. at 306. Accordingly, the trial court did not err in determining that RCW 10.95.030(1) prohibited it from considering mitigating circumstances when imposing Moen's sentence.[7]

CONCLUSION

We affirm Moen's conviction and sentence because the trial court did not abuse its discretion in denying Moen's midtrial motion to excuse a juror and because sentencing a defendant with dementia to mandatory life imprisonment without the possibility of parole under RCW 10.95.030(1) is not categorically barred by article I, section 14's prohibition against cruel punishment.

Worswick, J.

We concur:

Maxa, C.J.

Lee, J.

[7] Moen filed a SAG contending that he received ineffective assistance of counsel and that the trial court erred in denying his expert witness's, Stanulis, request to testify out of order due to a pre-scheduled vacation. Because Moen's ineffective assistance of counsel claim depends on facts outside the record on appeal, we do not review it. Additionally, the record does not support Moen's claim that the trial court erred in denying Stanulis's request to testify out of order. On the contrary, the trial court permitted Stanulis to testify out of order.

Appendix B

THE SUPREME COURT
STATE OF WASHINGTON

SUSAN L. CARLSON
SUPREME COURT CLERK

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DEPUTY CLERK/
CHIEF STAFF ATTORNEY

TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov

October 8, 2018

LETTER SENT BY E-MAIL

Cleon Orville Moen **(sent by U.S. mail only)**
#393537
Monroe Correctional Center
P.O. Box 514
Monroe, WA 98272

Hon. Derek Byrne, Clerk
Division II, Court of Appeals
950 Broadway, Suite 300
MS-TB-06
Tacoma, WA 98402

Dana M. Nelson
Nielsen Broman & Koch PLLC
1908 E. Madison Street
Seattle WA 98122-2842

Eric H. Bentson
Cowlitz County Prosecutor's Office
312 S.W. 1st Avenue, Room 105
Hall Of Justice
Kelso, WA 98626-1799

Re: Supreme Court No. 96393-2 - State of Washington v. Cleon Orville Moen
Court of Appeals No. 49474-4-II

Clerk, Counsel and Mr. Moen:

The Court of Appeals has forwarded to this Court the Petitioner's "MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW". The matter has been assigned the Supreme Court cause number indicated above.

The motion is set for consideration on the Supreme Court Clerk's, October 25, 2018, Motion Calendar. The motion will be considered without oral argument.

Any answer to the motion should be served and filed by October 18, 2018. Any reply to any answer should be served and filed by October 24, 2018.

Sincerely,

Susan L. Carlson
Supreme Court Clerk

SLC:sk

NIELSEN, BROMAN & KOCH P.L.L.C.

October 18, 2018 - 2:41 PM

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