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No. 95263-9

(consolidated with 95110-7 and 96061-5)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

The person identified by the State in this  
Persistent Offender Proceeding as

ANTHONY MORETTI,  
Petitioner.

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ON REVIEW FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
GRAYS HARBOR COUNTY AND  
THE COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION TWO

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*PETITIONER MORETTI'S SUPPLEMENTAL BRIEF*  
AMENDED

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A. ISSUES PRESENTED ON REVIEW

1. In cases like Alabama v. Miller<sup>1</sup>, State v. Houston-Sconiers<sup>2</sup>, and State v. O'Dell<sup>3</sup>, our courts have recognized that human brain development affects the behavior and abilities of youth into their mid-20s in ways which fundamentally affect culpability and ability to reform and inform the constitutionality of sentencing.

Does our state's "three strikes" sentencing scheme categorically violate the Eighth Amendment or the more protective Article 1, §14, by requiring the extreme sentence of life without hope of parole based in part on conduct which occurred when the defendant was a youthful adult still under the influence of youth?

2. Was the sentence imposed on Mr. Moretti "cruel" or "cruel and unusual" punishment?

B. RELEVANT FACTS

Petitioner, identified by the state in this proceeding as Anthony Moretti, was born April 22, 1983, and completed only the eighth grade in school. CP 10-11; see CP 78. In March, 2004, at age 20, he pled guilty to a first-degree arson committed January, 2004. CP 69-74.<sup>4</sup> The standard sentencing range was 26-34 months; Moretti was ordered to serve 28 and pay restitution. CP 69-71. The state described this offense as occurring when "the defendant broke into a vacant home in an attempt to steal property and then chose to set fire to the home." CP 66.

In 2009, when he was 26, Moretti entered a plea in Lewis County to vehicular assault and second-degree driving while license suspended.

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<sup>1</sup>567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

<sup>2</sup>188 Wn.2d 1, 391 P.3d 409 (2017).

<sup>3</sup>183 Wn.2d 680, 358 P.3d 359 (2015).

<sup>4</sup>The sentencing documents presented below are attached as Appendix A.

CP 75-85.<sup>5</sup> On the plea he admitted that, *inter alia*, he had been under the influence of alcohol and caused substantial bodily injury to another by pulling in front of another vehicle. CP 84-85. The standard range was 13-17 months; Moretti received 13 months.<sup>6</sup> See CP 75-76. The plea statement had the following stricken out:

~~(n) — This offense is a most serious offense or strike as defined by RCW 9A.030, and if I have at least two prior convictions for most serious offense, whether in this state, in federal court, or elsewhere, the crime for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole.~~

CP 98 (strikeout in original).

In 2015, in the proceeding underlying this proceeding, Moretti was convicted of first-degree robbery and two counts of second-degree assault. CP 57-59. It was alleged that he and another, Samuel Hill, had robbed Michael Knapp and his friend Tyson Ball when Knapp and Ball went to a boat ramp to buy methamphetamine. RP 38-39, 107, 109, 111. Knapp and Ball were already “high” on “meth” and had been drinking. RP 39-41. The two men gave very different versions of events. RP 38-39, 107, 109, 111. Ultimately, however, both said they had been assaulted by two men and Knapp was robbed of about \$1,000. RP 38-42, 120-24, 138, 146-47, 186-88. Knapp sustained injuries which resulted in headaches “and stuff” but he did not go to at doctor or hospital. RP 168, 171.

The entire incident took maybe a minute or two. RP 125. Moretti was identified from a photographic montage by Ball and Knapp a few

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<sup>5</sup>The sentencing documents presented below are attached as Appendix B.

<sup>6</sup>365 days (concurrent) was ordered for the license offense. CP 88-90.

months later.<sup>7</sup> RP 133-35, 189-90. At Moretti's trial, the State's theory was that Moretti was the "second man" who got involved in the incident after Hill had commenced with an assault.<sup>8</sup> RP 395, 403-404.

In imposing the sentence of life without the possibility of parole, the judge said, "I don't have any discretion in a case like this," because the POAA sentence was "the only option I have." RP 420-21, 426.

C. ARGUMENT

MANDATORY LIFE WITHOUT PAROLE UNDER THE POAA CAN NO LONGER BE UPHELD UNDER THE EIGHTH AMENDMENT AND ARTICLE 1, §14 WHERE ONE OF THE "STRIKES" WAS COMMITTED AS A YOUTHFUL ADULT; IN THE ALTERNATIVE THE SENTENCE HERE DOES NOT WITHSTAND REVIEW

Life without the possibility of parole is second only to the death penalty in severity in our country and currently the most extreme punishment in this state. See Graham v. Florida, 560 U.S. 48, 69, 74, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010); State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018). For Petitioner Moretti, this sentence was not the result of discretion or reasoned judgment; it was "the only option." RP 421-26. The sentencing judge was deprived of all discretion as a result of our state's "three strikes" statutory sentencing scheme, the "Persistent Offender Accountability Act" or "POAA." See State v. Manussier, 129 Wn.2d 652, 658, 921 P.2d 475 (1996).

In the past, this Court has upheld that scheme as not "cruel" or

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<sup>7</sup> Knapp did not remember previously admitting under oath that he was bad with faces and that his recollection of what happened at the boat ramp "ain't clear." RP 188-94. Ball admitted he was high and "pretty drunk" during the incident and had "tweaked" hard on "meth" several times the previous month. RP 40.

<sup>8</sup>Hill was acquitted in his separate trial even before Moretti was tried. See CP 60-61.

“cruel and unusual” punishment under the Eighth Amendment or Article 1, §14. See *id.*; *State v. Thorne*, 129 Wn.2d 736, 746-47, 921 P.2d 514 (1996), abrogated on other grounds by, *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed. 2d 403 (2004); *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996); see also, *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014). But there have since been fundamental shifts which affect how Eighth Amendment and Article 1, §14, analysis is and should be done. Further, there has been an existential change to how we view the culpability and rehabilitation of youthful offenders, based on revelations in brain development which continue even after age 18, the current “majority” age. See, *O’Dell*, 183 Wn.2d at 365. As a result, the POAA can no longer withstand Eighth Amendment or Article 1, §14 review where, as here, it compels a mandatory sentence of life without the possibility of parole based in part on conduct committed when the defendant was a youthful offender with a brain which was not yet fully adult. Such automatic imposition of the state’s most extreme sentence without any room for discretion is both cruel and cruel and unusual punishment.

1. The POAA and prior challenges in context

The POAA was the result of a voter initiative in 1993 after several high-profile cases involving horrendous crimes committed by repeat offenders. See Jennifer Cox Shapiro, COMMENT, *Life in Prison for Stealing \$48? Rethinking Second-Degree Robbery as a Strike Offense in Washington State*, 34 SEATTLE U. L. REV. 935, 939-44 (2011). The crimes led to calls for harsh sentencing laws with the belief such draconian

measures would increase public safety by removing from society the relatively small number of offenders who were thought to pose the most danger. See id; Rivers, 129 Wn.2d at 712-13. The stated purposes of the POAA were primarily to put “three-time, most serious offenders” away and “[i]mprove public safety,” “tougher sentencing” and express public concern. Laws of 1993, ch. 1, §2. Such “recidivist” laws segregate offenders for community safety based on the recent conduct but also that of the past crimes, which together show “the propensities [t]he [defendant] has demonstrated over a period of time.” Rummel v. Estelle, 445 U.S. 263, 284-85, 100 S.Ct.1133, 63 L. Ed. 2d 382 (1980).

The POAA is codified in several sections of the adult sentencing statutes and, in short, requires a sentence of life without parole for anyone who is a “persistent offender,” as Moretti was deemed here. See Thorne, 129 Wn.2d at 746-47; RCW 9.94A.505; RCW 9.94A.570. In this case, the applicable section defined “persistent offender” as someone who is convicted of a “most serious offense” and has previously been convicted of two other such crimes. Former RCW 9.94A.030(37)(2015). “Most serious offense” is further defined and at the relevant times included the prior offenses relied on here. See Former RCW 9.94A.030(29) (2005); former RCW 9A.48.020(1981); former RCW 46.61.552 (2001).

Where the POAA applies, the judge has no discretion to vary the sentence in any way. Thorne, 129 Wn.2d at 765; see RCW 9.94A.570. This is in contrast to the discretion courts have in a non-POAA case. See RCW 9.94A.535(1). The POAA was enacted at time of “heightened fear

of increased violent crime,” as well as “public outrage” over such crime, nationally. See Mark Owens, *California’s Three Strikes Law: Desperate Times Require Desperate Measures - But Will it Work?*, 26 PAC. L. J. 881, 884-85 (1995). The public view was that judges were too lenient and “certain offenders are so culpable and irredeemable, and their offenses so heinous, that they do not deserve the individualized consideration normally afforded defendants in this country.” Perry L. Moriearty, *Miller v. Alabama and the Retroactivity of Proportionality Rules*, 17 J. CON. L. 928, 977 (2015).

At the same time, the nation’s highest Court was issuing conflicting decisions upholding death and other harsh penalties in stark situations and fluctuating between its prior Eighth Amendment commitment to requiring that a sentence must be “proportional” to the offense and holding that the Eighth Amendment only precluded certain “modes” of punishment. See *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L.Ed. 2d 836 (1991); compare, *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L.Ed.2d 637 (1983); *Rummel v. Estelle*, 445 U.S. 263, at 284-85. *Rummel* upheld a sentence of life without parole for minor thefts under a “recidivist” statute. 445 U.S. at 264. In *Harmelin*, the Court reasoned that mandatory death penalty schemes had “abounded” in the first penal codes of the country, concluding that any punishment short of death could thus hardly be deemed “unusual.” 501 U.S. at 995. *Harmelin* left the requirement for “an individualized determination that the punishment is ‘appropriate’” or “grossly disproportionate” under the

Eighth Amendment intact only for death penalty cases. 501 U.S. at 995.<sup>9</sup>

But the concept of proportionality as an Eighth Amendment requirement had been mentioned as far back as 1910, when the Court had found “cruel and unusual” a punishment of fifteen years “hard and painful labor” for falsifying a public document. Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910).

At about the same time as the POAA statute was enacted, the U.S. Supreme Court had rejected several categorical challenges to the death penalty under the Eighth Amendment - for youths age 15-18 and the developmentally disabled. Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed.2d 306 (1989), abrogated, Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)); Penry v. Lynaugh, 492 U.S.302, 335, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), abrogated, Atkins v. Virginia, 536 U.S. 304, 314, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). In both cases, the Court found no “national consensus” supporting the idea that such punishments were categorically “cruel and unusual.” Penry, 492 U.S. at 335; Stanford, 492 U.S. at 370-71.

This Court decided the initial challenges to the POAA in this context. See, e.g., Thorne, supra; Rivers, supra; Manussier, supra. In each case, the Court upheld the defendant’s specific sentence as not “cruel” or “cruel and unusual” but “did not resolve all Article 1, §14, challenges” to a sentence under the POAA. Thorne, 129 Wn.2d at 768, 772 n.1; Manussier, 129 Wn.2d at 674-75; Rivers, 129 Wn.2d at 712-13. In

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<sup>9</sup>The confusion on the Eighth Amendment and “proportionality” was strong. Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court’s Tortured Approach to Cruel and Unusual Punishment*, 84 KY.L.107 (1996).

reaching its conclusions, this Court indicated it was relying on the state constitution. Thorne, 129 Wn.2d at 773; Manussier, 129 Wn.2d at 674; Rivers, 129 Wn.2d at 733-34. But it also explicitly cited Harmelin, *supra*, and Rummel, *supra*, pointing out that those cases had upheld such a sentence for major cocaine possession and minor thefts. Thorne, 129 Wn.2d at 775-76; Manussier, 129 Wn.2d at 675-77; Rivers, 129 Wn.2d at 714-15. These federal decisions thus strongly informed the Court's conclusions about what was "disproportionate."

## 2. Evolving standards of decency

In the early 2000s, the U.S. Supreme Court started finding the death penalty to be cruel and unusual punishment when imposed on certain groups as a categorical matter. It found a national "consensus" against death for the developmentally disabled in 2002 and held that the mitigations of disability and reduced blame rendered it categorically "cruel and unusual" under the Eighth Amendment. Atkins, 536 U.S. at 335. In 2005, there was now a developed consensus against imposing a sentence of death on 15-18 year-old youth. Roper, 543 U.S. at 578. No matter the crime, the Court found, the transient qualities of "youth" caused by normal development of the human brain rendered all youth so much less culpable and the reasons for the penalty so much less strong that the Eighth Amendment required a "categorical" bar. 543 U.S. at 578.

Then in 2010, for the first time, the high Court compared the death penalty to life without the possibility of parole and found them so akin in severity that the same Eighth Amendment mandate that the

sentence must be “proportional” and individualized applied to both. Graham, 560 U.S. at 60-61. Because of the transient qualities of youth - the “characteristics of the offender” - life without parole was categorically unconstitutionally cruel and unusual punishment in violation of the Eighth Amendment for all juvenile offenders, for non-homicide crimes. Id. The Court would later reject automatic imposition of life without parole for youthful crime, requiring consideration of the mitigating factors of youth before any such sentence may be imposed - and then, only rarely, if the defendant is “incorrigible.” Miller, 567 U.S. at 487; see Montgomery v. Louisiana, \_\_\_ U.S. \_\_\_, 136 S. Ct. 178, 726, 733, 193 L. Ed. 2d 599 (2016) (“mandatory life without parole poses too great a risk of disproportionate punishment”).

Prior to Miller and its progeny, the thought that youth could be a mitigator was rejected by our state’s courts as “border[ing] on the absurd.” See State v. Scott, 72 Wn. App. 207, 218-19, 866 P.2d 1258 (1993), affirmed sub nom, State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1308 (1995); see State v. Ha’mim, 132 Wn.2d 834, 846-47, 940 P.2d 633 (1997).

In Witherspoon, supra, the majority of this Court rejected the idea that Graham or Miller held any relevance to a POAA sentence when the defendant was an adult. Witherspoon, 180 Wn.2d at 882. More recently, however, such relevance was found. See O’Dell, 183 Wn.2d at 362; Houston-Sconiers, 188 Wn.2d at 4; see State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018). In O’Dell, the Court recognized advances in scientific literature and adolescent cognitive development which:

reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse

control, tendency toward antisocial behaviors, and susceptibility to peer pressure. . . [and show that] [u]ntil full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond.

O'Dell, 183 Wn.2d at 364-65 (emphasis in original) (quotations omitted).

Based on these transient qualities of youth, this Court held, the rationale for imposing harsh punishment do not apply. Id. Retribution/blame is less justified because of decreased behavior control from the still-developing brain. Id.; see Graham, 560 U.S. at 71. Deterrence is less successful with offenders who lack of full ability to foresee consequences and options. O'Dell, 183 Wn.2d at 365. Segregation from society for community safety is less justified when the offender is youthful and will go through brain development which makes the likelihood they can reform far stronger than with adults. Miller, 567 U.S. at 571.

In Houston-Sconiers, this Court relied on this reasoning and held that the Eighth Amendment was violated by the application of mandatory, "stacking," flat-time sentencing enhancements against a youth, even when tried as an adult. 188 Wn.2d at 19. To comply with the Eighth Amendment, this Court held, "[t]rial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable" range. Id. 188 Wn.2d at 20.

In Bassett, this Court applied the "categorical approach" and held that sentencing juvenile offenders to life without possibility of parole always violates Article 1, §14, no matter the crime. 192 Wn.2d at 82-83. In so doing, it noted the trend towards abolishing life without

parole for juvenile and even adults in some state, and again pointed out the “penological goals of retribution, deterrence, incapacitation, and rehabilitation” were not served by imposing this harsh penalty on youth whose brain development is not yet complete. 192 Wn.2d at 86-87. And in State v. Gilbert, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_ (April 4, 2019), this Court reaffirmed that a court sentencing a person whose brain is not fully developed must have full discretion to consider an exceptional sentence downward despite any “mandatory” sentencing provisions, in light of the mitigating factors of youth.

The POAA, however, robs courts of all discretion. Rivers, 129 Wn.2d at 768-69. And it makes no distinction between “strikes” committed while still under the influence of youthful brain development -and thus less culpable - and those committed after full adult brain development occurs. Both this Court and the U.S. high court have found that the mitigating qualities of youth do not stop when the current age of majority - 18 - is reached. O’Dell, 183 Wn.2d at 365; see Roper, 543 U.S. at 574. Instead, “[t]he brain isn’t fully mature” at 18, or even “at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.” O’Dell, 183 Wn.2d at 692, n. 5 (quotations omitted).

As a result, “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.” Roper, 543 U.S. at 574. And this Court announced in O’Dell, “we now know that age may well mitigate a defendant’s culpability, even if that defendant is over the age of 18.” O’Dell, 183 Wn.2d at 365. This Court reached that conclusion based on “psychological and neurological studies showing that the ‘parts

of the brain involved in behavior control' continue to develop well into a person's 20s." O'Dell, 183 Wn.2d at 691-92.

Since O'Dell, the evidence to support this neurological distinction has only increased. See Elizabeth Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 *FORDHAM L. REV.* 641 (2016). Newer studies have found, *inter alia*, that youthful adults, 18-21, are more like their younger peers than adults in reactive situations and impulse control. See e.g., Alexandra Cohen et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 *PSYCHOL. SCI.* 549, 559-60 (2016).

Notably, the setting of 18 as the "age of majority" and thus presumptive adult ability is relatively new. See, former RCW 26.28.010 (1970); see also, Laws of 1923, ch. 72, §2; Jones v. Jones, 72 F.2d 829, 830 (App. D.C. 1934). The age was 21 under English common law and in the colonies and states, including ours, until about 1971, when most states lowered the age to 18 based on pressure because people that age were being sent to die in Vietnam but could not participate in much of civic life as adults. See Basil v. Basil, 354 A.2d 392 (1976); see Laws of 1971, ch. 292, §1<sup>10</sup>; see Wayne R. Barnes, *Arrested Development: Rethinking the Contract Age of Majority for the Twenty-First Century Adolescent*, 76 *MD. L. REV.* 405, 406-407, 416-17 (2017).

### 3. The POAA no longer withstands review

Based on all these developments, this Court should hold that the

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<sup>10</sup>Until 1971, you had to be 21 in this state to, *inter alia*, serve as a juror, accept service of process, *serve process*, or hold certain jobs, like certified public accountant, undertaker or embalmer. Laws of 1971, ch. 292, §§ 3, 4, 11, 17, 24.

Eighth Amendment or Article 1, §14, categorically prohibit imposing life without parole when one of the “strike” crimes was committed as a youthful adult, between 18-21. This Court has repeatedly held that “the state constitutional proscription against cruel punishment affords greater protection than its federal counterpart” in the context of sentences of “life without parole,” and where the offender is a youth. Bassett, 192 Wn.2d at 78; see Manussier, 129 Wn.2d at 674; see also, State v. Ramos, 187 Wn.2d 420, 453-54, 387 P.3d 650, cert. denied, \_\_\_ U.S. \_\_\_ (2017); Witherspoon, 180 Wn.2d at 887; Rivers, 129 Wn.2d at 712; State v. Fain, 94 Wn.2d 387, 392, 617 P.2d. 720 (1980). It has so held for the discretionary decision to impose LWOP. Bassett, 192 Wn.2d at 78. This Court has also declared that its interpretation of the state provision “is not constrained by the Supreme Court’s interpretation” of the Eighth Amendment. State v. Bartholemew (Bartholemew II), 101 Wn.2d 631, 639, 683 P.2d 1079 (1984).

There have been very few situations where such greater protection has not been found. Bassett, 192 Wn.2d at 78-79. In general, to determine whether a state constitutional provision provides greater protection than its federal counterpart in a particular context, this Court applies the six non-exclusive factors set forth in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Those factors are: 1) the textual language of the state clause, 2) the differences between that language and the language of the parallel federal provision, 3) the relevant state constitutional and common law history, 4) “preexisting” state law, 5) structural differences between the constitutions, and 6) whether the

issue involves matters of particular local concern. Gunwall, 106 Wn.2d at 61-62.

First, the plain text of the state constitution explicitly provides for more protection in comparison with the federal clause, because Article 1, §14, protects against “cruel punishment,” while the Eighth Amendment is limited to prohibiting punishment which is not just “cruel” but must be both “cruel and unusual.” Art. 1, §14; Eighth Amend. The language shows a broader range of punishments than the federal clause. See Thorne, 129 Wn.2d at 772 n. 10.

Regarding the state’s constitutional law history, this Court has found historical evidence that our framers rejected an amendment which would have added the word “unusual.” Fain, 94 Wn.2d at 393, citing, *Journal of Wa.State Constitutional Conv.: 1889*, 501-502 (Rosenow ed. 1962). Thus, the state constitution’s “textual language” (1), the differences in the parallel state and federal texts (2), and the state’s constitutional law history on this provision (3) support independent interpretation and providing greater protection than given by the more broad Eighth Amendment “cruel and unusual punishment” clause. See Bassett, 192 Wn.2d at 79-80.

The fourth Gunwall factor focuses on “established bodies of state law, including statutory law,” and how they might “bear on the granting of distinctive state constitutional rights.” Gunwall, 106 Wn.2d at 61. This factor can help define the “scope of a constitutional right later established” by showing relevant statutes or other state laws in effect not just at the time of our state’s founding but throughout its history.

Gunwall, 106 Wn.2d at 61-62. Such laws and practices may be “responsive to concerns of its citizens long before” a court holds them constitutionally required. Gunwall, 106 Wn.2d at 61-62. Thus, in Gunwall, the Court at both an early statute governing intrusions in to telegraphs and more recent statutes on electronic communication in asking whether Article 1, §7, provided greater protection than the Fourth Amendment (and thus a warrant was required) where the government was intruding into telephone records with a “pen register” device. Gunwall, 106 Wn.2d at 55-56.

Our state has a long history and tradition of providing protection for youthful adults up to age 21 not only from the harshness of our adult criminal justice system but of adult life itself. Until 1971, “adult” status required attaining the age of 21, not 18. See Laws of 1971, ch. 292. And early in our state’s history, sentencing courts had discretion to suspend sentences *only* where the convicted person was “under the age of twenty-one years.” See Laws of 1909, ch. 249. § 28, p. 896. Unique sections of the Washington Constitution required age-appropriate governmental services for youth and youthful adults up to age 21 as a “Paramount” duty. See, e.g., Art. 9, §§ 1, 2; see McCleary v. State, 173 Wn.2d 477, 269 P.3d 227 (2012). For years, “child welfare” services defined a “child” as someone “less than twenty-one.” Former RCW 74.13.020 (1965). Indeed, at one point even driver’s licensing reflected recognition of 21 as the age of full adulthood, with 18-21 as something less. See former RCW 46.20.011 (1967) (“adult” driver’s license only for 21 or over; “minor’s” license for 18-21; “juvenile’s license” for 16-18).

Current laws still reflect a distinction for certain government services. See e.g., RCW 74.13.020(2). More recently, the Legislature has recognized the developmental needs of youthful offenders between 18-25 in amending former RCW 13.40.300 (2005) to allow the juvenile court to commit an offender to a juvenile corrections facility even beyond their 21<sup>st</sup> birthday, up to age 25, rather than housing them with adults. Laws of 2018, ch. 162, §6. Thus, our state has a long history of treating those under age 21 as less than adults. Coupled with the recent developments discussed in Bassett, supra, this criteria provides strong support for finding our state constitution more protective in this situation.

The fifth Gunwall factor always points towards independent state analysis, because “the federal constitution is a grant of power from the states,” but the state’s is “a limitation of the State’s power.” Bassett, 192 Wn.2d at 82. The sixth factor focuses on “national uniformity” versus “state” concerns. See Gunwall, 106 Wn.2d at 67. This is satisfied by our state’s long history of treating youthful adults as children up to age 21 and state concerns in proportional sentencing.

Applying our state’s prohibition against “cruel” punishment requires discussion, however, because the analysis this Court adopted in Fain, supra, does not properly reflect this state’s greater protection. This makes sense because of whence it came: Hart v. Coiner, 483 F.2d 136 (4<sup>th</sup> Cir. 1973), cert. denied, 415 U.S. 938 (1974). Hart was a federal case which interpreted only the Eighth Amendment, not our more protective state provision. See Hart, 483 F.2d at 140-41. The focus in Hart was disproportionality through the lens of deciding what was “cruel and

unusual" punishment, not what was simply "cruel." 483 F.2d at 140-41. But "cruel and unusual" is a relative phrase with a meaning far different than just "cruel," thus, the Hart factors adopted in Fain include focus largely on what is "unusual," too: 1) the nature of the offense (relative to others), 2) the legislative purpose behind the POAA, 3) the punishment that would be imposed in other states for the same crime and 4) the punishment for other offenses in the same state. Nothing in that analysis asks whether a punishment is simply "cruel." See Rivers, 129 Wn.2d at 723 (Sanders, J., dissenting). The factors in Fain do not sufficiently ensure that citizens in this state receive the state constitutional protection which is their due by ensuring consideration of the merely "cruel" rather than requiring "unusual" punishment, too. Failing to provide adequate protection in our state renders Fain incorrect and harmful. See State v. Baldwin, 150 Wn.2d 448, 460-61, 78 P.3d 1005 (2003). Indeed, Fain is incorrect and harmful even under the Eighth Amendment because it does not allow the Court to consider the mitigating qualities of the offender, yet both the Eighth Amendment and Article 1, §14 now so require. See Bassett, 192 Wn.2d at 83-84. Notably, even earlier the Fain inquiry was inconsistent with providing greater protection by allowing the purpose behind the punishment to be considered unlike in the federal system. Compare, Helm, 463 U.S. at 280; Fain, 94 Wn.2d at 392.

In Bassett, this Court adopted a categorical ban on life without parole for anyone under the age of 18, based upon the same youthful brain issues both this Court and the country's highest have held still

apply into a human's mid-20s. 192 Wn.2d at 84. But in so doing, it again focused on what was "unusual," asking if there was "objective indicia of a national consensus against the sentencing practice at issue" in addition to using the Court's own independent judgment. 192 Wn.2d at 83. To give real purpose to our state's greater protection, any "categorical" ban should reflect not national consensus (and thus what is "unusual") but rather the Court's current interpretation of what punishment is "cruel." One justice has looked at common usage at the time of our state's founding and argued that the term "cruel" in the clause means "(1) punishment beyond that which is necessary and (2) absence of mercy." See Rivers, 129 Wn.2d at 723 (Sanders, J., dissenting). The U.S. Supreme Court also gave some guidance when it declared, "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." Harmelin, 501 U.S. at 995.

The POAA's mandatory imposition of the most severe of punishments based on goals which are not served by that sentence, based on branding someone "incorrigible" based in part on conduct which is seriously mitigated by brain development is "punishment beyond that which is necessary," showing an "absence of mercy" and most definitely "cruel." This Court should find it categorically so. The same concerns about an "offender class" exist here as in Bassett, based on the same brain science used in that case and O'Dell. Even more, in Bassett the Court struck down a statute which *required* considering the mitigating factors of youth before imposing life without parole on

anyone 16-18. See RCW 10.95.030(3)(a)(ii). Under the POAA, such consideration is *prohibited* even where, as here, one of the “strikes” was committed as a youthful adult. But the country is moving “unmistakably and steadily” away from putting children in prison for their entire lives based on conduct committed while brain development is not yet complete. See Bassett, 192 Wn.2d at 86. The same mitigating, transient issues which reduce the penological justifications for imposing life without parole on anyone 16-18 years old also apply where, as here, the offender is 18-21, still a youthful adult. O’Dell, 183 Wn.2d at 695; Miller, 567 U.S. at 472.

Even if the Court does not find LWOP categorically “cruel” when imposed based in part on conduct committed as a youthful adult, it should find that imposition of life without parole here violates Article 1, §14. Applying the existing Fain factors and adding a 5<sup>th</sup> factor of whether the punishment is for greater than its stated purpose or absent mercy necessarily requires considering the nature of the offender and somewhat balances out the Fain focus on whether the punishment is “unusual,” i.e., what other states do and what this state does in other situations, as opposed to “cruel,” i.e., more than needed for its stated purpose and absent mercy. Here, for the “nature” of the offenses, there is no evidence that the arson 1 involved anything other than property and the prosecutor’s description indicates an impulsive, not thoughtful act. CP 66. At the relevant time, first-degree arson involved, *inter alia*, knowingly and maliciously starting a fire or explosion which “damages a dwelling” - the apparent offense here. See CP 66; former RCW

9A.48.020 (1981). The nature of the second “strike” (vehicular assault while drunk) was also a thoughtless, immature act which resulted in someone getting somewhat hurt. For the current offense, the assault did not inflict extreme injury and lasted only as long as required to commit the robbery. Nor did any of the crimes involve gratuitous violence, or torture.

The “purposes” of the POAA are also not met in this case. The POAA goals of retribution, deterrence and safely locking away from society “the most dangerous criminals” lose their strength when one strike is conduct committed as a youthful adult, still experiencing brain development. See Graham, 560 U.S. at 71; O’Dell, 183 Wn.2d at 365. The punishment that would be imposed in other states is a question of whether a punishment is “unusual,” but as this Court has noted there is a trend away from life without parole for youth, based on brain science - the same which applies into mid-20s. See Bassett, 129 Wn.2d at 86-87.

There is a staggering difference between the severity and sentences of the “strikes” and the sentence of life without parole: both were sentenced at the low end of the range, for the arson, 28 months; for the vehicular assault, 13. CP 69-76. Had the POAA not applied, the standard range for the current crimes would have been 129-171 months (robbery) and 63-84 months (assault) - far more than Petitioner has ever served before.

Life without parole is the same sentence imposed for aggravated murder. See, e.g., RCW 10.95.030(1). It is the sentence Dayva Cross will serve, although a five-justice majority of this Court had previously found

that death was a proportional penalty for Cross' conduct of, *inter alia*, fatally stabbing his wife and two teenage stepdaughters after causing a "marked level of cruelty" and "substantial conscious suffering" of one. State v. Cross, 156 Wn.2d 580, 132 P.3d 80 (2006), abrogated by Gregory, supra. It is the sentence the Green River Killer, Gary Ridgway, obtained through plea even though he admitted to brutally murdering more than 40 people over years. See State v. Yates, 161 Wn.2d 714, 793, 168 P.3d 359 (2007), abrogated by Gregory, supra. This factor shows the extreme disproportionality of life without parole for Moretti, especially based in part on conduct he committed while still suffering the transient weaknesses of the youthful brain. This Court should so hold.

D. CONCLUSION

Mandatory imposition of life without hope of parole is categorically disproportionate when one of the "strike" crimes was committed as a youthful adult, and this Court should so hold. In the alternative, the Court should find the sentence here was cruel and unusual punishment.

DATED this 5th day of April, 2019.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL AND EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Supplemental Brief to opposing counsel via this Court's upload service and to Mr. Anthony Moretti, DOC 860499, Clallam Bay CC, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

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