

FILED
SUPREME COURT
STATE OF WASHINGTON
5/13/2019 2:15 PM
BY SUSAN L. CARLSON
CLERK

NO. 95263-9 (CONSOLIDATED)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HUNG VAN NGUYEN,

Appellant.

RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEFS
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LAWYERS, WASHINGTON DEFENDER
ASSOCIATION, AND TEAMCHILD

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONNA L. WISE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
Seattle, Washington 98104
(206) 477-9497

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A. INTRODUCTION

Three amicus curiae briefs have been filed in support of the appellants in these consolidated cases, one by The American Civil Liberties Union Of Washington (hereafter ACLU), the second by the Fred T. Korematsu Center For Law And Equality (hereafter Korematsu Center), and the third jointly filed by Juvenile Law Center, Washington Association Of Criminal Defense Lawyers, Washington Defender Association, and Teamchild (hereafter Joint Amicus).

The ACLU argues that this Court must declare the imposition of any mandatory life sentence under the Persistent Offender Accountability Act (POAA) unconstitutional. It argues that any sentence that does not take into account all of the individual characteristics of an offender amounts to unconstitutional cruel punishment under the Washington Constitution, article I, section 14. WASH. CONST. art. I, § 14. The ACLU argument is based on its disapproval of the scope of the POAA, not sound constitutional doctrine. Its adoption would require this Court's rejection of the framework of the Sentencing Reform Act (SRA), the determinate sentencing system that was adopted to eliminate the unfair disparities that occur when a sentencing authority has complete discretion to impose any term (or none) at sentencing, and to accomplish a fairer and more

transparent system of justice. The ACLU has not justified such a radical shift in constitutional analysis.

The Korematsu Center contends that this Court should extend by two leaps the categorical analysis of cruel punishment claims that was applied to juveniles in State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018). Its argument is that this analysis first should extend to crimes committed by adults and further, should extend to prior adult convictions, and that Washington's Constitution prohibits counting violent offenses committed before an adult defendant is 22 years old as strikes under the POAA. This Court's Bassett analysis was adopted specifically to address sentencing of juveniles and there is no logical extension of that analysis to adult recidivists.¹

The Joint Amicus contends that the Eighth Amendment² mandates individualized sentencing of any adult who is a persistent offender, so that in every case the defendant's psychological state and home and family life at the time of each prior conviction for a most serious offense must be considered before imposing sentence. Eighth Amendment jurisprudence requiring individualized sentencing of juvenile offenders before imposing

¹ See State v. Nguyen, Supplemental Brief of Respondent at 8-11, for a discussion of the inapplicability of the analysis of Bassett to Nguyen's arguments.

² U.S. CONST. amend. VIII.

a life sentence cannot logically be extended to adult recidivists. The Joint Amicus misplaces its reliance on State v. Houston-Sconiers,³ because the rationale of that decision is specific to juveniles (“children are different”) and is not applicable to adult recidivists.

B. ARGUMENT

1. AMICI STRIKE AT THE CORE OF DETERMINATE SENTENCING.

Amici assert that it was a violation of the federal and State prohibitions on cruel punishment to impose a mandatory life sentence on Nguyen, a persistent offender under RCW 9.94A.570, upon his conviction for his third (and fourth) most serious offense at the age of 41. Their arguments explicitly challenge only the constitutionality of the POAA, but their analysis would invalidate Washington’s entire determinate sentencing system for adult felony convictions. Any defendant may oppose a sentence on the basis that it is disproportionate as applied to that defendant’s particular circumstances. See Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) (finding cruel and unusual a life sentence imposed for writing a bad check, where defendant’s criminal record did not include any crimes of violence). Amici have not

³ 188 Wn.2d 1, 21, 391 P.3d 409 (2017).

established that Washington’s determinate sentencing system, including life sentences for persistent offenders, is unconstitutional on its face.

The arguments of the ACLU and Joint Amici are based on the premise that the circumstances and characteristics of the individual defendant at the time prior crimes were committed must be examined before imposing a sentence that is predicated on the existence of those prior convictions. Amici rely on recent cases extending special constitutional protection to defendants being sentenced for crimes committed while they were juveniles, beginning with Roper v. Simmons,⁴ and extending through this Court’s decision in State v. Gilbert.⁵ They have not established that an extension of these cases to adult recidivists is constitutionally compelled.

The Korematsu Center and Joint Amici contend that there is an emerging consensus that the sentences imposed in these consolidated cases are unconstitutionally cruel. However they have cited no case that involved the sentencing of a person over 40 years old, as Nguyen was when he committed the current crimes.

⁴ 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (invalidating death penalty for crimes committed when under 18).

⁵ __ Wn.2d __, 438 P.3d 133 (2019).

The Korematsu Center asserts that there is an emerging consensus that there is no meaningful psychological distinction between persons under 18 and those who are 18-21 years old, but cites only the Joint Amicus as authority. Korematsu Center Brief at 5. That statement is unsupported by the brain research cited in the Joint Amicus brief, which establishes simply that the brain continues to mature as a person ages. See Joint Amicus Brief at 9-13. Thus, the research supports the conclusion that a person who is 20 is more mature than a person who is 16 or 17. This continuing maturation also is consistent with our common human experience.

To establish a national consensus that there is no distinction between juveniles and adults who are 18 to 21 years old, the Korematsu Center cites a journal article noting that many states (including Washington) prohibit use of juvenile convictions as strikes.⁶ This is true, but it is not the issue before this Court, which is the constitutional limitations on a sentence imposed where the defendant's prior convictions are all for offenses committed as an adult.

It is telling that in at least one study cited by the Joint Amicus, the “risky behavior” that young adults are described as more likely to engage

⁶ Korematsu Center Brief at 5 (citing Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. Rev. 581 (2012)).

in is described as “smoking cigarettes, binge drinking, driving recklessly, and committing theft.” Alexander Weingard et al, *Effects of Anonymous Peer Observation on Adolescents’ Preference for Immediate Rewards*, 17 *Dev. Sci.* 71 (2013) (cited by Joint Amicus at 11). This does not establish that young adults have a higher propensity to commit violent crimes, or do not understand the consequences of violent crimes, or should not be held responsible for committing violent crimes.

There simply is no emerging consensus in support of the standards proposed by the amici. The Korematsu Center concedes as much. In noting the allegedly limited mental capacity of defendants in their early twenties, it cites only cases involving sentences for current offenses committed at that age. Korematsu Center Brief at 7-8. It claims that this Court is constitutionally mandated to consider what it characterizes as an emerging consensus, but acknowledges the absence of a consensus – imploring this Court to be a consensus of one. *Id.* at 10.

There is no emerging penological consensus that convictions for crimes committed by an adult who was under 25 at the time should be discounted in determining the appropriate sentence for subsequent crimes committed by that person. No case or legislation is cited that has made such a distinction as to prior adult convictions.

Extension of the cruel punishment cases relating to juvenile offenders to adult recidivists would eviscerate the remaining framework of the Sentencing Reform Act as well. Just as a court sentencing a persistent offender must impose a sentence of life without parole under RCW 9.94A.570, a judge sentencing any adult for a felony conviction in Washington is limited to imposing a sentence within the standard range under the SRA, unless there is a statutorily-authorized basis for an exceptional sentence. RCW 9.94A.535. The standard range is determined by a defendant's offender score, calculated based on prior convictions and the statutorily specified seriousness level of the current crime, with any special enhancements added. RCW 9.94A.530. A sentencing court may consider individual characteristics of a defendant only to the extent permitted within the statutory framework.

To the extent that the SRA mandates a higher sentence when prior convictions increase the offender score, the arguments of the ACLU and Joint Amicus would compel sentencing courts to examine the circumstances of prior convictions and all of the surrounding personal circumstances of the defendant at that time, to determine the appropriate culpability that should attach to prior convictions. This reexamination of the nature and circumstances of each prior conviction is well beyond the

scope of decisions mandating the exercise of such discretion when imposing a sentence for a current crime committed by a juvenile.

The Eighth Amendment analysis of Houston-Sconiers confers absolute discretion in sentencing juveniles. In re Pers. Restraint of Meippen, No. 95394-5, 2019 WL 2050270 (Wash. S. Ct. May 9, 2019), slip op. at 1. Thus, if this Court were to accept the Joint Amicus argument that the Houston-Sconiers analysis extends to consideration of prior adult convictions, sentencing courts would have complete discretion to discount or to completely erase prior convictions from the offender score. Setting aside the difficulty of determining the circumstances of a defendant's decades-old prior convictions,⁷ if sentencing judges are free to change or erase a defendant's offender score in their discretion, the framework of the SRA will be dismantled.

Moreover, even if the proposed constitutional rules were limited to possible life sentences, the consequences for all sentences under the SRA would not be significantly limited. If an applicable standard range is a lengthy term, it may constitute a de facto life sentence, particularly if the defendant is 41 (as Nguyen was), and has committed a serious crime. If, for example, Nguyen had been successful in killing Thu Nguyen, as he

⁷ Nguyen's first strike occurred June 11, 1994. CP 113. That was 21 years before the current sentencing hearing, which was March 4, 2016. CP 106.

intended, his standard range for first degree murder would have been 31 to 40 years.⁸ Given his age, that likely would be considered a de facto life sentence. See State v. Ramos, 187 Wn.2d 420, 387 P.3d 650 (2017) (constitutional limitations on juvenile life sentences apply to de facto life sentences). Under those circumstances, if the arguments of the ACLU and Joint Amicus are accepted, it would be unconstitutional to require imposition of that sentence – the sentencing court must have absolute discretion to impose any sentence it deems appropriate. This result, conferring complete discretion on the judge as the crime being sentenced becomes more serious, or where the defendant’s high offender score results in a long sentencing range, is inconsistent with any analysis of cruel punishment or proportionality.⁹

Extension of the cruel punishment cases relating to juvenile offenders to adults also would eliminate the mandatory minimum sentences included in the SRA, at least as to offenders in their twenties or those with extensive criminal history, including for first degree aggravated murder (life), first degree murder (20 years), and first degree rape (5

⁸ Specifically, the range would be 374-486 months. The base range is 338-450 months based on Nguyen’s offender score of 7. CP 103; RCW 9.94A.515 (seriousness level of first degree murder is XV); RCW 9.94A.510. The two deadly weapon enhancements, 24 months on Count 1 and 12 months on Count 2, are added to the sentence range, and run consecutively to each other. RCW 9.94A.533(4).

⁹ There also would be uncertainty inherent in the question of what constitutes a de facto life sentence for a person who 41 or 51 or 61.

years). RCW 9.94A.540(1). The only group as to which the judge would not have complete discretion in sentencing would be older defendants with *no* criminal history. Such a result is contrary to common sense and is not supported by any emerging consensus as to appropriate punishment of adult crimes.

**2. THE RANGE OF REMEDIES PROPOSED
ILLUSTRATE THAT THE STANDARDS
ADVOCATED ARE POLICY PROPOSALS AND
NOT A MATTER OF CONSTITUTIONALLY-
MANDATED CONSENSUS.**

Each amicus claims that there is a national consensus that compels a finding that the sentence imposed on Nguyen is unconstitutional cruel punishment. That each claims a different result is mandated belies their claims that there is any consensus regarding the treatment of prior convictions when sentencing an adult defendant. Any policy decision that some prior adult convictions for violent crimes should be discounted or erased from consideration when a defendant is sentenced for another violent crime is not constitutionally mandated, it is properly a matter for the legislature.

The ACLU claims that current standards of decency demand a new component be added to the Fain¹⁰ proportionality test – that the sentencing court take into account the culpability of each defendant in light of all of their personal characteristics. As argued in the previous section of this response, if the proportionality required by the Washington Constitution requires that judges have complete discretion in all sentencings, not only the POAA but the entire framework of the Sentencing Reform Act would be unconstitutional. In contrast, the Korematsu Center claims that under this Court’s categorical analysis under the Washington Constitution cruel punishment clause, a bright line rule must be applied – violent offenses that are committed before a defendant is 22 years old cannot be treated as strikes under the POAA.

The Joint Amicus claims that this Court in State v. Houston-Sconiers, supra, expanded the scope of the Eighth Amendment ban on cruel punishment and that it and State v. Ramos¹¹ require that a sentencing court take into account “how children are different” before imposing a life sentence under the POAA. According to the Joint Amicus, a sentencing court must consider a defendant’s “home and family environments and the impact of familial and peer pressures” on the defendant and their criminal

¹⁰ State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980).

¹¹ 187 Wn.2d 420, 387 P.3d 650 (2017).

activities “at the time of each qualifying POAA offense.” Joint Amicus Brief at 15-16. But the SRA framework of reliance on convictions to determine a standard range is built to avoid reliance on facts beyond the existence of prior convictions, to ensure accountability and transparency in evaluating a criminal record. Abandonment of that framework would eliminate that limitation on consideration of additional facts related to prior convictions, because consideration of all of the facts will be necessary if the parties must litigate the defendant’s culpability. The obstacles to conducting a reliable and just consideration of the circumstances of prior convictions would be numerous: the inquiry would relate to events many years prior to the current sentencing; if the prior conviction was a negotiated guilty plea, it is unclear whether the later sentencing court could consider the real facts of the prior crime; and the multiple sources of information that would be offered would create a substantial burden for the sentencing court.

For example, at the time of Nguyen’s 2012 plea to second degree assault, he agreed that the court could consider the facts in the certification

for determination of probable cause.¹² Those facts were that not only did Nguyen strangle his sister when she asked him to leave her home, as he admitted in his guilty plea, he also punched her in the face and threw her into a wall. CP 177. After he strangled her, he held a broken piece of glass to her throat, with the jagged side to her skin, and yelled at her, “I’ll kill you.” CP 177. The victim’s 6-year-old son saw the attack and called 911, and the police arrived to interrupt the incident at that point. CP 175-77. Although Nguyen pled guilty to second degree assault and harassment, the facts of the incident convey much more clearly the actual threat and violence of his behavior. Nevertheless, proof of those facts would be difficult some years later.

The Joint Amicus and Nguyen rely on the capability of youth for rehabilitation, but Nguyen (and the other defendants in these consolidated cases) have had the opportunity for rehabilitation and yet have continued to commit violent crimes. The Joint Amicus points out that young adults are capable of change and rehabilitation even until the age of 25,¹³ but while adolescents and young adults may have greater capacity for

¹² That plea agreement included the provision: “REAL FACTS OF HIGHER/ MORE SERIOUS CRIMES: In accordance with RCW 9.94A.530, the parties have stipulated that the following are real and material facts for purposes of this sentencing: [x] The facts set forth in the certification(s) for determination of probable cause and the prosecutor’s summary. The defendant acknowledges and waives any right to have a jury determine these facts by proof beyond a reasonable doubt.” CP 192.

¹³ Joint Amicus Brief at 16.

rehabilitation in general, not every young adult who commits a crime will change for the better. Nguyen is well past age 25 and has demonstrated an enduring proclivity for violent crime. Nguyen is well past the point when the potential for rehabilitation would exist based simply on youth.

The ACLU advocates striking down the POAA because it reflects institutional biases and increases the racial inequities in the criminal justice system. Institutional biases certainly are reflected throughout the criminal justice system. On the other hand, ACLU cites a Senate Bill Report for the proposition that there is racial disparity in enforcement of the POAA, without noting that the quoted language was from the staff summary of public testimony on the original bill, voiced by an opponent of the POAA. Senate Bill Report for SB 5288 at 3 (cited by ACLU Amicus at 9).¹⁴ Striking down the structured sentencing system of the SRA, including the POAA, would allow judges absolute discretion in sentencing, but provide no more assurance that those sentencing decisions would not also reflect institutional bias and the unconscious biases of those judicial officers.

¹⁴ The ACLU also relies extensively on a recent book written by Marc Mauer and Ashley Nellis, employees of The Sentencing Project, an organization whose stated goal is to eliminate all sentences longer than 20 years. ACLU Brief at 9-10 (citing Marc Mauer & Ashley Nellis, *The Meaning of Life: The Case for Abolishing Life Sentences* (2018)). For their staff profiles, see <https://www.sentencingproject.org/staff/> (last visited 5/11/19).

The ACLU also posits that judges must have absolute discretion in sentencing because prosecutors otherwise establish the applicable sentence by their charging decisions. That logic applies to the entirety of the SRA, of course, as it was the goal of the SRA that similar sentences would be imposed on defendants who commit similar crimes. The Washington Constitution entrusts the discretion to make charging decisions to the prosecuting authority. State v. Rice, 174 Wn.2d 884, 900-907, 279 P.3d 849 (2012) (noting breadth and limitations of prosecutor's discretion). Nevertheless, no prosecutor can obtain a sentence under the POAA unless a crime is committed, proof of the crime is lawfully obtained, a trier of fact finds that the crime is proven beyond a reasonable doubt, and the sentencing court finds that the defendant has a prior conviction for a most serious offense, another conviction for a most serious offense that occurred after conviction on the first one, and that those prior strikes do not wash out based on time in the community without committing crimes. RCW 9.94A.030(38)(a); RCW 9.94A.570. There is no greater chance that impermissible bias or motive will infect a charging decision than that it will infect a judge's sentencing decision, whether those biases are conscious or unconscious, and the prosecutor's decision is limited by many checks in the system.

Any defendant may oppose a sentence on the basis that is disproportionate as applied to that defendant's particular circumstances. See Solem v. Helm, supra. The amici have not established that returning sentencing decisions to the absolute discretion of the sentencing judge is constitutionally mandated.

The legislature's changes to the Juvenile Justice Act in 2018 illustrate that it is actively supporting special treatment for juveniles and promoting rehabilitation efforts, even for juveniles who commit violent crimes. The legislature reduced the list of crimes that established automatic adult jurisdiction for 16 and 17-year-olds, expanded sentencing options for some crimes, and extended jurisdiction for commitment or supervision of juveniles to age 25 in limited circumstances, so that both the needs of the juvenile and protection of the public can be served, while the juvenile remains in the juvenile court system. 2018 WASH. LAWS ch. 162, §§1, 2, 4, 6, 7. The legislature did not extend juvenile court jurisdiction to crimes committed by anyone 18 years of age or older.

Each amicus argues essentially that because it does not approve of the lines drawn by the legislature, this Court should draw lines proposed by each respective amicus. That is not the nature of constitutional analysis of cruel punishment claims. These constitutional challenges to the structure of the POAA and the SRA as a whole should be rejected.

3. THERE IS NO ISSUE BEFORE THIS COURT AS TO NGUYEN'S INTELLECTUAL CAPACITY.

Nguyen's intellectual capacity was not raised as an issue in the trial court and the nature of his intellectual capacity is not an issue before this Court. Joint Amicus incorrectly asserts that there is a dispute about whether Nguyen had an intellectual disability that interfered with his ability to assist his defense. Joint Amicus Brief at 13 n.2. The authority cited for that statement is Nguyen's original Supplemental Brief in this Court, which was stricken by this Court before the amicus brief was filed, after the State's objection to the inclusion of new issues in Nguyen's brief.

There is no remaining dispute about Nguyen's competency. When a question was raised pretrial as to his competency to stand trial, he was evaluated, and the trial court observed, "It does appear that when Mr. Nguyen wants to cooperate, that he clearly is competent. But sometimes he chooses not to." RP 28. The Court of Appeals rejected Nguyen's challenge to the trial court's finding that he was competent and this Court did not accept review of that issue. State v. Nguyen, 2 Wn. App. 2d 1001 (No. 74962-5-I) (2018) (unpublished).

There has been no determination that Nguyen has an intellectual disability. Nguyen's claim, repeated in his amended brief, that he was "determined to have" borderline intellectual functioning is unsupported by

the record. He takes a statement out of context from a 2015 report of a competency evaluation performed by Western State Hospital psychologist Dr. Deanna Frantz. Amended Supplemental Brief at 2, citing CP 28-29. Nguyen asserts, “Nguyen was evaluated in 2012 and determined to have ‘borderline intellectual functioning IQ 70-85.’” Id. The 2015 report does state that a previous evaluator administered one psychological test that “estimates intellectual competence by evaluating an individual’s skill at solving novel abstract / figural problems” and reported that Nguyen’s result on that test “would indicate Mr. Nguyen was in the below average range (borderline intellectual functioning IQ 70-85) as measured by this test protocol.” CP 29. However, the next sentence of the excerpt from the 2012 report is, “While this test alone does not indicate a level of intellectual functioning in the borderline range, it does suggest that Mr. Nguyen has some possible cognitive difficulties.” CP 29 (emphasis added). The 2015 evaluation was conducted with the aid of a Vietnamese interpreter, and Nguyen relied on interpreters in court, but it has not been established whether an interpreter was used in the 2012 evaluation and whether the interpreter, other cultural influences, or volitional lack of cooperation may have had an effect on the results of the one test cited. CP 26; RP 47, 680. The truncated excerpt from a report related to a prior case

is not a determination that Nguyen has an intellectual disability, or a determination of the nature and extent of any such disability.

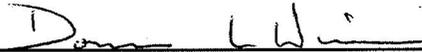
C. **CONCLUSION**

For the reasons set forth in the State's briefs, this Court should affirm Nguyen's sentence.

DATED this 13th day of May, 2019.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DONNA L. WISE, WSBA #13224
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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Superior Court Case Number: 15-1-00005-8

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- wapofficemail@washapp.org

Comments:

Sender Name: Bora Ly - Email: bora.ly@kingcounty.gov

Filing on Behalf of: Donna Lynn Wise - Email: donna.wise@kingcounty.gov (Alternate Email:)

Address:
King County Prosecutor's Office - Appellate Unit
W554 King County Courthouse, 516 Third Avenue
Seattle, WA, 98104
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