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Court of Appeals
Division I
State of Washington

No. 74962-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

HUNG VAN NGUYEN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

During Hung Van Nguyen's trial, defense counsel repeatedly told the court he had doubts about Nguyen's competency to stand trial and his ability to assist counsel in his defense. The court disregarded those concerns and found Nguyen competent, relying only upon the findings of an exam conducted in jail. The court's failure to give adequate deference to counsel's opinion regarding Nguyen's incapacity and inability to assist in his defense violated constitutional due process.

In addition, Nguyen's "three-strike" sentence is unconstitutional. One of the predicate convictions is unconstitutionally invalid on its face and the court erred in relying upon it. The sentence of life without the possibility of parole violates both the Eighth Amendment and article I, section 14, because Nguyen was only 20 years old when he committed his first "strike" and was therefore not fully culpable. And the sentence violates the Equal Protection Clause because the State was not required to prove the predicate convictions to a jury beyond a reasonable doubt.

B. ASSIGNMENTS OF ERROR

1. The court erred in finding Nguyen “understands the nature of the criminal proceedings against him/her and the defendant is able to effectively assist counsel in the defense of his/her case.” CP 24.

2. The court erred in concluding Nguyen was competent to stand trial, in violation of constitutional due process.

3. The court erred in imposing a sentence of life without the possibility of parole where one of the predicate convictions is constitutionally invalid on its face.

4. The sentence of life without the possibility of parole constitutes cruel and unusual punishment under both the federal and state constitutions.

5. The sentence of life without the possibility of parole violates the Equal Protection Clause.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. If an accused in a criminal case is not mentally competent to understand the nature of the proceedings or assist counsel in his defense, he may not be required to stand trial. Requiring a mentally incompetent person to stand trial violates constitutional due process. The court must give deference to the attorney’s assessment of the

defendant's competence and ability to assist counsel. Here, counsel repeatedly informed the court he had concerns about Nguyen's competence and ability to assist counsel in his defense. Did the trial court err in disregarding counsel's concerns and requiring Nguyen to stand trial?

2. A court may not impose a sentence of life without the possibility of parole under the Persistent Offender Accountability Act (POAA) if one of the predicate convictions is constitutionally invalid on its face. A criminal conviction resulting from a guilty plea is invalid on its face if the facts the defendant admits in pleading guilty do not establish the elements of the crime. Here, Nguyen's guilty plea statement for one of the predicate convictions demonstrates on its face that the facts he admitted do not establish the elements of second degree assault by strangulation. Did the court err in relying upon the conviction to impose a sentence of life without the possibility of parole under the POAA?

3. The Eighth Amendment prohibits cruel and unusual punishment and Article I, section 14 prohibits cruel punishment. Where Nguyen was only 20 years old when he committed one of the

predicate offenses, did imposition of a mandatory sentence of life without the possibility of parole constitute cruel punishment?

4. For some crimes in Washington, the fact of a prior conviction that elevates the punishment is classified as an “element” that must be proved to a jury beyond a reasonable doubt. For other crimes, such as those subject to sentencing pursuant to the POAA, the fact of a prior conviction that elevates the punishment is classified as a “sentencing factor” that need be proved to the court by only a preponderance of the evidence. Does the POAA violate the Equal Protection Clause by arbitrarily providing lesser procedural protections for prior convictions classified as “sentencing factors” than those classified as “elements,” even though the same government interest is served in both instances?

D. STATEMENT OF THE CASE

Hung Van Nguyen was born in Vietnam on July 30, 1973. CP 10. He moved to the United States in 1990. CP 27. He did not receive any formal education, in either Vietnam or the United States, and never learned to read or write. CP 28. He does not speak English well and required the assistance of a Vietnamese interpreter throughout the proceedings. See CP 26; RP 6, 16, 26, 47, 55.

During the last months of 2014, Hung was living off and on with his friend Thu Nguyen, who is also from Vietnam.¹ RP 351. Hung and Thu had been friends for many years. RP 316.

On December 11, 2014, Hung was at Thu's house. She asked him to leave but he refused. RP 325. She called the police, who arrived and persuaded Hung to leave. RP 326-28. He returned about an hour later. RP 328. He banged on the door and pleaded to come in. RP 328. He had no place else to stay and the weather was cold. RP 322. Thu did not let him in. RP 328. She went to bed. RP 329.

The next morning, Thu left the house to take her son to school. RP 329-30. She returned home and went to her bedroom to take a nap. RP 331. She said Hung emerged from the bedroom closet with a knife in his hand. RP 331-32. She said he stabbed her several times with the knife. RP 333-38.

Thu's friend Linh Truong came by to visit and knocked on the front door. RP 338, 363. Thu's grandson Jimori opened the door. Truong said she saw Thu on the floor and Hung on top of her with a knife in his hand. RP 365. Truong grabbed a chair and threw it at

¹ Although Hung Van Nguyen and Thu Nguyen have the same surname, they are not related. RP 318. In order to avoid confusion, they will be referred to by their given names in this brief.

Hung. RP 366. Hung turned around and stabbed at Truong in the side.

RP 368.

Thu was taken to Harborview Hospital. RP 393. None of her wounds was life threatening. RP 396-98, 406. She left the hospital later that same day. RP 408.

Hung was charged with one count of first degree assault of Thu, and one count of second degree assault of Truong. CP 50-51.

In a pretrial hearing, before Judge Roger Rogoff, defense counsel told the court he had concerns about Hung's "mental condition at present and also his future ability to assist counsel in his defense." RP 8. Counsel's concerns arose after he spoke to Hung and after he reviewed prior cases from his office in which attorneys had similar concerns about Hung's competency. RP 8-9. Counsel asked the court to order a competency evaluation. RP 8.

Judge Rogoff asked Hung if he was having trouble understanding the proceedings or communicating with his attorney. RP 8-9. Hung replied, "I don't know." RP 9. Judge Rogoff asked Hung if he knew what his lawyer's job was and he said, "He's a lawyer" and "They argue." RP 9. Judge Rogoff asked what the prosecutor's job was and Hung said, "I don't know." RP 9. Based upon Hung's

responses and counsel's representations, the court found "[t]here's a question as to whether or not he has a mental disease or defect which makes it difficult for him to assist his counsel and/or makes it difficult for him to understand that [sic] nature of the proceedings." RP 9-10.

The court ordered a competency evaluation. RP 9-10; CP 11-12.

Hung had a previous forensic mental health evaluation at Western State Hospital in February 2012. CP 28. At that time, he was determined to be in the below average range of intelligence with "borderline intellectual functioning IQ 70-85." CP 29.

For this case, a psychologist from Western State Hospital evaluated Hung at King County Jail. CP 26, 33. Hung was assisted by a Vietnamese interpreter. CP 26. Defense counsel was present. CP 26.

Consistent with the earlier evaluation, the psychologist found Hung's intellectual functioning was "below average to low average." CP 31. This was based on Hung's "educational history, previous assessment, fund of information, and vocabulary." CP 31.

The evaluator noted Hung reported being hospitalized as a child in Vietnam after being hit in the head by a rock. CP 28. He was also hospitalized around 2007 or 2008 after being injured in a car accident.

CP 2008. Finally, he reported being “jumped” and hit in the head sometime after 2012. CP 28.

The evaluator diagnosed Hung with “Intellectual Disability, Mild.” CP 32. The evaluator noted Hung was unable “to recall details related to his current legal situation,” but concluded this was “volitional” and not a function of cognitive impairment or underlying mood or thought disorder. CP 31-32. The evaluator concluded, “[w]hile Mr. Nguyen may be a difficult client to work with,” he did not lack the capacity to assist in his defense. CP 33.

Another pretrial hearing was held, before Judge James Cayce. RP 26. Defense counsel acknowledged the psychologist’s findings but maintained he still had concerns about Hung’s mental capacity. RP 27. Counsel pointed out the evaluator did not fully investigate Hung’s history of head injury and its “potential impact on this individual’s capacity.” RP 27-28. Counsel stated he still doubted Hung’s ability to assist counsel. RP 27-28.

Despite counsel’s concerns, Judge Cayce found Hung was competent to stand trial and assist counsel in his defense. RP 28-29; CP 23-33.

Following a trial before Judge LeRoy McCullough, the jury found Hung guilty of one count of first degree assault and one count of second degree assault as charged. CP 73-74. The jury also answered “yes” on the special verdict forms, finding he was armed with a deadly weapon. CP 75-76.

At sentencing, the State asserted Hung must receive a sentence of life without the possibility of parole under the POAA. RP 681. The State presented certified copies of judgments and sentences for two prior convictions for “strike” offenses. CP 113-28. One was a 1994 conviction for first degree burglary from King County Superior Court. CP 113. That crime was committed on June 11, 1994, when Hung was 20 years old. CP 10, 113.

The other prior conviction was from 2011 for second degree assault from King County Superior Court. CP 119. That conviction resulted from a guilty plea. CP 119.

Defense counsel argued the court could not consider the 2011 conviction because it was constitutionally invalid on its face. RP 683-84; CP 160. Counsel argued the conviction was invalid because the facts Hung admitted in pleading guilty did not establish the elements of the crime. RP 683-84, 692-93; CP 160.

The court overruled the objection and imposed a sentence of life without the possibility of parole for both counts. RP 694, 697; CP 105.

At the sentencing hearing, counsel again repeated his concerns about Hung's competency and ability to assist counsel in his defense.

RP 696. Counsel explained,

I believe it is incumbent upon me, in closing, to just advise the Court that in the preparation of this case, I had significant concerns regarding my client's competence. That issue was raised pretrial. There was an order finding him competent and that is how we proceeded.

RP 696. Counsel stated his concerns about Hung's competency "have remained with me during this entire matter." RP 696.

E. ARGUMENT

- 1. By failing to give adequate deference to defense counsel's representations regarding Hung's lack of competency, the trial court failed to follow all necessary procedures before finding Hung competent, in violation of constitutional due process.**

The conviction of an accused person who is not competent to stand trial violates his constitutional right to a fair trial under the Fourteenth Amendment's due process clause. State v. Mahaffey, 3 Wn. App. 988, 993, 478 P.2d 787 (1970); Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); U.S. Const. amend. XIV.

The constitutional standard for competency to stand trial is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and to assist in his defense with a rational as well as factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

“Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.” In re Pers. Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). The two-part test for determining legal competency to stand trial in Washington is: (1) whether the defendant understands the nature of the charges; and (2) whether he is capable of assisting in his defense. Id.

A defendant is deemed competent to assist counsel in his defense if he has “adequate recall of the factual events involved in the charge against him, . . . [is] able to communicate those recollections to his attorney and . . . [has] both an intellectual and an emotional appreciation of the ramifications and consequences of being charged with the crime.” State v. Gwaltney, 77 Wn.2d 906, 908, 468 P.2d 433 (1970).

The failure to observe procedures adequate to protect the right to be tried only while competent is a denial of due process. State v. Heddrick, 166 Wn.2d 898, 904, 215 P.3d 201 (2009). Washington law implements the requisite due process protections by statute, chapter 10.77 RCW. Id.; State v. Coley, 180 Wn.2d 543, 551, 326 P.3d 702 (2014). So long as a defendant maintains a challenge to competency, these statutory procedures are mandatory to satisfy due process. Heddrick, 166 Wn.2d at 909.

RCW 10.77.050 provides that “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.”

If there is reason to doubt the accused’s competency to stand trial, the statute requires the court to order an expert to “evaluate and report upon the mental condition of the defendant.” RCW 10.77.060(1)(a).

When the issue of competency is raised, the trial court must give “considerable weight” to defense counsel’s opinion regarding his client’s competency and ability to assist the defense. State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). Because defense counsel is usually the person with the closest contact with the defendant, his

opinion regarding his client's competency is of substantial importance.

City of Seattle v. Gordon, 39 Wn. App. 437, 441-42, 693 P.2d 741 (1985).

Even if the expert opines that the defendant is competent, the trial court may still disagree based upon the defendant's courtroom behavior or his attorney's representations. Dougherty v. State, 149 So.3d 672, 678 (Fla. 2014).

Here, the trial court did not give adequate weight to defense counsel's representations regarding Hung's lack of competency to stand trial. Counsel told the court repeatedly he did not think Hung had the capacity to assist him in his defense. RP 8, 27-28, 696. Counsel thereby informed the court that Hung either did not have an adequate recall of the factual events involved in the charges against him, was not able to communicate those recollections to his attorney, and/or did not have an intellectual or emotional appreciation of the ramifications and consequences of being charged with the crime. See Gwaltney, 77 Wn.2d at 908.

Counsel acknowledged that the expert found Hung competent but stated he disagreed with that finding. RP 27, 696. He told the court

his concerns about Hung's competency "have remained with me during this entire matter." RP 696.

Notwithstanding counsel's representations that Hung was not capable of assisting in his defense, the trial court found him competent to stand trial. RP 28-29; CP 23-33. This decision failed to give the required weight to counsel's opinion. Lord, 117 Wn.2d at 901; Gordon, 39 Wn. App. at 441-42. Given counsel's representations, the court was free to disagree with the expert's opinion. Dougherty, 149 So.3d at 678.

By failing to give adequate deference to defense counsel's opinion, the court violated the procedures it was required to follow to ensure Hung's constitutional right to be tried only while competent was protected. Heddrick, 166 Wn.2d at 904, 909.

The remedy for a trial court's failure to conduct a proper competency hearing is to order a new trial if the defendant is deemed competent to proceed on remand. Pate, 383 U.S. at 386-87. Thus, Hung is entitled to a new trial if he is deemed competent to proceed on remand.

2. The trial court erred in relying upon Hung’s 2011 conviction for second degree assault to impose a sentence of life without the possibility of parole because that conviction is constitutionally invalid on its face.

Hung’s prior 2011 conviction is constitutionally invalid on its face because the guilty plea statement demonstrates that the acts Hung admitted committing do not constitute the offense charged.

Before imposing a sentence of life without the possibility of parole under the POAA, the State must prove and the trial court must find the defendant has two prior convictions for “most serious offenses.” RCW 9.94A.030(38)(a); RCW 9.94A.570; State v. Manussier, 129 Wn.2d 652, 682, 921 P.2d 473 (1996).

The court may not impose a life sentence under the POAA by relying upon a prior conviction that is “constitutionally invalid on its face.” Manussier, 129 Wn.2d at 682; State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986). “Constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude.” Ammons, 105 Wn.2d at 187-88.

In determining whether a prior conviction is “invalid on its face,” the court examines not only the judgment and sentence but also

“those documents signed as part of a plea agreement.” In re Pers. Restraint of Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000); In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 354, 5 P.3d 1240 (2000).

It is a fundamental principle of constitutional due process that a guilty plea must be knowing, intelligent and voluntary. State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980); Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); U.S. Const. amend. XIV; Const. art. I, § 3. A court may not impose a sentence of life without the possibility of parole under the POAA if one of the predicate convictions demonstrates on its face that it was obtained as the result of a guilty plea that was not knowing, intelligent and voluntary. State v. Webb, 183 Wn. App. 242, 251, 333 P.3d 470 (2014), review denied, 182 Wn.2d 1005, 342 P.3d 327 (2015).

In order for a guilty plea to be knowing, intelligent and voluntary, the conduct the defendant admits committing must actually constitute the offense charged or an offense included therein to which the defendant has pled guilty. McCarthy v. United States, 394 U.S. 459, 466-67, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). Requiring this concurrence between the law and the acts the defendant admits is designed to protect a defendant “who is in the position of pleading

voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.” Id. (internal quotation marks and citation omitted); In re Pers. Restraint of Keene, 95 Wn.2d 203, 209, 622 P.2d 350 (1981).

Hung was charged with and pled guilty to second degree assault by strangulation. CP 141; RCW 9A.36.021(1)(g). The statute provides, “[a] person is guilty of assault in the second degree if he or she . . . [a]ssaults another by strangulation or suffocation.” RCW 9A.36.021(1)(g). “Strangulation” is defined elsewhere in the statute as “to compress a person’s neck, thereby obstructing the person’s blood flow or ability to breathe, or doing so with the intent to obstruct the person’s blood flow or ability to breathe.” RCW 9A.04.110(26).

The admitted facts in Hung’s guilty plea statement do not satisfy the elements of second degree assault by strangulation. Hung admitted “I did intentionally assault my sister . . . when I put my hand on her throat in [sic] attempt to strangle her.” Sub #93 at 17; CP 160. The guilty plea statement further states, “strangle means to cut off ability to breathe by pressing on airway/neck.” Sub #93 at 17; CP 160.

Hung did not admit facts sufficient to satisfy the elements of the charge because he admitted only “attempt[ing] to strangle” his sister.

CP 160. As stated, the statute requires proof that the defendant *actually* “[a]ssault[ed] another by strangulation.” RCW 9A.36.021(1)(g). Because Hung admitted only *attempting* to strangle his sister rather than *actually* strangling her, the facts he admitted do not constitute the offense charged. The guilty plea documents do not demonstrate the plea was knowing, intelligent and voluntary as required by constitutional due process. Boykin, 395 U.S. at 244; McCarthy, 394 U.S. at 466-67; Keene, 95 Wn.2d at 209.

Because the 2011 conviction is constitutionally invalid on its face, the trial court erred in relying upon it to impose a life sentence. Ammons, 105 Wn.2d at 187-88; Webb, 183 Wn. App. at 250-51. His sentence must be reversed and remanded for resentencing within the standard range. Webb, 183 Wn. App. at 251-52.

3. A mandatory sentence of life without the possibility of parole, with no consideration of Nguyen’s youthfulness at the time he committed one of the predicate offenses, amounts to cruel and unusual punishment in violation of the Eighth Amendment and Article I, section 14.

a. Article I, section 14 is more protective than the Eighth Amendment and established factors require the punishment be proportionate to the crime.

It is well-established that article I, section 14 of the Washington Constitution is more protective than the Eighth Amendment. See State v. Witherspoon, 180 Wn.2d 875, 887, 329 P.3d 888 (2014); State v. Roberts, 142 Wn.2d 471, 506, 14 P.3d 713 (2000).

The seminal case is State v. Fain, 94 Wn.2d 387, 402, 617 P.2d 720 (1980). There, our supreme court reversed a life sentence imposed under the former habitual offender statute because the three predicate crimes were all relatively minor. Id. The court recognized that the United States Supreme Court had upheld a life sentence under similar circumstances, but ruled that article I, section 14 should be construed as more protective than the Eighth Amendment. Id. at 391-92. Among other reasons, our state constitution explicitly prohibits “cruel punishment,” while the Eighth Amendment protects only against

punishments that are both “cruel and unusual.” See Fain, 94 Wn.2d at 392-93; Const. art. I, § 14; U.S. Const. amend. VIII.

While holding that article I, section 14 is more protective than the Eighth Amendment, the Fain court looked to federal constitutional jurisprudence as a starting point. The court held our cruel punishment clause, like its federal counterpart, must be interpreted consistent with “evolving standards of decency that mark the progress of a maturing society.” Fain, 94 Wn.2d at 396-97 (quoting Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)). The court also followed Eighth Amendment case law in concluding that article I, section 14 mandates *proportionate* punishment – meaning the punishment must be “commensurate with the crimes for which [the] sentences are imposed.” Fain, 94 Wn.2d at 396 (citing, *inter alia*, Coker v. Georgia, 433 U.S. 584, 591-92, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) (prohibiting death penalty for crime of rape)).

Fain set forth four factors to guide judges in determining whether a particular sentence is proportionate to the crime: (1) the nature of the offense; (2) the legislative purpose behind the sentencing statute; (3) the punishment the defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for

other offenses in the same jurisdiction. Fain, 94 Wn.2d at 397.

Although similar considerations are taken into account under the Eighth Amendment, they are viewed more strictly under article I, section 14.

Thus, even though Fain’s sentence would pass Eighth Amendment muster, it was “entirely disproportionate to the seriousness of his crimes” for purposes of article I, section 14. Id. at 402.

b. Recent United States Supreme Court cases emphasize that under the Eighth Amendment, punishment must be proportionate not just to the crime but also the defendant, and that youth is a particularly relevant characteristic.

Fain and federal constitutional cases predating Fain focused on the requirement that punishment be proportionate to the offense. But later Eighth Amendment cases emphasized that punishment must also be proportionate to the defendant. See Thompson v. Oklahoma, 487 U.S. 815, 834, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (invalidating death penalty for children under 16 and stating “punishment should be directly related to the personal culpability of the criminal defendant”); Atkins v. Virginia, 536 U.S. 304, 314, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (invalidating death penalty for intellectually disabled defendants); Roper v. Simmons, 543 U.S. 551, 578, 125 S. Ct. 1183,

161 L. Ed. 2d 1 (2005) (invalidating death penalty for defendants under age 18).

In Roper, the Court explained that because juvenile brains are not fully developed, young people who commit crimes are both less culpable and more amenable to rehabilitation than older defendants, and sentences must reflect this difference. Roper, 543 U.S. at 570.

This proportionality principle extends to cases outside the capital punishment context. In Graham, the Court held that juveniles who commit non-homicide crimes may not be sentenced to life in prison without the possibility of parole. Graham v. Florida, 560 U.S. 48, 74-75, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). The Court explained there are “two subsets” of cases holding certain types of punishments categorically violate the Eighth Amendment: “one considering the nature of the offense, the other considering the characteristics of the offender.” Graham, 560 U.S. at 60. The characteristics of a youthful offender preclude mandatory lifetime imprisonment. Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407 (2012) (extending Graham to homicide cases). Only in the rarest circumstances, after a sentencing hearing at which the impact of youth on the particular individual is addressed, may a

juvenile be sentenced to life in prison. Montgomery v. Louisiana, ___ U.S. ___, 136 S. Ct. 718, 733-34, 193 L.Ed.2d 599 (2016) (holding Miller applies retroactively and emphasizing that life sentences should almost never be imposed on juvenile defendants—even for the most egregious homicides).

c. Youth is also an important characteristic to consider when sentencing adults under the Sentencing Reform Act.

The Washington Supreme Court has also acknowledged the importance of considering a defendant’s age as a potential mitigating circumstance in sentencing adults under the Sentencing Reform Act. State v. O’Dell, 183 Wn.2d 680, 689, 358 P.3d 359 (2015). O’Dell reversed a young adult’s sentence and remanded for consideration of whether his youth justified a sentence below the standard range. O’Dell, 183 Wn.2d at 698-99.

O’Dell found studies of brain development “establish a clear connection between youth and decreased moral culpability for criminal conduct.” Id. at 695. The court endorsed the data referenced in Roper, Graham, and Miller as well as other 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. “The brain isn’t fully

mature at . . . 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.” Id. at 692 n.5 (quoting MIT Young Adult Development Project: Brain Changes, Mass. Inst. of Tech., <http://hrweb.mit.edu/worklife/youngadult/brain.html> (last visited Dec. 13, 2016)).

Thus, age is highly relevant to sentencing not just for juveniles, but also for young adults. Id. (quoting Roper, 543 U.S. at 574) (“[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.”).

d. In light of recent developments, this Court should hold that a defendant’s personal characteristics, including his age, must be considered in deciding whether a sentence violates article I, section 14.

The confluence of the Washington Supreme Court’s decision in O’Dell and the United States Supreme Court’s decisions in Roper and its progeny suggest that a defendant’s young age must be considered in evaluating whether his sentence violates article I, section 14. Although it is well-established that article I, section 14 is more protective than the Eighth Amendment, Washington courts have not yet had occasion to update the state constitutional standard in light of these significant

developments. The Fain factors include consideration of the nature of the offense but do not explicitly include consideration of the defendant's characteristics. This Court should hold that punishment must be proportionate both to the offense *and to the offender* in order to comport with article I, section 14.

e. Hung's sentence of life without the possibility of parole violates article I, section 14.

“By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, mandatory life without parole poses too great a risk of disproportionate punishment.”

Montgomery, 136 S. Ct. at 726 (internal citation omitted).

An evaluation of all relevant factors demonstrates that Hung's life sentence violates article I, section 14. Hung was just 20 years old when he committed his first predicate crime. At that age, his mental and emotional development was far from complete. O'Dell, 183 Wn.2d at 691-92.

Other considerations also dictate reversal of this sentence. Not only was Hung just 20 years old when he committed his first strike offense, his second strike offense is for second degree assault, a class B felony. CP 119; RCW 9A.36.021. His presumptive sentence for the

current offenses in the absence of the POAA is 178 to 236 months. CP 103. Yet he is serving the same sentence as defendants convicted of multiple counts of aggravated murder. See RCW 10.95.030(1). Finally, Hung’s borderline intellectual functioning is an additional characteristic that should be considered.

Hung’s sentence of life without the possibility of parole is disproportionate in light of all relevant circumstances. The sentence should be reversed and remanded for resentencing within the standard range.

4. The arbitrary labeling of a persistent offender finding as a “sentencing factor” that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment.

a. Because a fundamental liberty interest is at stake, strict scrutiny applies to the classification at issue.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); U.S. Const. amend. XIV. When analyzing an equal protection claim, the Court applies strict scrutiny to laws implicating fundamental liberty interests. Skinner v. Oklahoma, 316 US. 535, 541,

62 S. Ct. 1110, 86 L. Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. Plyler, 457 U.S. at 217.

The liberty interest at issue here—physical liberty—is the prototypical fundamental right. “[T]he most elemental of liberty interests [is] in being free from physical detention by one’s own government.” Hamdi v. Rumsfeld, 542 U.S. 507, 529, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004). Thus, strict scrutiny applies to the classification at issue. Skinner, 316 U.S. at 541.

b. Under either strict scrutiny or rational basis review, the classification here violates the Equal Protection Clause.

Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. State v. Manussier, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Although the proper standard of review is strict scrutiny, the result of the inquiry is the same regardless of the lens applied. Under

either strict scrutiny or rational basis review, the classification here is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

The Legislature determined that the State has an interest in punishing repeat criminal offenders more severely than first-time offenders. For example, defendants who twice previously violated no-contact orders are subject to a significant increase in punishment for a third violation. RCW 26.50.110(5); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). And defendants who have twice previously been convicted of “most serious” (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW 9.94A.030(33); RCW 9.94A.570. But the prior offenses that cause the significant increase in punishment are treated differently simply by virtue of the arbitrary labels “elements” of a crime or “sentencing factors” which have been attached to them.

Where prior convictions that increase the maximum sentence available are termed “elements,” they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for communicating with a minor for

immoral purposes as a felony. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no-contact order must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact order as a felony. Oster, 147 Wn.2d at 146. In neither example did the Legislature label the facts “elements.” Courts simply treat them as such.

But where, as here, prior convictions that increase the maximum sentence available are termed “sentencing factors,” they need only be proved to the jury by a preponderance of the evidence. See State v. Witherspoon, 180 Wn.2d 875, 892-93, 329 P.3d 888 (2014). Just as the Legislature never labeled the facts in Oster or Roswell “elements,” the Legislature never labeled the fact at issue here a “sentencing factor.” Instead it is an arbitrary judicial construct. This classification violates the Equal Protection Clause because the government interest in either case is *exactly the same*: to punish repeat offenders more severely.

If anything, there might be a rational basis for requiring proof of prior convictions to a jury beyond a reasonable doubt in the “three strikes” context but not in other contexts because the punishment in the “three strikes” context is the maximum possible (short of death). Thus,

it might be reasonable for the Legislature to determine that the greatest procedural protections apply in that context but not in others. But it makes no sense to say greater procedural protections apply where the necessary facts only marginally increase punishment but need not apply where the necessary facts result in the most extreme increase possible.

As the United States Supreme Court explained, “merely using the label ‘sentencing enhancement’ to describe [one fact] surely does not provide a principled basis for treating [two facts] differently.” Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). But Washington treats prior convictions used to enhance current sentences differently based only on such labels. See Roswell, 165 Wn.2d at 192. “The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.” Skinner, 316 U.S. at 542.

The imposition of a sentence of life without the possibility of parole in this case violated the Equal Protection Clause. Hung should be resentenced within the standard range.

5. Any request that costs be imposed on Hung for this appeal should be denied because the trial court determined he does not have the ability to pay legal financial obligations.

This Court has broad discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016); RCW 10.73.160(1). An offender's inability to pay is an important consideration to take into account in deciding whether to disallow costs. Sinclair, 192 Wn. App. at 389.

Hung does not have a realistic ability to pay appellate costs. The trial court entered an order authorizing Hung to seek review at public expense and appointing public counsel on appeal. As the Court noted in Sinclair, RAP 15.2(f) requires that a party who has been granted such an order of indigency is required to notify the trial court of any significant improvement in financial condition. Sinclair, 192 Wn. App. at 393. Otherwise, the indigent party is entitled to the benefits of the order of indigency throughout the review process. Id.; RAP 15.2(f).

There is no trial court record showing Hung's financial condition has improved or is likely to improve. Hung received a sentence of life in prison without the possibility of parole. CP 105. At

sentencing, the court imposed only those legal financial obligations it deemed mandatory due to Hung's indigency. RP 697-98; CP 104. As in Sinclair, "[t]here is no realistic possibility that he will be released from prison in a position to find gainful employment that will allow him to pay appellate costs." Sinclair, 192 Wn. App. at 393. Because Hung does not have the present or likely future ability to pay appellate costs, this Court should not impose them if the State substantially prevails.

F. CONCLUSION

The trial court erred in finding Hung competent to stand trial. His conviction must be reversed and remanded for a new trial should he be deemed competent to proceed on remand. For various reasons, Hung's sentence of life without the possibility of parole is unconstitutional. The sentence must be reversed and remanded for resentencing within the standard range.

Respectfully submitted this 15th day of December, 2016.

/s/ Maureen M. Cyr

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 74962-5-I
)	
HUNG VAN NGUYEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF DECEMBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] HUNG VAN NGUYEN 725663 WSP 1313 N 13 TH AVE WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF DECEMBER, 2016.



X _____

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