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Brief of Fred T. Korematsu Center for Law and Equality as Amicus Curiae in Support of Petitioners

Fred T. Korematsu Center for Law and Equality

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No. 95263-9
(Consolidated with Nos. 95510-7 & 96061-5)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ANTHONY A. MORETTI,
HUNG VAN NGUYEN, and
FREDERICK ORR,

Petitioners.

BRIEF OF FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The statement of identity and interest of amicus is set forth in the Motion for Leave to File submitted contemporaneously with this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

But for strikes committed when they were between 18 and 21 years old, Mr. Moretti, Mr. Nguyen, and Mr. Orr would not be serving life without parole sentences under the Persistent Offender Accountability Act (POAA).[1] This Court could accept the artificial boundary of the eighteenth birthday and decide that because the strike offenses occurred when Mr. Moretti, Mr. Nguyen, and Mr. Orr were over 18 years of age, these individuals must serve life without parole—the harshest punishment under Washington's criminal law. Or, this Court could again embrace emerging science to apply justice and recognize, as it did in *State v. O'Dell*, that the intrinsic nature of youth extends beyond the eighteenth birthday. 183 Wn.2d 680, 358 P.3d 359 (2015). Because at least one of the strike offenses occurred when they were less culpable and therefore "less deserving of the most severe punishments," *Graham v. Florida*, 560 U.S. 48, 58, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), Petitioners ask the

[1] RCW 9.94A.555, 570; *see also* RCW 9.94A.030(35) (defining offender), (38) (defining persistent offender).

Court to determine that their punishment is disproportionate and therefore cruel, in violation of article I, section 14.

Amicus presents three points highlighting that under article I, section 14, a categorical bar of youthful strikes—strike offenses committed between the ages of 18 and 21—is doctrinally sound. First, courts and legislatures around the nation have responded to a growing body of science that the mitigating qualities of youth extend to at least 21 years old,[2] and this trend should inform the Court's understanding of the categorical bar analysis. Second, just as individual proportionality review of persistent offender punishment under article I, section 14 encompasses all strikes, so must categorical proportionality review of persistent offender punishment—making salient Petitioners' youth at the time of *each* strike. Third, characterization of recidivist schemes as punishment for only the last strike is inapposite in the context of proportionality review. Amicus discusses an inconsistency within this Court's article I, section 14 persistent offender proportionality jurisprudence that reviews all strikes, yet characterizes recidivist schemes as punishment for only the last strike by citing *State v. Lee*, 87 Wn.2d 932, 558 P.2d 236 (1976). The cases on which *Lee* relies for this rule are not grounded in proportionality

[2] *See generally* Br. of Amici Curiae Washington Association of Criminal Defense Lawyers, et al.

analysis, and are instead decisions upholding early habitual offender statutes against challenges based on double jeopardy, due process, and ex post facto protections.

ARGUMENT

I. COURTS AND LEGISLATURES ACROSS THE COUNTRY ARE ACKNOWLEDGING THAT THE MITIGATING QUALITIES OF YOUTH EXTEND TO AT LEAST 21 YEARS OF AGE, AND THIS TREND SHOULD INFORM THE COURT'S CATEGORICAL BAR ANALYSIS.

Proportionality analysis asks whether the punishment is disproportionate to either the crimes or the class of offender. *State v. Bassett*, 192 Wn.2d 67, ¶ 28, 428 P.3d 343 (2018); *Graham*, 560 U.S. at 59. While individual proportionality "weighs the offense with the punishment," *Bassett*, 192 Wn.2d ¶ 28, categorical proportionality analysis "requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Id.* (citing *Graham*, 560 U.S. at 67). Here, the Petitioners ask the court to consider the categorical proportionality of the class of offenders[3] serving life without parole based on one or more strike

[3] The State contends in its supplemental briefs that the class of offenders is ill-defined. Supp. Br. of Resp't in *Moretti* at 15-16; Supp. Br. of Resp't in *Nguyen* at 18; Supp. Br. of Resp't in *Orr* at 9-10. Petitioner Moretti defines the class as those serving life without parole based on one more strikes committed between the ages of 18 and 21. Supp. Br. of Moretti at 12-13, 19.

offenses committed as a youth, from ages 18-21.[4]

A categorical analysis consists of two prongs. *Bassett*, 192 Wn.2d ¶ 27. First, the Court considers national consensus with respect to the specific sentencing practice at issue. *Id.* Second, it requires this Court to exercise its independent judgment based on "'the standards elaborated by controlling precedents and by the [c]ourt's own understanding and interpretation of the [cruel punishment provision]'s text, history,…and purpose.'" *Id.* (quoting *Graham*, 560 U.S. at 61) (alternations in original). In these cases, that requires consideration of "'the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question,' and 'whether the challenged sentencing practice serves legitimate penological goals.'" *Id.* ¶ 34 (quoting *Graham*, 560 U.S. at 67). Because the parties' supplemental briefs cover the independent judgment prong in detail, amicus has taken care to not repeat those arguments, and instead provides additional argument on the national consensus prong.

While the issue before the Court is the constitutionality of youth strikes (18-21) rather than juvenile strikes (under 18), the consensus against juvenile adjudications and juvenile strikes is relevant, as the brain

[4] These three cases were stayed pending *State v. Bassett*, making the inclusion of the categorical challenge appropriate in supplemental briefing.

science demonstrates that the same deficits are present in both age groups. *See generally* Br. of Amici Curiae Washington Association Criminal Defense Lawyers, et al. (explaining the emerging consensus in the scientific community that there are no meaningful psychological or neurobiological distinctions between those who fit the current definition of juvenile, and those who are between 18 and 21). Professor Beth Caldwell's recent analysis of whether states with harsh recidivist statutes (allowing sentences from 15 years to life) permit the use of juvenile adjudications as prior convictions to enhance sentences under recidivist statutory schemes determined that such a national consensus exists. Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. Rev. 581, 617-25 (2012).[5]

While states' approaches to the use of adult convictions of juvenile offenders as strikes vary more than the use of juvenile adjudications, Caldwell notes that there may be an "emerging national consensus against using adult convictions of juvenile offenders for sentencing

[5] As of 2012, ten states, including Washington, RCW 9.94A.030(35), (38), have legislation that explicitly excludes the use of juvenile adjudications as prior convictions for three strikes sentencing. Caldwell, *supra*, at 619 n.240 (citing jurisdictions). Ten additional jurisdictions' statutes "most likely prohibit the use of juvenile adjudications as strikes." *Id.* at 619 n.241. Thirteen additional states appear to prohibit the use of juvenile adjudications as strikes through case law. *Id.* at 620 n.244. In total, as of 2012, thirty-three states most likely prohibit the use of juvenile adjudications to count as "strikes."

enhancements." *Id.* at 628; *see also Roper v. Simmons*, 543 U.S. 551, 566 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (it is the "consistency of the direction of change" rather than a static examination of the law at any particular point that is relevant (quoting *Atkins v. Virginia*, 536 U.S. 304, 315, 122 S. Ct. 2442, 153 L. Ed. 2d 335 (2002))). In 2012, Caldwell identified at least eight jurisdictions that "prohibit or limit the circumstances under which convictions of juvenile offenders in adult court may be used for future sentencing enhancement under three strikes laws." Caldwell, *supra*, at 628 n.282.[6] Since then, at least one state, Wyoming, as part of its *Miller*[7] fix statute, not only eliminated juvenile life without parole, but also excluded convictions of juveniles in adult court from counting as strike offenses under its habitual offender statute. Wyo. Stat. Ann. § 6-10-201(b)(ii) (permitting life without parole for three strikes only after three or more previous convictions for "offenses committed after the person reached the age of eighteen (18) years of age."); *see also* 2013

[6] These eight jurisdictions break down into two categories. Kentucky, New Jersey, New Mexico, North Dakota, and Oregon expressly limit or exclude the use of juvenile convictions as strikes. Ky. Rev. Stat. Ann. § 532.080(2)(b), 3(b); N.J. Stat. Ann. § 2C:44-7; N.M. Stat. Ann. § 31-18-23(C); N.D. Cent. Code § 12.1-32-09; Or. Rev. Stat. Ann. § 161.725. Alabama, New York, and Wisconsin do not allow the use of youthful offender convictions of juveniles in adult court as strikes. N.Y. Penal Law § 60.10; *Ex parte Thomas*, 435 So. 2d 1324, 1326 (Ala. 1982); *State v. Geary*, 95 Wis. 2d 736, 289 N.W.2d 375, 1980 WL 99313 (Ct. App. 1980).

[7] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 138 L. Ed. 2d 407 (2012).

Wyo. Sess. Laws 75 (showing *Miller* fix along with revision to habitual offender statute).[8] When *Graham* was decided, only six jurisdictions had prohibited JLWOP categorically, and another seven jurisdictions allowed JLWOP but only for homicide crimes. *Graham*, 560 U.S. at 62.

In conducting the categorical bar analysis, amicus also encourages the Court to take note of significant court decisions and legislative action across the country that acknowledge that youth continues to diminish culpability through the early twenties. *See, e.g.*, *Cruz v. United States*, No. 11-CV-787 (JHC), 2018 WL 1541898 (D. Conn. Mar. 29, 2018) (granting defendant's habeas petition on the ground that *Miller* applies with equal force to 18-year-olds and rendered his mandatory life sentence unconstitutional); *United States v. Walters*, 253 F. Supp. 3d, 2017 WL 2362644 (E.D. Wis. 2017) (imposing sentence of time served on 19-year-old offender, which was below federal guidelines, in recognition of underlying brain science); *In re Poole*, 24 Cal. App. 5th 965 (Cal. Ct. App. 2018) (vacating a parole board's decision denying parole in light of inadequate consideration of age of 19-year-old offender); Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, *Commonwealth v. Bredhold*, No. 14-CR-161, 2017 WL 8792559 (Fayette Circuit Court, 7th

[8] http://legisweb.state.wy.us/2013/Session Laws.pdf.

Div. Aug. 1, 2017) (Scorsone, J.), *review granted*, No. 2017-SC-436 (Ky. Feb. 15, 2018) (declaring death penalty unconstitutional for those under 21 years of age at the time of the offense, and relying on brain-science-related testimony of Dr. Laurence Steinberg, as individuals under 21 are categorically less culpable in the same way that *Roper* describes under 18 year olds as less culpable); *State v. Norris*, No. A-3008-15T4, 2017 WL 2062145 (N.J. Super. Ct. App. Div. May 15, 2017) (relying on *Miller* to support its decision to remand for resentencing a de facto life sentence imposed for murder committed by 21-year-old defendant); *State v. Reyes*, No. 9904019329, 2016 WL 358613 (Del. Super Ct. Jan. 27, 2016), *reversed on other grounds by State v. Reyes*, 155 A.3d 331 (Del. 2017) (on collateral review, vacating death sentence for trial counsel's failure to explore and present the mitigating evidence concerning the qualities of 18 year-old defendant's youth).

Legislative reform also reflects recognition of the diminished culpability of youthful offenders. California has provided youthful offender parole. A.B. 1308 (Cal. 2017) (amending Cal. Penal Code § 3051, http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1308 (extending youth offender parole eligibility to those who committed offenses before age 25). Alabama, Florida, Hawaii, and Virginia provide special status and resentencing relief to youthful

offenders. Ala. Code §§ 15-9-1 to 15-19-7 (permitting courts to designate certain offenders under the age of 21 as "youthful offenders," entitling them to a suspended sentence, a period of probation, a fine, and/or a term of incarceration not to exceed 3 years); Fla. Stat. § 958.04 (permitting alternative sentences for those under 21 at time of sentencing for any felony offense other than those carrying capital or life sentence, including supervision on probation, community custody, or incarceration not to exceed 6 years); Haw. Rev. Stat. § 706-667 (defining young adult defendant as under 22 that has not previously been convicted of a felony, and providing for specialized correctional treatment, community custody, individualized rehabilitative treatment, and/or sentencing to no more than 8 years); Va. Code § 19.2-311 (providing for relief of those convicted of certain first-time offenses occurring before age 21, including giving courts discretion to sentence to an indeterminate period of incarceration of four years). And Washington has joined Vermont in expanding juvenile court jurisdiction. S. 234, 2017-2018 Sess. (Vt. 2018), https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT201/ACT201%20As%20Enacted.pdf. As of February, four other jurisdictions had bills pending to expand juvenile court jurisdiction. Campaign for Youth Justice, 2019 Legislation on Youth Prosecuted As Adults in the States (Feb. 4, 2019), http://cfyj.org/2019/item/2019-legislation-on-youth-prosecuted-as-

adults-in-the-states.

Importantly, the determination of a national consensus is not dispositive. *Bassett*, 193 Wn.2d ¶ 33. And a consensus must always begin with one.

II. PROPORTIONALITY REVIEW UNDER ARTICLE I, SECTION 14 ENCOMPASSES ALL STRIKES THAT FORM THE BASIS FOR RECIDIVIST PUNISHMENT.

This Court must consider whether age categorically diminishes the culpability of the offenders at the time of *each of the strikes* in conducting a categorical proportionality analysis, as part of the exercise of its independent judgment. The consideration of all strikes is—and has been—central to proportionality review of persistent offender punishment under article I, section 14 since *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980).[9] In *Fain*, this Court considered the proportionality of a life sentence under the habitual offender statute in effect in 1980 by looking at the nature of "*each of the crimes that underlies his conviction as a habitual offender*" in determining whether Mr. Fain's sentence violated the more protective article I, section 14. *Id.* at 397-98 (emphasis added) (citing *Rummel v. Estelle*, 445 U.S. 263, 295, 100 S. Ct. 1133, 63 L. Ed.

[9] If this Court does not adopt the categorical approach to Petitioners' claims, *amicus* urges the Court to expand the *Fain* factors to encompass the characteristics of the offender, as articulated in the ACLU amicus brief.

2d 382 (1980) (Powell, J., dissenting) (considering each of the victimless crimes underlying a life without parole sentence)).

This Court's more recent decisions in *State v. Manussier*, 129 Wn.2d 652, 921 P.2d 473 (1996), and *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014), also reflect that proportionality analysis under article I, section 14 subjects each of the strike offenses to scrutiny, as well as the "qualifying" strike, in reviewing a sentence under the POAA. In *Manussier*, this Court's proportionality analysis under article I, section 14[10] explicitly considered the two prior strikes in addition to the third strike before determining that the sentence was not disproportionate. 129 Wn.2d at 485 (considering "*each of the offenses underlying his conviction* as a 'persistent offender" and that *all three* of his offenses were serious crimes (emphasis added)).

In *Witherspoon*, before concluding that the life sentence was not disproportionate, the Court looked at the nature of the first two strike offenses (first degree burglary and residential burglary with a firearm). 180 Wn.2d ¶ 27 (relying on the analysis in *Manussier* and *Lee*, where the

[10] This Court also considered the prior strikes under its Eighth Amendment proportionality analysis. *Id.* at 484 (contrasting Mr. Manussier's strike offenses as "far more serious" than the petitioners in *Solem* and *Rummel*, where the strike offenses were nonviolent property offenses (citing *Solem v. Helm*, 463 U.S. 277, 299, 103 S. Ct. 3001, 3013, 77 L. Ed. 2d 637 (1983); *Rummel*, 445 U.S. at 284-85)).

Court had considered the prior strikes in conducting proportionality analysis of prior persistent offender punishments). The *Witherspoon* Court also suggested that the "differences between children and adults" recognized in *Graham* and *Miller* might have application in proportionality analysis under article I, section 14, based on the offender's age at commission of "*all three* of his strike offenses." *Id.* ¶¶ 29-31 (emphasis added) (declining to apply *Graham* and *Miller*, because Mr. Witherspoon was an adult at the time of all three of his strike offenses).[11]

While the substance of the individual proportionality analysis in these three cases is inapplicable to the categorical challenge here, *Fain*, *Witherspoon*, and *Manussier* demonstrate more generally that proportionality analysis under article I, section 14 encompasses *all* of the conduct that forms the basis for the life without parole sentence. The third strike is not considered in a vacuum.

Federal decisions conducting proportionality analysis under the Eighth Amendment in persistent offender contexts also scrutinize all strike offenses.[12] *Solem v. Helm*, 463 U.S. 277, 296–97, 303, 103 S. Ct. 3001,

[11] The opinion does not state whether any of Witherspoon's strike offenses were committed between the ages of 18-21.

[12] The Fourth Circuit—the only circuit to date that has meaningfully considered the import of *Graham* and *Miller* on federal recidivist schemes under the federal sentencing guidelines—determined that a life sentence imposed under the de facto career offender provision of the federal sentencing guidelines was substantively unreasonable, where the majority of the predicate convictions

3013, 77 L. Ed. 2d 637 (1983) (life without parole imposed to punish the relatively minor criminal conduct underlying all strike offenses was disproportionate: "Helm's status [as a recidivist]. . .*cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor*"); *Rummel*, 445 U.S. at 284 (persistent offender

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occurred when the petitioner was a juvenile. *United States v. Howard*, 773 F.3d 519, 531-32 (4th Cir. 2014). The *Howard* court conducted a substantive reasonableness review, requiring courts to consider the "totality of the circumstances" by "proceed[ing] beyond a formalistic review of whether the district court recited and reviewed the 3553(a) factors [federal sentencing guidelines] and ensur[ing] that the sentence caters *to the individual circumstances of a defendant.*" *Id.* at 531 (citation omitted). The *Howard* court determined the district court erred by "focusing too heavily on Howard's juvenile criminal history in its evaluation of whether it was appropriate to treat Howard as a career offender." *Id.*; *see also id.* at 532 (relying on *Graham* and *Miller* to support its conclusion, given the diminished culpability of juvenile offenders).

The other federal cases relied on by the State to argue that the age of the offender in earlier strike offenses is not material either did not engage in substantive reasonableness review, and/or simply avoided the issue of youth altogether by concluding that sentencing took place at the time the offender was an adult. *See United States v. Hoffman*, 710 F.3d 1228, 1232 (11th Cir. 2013) (declining to consider youth under substantive reasonableness review, because *Roper* and *Miller* did "not deal specifically—or even tangentially—with sentence enhancement" (internal quotations omitted)); *United States v. Scott*, 610 F.3d 1009, 1018 (8th Cir. 2010) (rejecting individual proportionality argument, declining to engage in substantive reasonableness review, and declining to acknowledge the import of *Roper* and *Graham*, instead relying on *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002)—a case decided before *Roper*—that permitted juvenile court adjudications to enhance subsequent sentences for adult convictions); *United States v. Graham*, 622 F.3d 445, 457-64 (6th Cir. 2010) (declining to consider totality of circumstances in conducting reasonableness review and unpersuasively determining that *Graham v. Florida* does not apply because defendant was an adult at the time of the commission of the third strike offense); *United States v. Mays*, 466 F.3d 335 (5th Cir. 2006) (no substantive reasonableness review; declining to acknowledge applicability of *Roper* because there was no national consensus that sentencing enhancement based in part upon juvenile conviction contravenes modern standards of decency).

punishment is "based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes," but declining to find a life sentence based on nonviolent, petty property crimes constituted cruel and unusual punishment); *Rummel*, 445 U.S. at 300 (Powell, J., dissenting)[13] (engaging in an individual proportionality analysis by analyzing each of the three crimes in concluding that "a mandatory life sentence for the commission of three nonviolent felonies is unconstitutionally disproportionate").[14]

III. THE STATE'S RELIANCE ON *THORNE*, *LEE*, AND *LEPITRE* TO FORECLOSE CONSIDERATION OF PREVIOUS STRIKES IGNORES THE CONTEXT AND DOCTRINAL ROOTS OF THE CITED LANGUAGE.

There is, admittedly, a tension that exists in the language used by

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[13] Justice Powell's *Rummel* dissent foreshadowed his majority opinion in *Solem.*

[14] Further, the availability of proportionality review under article I, section 14 in the persistent offender context is material to factor 4 of the parties' *Gunwall* analysis. The preexisting Washington law demonstrates that the Court has subjected persistent offender punishment to proportionality analysis under article I, section 14, even where Eighth Amendment proportionality jurisprudence has, at times, restricted itself to apply only to capital punishment. *Rummel*, 445 U.S. at 272 ("Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."); *Rummel*, 445 U.S. at 274 ("[O]ne could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of sentence actually imposed is purely a matter of legislative prerogative."). *But see Solem*, 463 U.S. at 286-90 (comprehensively discussing the Court's proportionality jurisprudence to reaffirm that the Eighth Amendment guarantees proportionality between the crime and any criminal sentence, not just capital punishment).

this Court in its past decisions in POAA and other habitual offender statute cases. Specifically, this Court has simultaneously recognized that proportionality review encompasses *all strikes*, *Fain*, 94 Wn.2d at 397-98 (discussing each of the underlying crimes), while also pronouncing that Washington's recidivist schemes punish the last strike only, *State v. Thorne*, 129 Wn.2d 736, 776, 921 P.2d 514 (1996) ("The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime" (quoting *Lee*, 87 Wn.2d at 937)).[15] Importantly, the context for this pronouncement in *Thorne* is the Court's application of *Fain* factor 4 to determine if, as applied to Mr. Thorne, his punishment was disproportionate. The Court considered all of Mr. Thorne's previous convictions. 129 Wn.2d at 775. In *Lee*, the Court likewise considered all of Mr. Lee's offenses. 87 Wn.2d at 937, 937 n.4 (discussing Mr. Lee's prior convictions and finding sentence not disproportionate, and unlike the disproportionate sentence of a person whose "prior crimes were writing a check for insufficient funds and transporting a forged check across state lines"). These cases demonstrate that the Court examined not just the last offense but also the previous

[15] This Court cited the identical language from *Lee* in *Rivers*, *Manussier*, and, more recently, in *Witherspoon*. *State v. Rivers*, 129 Wn.2d 697, 714-15, 921 P.2d 495 (1996) (quoting *Lee*, 87 Wn.2d at 937); *Manussier*, 129 Wn.2d at 677 (quoting *Lee*, 87 Wn.2d at 937); *Witherspoon*, 180 Wn.2d ¶¶ 23-28 (quoting *Rivers*, 129 Wn.2d at 714-15 (quoting *Lee*, 87 Wn.2d at 937)).

offenses in order to determine disproportionality. Thus, the State's reliance upon *Thorne* and *Lee* to foreclose consideration of the previous strikes for Mr. Moretti, Mr. Nguyen, and Mr. Orr is misplaced.[16]

Instead, the import of the language in *Thorne* and *Lee* referring to recidivist statutes as punishing only the last strike becomes apparent when one follows the citation chain. The *Lee* Court, citing *State v. Miles*, 34 Wn.2d 55, 61-62, 207 P.2d 1209 (1949), rejected the proportionality argument in one sentencing, stating "[t]he life sentence…is not cumulative punishment for prior crimes. The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime," *Lee*, 87 Wn.2d at 239 (citing *Miles*, 34 Wn.2d at 61-62).

However, a close examination of the Court's sparse decision in *Miles* shows that the *Miles* Court conducted no proportionality analysis and upheld the habitual offender statute, citing the rules that habitual offenders "are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier

[16] The State focuses on the language quoted in *Lee* without placing it in context, in an effort to contract the scope of proportionality review to only the last strike. Supp. Br. of State in *Moretti* at 14 (citing *State v. Thorne*, 129 Wn.2d 736, 776, 921 P.2d 514 (1996) (quoting *Lee*, 87 Wn.2d at 937)); Supp. Br. of State in *Nguyen*, at 15 (citing identical rule from *Lee*) (quoting *Thorne*, 129 Wn.2d at 776 (quoting *Lee*, 87 Wn.2d at 937))); Supp. Br. of State in *Orr* at 6, 18 (citing a rule similar to the language quoted in *Lee* in *State v. Le Pitre*, 54 Wash. 166, 103 P. 27 (1909)).

penalties when they are again convicted," 34 Wn.2d at 62 (citing *Graham v. W. Virginia*, 224 U.S. 616, 623, 32 S. Ct. 583, 56 L. Ed. 917 (1912)), and that "punishment is for the new crime only," *id.* (citing *McDonald v. Commonwealth of Massachusetts*, 180 U.S. 311, 21 S. Ct. 389, 45 L. Ed. 542 (1901)). The two cases cited by the *Miles* Court for this rule involved challenges to early habitual criminal offender statues under double jeopardy, due process, and ex post facto challenges. *McDonald*, 180 U.S. 311 (rejecting a challenge to Massachusetts's habitual criminal statute based on the double jeopardy and ex post facto provisions because the "punishment is for the new crime only, but is the heavier if he is an habitual criminal"; no Eighth Amendment challenge brought); *Graham*, 224 U.S. at 623 (citing *McDonald*, 180 U.S. at 312-13) (rejecting a challenge to West Virginia's habitual criminal offender statute under due process and double jeopardy, reasoning that habitual criminal offenders "are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted").[17]

[17] While the petitioner in *Graham* apparently argued that his sentence was cruel and unusual punishment, *Graham*, 224. U.S. at 623, the Court resolved it in one sentence, again relying on cases that did not involve Eighth Amendment proportionality challenges: "Nor can it be maintained that cruel and unusual punishment has been inflicted," *id.* at 631 (citing *Re Kemmler*, 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 (1890) (rejecting challenge to New York's statute authorizing capital punishment by electric shock); *McDonald*, 180 U.S. 311; and

Similarly, in an even earlier challenge to a habitual criminal statute, *LePitre*, 54 Wash. 166, 03 P. 27 (1909), the Court summarily dismissed claims based on double jeopardy, ex post facto, jury trial rights, or cruel and unusual punishment with a single sentence: "It [the habitual criminal statute] merely provides an increased punishment for the last offense." *Id.* at 168 (citing secondary sources and *In re Miller*, 110 Mich. 676, 68 N.W. 990 (1896)). The decision *LePitre* relies on, *In re Miller*, a two paragraph opinion, dismissed an ex post facto challenge to a Michigan statute providing that convicts with prior criminal history would not be entitled to a reduction in sentence for good behavior, whereas those without prior criminal history would. *Id.* at 676. The *Miller* Court found no ex post facto violation. *Id.* at 677.

Thus, tracing the origins of the *Lee* and *LePitre* pronouncement reveals that these cases do not foreclose consideration of previous strike offenses. Instead, the context and history of *Lee* and *LePitre* simply reaffirm that recidivist statutes do not run afoul of due process protections or guarantees against double jeopardy or ex post facto laws. And more

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Moore v. Missouri, 159 U.S. 673, 676-77, 16 S. Ct. 179, 40 L. Ed. 301 (1895) (rejecting challenge to habitual criminal statute based on double jeopardy, reasoning that "[t]he increased severity of the punishment for the subsequent offense is not a punishment for the same offense for the second time, but a severer punishment for the subsequent offense, and rejecting the challenge based on cruel and unusual punishment in one sentence)).

fundamentally to Petitioners' cases, it is improper to rely on this pronouncement, as it has no place in proportionality review under article I, section 14.

CONCLUSION

Amicus asks this Court to apply what it recognized in *O'Dell*—that the same deficits of the juvenile brain are present beyond the artificial boundary of the eighteenth birthday. The culpability of those who commit strike offenses in their youth is inherently diminished, and therefore cannot be the basis for imposition of the harshest sentence now available in Washington. The most just and practical solution is to categorically bar strike offenses committed between the ages of 18 and 21 from counting as strikes under the POAA.

RESPECTFULLY SUBMITTED this 18th day of April, 2019.

s/ Jessica Levin

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on April 18, 2019, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 18th day of April, 2019.

s/ Jessica Levin

Jessica Levin
Counsel for Amicus Curiae
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