No. 95263-9
Consolidated with Nos. 95510-7 and 96061-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ANTHONY ALLEN MORETTI,
HUNG VAN NGUYEN, and
FREDERICK ORR,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

The American Civil Liberties Union of Washington ("ACLU") submits this amicus brief to urge the Court to expand the proportionality analysis adopted in *State v. Fain* to keep pace with the evolving legal framework and our society's contemporary understanding of justice. As is so amply demonstrated by the circumstances of the three Petitioners, to appropriately assess whether a particular sentence imposes unconstitutional punishment, a court must be able to take into consideration not just the characteristics of the *offense*, but also the characteristics of the *offender*. In light of recent brain science, and as recognized by courts nationwide, this need is particularly salient as applied to young offenders, whose youthfulness bears on—and often diminishes—the offenders' culpability. Only by adding this factor to the well-established *Fain* proportionality analysis can the Court's constitutional mandate keep pace with the state's "evolving standards of decency that mark the progress of a maturing society." *Hall v. Florida*, 572 U.S. 701, 708, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014) (citation omitted).

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The ACLU is an *amicus curiae*, and its identity and interests are set forth in the accompanying Motion for Leave to file an amicus brief.

III. STATEMENT OF THE CASE

The consolidated cases before the Court concern sentences of life-without-parole mandated by the Persistent Offender Accountability Act ("POAA") for the three Petitioners, each of whom committed at least one of the predicate strike offenses as a young adult. The parties' briefs presented the relevant factual background, and it will not be repeated here.

IV. ARGUMENT

Since capital punishment has been ruled unconstitutional, the most severe punishment possible in our state consists of a sentence of life in prison without the possibility of parole. But "to lock up a prisoner and take away all hope of release is to resort to another form of the death sentence."[1] The POAA imposes this harshest of sentences reflexively, stripping from the sentencing judge any discretion to account for relevant characteristics of the offender or the offense. While the legislature has authority to enact statutes that not only define crimes but also their punishment, "this 'authority is ultimately circumscribed by the constitutional mandate forbidding cruel punishment.'" *State v. Bassett*, 192 Wn.2d 67, 78, 428 P.3d 343 (2018) (quoting *State v. Fain*, 94 Wn.2d 387, 402, 617 P.2d 720 (1980)). Therefore, a robust proportionality test is

[1] Catherine Appleton & Brent Grover, *The Pros and Cons of Life Without Parole*, 47 Brit. J. Criminology 597, 606, 610 (2007).

critical to ensure that the sentences automatically imposed by legislative fiat still comply with not only the Eighth Amendment, but also the Washington Constitution. *See* Const. art. I, § 14.

A. The structure of the POAA leads to disproportionate and cruel sentences.

The cases before the Court exemplify the injustice inherent in the POAA's sentencing scheme. It mandates the harshest possible sentence for commission of a vast variety of strike offenses without any consideration of the characteristics of the defendant in imposing that sentence. One of the touchstones of proportionality is that "its scope is not static; rather, it 'must draw its meaning from the 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)). But the Court's proportionality test, as set forth in *Fain*, has not changed in almost 40 years. The analysis is limited to four factors, none of which considers the characteristics of the defendant. *Id*. at 397.

1. The context in which the POAA was enacted illustrates the need for a robust proportionality test.

In 1993, after highly publicized crimes committed by repeat offenders, the People of Washington enacted the POAA.[2] During this

[2] *See* Jennifer Cox Shapiro, *Life in Prison for Stealing $48?: Rethinking Second-Degree Robbery as a Strike Offense in Washington State*, 34 Seattle U. L. Rev. 935, 939-44 (2011) (discussing history of the initiative).

time, a "get tough on crime" attitude permeated the national psyche, as did the view that judges were too lenient because certain offenders were "so culpable and irredeemable, and their offenses so heinous, that they do not deserve the individualized consideration normally afforded defendants in this country."[3] These fears affected not only society's view of criminal culpability, but also its approach to criminal justice policy and sentencing.[4]

At the time of the POAA's enactment, society's "standards of decency" were different from those of today, particularly with respect to perceptions of culpability and youth, as is evident in the cases before the Court here. Until 2005, courts still sentenced minors to death. *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (holding that death penalty for youth under the age of 18 violates the Eighth Amendment). And it was not until 2010, almost 20 years after the POAA's passage, that the U.S. Supreme Court in *Graham v. Florida* prohibited life sentences for minors in non-homicide offenses. 560 U.S. 48, 59, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). By 2018, "[w]hen asked whether juveniles should be treated differently than adults, both the

[3] Perry L. Moriearty, *Miller v. Alabama and the Retroactivity of Proportionality Rules*, 17 U. Penn. J. Const. L. 928, 977 (2015).
[4] *See* Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. Crim. L. & Criminology 729, 746-51 (2011).

United States Supreme Court and this court have consistently answered affirmatively and now 'it is the odd legal rule that does *not* have some form of exception for children.'" *State v. Watkins*, 191 Wn.2d 530, 549, 423 P.3d 830 (2018) (Yu, J., dissenting) (quoting *Miller v. Alabama*, 567 U.S. 460, 481, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). Further, we now accept that the characteristics of youth persist past the age of 18. *See State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015).

2. The breadth of strike offenses and severity of the punishment imposed under the POAA underscores the need for a robust proportionality test.

The POAA exacerbates the proportion of punishment to crime because the statute covers an expansive range of "most serious offenses" while also imposing the single most severe form of punishment in the state. The POAA mandates a life-without-parole sentence for any individual convicted of a third, so-called "[m]ost serious offense." RCW 9.94A.030(33). But this list of "most serious offenses" by now includes *over 100 separate offenses*: all class A felonies and criminal solicitation or conspiracy to commit a class A felony (crimes such as murder, rape, first-degree assault, and first-degree child molestation); 17 other specific offenses including class B felonies such as second-degree assault and kidnapping; any other class B felony that the court found was sexually motivated; any felony involving a deadly weapon; and attempts to commit

any of those felonies. *Id*. This is not a narrow list of offenses. Indeed, Washington has the longest list of eligible felonies of any similar legislation nationwide.[5]

Two additional factors expand the list of strikes even further. The POAA applies retroactively, so any strike-offense conviction before December 2, 1993 that is comparable to a "most serious offense" on the strike list also counts as a strike offense. RCW 9.94A.030(33)(u). Also counting as a strike is "any federal or out-of-state conviction" for an offense that would qualify as a "most serious offense" under Washington law. *Id.*

Whether this laundry list of crimes is truly reflective of the "most serious offenses" is deeply suspect. The sentencing ranges for committing one of these "most serious offenses" varies, reflecting the ways in which we, as a society, have chosen to punish these crimes notwithstanding the POAA. *See* Appendix A (listing sentencing ranges for all strikes). At least nine of the crimes that the POAA designates as "most serious offenses" carry a maximum sentence of less than a year, with several having sentences as short as *three months*. *See id.* Thirty-nine offenses carry a maximum sentence of less than 10 years. *See id.* Because

[5] *See* Michael G. Turner et al., *"Three Strikes and You're Out" Legislation: A National Assessment*, 59 Fed. Prob. 16, 25 (1995).

sentences for any attempted offenses carry a sentence that is 75% of the recommended range,[6] that means that well over half of all of these "most serious offenses" carry sentences of less than ten years.

To take a specific example, consider second-degree assault. Its sentencing range for a first offense is three to nine months.[7] The U.S. Court of Appeals for the Ninth Circuit recently held that this same offense is *not* a crime of violence. *See United States v. Door*, 917 F.3d 1146, 1154 (9th Cir. 2019) (second-degree assault under RCW 9A.36.021(1) "is not a crime of violence because the offense, in the ordinary case, does not 'present a serious potential risk of physical injury to another'").

Compare that to those offenses more recognizable as the most heinous crimes: aggravated first-degree murder carries a mandatory sentence of life without parole; acts of terrorism face sentences of 240 months (20 years) to 360 months (30 years); first-degree rape is punished by 93 months (7.75 years) to 123 months (10.25 years).[8]

The removal of judicial discretion in sentencing when a defendant faces a third strike under the POAA suggests that every time an offender commits a serious offense, the circumstances are equivalent, which is not

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[6] 2018 Washington State Adult Sentencing Guidelines Manual 112, 271 (Wash. State Caseload Forecast Council 2018) (hereinafter "Sentencing Guidelines"). Sentencing Guidelines at 58-60.
[7] Sentencing Guidelines at 271.
[8] *Id*. at 268, 385, 424.

the case given the diversity in "most serious offenses." The disparity in strikes means that POAA sentences can easily become disproportionate punishment when all relevant factors are considered.

3. The POAA propagates systemic disparities and disproportionally punishes African Americans.

A second, separate reason exists for the Court to carefully scrutinize the punishment mandated by the POAA in light of the constitutional prohibitions. Three-strikes laws, like the POAA, exist around the nation and have for decades—and their impacts have now been analyzed carefully. (The Washington State Attorney General's Office recently issued a report recognizing that when it comes to racial disparities in the criminal justice system, "Washington State is not unique."[9])

The one-size-fits-all approach mandated by the POAA reflects our society's systemic, institutional biases. As one legislator aptly summarized it:

> The three strikes initiative promised to put away the 'worst of the worst' but it instead deepened the inequities in our corrections system: The resulting mass incarceration disproportionately impacted and severely damaged people of color.

[9] Wash. State, Office of Att'y Gen., *Consolidating Traffic-Based Financial Obligations in Washington State* 9 (Dec. 1, 2017), http://www.atg.wa.gov/reports-legislature.

State Sen. Jeannie Darnell (quoted in Seattle Post-Intelligencer, *'Three Strikes' Life in Prison Law Changed by Legislature* (Apr. 17, 2019)); *see also* Senate Bill Report for SB 5288 (Feb. 21, 2019) (bill eliminating second degree robbery as a strike, in part because "[t]here is a racial disparity in how the persistent offender statue is enforced.").

The POAA disproportionally punishes African American men. The Sentencing Guidelines Commission's most recent report from February 2009 found that in Washington, 314 individuals serve a term of life imprisonment under the POAA.[10] Of these, 40.4% were African American.[11] Yet, only about 4.2% of the general state population identifies as African American, a statistic that has remained relatively static since the 1990s.[12]

The foundation of the three-strikes punishment scheme further reflects the disproportionate impact of the criminal justice system on people of color. The key area for disparity under three-strikes laws is the impact of a prior record on enhancing the severity of sentence.[13] African Americans are considerably more likely to have a prior, or extensive,

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[10] 2009 Commission Report at 10.
[11] *Id*. *See also* Senate Bill Report for SB 5288 at 2 (Feb. 21, 2019).
[12] U.S. Census Bureau, *Quick Facts: Washington*, https://www.census.gov/quickfacts/fact/ table/wa/RHI125217#RHI125217 (last visited Apr. 16, 2019).
[13] *See* Marc Mauer & Ashley Nellis, *The Meaning of Life: The Case for Abolishing Life Sentences*, 106 (2018).

criminal record than other racial groups, whether because of overly aggressive policing or socioeconomic disparities that translate into higher involvement in crime.[14]

Further, racial and socioeconomic disadvantage begins at the point of arrest.[15] It is now well-documented that law enforcement resources are focused disproportionately on low-income communities of color.[16] Even more problematic, the POAA shifts the sentencing burden from *judges to prosecutors*, which contradicts the Washington sentencing guidelines' paramount goal of sentencing consistency.[17] Prosecutors may decide which charges to bring against a defendant, but judges lack discretion in sentencing if a person meets the definition of a "persistent offender."[18]

Given the expanse of the POAA and its consequences, the Court serves a critical function in ensuring that the mandatory sentences imposed via legislative fiat do not exceed the constitutional limitations created by our founders. As this Court acknowledged in *Bassett*, "[w]e are free to evolve our state constitutional framework as novel issues arise to ensure the most appropriate factors are considered." 192 Wn.2d at 85. That is

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[14] *Id*.
[15] *Id*. at 104.
[16] *Id*.
[17] *See* Daniel W. Stiller, Note, *Initiative 593: Washington's Voters Go Down Swinging*, 30 Gonz. L. Rev. 433, 435 (1995).
[18] *Id*. *See also* Senate Bill at 3 (noting geographic disparities in how prosecution of strike offenses).

precisely what the Court should do here. The *Fain* factors must evolve to consider characteristics of the offender—whether that characteristic is youth, race, mental disability, mental health, or another relevant consideration. Only then will courts have the tools necessary to protect against sentencing based on factors contrary to society's evolving standards of decency—one of them being systemic racism that the POAA perpetuates.

B. The *Fain* test is an inadequate tool for assessing the proportionality of sentences.

For nearly four decades, Washington courts have used the four-factor test announced in *Fain* to guide a proportionality analysis. The time has come to update this analysis to expressly incorporate a fifth factor into the proportionality test: the characteristics of the offender.

1. The *Fain* four-factor test is a floor, not a ceiling.

Jimmy Fain was convicted as a habitual criminal after forging and writing bad checks between 1960 and 1977 and sentenced to life in prison. *Fain*, 94 Wn.2d at 389-90. He challenged his sentence, arguing, *inter alia*, that it was disproportionate to the nature of his three strikes under the Washington Constitution. *Id.* at 391-92. The court agreed with Fain that proportionality principles apply even to legislatively mandated sentences, acknowledging that "the proportionality doctrine has been expanded in noncapital cases to help courts decide whether sentences of ordinary

imprisonment are commensurate with the crimes for which the sentences are imposed." *Id.* at 396.

At the time that *Fain* was decided, the need to attend to proportionality principles was clear, but the means for doing so was not, in part due to the "illusive" nature of categorizing "proportionality." *Id.* As the *Fain* court recognized, whether a given sentence is "proportional" to the crime committed is inherently tethered to "evolving standards of decency that mark the progress of a maturing society." *Id.* at 396-97 (quoting *Trop*, 356 U.S. at 101). Because "standards of decency" change over time, so should the proportionality standard.

An appropriate proportionality standard is difficult to administer for a second reason: "the possibility that the merely personal preferences of judges will decide the outcome of each case." *Id.* at 397. Washington courts after *Fain* have declined to consider additional factors that bear on evolving standards of decency and rightly should be included in the proportionality analysis. The time has come to change the test.

a. *Fain* relied on federal law applying the U.S. Constitution and therefore does not sufficiently protect against "cruel" punishments.

The *Fain* court's answer to the twin challenges of developing a test to adequately capture "evolving standards of decency" while simultaneously guarding against judicial bias was to rely on cases from

federal courts that had previously wrangled with this issue. The *Fain* court turned to *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), a case decided "in a remote federal circuit more than 80 years after the [Washington] state constitution was adopted." *State v. Rivers*, 129 Wn.2d 697, 734, 921 P.2d 495 (1996) (Sanders, J., dissenting); *see also Bassett*, 192 Wn.2d at 84-85 (explaining the four *Hart* factors are derived from a "nonbinding" court). *Hart*, like *Fain*, concerned the proportionality of a life sentence imposed under a state recidivist statute. *Hart*, 483 F.2d at 137. The *Hart* court, like the *Fain* court, acknowledged the difficulty in assessing proportionality given its "progressive," nonstatic nature and the equal need to apply "objective factors" to determine whether a sentence is constitutionally disproportionate to the underlying crime. *See id.* at 140.

But *Hart*, unlike *Fain*, "was expressly an Eighth Amendment case and stressed whether the punishment was 'unusual' rather than the nonrelative examination of 'cruel'" that the Washington Constitution requires. *Rivers*, 129 Wn.2d at 734-35 (Sanders, J., dissenting). *Hart* "did not even purport to be a construction of [the Washington], or any other, state constitution." *Id.* at 734.[19] Similarly, the *Fain* factors tilt towards

[19] The *Hart* four-factor analysis in turn derives from a concurring opinion in a Supreme Court case, *Furman v. Georgia*, 408 U.S. 238, 282, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Brennan, J., concurring). Furman, like *Hart* itself, dealt with the U.S. Constitution's prohibition of "cruel and unusual" punishment and bears not at all on proportionality under Washington's "cruel" punishment prohibition. *See id*.

assessing whether the punishment is "cruel *and* usual"—testing it against the punishment meted out in various jurisdictions and the intent behind the legislation.

Washington courts have long acknowledged that our state constitution provides its citizens with more protection than the U.S. Constitution. *See, e.g.*, *Fain*, 94 Wn.2d at 392 ("[W]e may interpret the Washington Constitution as more protective than its federal counterpart."); *Bassett*, 192 Wn.2d at 78 ("This court has repeatedly recognized that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment.") (internal quotations marks, citation and alterations omitted). To determine whether a state constitutional provision provides greater protection than its federal counterpart, the Court applies the six non-exclusive *Gunwall* factors,[20] which, applied here, make clear that article 1, section 14 of the Washington Constitution provides more protection than the Eighth Amendment.[21]

Fain's reliance on *Hart* fails to account for this important difference between the state and federal constitutions. At most, a stark *Fain* analysis—with no further examination—guarantees that sentences

[20] *See State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).
[21] *See* Am. Suppl. Br. of Pet'r Moretti at 14.

will satisfy the U.S. Constitution, with no regard for whether they pass muster under the Washington Constitution. As one former justice from the Court has already acknowledged, *see Rivers*, 129 Wn.2d at 734-35 (Sanders, J., dissenting), the *Fain* test on its own is today insufficient to assess proportionality under both the state and federal constitutions.

b. The *Fain* court did not intend the four-factor test to be the last word on proportionality.

A close reading of *Fain* confirms that the *Hart* four-factor proportionality test was intended to serve only as a starting point for assessing whether sentences are constitutional under the Washington Constitution. No part of *Fain* requires Washington courts to cabin the proportionality analysis to the four *Hart* factors. *See generally Fain*, 94 Wn.2d 387. The *Fain* court justified its adoption of the *Hart* factors based on two prior Washington cases that merely refer to, but do not themselves agree with, *Hart*. *See Fain*, 94 Wn.2d at 397 (citing *State v. Lee*, 87 Wn.2d 932, 558 P.2d 236 (1976) and *State v. Gibson*, 16 Wn. App. 119, 553 P.2d 131 (1976)). Based on these cases, *Fain* implies that Washington courts have long subscribed to the *Hart* test. *See id.* ("We have previously indicated that the standards enunciated in *Hart* may be useful in analyzing a claim of cruel punishment."). To the contrary, the courts in both cited cases distinguished, and did not adopt, *Hart*. *See Lee*,

87 Wn.2d at 937 n.4 ("The *Hart* case is factually distinguishable from this case."); *Gibson*, 16 Wn. App. at 125 (*Hart* is "not applicable").[22]

Hart itself suggests the four-factor test is merely a starting point. At the outset of its analysis, the *Hart* court acknowledged that "there are *several objective factors* which are useful" in determining whether a sentence is constitutionally disproportionate. 483 F.2d at 140 (emphasis added). The court further indicated that the appropriate test to be used to assess proportionality should be "cumulative" in nature, focusing on "combined factors." *Id.*

Precedent supports the four-factor proportionality test as a useful starting point—and it does not prohibit the extension of the test to reflect the evolving nature of what constitutes a proportional sentence.

2. The *Fain* factors do not reflect our current standards of decency because they do not consider the person being punished.

Fain itself dictates that proportionality must be assessed in view of "evolving standards of decency that mark the progress of a maturing society." 94 Wn.2d at 396-97. Because society's notions of decency evolve over time, the proportionality test similarly must "develop[] gradually in response to society's changes." *Id.* at 396. The current *Fain*

[22] Notably *Gibson* considered the proportionality of a life sentence under the U.S. Constitution, not the more protective Washington Constitution. 16 Wn. App. at 125-26.

factors, however, fail to capture significant evolutions in our social mores when they do not account for offender characteristics.

The circumstances presented by the three Petitioners before the Court in these consolidated cases underscore what is lacking in the current articulation of the proportionality test. The failure (or inability) of courts to consider the youthfulness of an offender at the time of a predicate strike flies in the face of the steadily evolving social stance that it is unjust to punish offenders prior to the brain's natural maturation, without any regard to youth as a mitigating factor. In the past 40 years, developments in brain science have informed society's conception of punishments that are "decent." Relevant studies show "that the parts of the brain involved in behavior control continue to develop well into a person's 20's." *O'Dell*, 183 Wn.2d at 691-92 (citations omitted). This phenomenon bears directly on culpability: "[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences" and, in essence, make young offenders less blameworthy. *Miller*, 567 U.S. at 472.

As argued persuasively in the Petitioners' mcmcbriefing, the Court here should find that the commission of a strike offense while the offender was still a youthful adult must be considered when evaluating the proportionality of their sentences under the POAA. The federal precedent

(finally) eliminating the harshest punishments for juveniles—*Roper*, *Graham*, and *Miller*, focused on the characteristics of the offender that required the evolution of the jurisprudence.[23]

But our nation's consciousness, and jurisprudence, has evolved in more than just the recognition that both science and justice demand treating children differently. For example, both this Court and federal constitutional law has evolved significantly to consider the mental capacity of the defendant. *See Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (striking down on Eighth Amendment grounds imposition of death penalty for developmentally disabled offenders).

Although Washington courts have begun to recognize and follow evolved standards of decency in sentencing,[24] none have been willing to evolve the *Fain* test.

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[23] *See Roper*, 543 U.S. at 578 (striking down on Eighth Amendment grounds imposition of death penalty for any juvenile crime based on the offender's youth); *Graham*, 560 U.S. at 60-61 (striking down life sentence without possibility of parole for all juvenile crimes except homicide based on Eighth Amendment, focusing on the characteristics of the offender); *Miller*, 567 U.S. at 481 (striking down on Eighth Amendment grounds automatic imposition of life without possibility of parole for homicides committed while a youth, focusing on characteristics of the offender).

[24] *See State v. Houston-Sconiers*, 188 Wn.2d 1, 20-21, 391 P.3d 409 (2017) (striking down decades-long sentences based on characteristics of offenders who were youths when the crimes were committed but adults when sentenced, noting an "Eighth Amendment requirement to treat children differently, with discretion").

A recent case underscores Washington courts' struggle. In *Bassett*, this Court assessed the constitutionality of a juvenile's life sentence without parole. 192 Wn.2d 67. The Court toiled to identify the appropriate analytical framework. *See id.* at 82-85. It acknowledged that, though "*Fain* is the traditional test" to assess the constitutionality of a sentence, that framework "does not include significant consideration of the characteristics of the offender class" and therefore is "ill suited" to the task. *Id.* at 82-83. The Court thus employed the "categorical" analysis, which does consider offender characteristics. *See id.* at 84. But this new analysis is hampered by the need to define a class—a weakness exploited by the Respondents' briefing.

Expanding the *Fain* analysis to allow a court to consider not just the offense, but also the offender, will alleviate the need to do justice piecemeal, considering a specific class or characteristic at a time. At issue right now is the characteristic of youth. But even a ruling finding categorically that a strike committed while a youthful adult will always result in finding the resulting life-without-parole sentence cruel will do nothing to address the concerns about sentencing offenders that have intellectual disabilities, mental illnesses, or other striking characteristics that must be considered to ensure a sentence is proportional.

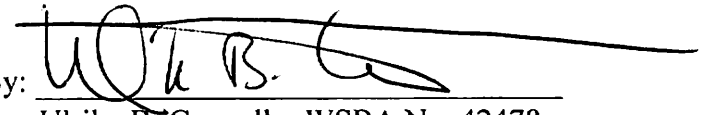
Washington courts' failure to update *Fain* in response to objective indicators of evolving decency standards provides courts with fewer tools to assess proportionality from an impartial standpoint and therefore increases (and does not protect against) the possibility that judges will inject their personal preferences into the proportionality analysis. To avoid this danger, and to bring *Fain* in line with current standards of decency, the proportionality test (like Washington's categorical test) must consider "the culpability of the offenders at issue in light of their crimes and characteristics." *Id.* at 83 (citation omitted).

V. CONCLUSION

To ensure that the proportionality analysis used to assess the constitutionality of a sentence can keep pace with our evolving understanding of justice and punishment, the Court should expand the long-standing *Fain* analysis and allow courts to consider the individual characteristics of the offense and the offender.

DATED: April 19, 2019

PERKINS COIE LLP

By: 

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CERTIFICATE OF SERVICE

Today I caused to be electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal, which will automatically cause such filing to be served on counsel for all other parties in this matter via the Court's e-filing platform.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: April 19, 2019, at Seattle, Washington.

June Starr
June Starr

Appendix A: Summary of Sentencing Ranges for Strike Offenses*

	RCW	Criminal Offense	Sentencing Range (in months): Low - High
1	10.95.020	Aggravated Murder 1	Life w/o parole
2	9A.32.055	Homicide by Abuse	240-360
3	70.74.280(1)	Malicious Explosion of a Substance 1	
4	9A.32.030	Murder 1	
5	70.74.280(2)	Malicious Explosion of a Substance 2	123-164
6	70.74.270(1)	Malicious Placement of an Explosive 1	
7	9A.32.050	Murder 2	123-220
8	9A.40.100(1)	Trafficking 1	
9	9A.36.011	Assault 1	93-123
10	9A.36.120	Assault of a Child 1	
11	9.68A.101	Promoting Commercial Sexual Abuse of a Minor	
12	9A.44.040	Rape 1	
13	9A.44.073	Rape of a Child 1	
14	9A.40.100(3)	Trafficking 2	
15	9A.32.060	Manslaughter 1	78-102
16	9A.44.050	Rape 2	
17	9A.44.076	Rape of a Child 2	
18	46.61.520(1)(b)	Vehicular Homicide – In a Reckless Manner	
19	46.61.520(1)(a)	Vehicular Homicide – While Under the Influence of Intoxicating Liquor or any Drug	
20	9A.44.083	Child Molestation 1	51 - 68
21	69.50.415	Controlled Substance Homicide	
22	9A.44.100(1)(a)	Indecent Liberties - With Forcible Compulsion	
23	9A.40.020	Kidnapping 1	
24	9A.82.060(1)(a)	Leading Organized Crime – Organizing Criminal Profiteering	
25	69.50.406(1)	Over 18 and Deliver Heroin, Methamphetamine, a Narcotic from Schedule I or II, or Flunitrazepam from Schedule IV to Someone Under 18	
26	9A.76.115	Sexually Violent Predator Escape	

*Ranges assume Offender Score of "0"; strikes without a recommended range not included

Appendix A: Summary of Sentencing Ranges for Strike Offenses*

	RCW	Criminal Offense	Sentencing Range (in months): Low - High
27	9A.36.130	Assault of a Child 2	31 - 41
28	70.74.180	Explosive Devices Prohibited	
29	79A.60.050(1)(a)	Homicide by Watercraft – While Under the Influence of Intoxicating Liquor or any Drug	
30	9A.82.060(2)(b)	Leading Organized Crime - Inciting Criminal Profiteering	
31	9A.56.200	Robbery 1	
32	9.68A.040	Sexual Exploitation of a Minor	
33	9A.48.020	Arson 1	21 - 27
34	79A.60.050(1)(b)	Homicide by Watercraft – In a Reckless Manner	
35	9A.32.070	Manslaughter 2	
36	9A.88.070	Promoting Prostitution 1	
37	9A.52.020	Burglary 1	15 - 20
38	9A.44.086	Child Molestation 2	
39	79A.60.050(1)(c)	Homicide by Watercraft - Disregard for the Safety of Others	
40	9A.44.100(1)(b-c)	Indecent Liberties - Without Forcible Compulsion	
41	9.41.225	Use of Machine Gun in Commission of a Felony	
42	46.61.520(1)(c)	Vehicular Homicide - Disregard for the Safety of Others	
43	9A.76.170(3)(a)	Bail Jumping with Murder 1	12+ - 14
44	9A.64.020(1)	Incest 1 (When Committed Against a Child Under 14)	
45	9A.56.120	Extortion 1	6 - 12
46	9A.64.020(2)	Incest 2 (When Committed Against a Child Under 14)	
47	9A.40.030(3)(a)	Kidnapping 2	
48	9A.40.030(3)(b)	Kidnapping 2 With a Finding of Sexual Motivation	
49	9A.44.060	Rape 3	
50	9A.36.021(2)(a)	Assault 2	3 - 9
51	9A.36.021(2)(b)	Assault 2 With a Finding of Sexual Motivation	
52	46.61.522(1)(a-b)	Vehicular Assault – In a Reckless Manner or While Under the Influence of Intoxicating Liquor or any Drug	

*Ranges assume Offender Score of "0"; strikes without a recommended range not included

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Appellate Court Case Title:	State of Washington v. Anthony Allen Moretti
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