No. 100239-4

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

State of Washington, Plaintiff/Respondent,

v.

Anthony Wright, Defendant/Appellant.

MEMORANDUM OF *AMICI CURIAE* WASHINGTON DEFENDER ASSOCIATION, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, ACLU-WASHINGTON, FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, & SEATTLE CLEMENCY PROJECT IN SUPPORT OF REVIEW

D'Adre Cunningham WSBN 32207 Cindy Arends Elsberry WSBN 23127 Washington Defender Ass'n 110 Prefontaine Pl S, Ste 610 Seattle, WA 98104 T: (206) 623-4321 E: dadre@defensenet.org cindy@defensenet.org Attorneys for amicus curiae	Thomas E. Weaver, WSBN 22488 Attorney at Law PO Box 1056 Bremerton WA 98337 T: (360) 792-9345 E: tweaver@tomweaverlaw.com Attorney for amicus curiae

WASHINGTON DEFENDER ASS'N	WASHINGTON ASS'N OF CRIMINAL DEFENSE LAWYERS
Melissa R. Lee, WSBN 38808 Robert S. Chang, WSBN 44083 Jessica Levin, WSBN 40837 RONALD A. PETERSON LAW CLINIC SEATTLE UNIVERSITY SCHOOL OF LAW 1112 E. Columbia Street Seattle, WA 98122 T: (206) 398-4025 E: changro@seattleu.edu leeme@seattleu.edu levinje@seattleu.edu Attorneys for Amicus Curiae FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY	Nancy Talner, WSBN 1196 Antoinette M. Davis, WSBN 29821 Jaime Hawk, WSBN 35632 ACLU OF WASHINGTON FOUNDATION P.O. Box 2728 Seattle, WA 98111 T: (206) 624 2184 E: talner@aclu-wa.org tdavis@aclu-wa.org jhawk@aclu-wa.org Attorneys for amicus curiae ACLU-WASHINGTON
Jennifer Smith, WSBN 35774 Executive Director SEATTLE CLEMENCY PROJECT 1126-34th Ave Ste 208 Seattle, WA 98122 T: (206) 276-6026 E: Jennifer@seattleclemencyproject.org Attorney for Amicus Curiae SEATTLE CLEMENCY PROJECT	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Washington Supreme Court Cases

Statutes

Constitutional Provisions

Other Authorities

The norms and notions of what just is, isn't always justice.

Amanda Gorman, excerpted from "The Hill We Climb"

2021 Presidential Inauguration poem

I. IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interests of amici curiae are set forth in the motion for leave to file, which is filed contemporaneously with this memorandum.

II. INTRODUCTION

The breadth, scope, and depth of America's tolerance of historic and ongoing harms to, and mistreatment of, people who are members of disfavored racial groups is overwhelming, at best, and damning at worst. People of color, in particular Black and Native American people, have historically been and continue to be treated more harshly in Washington's criminal legal system in comparison to their white counterparts.[1] Courts

---

[1] *See* Research Working Group, Task Force 2.0 Race and Washington's Criminal Justice System, *2021 Report to the Washington Supreme Court*. Fred T. Korematsu Center for Law and Equality 116, 9-26 (2021), https://digitalcommons.law.seattleu.edu/korematsu_center/116; Katherine Beckett and Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in*

have only just begun to acknowledge the impact that racial bias, whether explicit or implicit, has had on people of color in their everyday lives, let alone in the criminal legal system. *See, e.g.,* Supreme Court State of Washington, Letter to Members of the Judiciary and the Legal Community dated June 4, 2020.[2] The Legislature's attempt through the Sentencing Reform Act of 1981 ("SRA") to eliminate racial discrimination at felony sentencing hearings has ultimately failed. In fact, the SRA's sentencing scheme, as interpreted by *State v. Law,* 154 Wn.2d 85 (2005), over-emphasizes offense-specific criteria (a person's

---

Washington State, A Report for ACLU of Washington. ACLU of Washington 50-54 (2020), https://www.aclu-wa.org/file/104289/download?token=CRwJS5qWyst; Research Working Group, Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, Fred T. Korematsu Center for Law and Equality. Appendix A-8 Implicit Bias A17-A20 (2011), https://law.seattleu.edu/Documents/korematsu/race%20and%20criminal%20justice/preliminary%20report_report_march_1_2011_public_cover.pdf.

2 https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

crime and criminal history) and de-emphasizes criteria specific to the person. Since we now know that offense-specific criteria can be tainted by the effects of explicit and implicit biases, particularly racial bias, this interpretation should be revisited.

III. ISSUES TO BE ADDRESSED BY AMICI

Should this Court accept review and revisit the rule from *State v. Law* that prevents Washington courts from finding a person's extraordinary rehabilitation may constitute a mitigating basis in support of an exceptional lenient sentence?

IV. STATEMENT OF THE CASE

Amici adopt the facts as stated in the Petitioner's brief and supplemental briefs.

V. ARGUMENT

A. A person's demonstrated extraordinary rehabilitation should constitute a mitigating factor.

1. Many people serving lifelong and very long sentences will be resentenced in the near future.

There are many issues that can result a person returning to court to be resentenced for a felony crime, from legal errors at the original sentencing hearing to legislative changes in how we treat people being sentenced for serious crimes. Recent decisions of this Court, in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), *In re Domingo-Cornelio*, *cert. denied sub nom*., *Washington v. Domingo-Cornelio*, 141 S. Ct. 1753 (2021), *In Re Ali,* 196 Wn.2d 255, 474 P.3d 524 (2020), *cert. denied sub nom. Washington v. Ali*, 141 S. Ct. 1754 (2021), and *In re Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021), and recent legislative enactments, such as the 2013 amendments, known as the *Miller*-fix,[3] the 2019 and 2021 amendments to Washington's persistent offender statute (or "three-strikes

[3] Resentencing for all people adjudicated as adults and sentenced to mandatory life without parole (LWOP) for aggravated murder in the first degree as children under RCW 10.95.030 and RCW 10.95.035.

law"),[4] the 2020 amendments for certain drug crime convictions,[5] and the 2020 law creating prosecutor-initiated resentencing hearings, (or Senate Bill 6164 motions),[6] serve as a handful of examples of instances leading to resentencing hearings. In some of those resentencing hearings, evidence of significant, if not extraordinary, rehabilitation will be presented.

2. Guidance is needed from this Court on how courts should treat evidence of rehabilitation.

Providing an opportunity for rehabilitation is one of the primary goals of the SRA. RCW 9.94A.010(5). This Court's ruling in *Law,* barring consideration of significant and

---

[4] Robbery in the second degree was removed from the list of "strike" offenses under RCW 9.94A.030(32) and the law now provides for resentencing. *See* RCW 9.94A.647.

[5] These sentencing amendments provide for resentencing hearings for people convicted of drug crimes committed prior to July 1, 2004. *See* RCW 9.94A.519.

[6] Prosecutors may petition to resentence a person already sentenced for a felony "if the original sentence *no longer serves the interests of justice*." *See* RCW 36.27.130 *(emphasis added)*.

important evidence of rehabilitation in support of exceptional mitigated sentences in all cases, is inconsistent with the post-2005 amendments to the SRA and this Court's own recent jurisprudence providing for such consideration. The lower court here essentially decided we have two felony sentencing schemes in Washington, one that fashions sentences in light of the whole person before the court[7] and one that does not.

---

[7] Evidence of rehabilitation "may" be considered in SB 6164 motions. RCW 36.27.130 (3) ("The court may consider postconviction factors including, but not limited to, *the inmate's disciplinary record and record of rehabilitation while incarcerated*;…and *evidence that reflects changed circumstances since the inmate's original sentencing* such that the inmate's continued incarceration no longer serves the interests of justice."(emphasis added)). Evidence of rehabilitation will be considered when adults return to court for resentencing to address mandatory life without parole prison sentences for aggravated murder. *See Monschke,* 197 Wn.2d at 326 (rejecting that legislative bright line between 17 and 18 year-olds justifies excluding young and youthful adults from consideration of factors described in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) and *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017)). Evidence of rehabilitation as it may relate to a person's developmental maturity or youthfulness will also likely be considered by the court when people who were adjudicated as

In all of these situations, most people returning to court originally received lifelong, very long, or lengthy sentences, and all may present evidence of rehabilitation in support of a different, lesser sentence. Many will have had a significant amount of time to develop, mature, and transform. When their journey involves significant - and even extraordinary - rehabilitation, their efforts should make a difference in how they are treated now at sentencing. This court should accept

---

adults return to court for resentencing on crimes for crimes committed when they were children under *Domingo-Cornelio*, 196 Wn.2d at 259, or its companion case, *Ali*, 196 Wn.2d at 234. Evidence of transformation, maturity, and rehabilitation "must" be considered and given greater weight than retributive factors when adults return to court for resentencing of felony crimes committed when they were children. *See State v. Delbosque*, 195 Wn.2d 106, 121, 456 P.3d 806, 815 (2020)(The court must consider potential rehabilitation, RCW 10.95.030(3)(b), or the measure of rehabilitation that has happened since the crime's commission); *State v. Haag*, --- Wn.2d ----, 495 P.3d 241, 247 (2021) (*Miller*-fix hearings conducted under RCW 10.95.030 are "forward looking, focusing on rehabilitation rather than on the past" and "retributive factors must count for less than mitigating factors").

review to decide that no one,[8] like Mr. Wright, be left out of receiving meaningful relief under RCW 9.94A.535 from the operation of the SRA's presumptive sentence and mandatory prison terms.[9]

B. This Court should accept review to overrule *State v. Law* so that courts understand they may fashion sentences that are proportionate and just.

1. The ruling in *Law* should not be used now to prevent courts from fashioning sentences proportionate for the person being sentenced.

Washington courts must ensure that each sentence imposed on a person for a felony crime is proportionate to the

---

[8] Several other pathways to resentencing – whether pursuant to *State v. Blake*, "three strikes" reform, or the drug crime sentencing reform – lack any guidance on the extent to which sentencing courts have discretion when presented with evidence of rehabilitation, including whether they may impose an exceptional mitigated sentence.

[9] *See* Beckett and Evans, *About Time*, *supra*, note 1 at 37 (mandatory enhancements are a leading contributor to life and very long sentences); *see also infra*, note 14.

person being sentenced and the offense they committed.[10] Evidence of a person's extraordinary rehabilitation, whether or not it is related to the crime or the person's criminal history, is an important part of recognizing the humanity of every person being sentenced and ensuring that when substantial and compelling reasons exist to treat a person differently in order to fashion a proportionate sentence, the court can act. *But see State v. Law*, 154 Wn.2d 85, 98-99, 110 P.3d 717, 723–24 (2005); *State v. Estrella*, 115 Wn.2d 350, 358-59 798 P.2d 289,

---

[10] Courts have a particular duty to ensure that constitutional limits are observed in the imposition of sentences, regardless of what has been codified by the Legislature. *See Matter of Monschke*, 197 Wn.2d 305, 325, 482 P.3d 276, 286 (2021) (also noting Washington's cruel punishment clause provides greater protection than Eighth Amendment). *Roper v. Simmons*, 543 U.S. 551, 560, 125 S. Ct. 1183, 1190, 161 L. Ed. 2d 1 (2005) (internal quotations omitted)(constitutional protections "flow[] from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense.").

293 (1990)(rejecting an exceptional sentence fashioned to meet SRA's rehabilitative goals).[11]

2. The ruling in *Law* prevents trial courts from ensuring sentences are just.

Courts must be able to fashion sentences that are just.[12] This Court's prior interpretation of the SRA's nondiscrimination clause, RCW 9.94A.340,[13] prevent courts

---

[11] *See* also John M. Junker*, Guideline Sentencing: The Washington Experience*, 25 U.C. Davis L. Rev. 715, 746 (Spring 1992) (critiquing ruling in *State v. Estrella* for ignoring SRA's rehabilitative purpose and for providing no statutory or analytic rationale for barring use of "offender-related circumstances" for an exceptional mitigated sentence).

[12] *See* U.S. Const., XIV Amend.; Wash. Const. art. 1, sect. 3. *See, e.g., Quong Wing v. Kirkendall*, 223 U.S. 59, 63-64, 32 S.Ct. 192, 193, 56 L.Ed. 50 (1912) (XIV Amendment prohibits states from using police power through facially neutral laws that have discriminatory intent) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed.2d 220 (1886)). Courts also must ensure that sentencing laws are not imposed "in an arbitrary and racially biased manner." *See, e.g.*, *State v. Gregory,* 192 Wn.2d 1, 35, 427 P.3d 621, 642 (2018)(striking down Washington's death penalty under cruel punishment clause of the state constitution).

[13] The meaning of the nondiscrimination clause in this context is ambiguous at best. Courts should interpret statutes that are

from doing so. *State v. Law*, 154 Wn.2d 85, 98-99, 110 P.3d 717, 723–24 (2005); *cf. State v. Law*, 154 Wn.2d 85, 109, 110 P.3d 717, 728 (2005)(Sanders, J., dissenting). When the Legislature passed the SRA, proponents errantly believed that by imposing a grid-like system and limiting judicial discretion at sentencing to consideration of circumstances of the crime and a person's criminal history, it would eliminate racial bias in sentencing decisions. *See* David Boerner, *Sentencing in Washington: A Legal Analysis of the Sentencing Reform Act of*

---

ambiguous to avoid constitutional problems; *see Blake*, 197 Wn.2d at 170; *accord Jennings v. Rodriguez*, --- U.S. ---, 138 S. Ct. 830, 836, 200 L. Ed. 2d 122 (2018) ("…a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems."). *See Tommy P. v. Bd. of Cty. Comm'rs of Spokane Cty.,* 97 Wn.2d 385, 391, 645 P.2d 697 (1982)(courts must consider the intent as stated in the act, take all provisions as a whole and in relation to each other, and if possible, harmonize them).

1981, § 9.17, at 9–50 (1985). However, the SRA has failed in this goal.[14]

We now know that racial bias is pervasive in the criminal legal system, and it is not limited to disparity in sentencing.[15] Furthermore, we know that in Washington's criminal legal system, "implicit biases are pervasive, even among individuals

---

[14] Racial bias in sentencing decisions made under the SRA has also been well-documented. *See* Heather D. Evans, Ph.D. and Steven Herbert, Ph.D., *Juveniles Sentenced as Adults in Washington State, 2009-2019*. University of Washington, at 4 (2021)(noting extraordinary over-representation of youth of color among children who have been adjudicated as adults cannot be accounted for by criminal history or by type of offense), https://www.opd.wa.gov/documents/00866-2021_AOCreport.pdf; Beckett and Evans, *About Time*, *supra*, note 1 at 50-54; Research Working Group, Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System, 35 Seattle U. L. Rev. 623, 641-643, 645-648, 651-653 (2012), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2076&context=sulr.

[15] *See* Task Force 2.0 Race, *supra* note 1, at 17-21.; Evans and Herbert, Juveniles Sentenced, *supra* note 12 at 1-4; Task Force on Race (2012), *supra* note 12.

who do not openly express biased views."[16] Specifically, implicit racial bias informs decision-making long before the sentencing hearing takes place. These decisions impact who law enforcement targets for investigation; what charges prosecutors bring to court, including whether and how to plead facts in support of mandatory prison terms; and what charges prosecutors offer and negotiate in plea agreements. Further, prosecutorial discretion is not constrained by any part of the SRA. That is to say, who is arrested, what charges they face, and what charges they are convicted of are not racially neutral criteria, and therefore what crime a person is convicted of, whether a person has a criminal history record and what that criminal history record contains are not racially neutral criteria either.[17] Yet, this Court's ruling in *State v. Law* used these

---

[16] Evans and Herbert, *Juveniles* Sentenced, supra note 12 at 3 (citing Taskforce on Race (2011), *supra* note 1 at Appendix A8 Implicit Bias A17-A20).

[17] *See* Task Force on Race (2012), *supra* note 12 at Appendix B Prosecutorial Decision-Making; *see also* Beckett and Evans,

same two criteria to constrain judges from fashioning just sentences. *State v. Law*, 154 Wn.2d 85, 98-99, 110 P.3d 717, 723–24 (2005) ("Thus, RCW 9.94A.340 operates to regulate and constrain departures from the sentencing guidelines.").

Accepting review will allow this Court to remove the constraints placed upon the courts in fashioning just sentences for all people being sentenced or resentenced, who, like Mr. Wright, can demonstrate through their own extraordinary rehabilitation imposing a mitigated sentence at this time is just.

VI. CONCLUSION

For the reasons stated above, *Amici* respectfully request that petitioner's motion for discretionary review be granted.

About Time, *supra*, note 1 at 39 (Overall, though, the number of long, very long, and LWOP
sentences would have been reduced by 39 percent if offender scores had not increased during this period.")

Respectfully submitted this 22nd day of November 2021.

Electronically signed by Counsel for Amici Curiae listed below

D'Adre Cunningham WSBN 32207 Cindy Arends Elsberry WSBN 23127 Attorneys for amicus curiae WASHINGTON DEFENDER ASS'N	Thomas E. Weaver, WSBN 22488 Attorney for amicus curiae WASHINGTON ASS'N OF CRIMINAL DEFENSE LAWYERS
Melissa R. Lee, WSBN 38808 Robert S. Chang, WSBN 44083 Jessica Levin, WSBN 40837 Attorneys for Amicus Curiae FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY	Nancy Talner, WSBN 11196 Antoinette M. Davis, WSBN 29821 Jaime Hawk, WSBN 35632 Attorneys for amicus curiae ACLU-WASHINGTON
Jennifer Smith, WSBN 35774 Attorney for Amicus Curiae SEATTLE CLEMENCY PROJECT	

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on November 22, 2021, the foregoing 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, WA, this 22 day of November, 2021.

/s/ D'Adre Cunningham
D'Adre Cunningham
Attorney for Amicus Curiae
WASHINGTON DEFENDER ASSOCIATION

WASHINGTON DEFENDER ASSOCIATION

November 22, 2021 - 1:32 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,239-4
Appellate Court Case Title:	State of Washington v. Anthony Laurence Wright
Superior Court Case Number:	01-1-00772-7

The following documents have been uploaded:

- 1002394_Motion_20211122132828SC143289_5273.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Wright-Final Motion for Leave to File ACM.pdf
- 1002394_Other_20211122132828SC143289_4281.pdf
  This File Contains:
  Other - Memorandum of Amici Curiae
  The Original File Name was Wright-Final Memorandum of Amici.pdf

A copy of the uploaded files will be sent to:

- Jennifer@seattleclemencyproject.org
- ali@defensenet.org
- bpearce@spokanecounty.org
- cindy@defensenet.org
- ellis_jeff@hotmail.com
- gverhoef@spokanecounty.org
- jeffreyerwinellis@gmail.com
- jhawk@aclu-wa.org
- leeme@seattleu.edu
- lsteinmetz@spokanecounty.org
- scpaappeals@spokanecounty.org
- talner@aclu-wa.org
- tdavis@aclu-wa.org
- tweaver@tomweaverlaw.com

Comments:

Sender Name: D'Adre Cunningham - Email: dadre@defensenet.org
Address:
110 PREFONTAINE PL S STE 610
SEATTLE, WA, 98104-2626
Phone: 206-623-4321

Note: The Filing Id is 20211122132828SC143289