NO. 100873-2

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL REYNOLDS, JR.,

Appellant.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Petitioner Michael Scott Reynolds, Jr., seeks review of two claims rejected in the Court of Appeals' published opinion affirming his life-without-parole ("LWOP") sentence under the Persistent Offender Accountability Act ("POAA"). State v. Reynolds, No. 81022-7, 21 Wn. App. 2d 179, 505 P.3d 1174 (2022). Reynolds also seeks review of one claim he perfunctorily raises for the first time in his petition for review. Petition for Review at 10.

Reynolds' primary claim is that the Court of Appeals erred in applying the logic and analysis of State v. Moretti, 193 Wn.2d 809, 446 P.3d 609 (2019), to reject his claims that a life-without-parole ("LWOP") sentence for a violent attempted rape and sexually motivated burglary at age 33 violates the Eighth Amendment or article I, section 14 of the state constitution. Petition for Review at 2-3, 9-28. Specifically, Reynolds asserts that his sentence under the POAA—Washington's "three strikes and you're out" law—is unconstitutional, either categorically or

as applied to him, because his first "strike" in adult court was for an offense committed at age 17. Petition for Review at 2-3, 9-28.

Although this Court stated in Moretti that it was "express[ing] no opinion" on the constitutionality of a POAA sentence based in part on a prior strike committed as a juvenile rather than a 19-year-old, nearly all the disputed issues in this case are controlled by the logic and reasoning of Moretti. Like the defendants in Moretti, Reynolds' entire argument "depends on the assumption" that his POAA sentence punishes him for the strike offense he committed as a youth. Moretti, 193 Wn.2d at 826; Petition for Review. Moretti explicitly rejected that assumption based on over 100 years of well-established law. Id.

Reynolds does not ask this Court to overrule Moretti, and there is no valid basis on which to do so. Because the few remaining issues not controlled by Moretti do not warrant review, this Court should deny the petition for review.

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

Reynolds contends that the first, third, and fourth of these criteria are present in this case. As explained below, the Court of Appeals' decision faithfully applies this Court's prior decisions, the reasoning of which controls the outcome in this case. As a result, further clarification from this Court on these issues is not needed.

C. STATEMENT OF THE CASE

After two misdemeanor diversions, three misdemeanor adjudications, and seven felony adjudications, Reynolds was charged in juvenile court with attempted robbery in the first degree. CP 249, 392-93. The charge stemmed from a December 2001 incident in which then-17-year-old Reynolds, armed with a BB gun that looked like a real firearm, decided to rob a convenience store with two other teens. CP 387-88, 352. When the three teens entered the store, Reynolds pointed the gun at the clerk and demanded money, as they had planned. CP 382. The clerk opened the till to comply but then realized that the gun was not a real firearm. CP 352. The clerk slammed the till shut and ordered the three to leave. CP 352. As planned, Reynolds' 16-year-old compatriot threw a smoke grenade to aid their escape. CP 352.

Pursuant to plea negotiations, Reynolds agreed to the declination of juvenile court jurisdiction and pled guilty to attempted first-degree robbery in adult court, receiving a low-

end standard range sentence of 34.5 months in prison. CP 377, 398-401. Reynolds was released from prison to community custody in December 2004, when he was 20 years old. CP 164, 308.

Less than 13 months later, then-21-year-old Reynolds and an accomplice forced their way into an occupied residence, threatening the husband and wife who lived there with large knives and demanding money. CP 314. Reynolds took the wife to an ATM at knifepoint, telling her that if she "tried anything" he would call his accomplice and instruct him to kill her husband. CP 314-15. While waiting for Reynolds and the wife to return, Reynolds' accomplice carved a gang symbol into the husband's back with a knife. CP 315. The wife eventually managed to escape from Reynolds and call for help, and Reynolds and his co-defendant were promptly captured. CP 315.

Reynolds was allowed to plead guilty to reduced charges of burglary in the first degree and completed robbery in the first

degree without any enhancements. CP 310-11, 319-20, 322, 329. Reynolds received a standard-range sentence of 144 months in prison, from which he was released in September 2017. CP 290, 341.

Less than five months later, while 33-year-old Reynolds was employed, had stable housing, and was on active supervision with the Department of Corrections, he forced his way into a bikini barista stand one morning on his way to work. RP 811, 909, 917, 1021, 1321; CP 3. Reynolds dragged the barista out of the stand at knifepoint and violently attempted to rape her, ripping off her bikini and strangling her when she resisted. RP 1022-30. He broke off his attack only when another car pulled up to the barista stand, and then fled. RP 665-68, 1035-36.

A jury found Reynolds guilty as charged of attempted rape in the second degree with a deadly weapon and burglary in the first degree with sexual motivation and a deadly weapon. CP 140-44. The trial court found Reynolds to be a persistent

offender and sentenced him under the POAA to life in prison without the possibility of parole. CP 244, 246. The trial court rejected Reynolds' argument that such a sentence was unconstitutional due to his youth at the time of his first strike. RP 1530-38.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

1. REVIEW OF THE CATEGORICAL BAR ANALYSIS IS NOT WARRANTED BECAUSE IT IS ALMOST ENTIRELY CONTROLLED BY THE REASONING OF MORETTI.

In Moretti, this Court addressed claims nearly identical to the ones Reynolds raised in the Court of Appeals—the only difference was that the consolidated defendants in Moretti committed their first strikes at the ages of 19 and 20 rather than age 17 like Reynolds. Id. at 814-17. But like Reynolds, their second strikes were committed as young as age 21, and their third strikes were committed as fully formed adults in their early 30s or later. Id.

Like Reynolds, the Moretti defendants argued that the POAA violated the Eighth Amendment and article I, section 14, because it required the sentencing court to impose a sentence of life without parole for their third strikes without taking into consideration their youthfulness at the time of their first strikes. Id. at 814-15. And like Reynolds, they argued that their sentences were grossly disproportionate because their youth at the time of their first strikes made them less culpable. Id. at 832. This Court unanimously rejected those arguments for reasons that apply with equal force in this case.[1]

In Moretti, this Court followed the framework laid out in prior cases for a claim of categorical unconstitutionality. It first assessed whether there is a national consensus against the practice at issue and then exercised its independent judgment to evaluate whether the challenged sentencing practice serves

[1] While only seven justices signed the majority opinion, the concurring justices agreed with the majority's constitutional holding. Moretti, 193 Wn.2d at 835 (Yu, J., concurring).

legitimate penological goals. Id. at 820-30. There is no dispute that the same framework applies in this case.

This Court found no evidence of a national consensus against using a crime committed as a young adult to enhance the sentence of an adult who continues to offend. Id. at 821-23. While that part of the Court's analysis does not control the question of whether there is a national consensus against using a first strike committed as a juvenile but prosecuted in adult court, the Court of Appeals' analysis in this case is entirely consistent with the analytical process applied in Moretti and other categorical bar cases.[2] Id.; slip op. at 8-10. As the State

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[2] Contrary to Reynolds' contention in his petition, the Court of Appeals did not fail to "adequately consider Mr. Reynolds's argument that the national consensus is against juvenile offenders serving life without parole sentences." Pet. for Review at 14. That is an inaccurate description of the argument Reynolds raised below. Br. of Appellant at 22. It is irrelevant whether there is a national consensus against imposing LWOP sentences for offenses committed as a juvenile, because Reynolds received his LWOP sentence for offenses committed at age 33, not age 17.

The Court of Appeals in this case appropriately considered the scholarly articles and cases that Reynolds

pointed out in its briefing below, only two of the states that Reynolds claimed evinced a national consensus actually categorically prohibited the use of a first strike committed at age 17. Br. of Respondent at 24-32. Because the Court of Appeals ruling on this issue properly applied this Court's caselaw, which is clear and undisputed about what factors a court should consider when evaluating an assertion of national consensus, there is no need for this Court to address the issue in this case.

After this Court in Moretti found no national consensus, it moved to the second half of the categorical bar analysis, which is directly on point here. The Court exercised its independent judgment to "consider the culpability of the

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asserted established a consensus against "the use of juvenile strikes" in an adult recidivist sentencing scheme. Br. of Appellant at 22; slip op. at 9. The court correctly concluded that those sources did not establish a national consensus against the sentencing practice at issue in this case because they focused on the use of juvenile court *adjudications* as strikes, rather than on the use of adult court convictions of juvenile offenders. Slip op. at 9.

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. at 823 (internal quotation marks omitted). This Court concluded that "[i]ndependent judgment shows that the concerns raised by our new understanding of adolescent brain development are not present" when imposing sentence for an offense committed as a fully developed adult. Id. at 823, 825-26.

This Court's reasoning had nothing to do with the fact that the Moretti defendants were 19 or 20 years old at the time of their first strikes rather than 17 years old like Reynolds. To the contrary, this Court recognized that "age may well mitigate" the culpability of a 20-year-old just as much as the culpability of a juvenile. Id. at 824. But, the Court noted, "[t]hese POAA sentences are not punishment for the crimes the petitioners committed as young adults." Id. at 826. It has been well established for more than 100 years that "recidivist statutes do

not impose '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.'" Id. (quoting State v. Lee, 87 Wn.2d 932, 937, 558 P.2d 236 (1976); citing State v. Le Pitre, 54 Wash. 166, 168, 103 P. 27 (1909)); see also State v. Angehrn, 90 Wn. App. 339, 343, 952 P.2d 195 (1998) (POAA does not violate ex post facto clause as to third strikes committed after its enactment because it does not impose additional punishment for prior strikes).

Because a POAA sentence imposes punishment only for the third strike, the relevant considerations when engaging in the second half of a categorical bar analysis of a POAA sentence are (1) a defendant's culpability for his third strike, not his prior strikes, and (2) whether the goals of punishment justify imposing an LWOP sentence on a fully developed adult who continues to commit strike offenses after twice being given the opportunity to reform himself. Moretti, 193 Wn.2d at 825-29.

This Court correctly held that caselaw governing the sentencing of juvenile offenders is inapplicable to the sentencing of fully formed adult recidivists, because the special protections for juvenile offenders are based on juveniles' greater capacity for change and the difficulty of "differentiat[ing] between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 829. Fully formed adult recidivists, in contrast, "are neither juveniles nor young adults. We do not have to guess whether they will continue committing crimes into adulthood because they already have." Id.

Such offenders "have shown that they are part of this rare group of offenders who are 'simply unable to bring [their] conduct within the social norms prescribed by the criminal law.'" Id. at 829 (quoting Rummel v. Estelle, 445 U.S. 263, 284, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)). It is rational, the Court held, for the people of Washington to decide that such

offenders "must be incarcerated in order to protect the public." Id. at 829-30. For all of these reasons, this Court held that article I, section 14, and by extension the Eighth Amendment, "does not categorically prohibit imposing a life without parole sentence on a fully developed adult offender who committed one of their prior strike offenses as a young adult." Id. at 830.

Other than the question of a national consensus, which will always be a fact-dependent inquiry that turns on the record a defendant established in the Court of Appeals and the then-current status of other states' sentencing laws, every aspect of this Court's categorical bar analysis in Moretti applies with equal force in this case. There is thus no need for this Court to review the Court of Appeals' decision on this issue.

2. REVIEW OF THE FAIN PROPORTIONALITY ANALYSIS IS NOT WARRANTED BECAUSE REYNOLDS' PROPOSED MODIFICATION OF THE FAIN TEST WAS EXPLICITLY REJECTED IN MORETTI.

A sentence that is not categorically unconstitutional under article I, section 14 may nevertheless be unconstitutional

as applied "if it is grossly disproportionate to the offense." Moretti, 193 Wn.2d at 830. When conducting a proportionality analysis of a POAA sentence under article I, section 14, courts consider the four factors set out in State v. Fain: (1) the nature of the offense, which encompasses both the nature of the crime and the defendant's culpability in committing it; (2) the legislative purpose behind the POAA; (3) the punishment the defendant would have received in other jurisdictions; and (4) the punishment meted out for other offenses in the same jurisdiction. Moretti, 193 Wn.2d at 830, 832; State v. Fain, 94 Wn.2d 387, 397, 617 P.2d 720 (1980).

Reynolds' only quarrel with the Court of Appeals' analysis on this issue centers on whether the Fain proportionality analysis should "evolve" to require examination of a defendant's prior strikes, not just the crimes for which he was sentenced this case. Pet. for Review at 21, 23. Reynolds contends that the Court of Appeals' examination of only the current offenses "is in conflict with decades of this Court's own

three-strikes proportionality review jurisprudence, as well as seminal Eighth Amendment cases." Pet. for Review at 21-22. However, this Court explicitly rejected Reynolds' proposed version of the Fain test in Moretti. 193 Wn.2d at 832 ("[O]ur proportionality review focuses on the nature of the current offense, not the nature of past offenses."). That holding is consistent with the principle that the POAA punishes only the third strike and does not impose cumulative punishment for prior strikes. Id. at 826.

The Court of Appeals was obligated to follow Moretti and reject Reynolds' argument that the circumstances of his prior offenses must be considered when assessing the proportionality of the sentence he received for his current offenses. Because Reynolds does not ask this Court to overrule Moretti and there is no basis on which to do so, there is nothing

more that this Court need say on the issue, and review is not warranted.[3]

3. THIS COURT SHOULD NOT PERMIT REYNOLDS TO RAISE A CLAIM OF RACIAL DISPROPORTIONALITY FOR THE FIRST TIME IN HIS PETITION, PARTICULARLY WHEN THE RECORD IS INSUFFICIENT AND THE ALLEGED DISPROPORTIONALITY WOULD NOT HAVE PREJUDICED REYNOLDS, WHO IS WHITE.

"An issue not raised or briefed in the Court of Appeals will not be considered by this [C]ourt." State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993). For the first time in his petition for review, Reynolds appears to halfheartedly raise a claim that "the POAA is enforced in a racially disparate and disproportionally harsh manner, rendering Mr. Reynolds's sentence systemically unfair." Pet. for Review at 10. No such argument was raised below, and the claim that racial

[3] As noted in State's briefing below, even if a reviewing court were to include Reynolds' prior strikes in its proportionality analysis, he would still fail to establish that his culpability for those offenses was diminished by his youth or that his sentence is disproportionate to his three strikes as a whole. Br. of Respondent at 42-45.

disproportionality provides a basis to overturn his sentence is not supported by argument. See Samra v. Singh, 15 Wn. App. 2d 823, 836, 479 P.3d 713 (2020) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

Moreover, there is no evidence in the record that would allow this Court to assess whether racial disproportionality between the population at large and the class of offenders who receive POAA sentences is attributable to systemic racism in the application of the POAA specifically, as Reynolds asserts, rather than to systemic racism elsewhere in society and/or in other phases of the criminal justice system.[4] Reynolds also provides no argument or support for his contention that any

[4] It is highly concerning that the memorandum of amici curiae filed in support of the petition for review explicitly states that amici support review because they wish to present this Court with untested evidence the State has never seen, in total contravention of the rules of appellate procedure. RAP 9.1(a) (record on review may consist only of a report of proceedings, clerk's papers, exhibits, and a certified record of administrative adjudicative proceedings).

racial bias against people of color in the application of the POAA sentences would render the sentence imposed on him, a White man, "unfair." Pet. for Review at 10; CP 248.

Systemic racism in the criminal justice system is a critical issue that deserves this Court's careful consideration under the right circumstances. To reach Reynolds' claim in this case, based on untested and likely incomplete data presented by amici at the 11th hour, would put both the State and this Court at a disadvantage. Neither the parties nor this Court are well equipped to sift through raw statistics on an incredibly short timeline, without expert assistance, and without the ability to question the people who collected and maintained the data about any ambiguities or contradictions therein. Because decisions on important issues such as this one should be based on thorough briefing and evidence whose reliability has been adequately tested through the adversarial process, this Court should decline review of Reynolds' claim that racial

disproportionality in the application of the POAA renders the particular sentence imposed on him unfair.

E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

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DATED this 9th day of September, 2022.

Respectfully submitted,

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KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

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