NO. 102602-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DENNIS GIANCOLI,

Petitioner.

Appeal from the Superior Court of Pierce County
The Honorable Matthew H. Thomas

No. 19-1-04526-6

RESPONDENT'S ANSWER TO BRIEF OF AMICI CURIAE ACLU OF WASHINGTON FOUNDATION, KING COUNTY DEPARTMENT OF PUBLIC DEFENSE AND PURPOSE. DIGNITY. ACTION.

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I. INTRODUCTION

The Persistent Offender Accountability Act ("POAA") represents a judgment by the people of Washington that, where an offender repeatedly commits certain very serious offenses despite intervening opportunities to reform their behavior, permanent removal from society is warranted, both to protect the community from that offender and to deter other offenders from repeatedly committing "strike" offenses.

Amici curiae ACLU of Washington Foundation, King County Department of Public Defense, and "Purpose. Dignity. Action." have submitted a brief that makes both factual assertions unsupported by the record and policy arguments. Specifically, amici contends that the POAA is imposed in an arbitrary and racially biased manner. In support of this argument, amici use incomplete data and a one-sided summary of evidence that has not been fairly tested through the adversarial process. Amici also contends that the difference in sentencing between

petitioner and his codefendant violates fundamental principles of fairness.

Amici's claims should be rejected. There is no danger of implicit or overt biases disproportionately affecting petitioner's sentence because every defendant who qualifies as a persistent offender at sentencing is treated identically. The studies and statistics used by amici are not tested and this Court should decline to consider incomplete demographic data outside the appellate record. Finally, the disparate sentences between petitioner and his codefendant are not based on race, but on a sentencing error in the codefendant's case that the State is seeking to rectify through the appellate process.

II. ANSWER TO AMICI CURIAE

The state and federal constitutions prohibit the arbitrary imposition of sentences that disproportionately affect a race. U.S. Const. amend. VIII; Const. art. I, § 14; *see Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). Under *Furman* and its progeny, the death penalty is

constitutional only if it is properly constrained to avoid freakish and wanton application. *See generally Gregg v. Georgia*, 428 U.S. 153, 169, 173, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). To be constitutionally valid, "*where discretion is afforded a sentencing body* on a matter so grave as the determination of whether a human life should be taken or spared, *that discretion must be suitably directed and limited* so as to minimize the risk of wholly arbitrary and capricious action." *Id*. at 189 (emphasis added).

Prior to this Court ruling Washington's death penalty statutory scheme unconstitutional as applied under the state constitution, this Court undertook a racial proportionality review of death penalty cases. *State v. Cross*, 156 Wn.2d 580, 630–631, 132 P.3d 80 (2006), as corrected (Apr. 13, 2006); *State v. Gregory*, 192 Wn.2d 1, 18-19, 427 P.3d 621 (2018) (holding "Washington's death penalty is administered in an arbitrary and racially biased manner"); RCW 10.95.130(2)(b). The purpose of the review was, in part, to ensure that the challenged sentence

was "proportional to sentences given in similar cases, is not freakish, wanton or random; and is not based on race or other suspect classifications." *Cross*, 156 Wn.2d at 630. When this Court held that the state constitution forbade the statutory practice at issue, it determined that racial bias, both implicit and overt, played a significant role in the imposition of Washington's death penalty. *Gregory*, 192 Wn.2d at 19-24.

The POAA sentencing procedure is distinguishable from death penalty proportionality review. The death penalty scheme required multiple discretionary decisions that permitted the possible introduction of racial or other suspect bias. *Cross*, 156 Wn.2d at 623-24. The majority of these sentencing procedures rested on discretionary acts: the prosecutor must seek a special sentencing session; the prosecutor must judge whether sufficient mitigating circumstances exist to preclude the penalty; jurors must unanimously agree that the penalty is warranted; and jurors must also agree that sufficient mitigating factors do not exist. At

each individual exercise of decision-making, the danger of introducing implicit or overt racial biases existed.

The number of discretionary decisions involved in the POAA sentencing is quite minimal, compared to a death penalty case. Although some amount of discretion is involved in an individual prosecutor's charging decisions, the sentencing of persistent offender affords no discretion. A "persistent offender shall be sentenced to a term of total confinement for life." RCW 9.94A.570. There is no special sentencing procedure, the trial court cannot impose a different sentence, and every persistent offender receives an identical sentence. Neither the prosecutor nor the trier of fact need consider any mitigating factors. Implicit or overt racial biases cannot affect the sentencing of a persistent offender because every defendant who qualifies as a persistent offender at sentencing is treated identically. It is precisely this

lack of discretionary judgment that renders sentencing under the POAA immune from arbitrary imposition.[1]

Whenever a sentencing court concludes an offender is a "persistent offender," the court must impose a life sentence, and the offender is not eligible for parole or any form of early release. RCW 9.94A.570. A "persistent offender" is an offender currently being sentenced for a "most serious offense" who also has two or more prior convictions for "most serious offenses." RCW 9.94A.030(37). RCW 9.94A.030(32) lists Washington's "most serious offenses," and the Legislature recently removed second degree robbery. The only classification the POAA creates is a category of convicted defendants who are considered persistent offenders, and who must receive a term of life imprisonment. Offenders who do not meet the definition of

[1] Racial discrimination, as a constitutional matter, occurs only when a public official intends to hold a person's race against him, not from a racially disparate effect. *Luft v. Evers*, 963 F.3d 665, 670 (7th Cir. 2020).

persistent offenders are sentenced according to the other provisions of the SRA.

Moreover, the POAA statutory scheme does not stratify different classes of persistent offenders based on race or any other factor. The statute requires all persistent offenders to be sentenced to life imprisonment. Offenders meet the definition based on their criminal history, not their race. Consequently, amici fail to demonstrate that a POAA sentence is or may be imposed by a court in an arbitrary and racially biased manner.

Amici build on incomplete demographic data regarding POAA offenders presented by petitioner for the first time in his appellant's opening brief and urge this Court to conclude, based on that data, the POAA is applied in a racially discriminatory manner. The State has not had the ability to comb through the raw data on which amici rely to see whether it has been accurately coded and summarized by amici, and given the small sample sizes at issue, a single instance of incorrectly recording a data point could have an outsized impact on the statistical

conclusions that amici attempt to draw. This Court should not make decisions based on a one-sided summary of evidence that has not been fairly tested through the adversarial process. *See State v. Russell*, 125 Wn.2d 24, 49, 882 P.2d 747 (1994) ("[T]he adversary process is a means by which those who practice 'bad' science may be discredited, while those who practice 'good' science may enjoy the credibility they deserve.").

Trial courts have tools available by which to separate junk science from good science. These include the gatekeeping

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standards of *Daubert*,[2] *Frye*,[3] and various evidence rules,[4] the ability to appoint an independent expert,[5] knowledgeable cross-examination by both parties, and the opportunity for opposing parties to present contrary evidence and their own experts.

Appellate courts lack these tools. *See, e.g*., Caitlin E. Borgmann, *Appellate Review of Social Facts,* 101 Calif. L. Rev. at 1190-91; David DeMatteo & Kellie Wiltsie, *When Amicus Curiae Briefs are Inimicus Curiae Briefs*, 72 Am. U. L. Rev. at 1876-77. The absence of these tools has resulted in motivated

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[2] *Daubert v. Merrill Dow Pharm., Inc.,* 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (setting forth standards for admissibility of scientific evidence under the federal rules of evidence). "The purpose of *Daubert's* gatekeeping requirement 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Federal Judicial Center, Reference Manual on Scientific Evidence* at 6 (3rd Ed.) (available at https://www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1 (last visited Jan. 23, 2024).

[3] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (limiting admissibility of expert opinion to that supported by generally accepted science).

[4] *See generally* ER 104(a), 702-705.

[5] ER 706.

interest groups marshaling studies, statistics, and articles to support their pre-existing point of view. Many of the studies cited in amicus briefs are not peer-reviewed, not conducted in compliance with best scientific standards, and do not represent the most accurate state of our knowledge today. Frequently amicus presents factual evidence that rests on methods that have been seriously questioned by others working in the field. *See generally* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. at 1784-1799.

As noted by this Court, statistics "come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Oliver v. Pacific Northwest Bell Tel. Co., Inc*., 106 Wn.2d 675, 682, 724 P.2d 1003 (1986) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)). A small sample size may detract from the value of the evidence. *Id*. The number of people sentenced under the POAA each year in Washington is

miniscule. Compare *United States Census Bureau, Quick Facts Washington, Population, Census*, April 1, 2020 (population of Washington 7,705,247) (available at https://www.census.gov/quickfacts/WA (last visited Nov. 6, 2023), with *Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing Fiscal Year 2020*, at 57 (Table 14.A; POAA sentences imposed on 15 people representing .00019 per cent of the total population) (available at https://cfc.wa.gov/sites/default/files/Publications/Adult_Stat_Sum_FY2020.pdf (last visited Nov. 6, 2023).

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 petitioner asserts, rather than to systemic racism elsewhere in society and/or in other phases of the criminal justice system.

Systemic racism in the criminal justice system is a critical issue that deserves this Court's careful consideration under the right circumstances. To reach petitioner's claim in this case, based on untested and likely incomplete data presented by amici, 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 to make decisions based on the data presented by amici because it is incomplete and misleading and does not allow this Court to conclude that any disparity results from systemic racism in the application of the POAA as opposed to elsewhere in society.

A POAA sentence can only be imposed on individuals who have been convicted of three or more most serious offenses on separate occasions or two or more qualifying serious sex offenses on separate occasions. RCW 9.94A.030(37). Thus, the universe of persons who are eligible for a POAA sentence is limited to individuals who commit most serious offenses. Numerous studies indicate that due to persistent injustices in education and economic opportunities, certain ethnic or racial groups have higher rates of committing violent offenses, as opposed to drug offenses, relative to their presence in the general population:

> African Americans represent 14% of the U.S. population. But in 2019, this population comprised 36% of arrests for serious violent crimes (51% for murder and nonnegligent manslaughter) and 30% of arrests for property crimes. Latinx and American Indian people also experience poverty at higher rates than whites—at 1.9 times and 2.7 times, respectively—and are overrepresented in certain crime categories. Comparing arrest data with victimization surveys and self-reports of criminal offending suggests that, especially for certain violent crimes and to a lesser extent for property

> crimes, higher arrest rates among people of color correspond to higher rates of criminal offending.

The Sentencing Project, One in Five: Disparities in Crime and Policing at 5-6 (November 2023) (footnotes omitted). [Available at https://www.sentencingproject.org/app/uploads/2023/10/One-in-Five-Disparities-in-Crime-and-Policing.pdf (last visited Nov. 3, 2023).]

The differing rates of committing violent offenses are "'rooted in a legacy of structural racism'" that "'have left generations of Black people with disproportionately less wealth and education, lower access to health care, less stable housing, and differential exposure to environmental harms.'" *Id*. (*quoting* Johnson, T. L, & Johnson, N. N. (2023, March 10)). Much needs to be done by our communities to address these socioeconomic inequalities that contribute to higher rates of certain violent crimes against people of color. But the existence of these conditions and their impact on disproportionality of POAA sentences by race does not render the POAA unconstitutional.

III. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to reject the arguments of amici curiae.

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RESPECTFULLY SUBMITTED this 20th day of February, 2024

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2-20-24	*s/Therese Nicholson*
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PIERCE COUNTY PROSECUTING ATTORNEY

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