No. 98496-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ALAN JENKS,
Petitioner.

MEMORANDUM OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of amici are set forth in the Motion for Leave to File Memorandum of Amici Curiae in Support of Review, submitted contemporaneously with this memorandum.

INTRODUCTION

The Court has the opportunity to develop its common law to address race disproportionality in certain life without parole sentences, thereby answering its call to "administer justice…in a way that brings greater racial justice to our system as a whole." Washington Supreme Court, Open Letter to the Legal Community (June 4, 2020). Mandatory life without parole ("LWOP") sentences under the Persistent Offender Accountability Act ("POAA") have been imposed disproportionately on Black people, as well as other people of color. As of 2009, almost 40% of three strikes offenders sentenced to LWOP were Black, while comprising only 3.9% of the state's population. Columbia Legal Services, *Washington's Three Strikes Law: Public Safety & Cost Implications of Life Without Parole* 7 (2010).

In 2019, the legislature removed second degree robbery from the list of most serious offenses under the POAA. Laws of 2019, ch. 187, § 1.[1]

[1] An explicit retroactivity provision that would have applied to sentences that were final was removed in committee, S.B. 5288, 66th Leg. Reg. Sess. § 2 (2019), http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/5288.pdf

This Court has consistently held that the legislature's fundamental reappraisal of the value of punishment when it chooses to be less punitive is given retroactive effect in all pending cases. *See, e.g., State v. Allen*, 14 Wash. 103, 104-05, 44 P. 121 (1896). The Court of Appeals declined to apply this Court's long-standing common law rule. This Court could—and should—accept review simply to correct the erroneous decision of the Court of Appeals, granting relief to Mr. Jenks and any others facing LWOP under the POAA for a second degree robbery strike whose sentences are not yet final.

But the simple correction of this error would fail to reach those people whose sentences are final, but who are nevertheless sentenced to die in prison because of an offense that no longer qualifies as a strike. The common law rule does not reach Cheryl Lidel, a 60-year-old Black woman serving LWOP under the POAA based on a 2010 second degree robbery conviction. Tom James, *Lifer Inmates Excluded from Washington '3 strikes' Change*, Seattle Times (May 20, 2019, updated May 22, 2019), https://www.seattletimes.com/seattle-news/its-just-wrong-3-strikes-sentencing-reform-leaves-out-62-washington-state-inmates. Ms. Lidel "described her crimes as driven by substance abuse that began shortly

(original bill), and the bill as passed was silent as to retroactivity. *See* Laws of 2019, ch. 187, § 1.

after she was sexually assaulted as a young girl." *Id.* Nor does the law reach Devon Laird, a Black man whose third strike was "snatching a wallet from an elderly man outside a drugstore in 2007." *Id.*[2]

Rather than limiting itself to piecemeal justice, this Court should embrace Mr. Jenks's case as an opportunity to answer its own call by looking closely at whether its own precedent is harmful. Open Letter, *supra*. The harm here is that the common law rule of statutory retroactivity prevents justice and leaves in place the residue of race disparities that mar the criminal legal system. The Court could choose to look away and do nothing under cover of "venerable precedent." *Id*. Instead, this Court should engage the question of whether it is still defensible to limit statutory retroactivity to only those sentences that are not yet final. Failure to extend common law rules like this one stands in the way of meaningful relief for Black communities and other communities of color.

SUMMARY OF ARGUMENT

Amici support petitioner's argument that review is warranted under RAP 13.4(b)(1) because the Court of Appeals analysis is in conflict with

[2] The Seattle Times article did not identify Mr. Laird as Black, but the identical article published as Associated Press Wire Service Content in U.S. News & World Report did identify him as Black. Tom James, *Lifer Inmates Excluded from Washington '3 strikes' Change*, U.S. News & World Report (May 21, 2019), https://www.usnews.com/news/us/articles/2019-05-21/3-strikes-sentencing-reform-leaves-out-washington-inmates?context=amp.

numerous decisions by this Court giving retroactive effect to statutes that reflect the legislature's reappraisal of the value of punishment. But review is also warranted as an issue of substantial public importance under RAP 13.4(b)(4) due to the stark disproportionate impact the POAA has on Black people and people of color. To address this disproportionality, this Court should accept review to extend the long-standing common law rule regarding statutory retroactivity to also apply to sentences that are final.

ARGUMENT

I. Review Is Warranted Because Life Without Parole Under the POAA Based on a Strike of Second Degree Robbery Is Disproportionately Imposed on Black People.

Analysis by Columbia Legal Services demonstrates significant racial disproportionality in imposition of the POAA, across all types of strike offenses. "Approximately 53% of three strikers are from minority racial groups, while minority groups make up only 25.4% of the state's population." *Washington's Three Strikes Law*, *supra* at 7. The greatest disparity exists for the Black community: "almost 40% of three strikes offenders sentenced are African American, while only 3.9% of the state's population is African American." *Id.*

Senator Jeannie Darneille, who sponsored the bill that removed second degree robbery from the strike list, testified that of the 289 three-strikers, 62 would stand to have their life sentences vacated based on

second degree robbery strikes were the law made retroactive. Hearing on ESSB 5288 Before the H. Public Safety Comm., 66th Leg. Reg. Sess. (2019) (Testimony of Sen. Jeannie Darneille at 25:10-25:25), https://www.tvw.org/watch/?clientID=9375922947&eventID=2019031335&startStreamAt=1510&stopStreamAt=1525&autoStartStream=true. Thirty of the 62 would have served less than a 5-year sentence for the crime, were it not a strike offense. *Id.* at 25:56-26:15. Instead, they are sentenced to die in prison.

Of the 62 people serving LWOP under the POAA due to a second-degree robbery strike, "about half are [B]lack, despite African Americans making up only 4% of Washington's population." James, *supra*; *see also* Hearing on ESSB 5288 Before the S. Law & Justice Comm., 66th Leg. Reg. Sess. (2019) (Testimony of Adam Paczkowski at 40:40-41:09), https://www.tvw.org/watch/?clientID=9375922947&eventID=2019021227&startStreamAt=2440&stopStreamAt=2469&autoStartStream=true (as of 2017, 50% of those sentenced under the POAA are Black).

The POAA is partially responsible for the devastation of Black communities by mass incarceration in our state. Race disproportionality in imposition of the POAA is a critical issue, and this case is a vehicle for addressing it. Review is warranted under RAP 13.4(b)(4).

II. Review Is Warranted Because the Court of Appeals Decision Conflicts With Decisions of This Court that Have Long Declined to Broadly Apply RCW 10.01.040, Including *Wiley* and *Ramirez*.

Since at least 1896, this Court has recognized that when a statute reflects the legislature's fundamental reappraisal of the value of punishment, that statute is given retroactive effect to all pending cases, including those on direct appeal. *Allen*, 14 Wash. at 105 ("It is familiar law that the repeal of a statute pending a prosecution thereunder, without any saving clause as to such prosecution, will prevent its being further prosecuted; *and this rule applies as well after judgment and sentence pending an appeal duly taken therefrom* as before the final determination in the trial court.") (emphasis added). This common law principle is rooted by the long-held penological norm regarding retribution: when conduct is determined to be less culpable and a new penalty deemed adequate, "no purpose is served by imposing the older, harsher one." *State v. Heath*, 85 Wn.2d 196, 198, 532 P.2d 621 (1975) (citing *In re Estrada*, 63 Cal. 2d 740, 745, 408 P.2d 948 (1965); *People v. Oliver* 1 N.Y.2d 152, 151 N.Y.S.2d 367, 134 N.E.2d 197 (1956)). Any different rule would be to "conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." *Estrada*, 63 Cal. 2d at 745; *see also Oliver*, 1 N.Y.2d at 160.

The Court of Appeals's reliance on RCW 10.01.040 rather than this common law principle is in direct conflict with this Court's longstanding practice of construing statutes to have retroactive effect on all pending cases, in recognition that RCW 10.01.040 is in derogation of the common law and must be strictly construed. *State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109 (1970), *overruled on other grounds by United States v. Batchelder*, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979), *as recognized in City of Kennewick v. Fountain*, 116 Wn.2d 189, 192–93, 802 P.2d 1371 (1991); *see also State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2019) (changes to discretionary LFO statute prohibiting imposition of costs on indigent defendants applied retroactively to cases pending direct review); *Heath*, 85 Wn.2d at 198 (applying retroactively to all pending cases a statute allowing stay of order declaring a person a habitual traffic offender and revoking license as the legislation effectively reduced the acceptable punishment for a crime); *Zornes*, 78 Wn.2d at 13-14, 26 (amendment to Narcotic Drug Act removing cannabis as a narcotic applied to all pending cases); *Allen*, 14 Wash. at 104-05 (giving retroactive effect to legislature's decriminalizing the sale of improperly labeled imitation dairy products); *cf. State v. Wiley*, 124 Wn.2d 679, 687–88, 880 P.2d 983 (1994) (though holding that statute changed only an element of crime and did not apply retroactively for purposes of calculating offender score,

Court reaffirmed rule that statutes reappraising value of punishment are given retroactive effect). This Court should accept review under RAP 13.4(b)(1) because the Court of Appeals decision is in conflict with numerous decisions of this Court.

But this Court should also accept review to consider whether the limit on retroactivity to pending cases is tolerable any longer, given that the POAA contributes to mass incarceration and has a devastating impact on Black communities and other communities of color. *See* Part I, *supra*. In considering this case on the merits, amici urge this Court to consider an evolution of the common law rule that would extend the benefits of the legislature's reappraisal of the value of punishment to those whose sentences are final.

Doing so would be consistent with the same principles that animate retroactive application of new substantive constitutional rules. Though finality is generally the overriding consideration in deciding whether a ruling is retroactive, *In re Pers. Restraint Yung-Cheng Tsai*, 183 Wn.2d 91, 104, 351 P.3d 138 (2015) (citing *Danforth v. Minnesota*, 552 U.S. 264, 279–81, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008)), any interest in finality must give way where the punishment itself is disproportionate. *Cf. Montgomery v. Louisiana*, 136 S. Ct. 718, 731, 193 L. Ed. 2d 599 (2016), *as revised* (Jan. 27, 2016). "[A] court has no authority to leave in place a

conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Id.*

While a court may determine that certain punishments are disproportionate under constitutional norms, legislatures make social judgments about proportionality when they downgrade or otherwise reappraise punishment. "A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty…is sufficient to meet the legitimate ends of the criminal law." *Oliver*, 1 N.Y.2d at 160. Leaving disproportionate punishments in place "serves no purpose other than to satisfy a desire for vengeance." *Id.* In other words, when the legislature has determined that certain conduct is less culpable, the retributive purpose behind punishment falls away. *See Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (retribution rationale is that "a criminal sentence must be directly related to the personal culpability of the criminal offender."). Disproportionate sentences should not be tolerated when the legislature refines its thinking on the culpability of certain conduct.

This route would be a small step that would help to address one driver of race disproportionality in people incarcerated in Washington.

CONCLUSION

Amici respectfully request that the Court accept review for the foregoing reasons.

DATED this 6th day of July 2020.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on July 6, 2020, 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 6th day of July, 2020.

/s/ Jessica Levin
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