99744-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JEREMIAH SMITH AKA GLENN AKERS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

ANSWER TO PETITION FOR REVIEW

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1. IDENTITY OF PARTY

Respondent, State of Washington, was the plaintiff in the trial court and the respondent in the Court of Appeals.

2. STATEMENT OF RELIEF SOUGHT

Defendant has filed a petition for review. Respondent seeks denial of defendant's petition for review of the unpublished opinion issued by the Court of Appeals on February 16, 2021, *State v. Smith,* No. 36213-2-III, 2021 WL 568530.

I. ISSUES PRESENTED

1. Should this Court decline review because the constitutional issues presented are not manifest?

2. Should this Court decline review because the defendant's claims of youthfulness do not apply to his fourth strike offense, first-degree murder, committed at age twenty-five?

3. Should this Court decline review because the defendant's proportionality and categorical challenges fail under this Court's established jurisprudence?

4. Should this Court decline review where the statistics relied upon by the defendant to establish racial inequity in POAA sentencing are outdated?

II. STATEMENT OF THE CASE

At 11:23 p.m. on May 25, 2015, after Vatsana Muonghkoth squabbled by text message with her ex-boyfriend, Ruben Marmolejo,

Jeremiah Smith and Muongkhoth travelled to a sales establishment known as "Northwest Accessories" ("NWA") where they believed Marmolejo could be found. CP 401-03, 406. Smith later told his other girlfriend that they had intended "to hit a lick that night, but it went ba[d]."[1] CP 407.

NWA was already closed; its final patrons had departed, and the front doors were locked. Video surveillance showed Smith and Muongkhoth rush into NWA through the back door with their guns raised. Smith found Caesar Medina, a seventeen-year-old, on the sales floor. CP 404. Smith approached Medina with his gun drawn; Medina, unable to retreat, raised his hands over his head. *Id*. Medina laid on the floor and Smith placed his gun to Medina's head. *Id*.

A tattoo artist who worked at NWA, Anthony Baumgarden, observed Smith and Medina. *Id*. Baumgarden threw a propane bottle at Smith to defend Medina. *Id*. Smith fired a single shot toward Baumgarden, who retreated. *Id*. Smith left Medina and fled to the bathroom; Medina retreated in the other direction down the hallway. *Id*. However, thirty-two seconds after Medina was first confronted by Smith, Smith reentered the sales area. CP 405. Smith, with his gun raised, walked into the hallway

[1] The term "hit a lick" is slang for robbery. CP 407.

through which Medina fled, temporarily leaving the surveillance cameras' view. *Id*. Smith then "sprung back" from the hallway and departed in the direction from which he entered.[2] *Id*.

After Smith and Muongkhoth fled, the occupants emerged from their hiding spots. A trail of blood led from the hallway through which both Medina and Smith had travelled, through the tattoo room, leading to Medina's body. *Id*. The fatal bullet wound entered Medina's neck and travelled downward, making it likely that he was bending forward to lay on the ground when he was shot. CP 408. Medina's friends attempted to transport him to the hospital; however, he died from the gunshot.

As relevant here, the State charged the defendant with first-degree felony murder predicated on first-degree burglary (for Medina's death), first-degree burglary, and first-degree assault (on Baumgarden). CP 104-05. Each of those offenses included a firearm enhancement. *Id*. After a bench trial, the court found the defendant guilty of those charges. CP 411-17.

The defendant's criminal history consisted of several strike offense convictions. Smith committed first-degree burglary and conspiracy to

[2] Only two bullet defects were located within NWA – one attributable to the shot fired at Baumgarden, and one attributable to the shot that killed Medina.

commit first-degree robbery on November 16, 2009, when he was 19 years, 10 months and 340 days old. CP 373. Smith committed second-degree assault on December 17, 2008, five days before his 19th birthday. CP 360. For his 2008 and 2009 offenses, the defendant was sentenced separately within a four-day time period. CP 506.

The defendant's first most serious offense, first-degree robbery, occurred on July 26, 2007, when the defendant was 17 and one-half years old. CP 386. Smith was sentenced for that offense in adult court on April 21, 2008, CP 386; was granted an exceptional sentence downward from the standard range of 31 to 41 months based on his youth, CP 388, 536-38; and was ordered to serve 12 months of confinement with 36 months of community custody, CP 392-93.

III. ARGUMENT

This Court has repeatedly upheld Washington's persistent offender law against both challenges under the Eighth Amendment and under article I, section 14. *State v. Moretti*, 193 Wn.2d 809, 446 P.3d 609 (2019); *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014); *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996); *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996); *State v. Manussier*, 129 Wn.2d 652, 677, 921 P.2d 473 (1996).

This case presents no new constitutional issues unaddressed by this Court's jurisprudence; therefore, this Court should decline review.

A. THE DEFENDANT HAS FAILED TO DEMONSTRATE A MANIFEST ERROR.

The constitutionality of the defendant's persistent offender sentence was not raised to the sentencing court; the defendant did not ask the sentencing court to consider his youthfulness at the time of his first strike offense, or at the time of the first-degree murder committed at age 25. In fact, the defense agreed that a life sentence was proper, only requesting to reserve any theoretical constitutional issues for appeal. RP 1055-57. This issue, raised for the first time on appeal, should only be reviewed if it is a manifest error affecting a constitutional right. RAP 2.5(a). This alleged constitutional error is not manifest, i.e., obvious on the record or plain and indisputable. *See State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009). The Court of Appeals declined review of the defendant's claims of error on this basis. *State v. Smith*, Slip Op. 36213-2 at 1, 20-22 (Feb. 16, 2021).

This Court recently rejected a similar constitutionality challenge to sentencing of adult offenders predicated on "youthful" first strikes, noting other jurisdictions have upheld persistent offender-type sentencing *even*

when a predicate offense is committed by a juvenile. *Moretti*, 193 Wn.2d at 822-23 (citing *Wilson v. State*, 2017 Ark. 217, 521 S.W.3d 123, 127 (2017); *Vickers v. State*, 117 A.3d 516, 520 (Del. 2015)); *Com. v. Lawson*, 90 A.3d 1, 7 (Pa. Super. Ct. 2014); *Counts v. State*, 338 P.3d 902 (Wyo. 2014); *U.S. v. Hoffman*, 710 F.3d 1228, 1233 (11th Cir. 2013); *U.S. v. Scott*, 610 F.3d 1009, 1018 (8th Cir. 2010); *U.S. v. Mays*, 466 F.3d 335, 340 (5th Cir. 2006)). This Court denied review of the published decision in *State v. Teas*, 10 Wn. App. 2d 111, 447 P.3d 606 (2019), *review denied*, 195 Wn.2d 1008 (2020), presenting the same issue. Given these numerous decisions upholding the use of an adult strike offense, committed as a juvenile, as a basis for a subsequent, adult sentence to life without parole, the defendant's claimed errors are not manifest.

B. THIS COURT SHOULD DECLINE REVIEW BECAUSE, AT THE TIME OF HIS THIRD STRIKE OFFENSE, SMITH WAS A FULLY DEVELOPED ADULT WHO HAD BEEN PROVIDED OPPORTUNITIES FOR REHABILITATION.

The social science undergirding *Miller*, *Houston-Sconiers, O'Dell*, and *Monschke*,[3] applicable to juvenile or youthful offenders, is unavailing

[3] *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017); *State v. O'Dell*, 183 Wn.2d 680, 683-84, 358 P.3d 359 (2015); *Matter of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021).

to Smith. This Court should decline review under RAP 13.4 because it is well-settled that an adult offender may constitutionally be sentenced to life without parole. At age 25 and five months,[4] the defendant committed first-degree murder, first-degree burglary, and first-degree assault. Despite a chance to retreat before executing Medina, Smith failed to take that opportunity. He has also failed to take advantage of rehabilitative efforts provided during his previous incarceration and supervision, and has failed to otherwise conform his behavior to the law as he has aged.

The science in this area has been synthesized by law professor Elizabeth S. Scott and psychologist Laurence Steinberg, whose work was cited extensively in *Roper* and by this Court.[5] Per Scott and Steinberg, social scientists recognize that *juveniles* achieve the ability to use adult reasoning by mid-adolescence, but lack the ability to properly assess risks and engage in adult-style self-control.[6] Research also suggests that *teens* are more responsive to peer pressure between childhood and early adolescence. "This

[4] Smith was born on December 22, 1989, and killed Medina on May 26, 2015. CP 1.

[5] *See e.g.*, *Monschke*, 482 P.3d at 285; *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

[6] Elizabeth S. Scott & Laurence Steinberg, RETHINKING JUVENILE JUSTICE 34 (2008); Elizabeth S. Scott & Laurence Steinberg, BLAMING YOUTH, 81 Tex. L. Rev. 799, 812-13 (2003).

susceptibility peaks around age 14 and declines slowly *during the high school years*." BLAMING YOUTH at 813-14 (emphasis added). Generally, "[i]mpulsivity…increases between middle adolescence and early adulthood and declines soon thereafter." *Id.* at 815. Adolescents and adults differ in their ability to regulate their behavior or control their impulses. Risk-taking *peaks around age 16 or 17*.[7] One commentator has suggested:

> [C]rime engagement peaks at about age seventeen (slightly younger for nonviolent crimes and slightly older for violent ones), and declines significantly thereafter…[T]he majority of adolescents who commit crime desist as they mature into adulthood. Only a small percentage --generally between five and ten percent -- become chronic offenders or continue offending during adulthood.

Elizabeth Cauffman, et. al., HOW DEVELOPMENTAL SCIENCE INFLUENCES JUVENILE JUSTICE REFORM, 8 UC Irvine L. Rev. 21, 26 (2018) (footnotes omitted).

Brain structure and function studies claim that there is still growth in parts of the brain associated with decision-making and judgment *up to 25-years-old*.[8] This theory has limitations. One commentator has noted:

> The most significant current limitation of developmental neuroscience is its inability to *inform individual assessment.* Imaging studies that show group trends in structural maturity…do

[7] Barry C. Feld, ADOLESCENT CRIMINAL RESPONSIBILITY, PROPORTIONALITY, AND SENTENCING POLICY: *ROPER, GRAHAM, MILLER/JACKSON*, AND THE YOUTH DISCOUNT, 31 Law & Ineq. 263, 286 (2013).

[8] *See* Jay Giedd, BRAIN DEVELOPMENT, IX: HUMAN BRAIN GROWTH, 156 Am. J. Psychiatry 4 (1999).

> not show that all individuals in the group perfectly reflect the trend. Normal brains follow a unique developmental path bounded roughly by the general trajectory; that is, while all humans will pass through the same basic stages of structural maturation at more or less the same stages of life, the precise timing and manner in which they do so will vary. Moreover, such variation cannot be detected or interpreted *in any legally meaningful way*.

Terry A. Maroney, THE FALSE PROMISE OF ADOLESCENT BRAIN SCIENCE IN JUVENILE JUSTICE, 85 Notre Dame L. Rev. 89, 146 (2009) (emphasis added and footnote citations omitted).

In a 2016 article, summarizing recent behavioral and neural findings on cognitive capacity in youthful adults, members of the MacArthur Research Network on Law and Neuroscience conducted a study showing that, *relative to control groups comprised of adolescents aged thirteen to seventeen and adults aged 22 to 25*, young adults aged 18 to 21 showed diminished cognitive capacities similar to the adolescent group when they are in emotionally charged situations.[9]

While supervised on community custody, having completed an 80-month sentence, 25-year-old Smith coldly murdered Medina, an unarmed 17-year-old. The murder evidences Smith as an individual who failed to

[9] *See* Alexandra O. Cohen, et al., WHEN DOES A JUVENILE BECOME AN ADULT? IMPLICATIONS FOR LAW AND POLICY, 88 Temple L. Rev. 769, 786 (2016). Treating 21- to 25-year-olds as the control group, the study did not undertake any further comparison between the group of adults aged 22 to 25 and individuals over age 25.

take advantage of rehabilitative efforts during his incarceration and periods of community supervision, and has continued to violently reoffend as an adult. The defendant's conduct was not evidence of "youthfulness" and does not reflect any "hallmark quality" of youth. It was the deliberate act of a fully-formed adult. As explained below, it is for *this* final sentence for a *fully adult* offense that Smith was ordered to serve life in prison without the possibility of parole, not for his other strike offenses committed as a juvenile sentenced in adult court or as a "youthful offender." *See Witherspoon*, 180 Wn.2d at 888-89; *Moretti*, 193 Wn.2d at 832.

C. THIS COURT SHOULD DECLINE REVIEW BECAUSE A LIFE WITHOUT PAROLE SENTENCE IS NOT DISPROPORTIONATE TO THE OFFENSE OF FIRST-DEGREE MURDER, ESPECIALLY WHERE IT IS AGGRAVATED BY PRIOR STRIKE OFFENSES.

The State respectfully requests this Court deny review because this case does not present a conflict with any precedent of this Court or the Court of Appeals, RAP 13.4(b)(1) and (2), and does not present a substantial or constitutional issue that has not already been addressed by this Court, RAP 13.4(b)(3) and (4). This Court has steadfastly adhered to the principle that "[t]he life sentence contained in RCW 9.92.090 is not 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." *Witherspoon*, 180 Wn.2d at 888-89 (quoting *Rivers*, 129 Wn.2d at 714-15).

Proportionality review focuses on the nature of the *current* offense, not the nature of past offenses. *Moretti*, 193 Wn.2d at 832. *State v. Fain* has long been the standard for review of proportionality attacks under article I, section 14, of the Washington Constitution. Its analysis considers: (1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would have received in other jurisdictions; and (4) the punishment meted out for other offenses in the same jurisdiction. 94 Wn.2d 387, 397, 617 P.2d 720 (1980).

1. Nature of the offense and punishment in the same jurisdiction.

Addressing factors 1 and 4, the offense which triggered Smith's life without parole sentence, committed at age 25, was the first-degree murder of an unarmed seventeen-year-old (and the separate first-degree assault of a different individual). Unlike Smith, in none of this Court's opinions resolving proportionality attacks to the POAA was the defendant convicted of a third strike offense for *first-degree murder plus other various strike offenses*. *See Moretti*, 193 Wn.2d 809 (Moretti: first-degree robbery/second-degree assault; Ngyuen: first/second-degree assault; Orr:

first-degree burglary/second-degree assault); *Witherspoon*, 180 Wn.2d 875 (second-degree robbery); *Thorne*, 129 Wn.2d 736 (first-degree robbery/ kidnapping); *Rivers*, 129 Wn.2d 697 (second-degree robbery); *Manussier*, 129 Wn.2d 652 (first-degree robbery). Yet, in each case involving less egregious offenses, this Court did not find the life sentence to be disproportionate to the strike offense committed.

It stands to reason that a proportionality attack on an adult life without parole sentence for Smith's multiple strike offenses must necessarily fail where those offenses, if punished under general SRA sentencing provisions, would also result in a cumulative sentence of life without parole. Here, under RCW 9.94A.589(1)(b), Smith would have been subject to consecutive sentencing for the serious violent offenses of first-degree murder and first-degree assault; and under RCW 9.94A.533(3)(a), (d), and (e), Smith would have been subject to three 10-year mandatory, consecutive firearm enhancements, which, assuming an offender score of "9," [10] would result in a standard range of 72 to 78.4 years. *See*, Attach. A.

[10] This hypothetical assumes an offender score of "9." Smith's prior violent offenses would add 2 points each to his offender score, totaling 8 points. Smith was supervised on community custody when he killed Medina, adding an additional point, totaling 9 points.

2. The legislative purpose behind the POAA.

The purpose of the POAA is to improve public safety by placing the most dangerous criminals in prison; reducing the number of serious, repeat offenders by tougher sentencing; simplifying sentencing; and restoring trust in our criminal justice system. RCW 9.94A.555(2)(a)-(d). In *Rivers*, this Court recognized "the purposes of the persistent offender law include deterrence…and the segregation of those criminals from the rest of society." 129 Wn.2d at 713. Here, that purpose is served by incarcerating Smith, who has engaged in recurrent, escalating violence, culminating with murder, notwithstanding rehabilitative efforts and supervision.[11]

3. Sentences in other jurisdictions.

As further discussed, the defendant concedes that in at least 17 states, he would face a sentence of life without parole. A *Fain*

[11] For his 2007 first-degree robbery conviction, Smith was sentenced on April 18, 2008, to an exceptional sentence downward based on his youthfulness, with 12 months incarceration and 36 months of supervision. CP 388-93. While supervised, in December 2008, the defendant committed second-degree assault. Before that matter was adjudicated and while supervised, the defendant committed first-degree burglary and conspiracy to commit first-degree robbery on November 16, 2009, and was sentenced to 80 months in custody and 18 months of community custody. CP 373-79. At the time of his current offenses, Smith was supervised, CP 517, and in violation of his previous judgment, having been ordered in 2010 not to have any contact with Muongkhoth while supervised, CP 379.

proportionality analysis does not support the defendant's contention that his sentence is disproportionate to his crimes.

D. A LIFE SENTENCE FOR A 25-YEAR-OLD RECIDIVIST IS NOT CATEGORICALLY BARRED

In *State v. Bassett*, 192 Wn.2d 67, 82, 428 P.3d 343 (2018), and *Moretti*, 193 Wn.2d 809, this Court engaged in a "categorical bar" analysis to determine whether certain sentencing provisions violated article I, section 14's prohibition on cruel punishment. This analysis was developed to address categorical cruel punishment claims based on the nature of the offense or the characteristics of the offender. *Bassett*, 192 Wn.2d at 84.

1. There is no national consensus against using an adult conviction for an offense committed while a juvenile.

This Court should decline review because the defendant fails to demonstrate there is a national consensus against the sentencing practice at issue. *Moretti*, 193 Wn.2d at 821 (citing *Bassett*, 192 Wn.2d at 85). To make this determination, the Court considers "objective indicia of society's standards, as expressed in legislative enactments and state practice." *Id*. The burden is on the defendant to demonstrate a national consensus exists. *Id*. The defendant has failed to make this showing, *readily admitting that in at least 17 states*, he would face a life without parole sentence. Pet. at 14.

This Court recently held in *Moretti* there is *no national consensus* that recidivist statutes allowing the use of prior adult strikes committed when the defendant was a young adult or juvenile offender constitute unconstitutional punishment. 193 Wn.2d at 822–23. Division Two has recognized several other jurisdictions have "rejected this very argument." *Teas*, 10 Wn. App. 2d at 134. Other states concur. *See e.g., State v. Bush*, 733 So.2d 49, 54 (La. Ct. App. 1999); *Mullner v. State*, 406 P.3d 473 (Nev. 2017) (citing *U.S. v. Graham*, 622 F.3d 445, 455-61 (6th Cir. 2010)); *State v. Rideout*, 933 A.2d 706 (Vt. 2007) ("The mere fact that his sentence for crimes committed as an adult has been affected *by adult convictions obtained while he was a minor* does not…bring his sentence within *Roper's* narrow protective ambit. A…recidivist…is not punished again for his prior crimes" (emphasis added and internal citation omitted)).

Although this Court's decision in *Houston-Sconiers* would require judicial discretion at sentencing for an adult conviction committed when the defendant was a juvenile (and the defendant, in fact, received a mitigated exceptional sentence for his first strike offense based upon his youth, CP

538),[12] neither that case, nor any other authority, lead to the conclusion that the later use of that offense as a predicate for our persistent recidivist statute violates the constitutional prohibition on cruel punishment as recognized in *Moretti*. 193 Wn.2d at 822–23 .

2. Independent judgment should counsel that *Houston-Sconiers* and *Monschke* concerns are not present here.

The defendant further fails to demonstrate that this Court should exercise its independent judgment to find his life sentence for murder committed by a 25-year-old is categorically barred by either the state or federal constitution. *See Bassett*, 192 Wn.2d at 87. The court considers "'the culpability of the 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.* (quoting *Graham v. Florida*, 560 U.S. 48, 67, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)).

In short, and as above, the defendant's offenses reflect no degree of transient immaturity or reduced culpability. The defendant has had two prior opportunities to reform, failing both, and his violent behavior has

[12] With an offender score of "0" the defendant faced 31-41 months' incarceration for his first robbery conviction. CP 388. He received a sentence of 12 months. CP 388-92.

escalated to murder for no discernible reason. The science undergirding *Miller* and its progeny do not apply to Smith, a fully adult offender at the time of his third strike offense, an offense which has the highest seriousness level in Washington State other than aggravated murder. RCW 9.94A.515.

Smith does not fall within *Monschke's* prohibition on mandatory life sentences for 18 to 20-year-olds whose youthfulness *may* still merit discretion at sentencing. Like the defendants in *Moretti*, Smith was a "fully developed adult[] who [was] repeatedly given opportunities to prove [he] could change…It was [his] decision[] to commit [his] third most serious offenses that triggered the mandatory sentences of life without the possibility of parole. The POAA gives offenders a chance to show that they can be reformed, but the petitioner[] failed to do so." *Moretti*, 193 Wn.2d at 825-26 (citing *U.S. v. Rodriquez*, 553 U.S. 377, 385, 128 S.Ct. 1783, 170 L.Ed.2d 719 (2008)). Smith's failure to reform indicates that he poses an egregious and immutable danger to society, the remedy for which is incapacitation. *See Witherspoon*, 180 Wn.2d at 888 (deterrence and incapacitation are valid penological goals). This Court should decline review.

E. THE LEGISLATURE HAS STRUCK SECOND-DEGREE ROBBERY AS A PREDICATE OFFENSE, RENDERING THE DEFENDANT'S STATISTICS OUTDATED.

This Court should decline review of the defendant's claim that the persistent offender accountability act is "gravely disproportionate in its effect on racial minorities." Pet. at 16-18. This issue was not raised in the trial court or to the Court of Appeals, and the statistics cited by the defendant have not been tested by cross-examination. Generally, this Court's review on a direct appeal is limited to the record. RAP 9.1(a); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). When it is not, reliance on untested facts can produce problematic results. In *Nken v. Holder*, 556 U.S. 418, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009), Chief Justice Roberts relied upon the Solicitor General's brief which represented that DHS had a policy of repatriating victorious litigants.[13] It was later discovered there was no such policy. But the opinion was written, and the damage was done.

Unlike in *Gregory*, the defendant has not commissioned any specific studies that demonstrate racially biased imposition of the POAA.

[13] Nancy Morawetz, CONVENIENT FACTS: *NKEN V. HOLDER*, THE SOLICITOR GENERAL, AND THE PRESENTATION OF INTERNAL GOVERNMENT FACTS, 88-5 N.Y.U.L. Rev. 1600 (2013), available at www.nyulawreview.org/sites/default/files/pdf/NYULawReview-88-5-Morawetz.pdf

State v. Gregory,[14] 192 Wn.2d 1, 12, 427 P.3d 621 (2018). Instead, the defendant offers records from 2017 to 2020, claiming "in at least the past two years, life without parole sentences under the POAA have fallen especially hard on black men." Pet. at 16. However, the defendant's statistics are inaccurate and incomplete. These statistics do not indicate, for example, whether the defendants had previously been charged with strike offenses but benefitted from a plea to non-strike offenses; the numbers are also overinflated because they include defendants – a number of whom are African American – who will benefit from the legislature's enactment of ESB 5164, entitling all defendants sentenced to a POAA sentence by use of a second-degree robbery conviction to a resentencing hearing wherein that offense is no longer a predicate. Engrossed S.B. 5164, 67th Leg., Reg. Sess. (Wash. 2021). While that does not offer Smith relief, at least six African American individuals listed in the defendant's appendix are entitled to resentencing and/or release under the new legislation.[15]

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[14] This Court was divided in *State v. Davis*, 175 Wn.2d 287, 372, 290 P.3d 43 (2012), as to what degree statistics could be relied upon; the majority found based on the information available at that time, there was no evidence of racial discrimination in the imposition of capital punishment. Thereafter, specific studies were commissioned to investigate disproportionate application of the death penalty supporting the decision in *Gregory*.

[15] 2017 Fiscal Year: At least two African Americans and two Caucasians entitled to resentencing (King, Pierce, and Spokane Counties); 2018 Fiscal Year: At least one African American entitled to resentencing (Pierce); 2019 Fiscal Year: At least two African

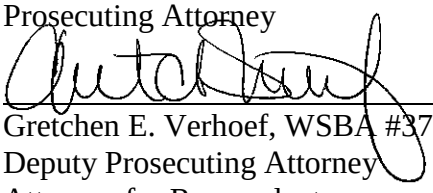
The State recognizes this Court's concern with racially disproportionate prosecutorial and sentencing practices, and where present, remedial steps should be taken. However, this Court should not rely upon outdated and untested statistics which do not thoroughly investigate any correlation between an offender's race and the application of the POAA.

IV. CONCLUSION

After his three previous strike offense convictions, incarceration, and rehabilitative efforts, Smith was on notice that another strike would result in life in prison without parole. Yet, while supervised on community custody, he sought to rob a retail establishment's occupants, at gunpoint and, in doing so, assaulted one individual with the firearm and killed another. Neither the defendant's youth, nor his race should be blamed for that decision. The State respectfully requests this Court deny review.

Dated this 7 day of June, 2021.

LAWRENCE H. HASKELL
Prosecuting Attorney



Gretchen E. Verhoef, WSBA #37938
Deputy Prosecuting Attorney
Attorney for Respondent

Americans entitled to resentencing (King and Kitsap); 2020 Fiscal Year: At least one African American and two Caucasians entitled to resentencing (King and Snohomish).

Attach. A.

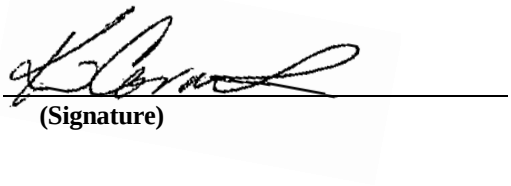
Standard Range for First Degree Murder (of Medina) with an Offender Score of "9"	RCW 9.94A.510; 9.94A.530	411 - 458 months (34.25 months to 45.66 months)
Standard Range for First Degree Assault (on Baumgarden) with an Offender Score of "0"	RCW 9.94A.589(1)(b); RCW 9.94A.510; RCW 9.94A.515	93 - 123 months (7.75 to 10.25 years)
Firearm Enhancement(s) for Subsequent Firearm Offense	RCW 9.94A.530(1); RCW 9.94A.533(3)(a), (d), (e).	30 years (Three consecutive 10-year enhancements for Counts 1, 2, 3.)
Total Incarceration (exclusive of other current offenses)		864 - 941 months (72 to 78.4 years)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEREMIAH SMITH, a/k/a JEREMIAH AKERS, Petitioner.	NO. 99744-6 CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 7, 2021, I e-mailed a copy of the Answer to Petition for Review in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
andrea@2arrows.net

6/7/2021 **(Date)** Spokane, WA **(Place)**  **(Signature)**

SPOKANE COUNTY PROSECUTOR

June 07, 2021 - 10:02 AM

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Appellate Court Case Title:	State of Washington v. Jeremiah A. Smith, aka Glenn A. Akers
Superior Court Case Number:	15-1-02459-1

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