

FILED  
Court of Appeals  
Division III  
State of Washington  
10/27/2022 11:20 AM

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
10/27/2022  
BY ERIN L. LENNON  
CLERK

101405-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

*Court of Appeals No. 38246-0-III*

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STATE OF WASHINGTON, Respondent,

v.

MARQUIS RUSSELL SMITH, Petitioner.

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**PETITION FOR REVIEW**

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## **I. IDENTITY OF PETITIONER**

Marquis Smith requests that this court accept review of the decision designated in Part II of this petition.

## **II. DECISION OF THE COURT OF APPEALS**

Petitioner seeks review of the decision of the Court of Appeals filed on September 27, 2022, declining to address his argument that the Persistent Offender Accountability Act's mandatory life without parole provisions are unconstitutional based on their discriminatory impact on racial minorities like Mr. Smith, who is black. A copy of the Court of Appeals' unpublished opinion is attached hereto.

## **III. ISSUES PRESENTED FOR REVIEW**

Is there sufficient publicly-available evidence to determine that Washington's "three-strikes" law, codified as RCW 9.94A.030(37) and RCW 9.94A.570, is imposed in an arbitrary and racially biased manner in violation of the Eighth Amendment and Washington's article I, section 14?

#### **IV. STATEMENT OF THE CASE**

Marquis Smith is a 45-year old African American man who was convicted of the second degree felony murder of his mother. CP 62, 182, 272. He had two prior “strike” convictions for second degree assault that were committed in 1994 (when he was 17 years old) and 1999, as well as a 2003 conviction for third degree assault (a non-violent offense) with a deadly weapon enhancement that elevated it to a “strike.” CP 361; *see* RCW 9.94A.030(32)(s) (defining “most serious offense” to include “[a]ny other felony with a deadly weapon verdict ....”). Consequently, he was sentenced to die in prison without the possibility of parole. CP 368.

On appeal, Mr. Smith argued only that the Persistent Offender Accountability Act (“POAA”), which mandates a sentence of life without the possibility of parole for a third strike conviction, is unconstitutional as administered because it produces well-established and manifest racial disparities. *Appellant’s Brief*, at 8. Mr. Smith relied on a number of

publicly available studies and data sources, including statistical information reported by the Caseload Forecast Counsel and the Sentencing Guidelines Commission, as well as analysis from Washington’s Task Force on Race and the Criminal Justice System, to show that overwhelming evidence demonstrates that Washington’s courts imprison black people to a harsher extent than can justified by criminal perpetration. *Appellant’s Brief*, at 8-10, 12. Nevertheless, the Court of Appeals declined to consider Mr. Smith’s argument under RAP 2.5(a) on the grounds that it lacked sufficient data to assess the merits of the claim. *Opinion*, at 1. Mr. Smith now seeks this Court’s review.

**V. ARGUMENT WHY REVIEW SHOULD BE  
ACCEPTED**

Review should be granted under RAP 13.4(b)(3) and (4).  
“[W]e owe a duty to increase access to justice, reduce and eradicate racism and prejudice, and continue to develop our legal system into one that serves the ends of justice.”  
*Henderson v. Thompson*, slip op. no. 97672-4 (filed 10/20/22),

at p. 1. When persistent offender sentences fall disproportionately and inexplicably hard on racial minorities, the Eighth Amendment to the U.S. Constitution and article I, section 14 of Washington's constitution demand that this Court consider whether the administration of the POAA can continue to be tolerated.

That the POAA is administered in a racially biased manner is evident. Since June 2008, more than one-third of all persistent offender sentences have been imposed on African-American men, despite comprising only 4.5% of Washington's population.<sup>1</sup> The disparities cannot be accounted for by

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<sup>1</sup> See U.S. Census Bureau, QuickFacts: Washington, available online at <http://www.census.gov/quickfacts/fact/table/WA/RHI225219> (last visited October 26, 2022); 2017-2020 Statistical Summary of Adult Felony Sentencing reports published by the Caseload Forecast Council, available online at [http://www.cfc.wa.gov/CriminalJustice\\_ADU\\_SEN.htm](http://www.cfc.wa.gov/CriminalJustice_ADU_SEN.htm) (last visited October 26, 2022) and attached as Appendix A to Appellant's Brief; Sentencing Guidelines Commission, Two-Strikes and Three-Strikes: Persistent Offender Sentencing in Washington State Through June 2008 (Feb. 2009) at p. 10, available online at



differences in rates of perpetration and are produced by discretionary decisions that are facially neutral but produce racially disparate effects over time. Research Working Group, Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington’s Criminal Justice System*, 47 GONZ. L. REV. 251, 254, 255-56, 275-78 (2012). Thus, these outcomes are a demonstration of structural racism – “the interaction between various institutions and practices that are neutral on their face but nevertheless produce racialized outcomes.” *Id.* at 272.

“Whether explicit or implicit, purposeful or unconscious, racial bias has no place in a system of justice.” *Henderson*, slip op. no. 97672-4 (filed 10/20/22), at p. 2. A penalty that is imposed in an arbitrarily and racially biased manner fails to serve any legitimate penological goal. *State v. Gregory*, 192

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[http://www.cfc.wa.gov/PublicationSentencing/PersistentOffender/Persistent\\_Offender\\_asof20080630.pdf](http://www.cfc.wa.gov/PublicationSentencing/PersistentOffender/Persistent_Offender_asof20080630.pdf) (last October 26, 2022).

Wn.2d 1, 5, 427 P.3d 621 (2018). In the case of persistent offender sentencing, the injustice is particularly brutal because the punishment itself is “the deprivation of hope” for black men and their loved ones – a determination that black men, more than other men, deserve to be discarded from society and forgotten, while men of other races can still pursue the promise of redemption. *State v. Moretti*, 193 Wn.2d 809, 836, 446 P.3d 609 (2019) (Yu, J., concurring).

Evidence of the racially disparate administration of the POAA is readily available in the public record to evaluate whether it meets the standards required by the Eighth Amendment and article I, section 14. Fundamental fairness is a question of legal analysis that does not demand detailed statistical analysis but asks simply whether the evidence shows that race has a meaningful impact on the imposition of the penalty. *Gregory*, 192 Wn.2d at 20.

Correcting the racial injustices produced by our criminal justice system is both a matter of significant public interest and the right thing to do to preserve the integrity of our courts. This Court should accept review under RAP 13.4(b)(3) and (4) to address the evidence of systemic racial bias in the imposition of persistent offender sentences and decide whether the plainly racialized consequences of the POAA serve legitimate penological goals and meet constitutional standards of fairness and decency under the Eighth Amendment and article I, section 14.

## **VI. CONCLUSION**

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(3) and (4) and enter an order vacating Mr. Smith's sentence and remanding the case to impose a proportionate sentence relative to the seriousness of his crime and his prior history.

RESPECTFULLY SUBMITTED this 27 day of  
October, 2022.

*This document contains 1,113 words, excluding the parts  
of the document exempted from the word count by RAP 18.17.*

TWO ARROWS, PLLC



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ANDREA BURKHART, WSBA #38519  
Attorney for Petitioner

## CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare under penalty of perjury under the laws of the State of Washington that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Marquis R. Smith, DOC #726791  
Washington State Penitentiary  
1313 N. 13th Ave.  
Walla Walla, WA 99362

And, pursuant to prior agreement of the parties, by e-mail to the following:

Larry Steinmetz  
Deputy Prosecuting Attorney  
SCPAAppeals@spokanecounty.org

Signed this 27 day of October, 2022 in Kennewick,  
Washington.

  
\_\_\_\_\_  
Andrea Burkhart

Court of Appeals Opinion no. 38246-0-III (filed 9/27/2022)

# APPENDIX A

**FILED**  
**SEPTEMBER 27, 2022**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

STATE OF WASHINGTON,	)	No. 38246-0-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
MARQUIS RUSSELL SMITH,	)	
	)	
Appellant.	)	

PENNELL, J. — Marquis Russell Smith appeals his life sentence for second degree murder based on a constitutional challenge to Washington’s Persistent Offender Accountability Act (POAA), RCW 9.94A.030, .570. Mr. Smith is a Black man. His challenge rests on data suggesting the POAA has a discriminatory impact on people of color. Because Mr. Smith did not challenge the constitutionality of the POAA in the trial court, we lack sufficient data to assess the merits of Mr. Smith’s constitutional claim. We decline review of Mr. Smith’s unpreserved error under RAP 2.5(a).

**FACTS**

On May 6, 2021, a jury convicted Marquis Smith of second degree murder and found he was armed with a deadly weapon. The allegations giving rise to his conviction involved the stabbing death of Mr. Smith’s mother.

At sentencing on May 20, the State argued Mr. Smith was a persistent offender under RCW 9.94A.030(37) and RCW 9.94A.570. Mr. Smith did not challenge this designation. Defense counsel agreed, “This is a three-strike situation. There’s not much else to say.” Report of Proceedings (May 20, 2021) at 17. The court imposed the mandatory sentence of life in prison without the possibility of parole under the POAA, RCW 9.94A.570.<sup>1</sup>

Mr. Smith now appeals from his judgment and sentence.

#### ANALYSIS

The sole issue raised in Mr. Smith’s appeal is a challenge to the constitutionality of the POAA. Mr. Smith contends application of the POAA to his case is arbitrary and racially biased. The State answers Mr. Smith’s claims do not merit review because they were not raised in the trial court and do not give rise to a claim of manifest constitutional error under RAP 2.5(a). We agree with the State.

Failure to object to an error at trial generally constitutes as waiver of the argument on review. RAP 2.5(a). An exception applies in the context of manifest constitutional error. RAP 2.5(a)(3). To be entitled to review of an unreserved error under

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<sup>1</sup> The trial court also sentenced Mr. Smith to a mandatory 24 months of confinement on the deadly weapon enhancement, and imposed \$5,325.15 in legal financial obligations.



No. 38246-0-III  
*State v. Smith*

RAP 2.5(a)(3), “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

Mr. Smith has not shown any manifest error. No existing case has held the POAA unconstitutional, and the data and statistics presented by Mr. Smith in his appellate briefing were not before the trial court at the time of Mr. Smith’s sentencing. The trial court could not have been expected to foresee and correct any hypothetical error posed by Mr. Smith’s sentence. Furthermore, it would not be fair to decide this case on the grounds argued by Mr. Smith without providing the State an opportunity to rebut the data he presents and to present its own data. *See also State v. Kennon*, No. 80813-3-I, slip op. at 25-28 (Wash. Ct. App. Aug. 16, 2021) (unpublished), <https://www.courts.wa.gov/opinions/pdf/808133.pdf>, *review denied*, 198 Wn.2d 1039, 501 P.3d 146 (2022); *State v. Simmons*, No. 80563-1-I, slip op. at 28-29 (Wash. Ct. App. Oct. 25, 2021) (unpublished), <https://www.courts.wa.gov/opinions/pdf/805631.pdf>, *review denied* 199 Wn.2d 1003, 504 P.3d 829 (2022).


Because Mr. Smith has not shown that error was manifest either as a matter of fact or law, review is inappropriate under RAP 2.5(a).

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*State v. Smith*

CONCLUSION

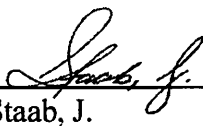
The judgment and sentence is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
\_\_\_\_\_  
Pennell, J.

WE CONCUR:

  
\_\_\_\_\_  
Siddoway, C.J.

  
\_\_\_\_\_  
Staab, J.

**BURKHART & BURKHART, PLLC**

**October 27, 2022 - 11:20 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 38246-0  
**Appellate Court Case Title:** State of Washington v. Marquis Russell Smith  
**Superior Court Case Number:** 19-1-10065-7

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