No. 102602-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DENNIS GIANCOLI,

Petitioner.

MEMORANDUM OF AMICI CURIAE ACLU OF WASHINGTON FOUNDATION, KING COUNTY DEPARTMENT OF PUBLIC DEFENSE AND PURPOSE. DIGNITY. ACTION. IN SUPPORT OF REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Cases

Statutes

Court Rules

Treatises

Constitutional Provisions

Published Reports and Books

I. IDENTITIES AND INTERESTS OF *AMICI*

Per RAP 10.3(e), the identities and interests of *Amici* are found in the accompanying motion for leave.

II. STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case.

III. ARGUMENT

Washington's three-strikes law—the Persistent Offender Accountability Act (POAA)—mandates death-in-prison sentences at an overwhelming racially disproportionate rate. Black and Indigenous people are serving life without the possibility of parole (LWOP) sentences at rates that far exceed their proportion of our state's population. This case presents the Court with the opportunity to address an incredibly harmful area of racial disparities in the criminal legal system—the racially-disparate impact of Washington's three-strikes law.

Dennis "Bearclaw" Giancoli is an Indigenous, mixed-race man. His mother is an Indigenous woman affiliated with the Cree First Nations of James Bay, Canada. CP 267. His father was a

white Vietnam Veteran who suffered from severe PTSD. CP 268. Mr. Giancoli was raised on the Muckleshoot Reservation and, at times, in foster care. CP 268. Mr. Giancoli's life experience as an Indigenous child—growing up on a reservation, foster care, juvenile arrests and incarceration, ongoing struggles with substance use disorder—reflect systemic failures commonly experienced by Indigenous youth that result in the overrepresentation of Indigenous people in the criminal legal system. CP 267-269.

This Court should accept review of Mr. Giancoli's petition because, consistently throughout Washington courts, the application of the POAA is racially biased which raises a significant question of constitutional law. RAP 13.4(b)(3). Mr. Giancoli's case also warrants review to address the question of fundamental fairness—an issue of substantial public interest—because Mr. Giancoli is sentenced to die in prison, but his similarly situated co-defendant is not. RAP 13.4(b)(4).

Mr. Giancoli's sentence highlights the racially disproportionate application of the POAA in the starkest of ways. Mr. Giancoli—an Indigenous, mixed-race man—is serving a death-in-prison sentence while his co-defendant—a white man—is not. This, even though both were convicted after trial of the same crimes based on the same incident and both were sentenced to die in prison. This Court should accept review because this disparate outcome calls into question the most basic principle of fundamental fairness—an issue of substantial public interest. RAP 13.4(b)(4).

1. Washington's Third Strike Law Is a Relic of Our Nation's Racially-Biased "Tough on Crime" Era

In 1981, the Washington State legislature adopted the Sentencing Reform Act (SRA), which abolished the state's previous parole system. The SRA mandated determinate sentences with the purported goal of ensuring that similarly situated defendants—people convicted of similar crimes and who have similar criminal histories—receive similar sentences.

Katherine Beckett & Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington* 12 (2020), https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state. The SRA's elimination of parole and newly imposed determinate sentencing scheme were driven by many concerns, including the racial disproportionality of the extremely subjective indeterminate sentencing system. *Id.* at 11.

While concerns with equity informed at least part of the SRA's reforms, a decade later, the political winds changed, and less laudable goals came to the fore. Under the SRA as originally enacted, only aggravated murder convictions triggered mandatory LWOP sentences, which automatically occurred if a death sentence was not imposed. *Id.* This mandatory LWOP sentencing structure was imported from legislation adopted in 1977 that required a LWOP sentence if the death penalty was not imposed after an aggravated murder conviction. *Id.* In 1993, in the midst of this nation's racially-motivated and draconian

"tough on crime" era, Washington State became the first state to adopt a "three strikes" law. *Id*. at 16; see also Laws of 1995, ch. 1 § 1. The POAA requires mandatory death-in-prison sentences—life without the possibility of parole—to be imposed upon the third conviction of "most serious offenses." RCW 9.94A.570.

The POAA is another iteration of a non-evidence-based, racially-biased "tough on crime" approach to the misperception of increased crime in our state.[1] This is evidenced by the fact that "the dramatic uptick in long and life sentences occurred at a time when crime rates were declining steadily." Beckett & Evans,

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[1]In the years following passage of the POAA, Washington State passed other statutory schemes mandating harsh prison sentences above those prescribed in the SRA. Washington's iteration of the "war on drugs" resulted in Black people charged with drug offenses to be 62% more likely to be sentenced to prison than white people. Sentencing enhancements like firearm enhancement scheme passed in 1995 added mandatory consecutive prison time without improvement of public safety. Mandatory minimum sentences both increased sentences generally but also compelled people charged with crimes to plead guilty rather than risk the "extreme consequences" of going to trial. Beckett & Evans, *supra* at 19-20, 52.

supra at 27. Further, "[the data shows] that the increased imposition of long prison sentences was not a response to crime trends." *Id*. Indeed, "*while the violent crime rate was 31 percent lower in 2016 than in 1986, the rate at which long and life sentences were imposed was 174 percent higher in 2016 than in 1986." Id.* (emphasis in original).

Just as "tough on crime" laws fueled racially disparate mass incarceration across America, so did Washington's POAA. This is not a mere coincidence nor an unintended consequence. Three-strikes laws were constructed from the ignominious legacy of appealing to white voters' racial anxieties through the "war on drugs," "super predator" myth, and other policies that invoked long-held racist beliefs about Black people that were thinly disguised under the façade of neutrality. James Foreman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow* (2008), https://law.yale.edu/sites/default/files/documents/pdf/sela/SELA12_Forman_CV_Eng.pdf. As one scholar describes,

"[b]eginning in the mid-1960s, Republican politicians—led by presidential candidates Goldwater and Nixon—focused on crime in an effort to tap into white voters' anxiety over increased racial equality and a growing welfare state." *Id.* at 9. This effort was more than just implied. "In the words of [one of Nixon's advisors], Nixon 'emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to.'" *Id* at 10. As another scholar explains, "[i]f one were writing a law to deliberately target blacks, one could scarcely have done it more effectively than 'three strikes.'" Greg Krikorian, More Blacks Imprisoned Under '3 Strikes,' Study Says, THE LOS ANGELES TIMES (Mar. 5, 1996) https://www.latimes.com/archives/la-xpm-1996-03-05-mn-43270-story.html.

2. Washington's Third Strike Law Is Imposed in an Arbitrary and Racially Biased Manner

In the years following the enactment of the POAA, LWOP sentences increased at a staggering rate. In 1986, there were 11 people serving LWOP sentences in Washington State. Beckett &

Evans, *supra* at 25-26. Between 1995 and June of 2017, a total of 503 LWOP sentences have been imposed under the POAA. *Id.* at 32 (including LWOP sentences imposed under the POAA's two- and three-strikes provisions).

The imposition of death-in-prison sentences are significantly disproportionately imposed on people of color—particularly on Black and Indigenous defendants. *Id.* at 27-28. Studies of sentencing data reflect this consistent and shocking trend. The degree to which Black people are over-represented among those with long and life sentences is startling, and increases as sentence length grows: between 1986 and 2017, an average of 3.5% of the state population identified as Black, "but 19% of those sentenced to prison, and 28% of those sentenced to life in prison, were [B]lack..." *Id.* at 28 (including both mandatory and de facto life sentences in this statistical analysis). During the same period, Indigenous people were nearly two times more likely to receive a death-in-prison sentence under the POAA as compared to their proportion of the population. *Id.* at

28 ("Just over one (1.2) percent of the state population identifies as Native American, but … 1.9 percent of those receiving life sentences are identified in the sentencing data as Native American.") (using the same method of statistical analysis as noted above).

Analyses of similar data show the same stark results. The Sentencing Guideline Commission analyzed data regarding LWOP sentences imposed through June of 2008, which revealed that 52.2% of defendants sentenced under the POAA were white while 40.4% were Black. State of Washington Sentencing Guidelines Commission, *Two-Strikes and Three-Strikes: Persistent Offender Sentencing in Washington State Through June 2008*, 10 (February, 2009), https://cfc.wa.gov/sites/default/files/Publications/Persistent_Offender_asof20080630.pdf. A similar report from the following year concluded that 47% of people sentenced to a third strike LWOP sentence were white, while 39.6% were Black. Columbia Legal Services, *Washington's Three Strikes Law: Public Safety*

& Cost Implications of Life Without Parole, 8 (Jan. 25, 2010). This striking disproportionality occurred during a time when only 3.9% of Washington's population was Black and 74.6% were white. *Id*. This trend continued into the 2010s and through this decade. Now, 272 people remain in prison sentenced under the three-strikes law. Brief of Appellant at Appx. 6–15, 17, *State v. Giancoli*, 56287-1-II, 2023 WL 7156773 (2023) (excluding people who are pending resentencing after second-degree robbery was removed as a "most serious offense).

Currently, in Washington State, Black people make up 4.4% of our state's population yet 37% of people sentenced to die in prison under the POAA. *Id*. at Appx. 6–15, 17, 19. Meanwhile, white people make up 76.8% of Washington's population yet only 54% of people sentenced to die in prison are white. *Id*. A law that sentences Black people to die in prison at a rate nearly 10 times higher than their percentage of the population cannot be tolerated.

In *State v. Gregory*, this Court found that our state's death penalty scheme was unconstitutional as administered because it was "imposed in arbitrary and racially biased manner." 192 Wn.2d 1, 1, 427 P.3d 621 (2018). This Court relied on data that overwhelmingly showed the racial disproportionality of the imposition of death sentences on Black people, including the finding that "[B]lack defendants were four and a half times more likely to be sentenced to death than similar situated white defendants." *Id.* at 12. Importantly, the *Gregory* court noted that it's not just a static statistical analysis that is required to show racial disproportionality, but rather "[t]he most important consideration is whether the evidence shows that race has a meaningful impact on imposition of the death penalty." *Id.* at 20. The Court explained that this is a legal analysis, "not pure science." *Id.*

The POAA—similar to the death penalty—has a shocking and unacceptable disproportionate impact on people of color, particularly Black and Indigenous people. If anything, the data is

even stronger in the case of LWOP sentences than it was with the death penalty. While the *Gregory* Court grappled with arguments regarding the limited data set related to our State's modern death penalty (*Id.* at n.7), no such concern is present here. The large number of LWOP sentences imposed in our state provides irrefutable evidence of the racially disproportionate impact of the POAA. Like in *Gregory*, the association between race and the imposition of death-in-prison sentences under the POAA is "not attribute[able] to random chance." *Id.* at 22.

3. The POAA's Inclusion of Second-Degree Assault as a Strike Offense Exacerbates Racial Disproportionality and Does Not Comport with Evolving Standards of Decency

While the death-in-prison sentences under the POAA generally are imposed in a racially disproportionate manner, the racial disparity is even more acute for defendants convicted of second-degree assault. Black people with second-degree assault predicate convictions serving death-in-prison sentences account for 38% of all LWOP sentences under the POAA, yet just 4.4% of the state's population. On the other hand, white people

constitute 50% of those serving death-in-prison sentences with second-degree assault predicate convictions, yet 67.5% of the state's population. Brief of Appellant at Appx. 18-20, *State v. Giancoli*, 56287-1-II, 2023 WL 7156773 (2023). The racial disparity of the application of death-in-prison sentences with second-degree assault predicate convictions alone shows that the law is administered and imposed in an arbitrary and racially biased manner.

On top of this even more profoundly racially biased application, the inclusion of second-degree assault as a predicate offense is out of step with evolving standards of decency. Indeed, Washington State—typically at the forefront of justice—is an outlier in the national consensus, that second-degree assault convictions should not constitute strike offenses. *See* Brief of Appellant at Appx. 21-30, *State v. Giancoli*, 56287-1-II, 2023 WL 7156773 (2023) (providing state-by-state analysis of three-strikes laws). Just as the *Gregory* court noted that the evolution of the law was moving to disfavor capital punishment, the

nation's legal landscape is moving away from punitive three-strikes sentencing regimes generally, and even more so the inclusion of second-degree assault as a strike offense.

4. The Starkly Differing Outcomes of Mr. Giancoli and his Co-Defendant's Appeals Violate Fundamental Principles of Fairness

Sentencing outcomes must abide by "prevailing notions of fundamental fairness." *In re* Blackburn, 168 Wn.2d 881, 885, 232 P.3d 1091, 1093 (2010) (quoting *State v. Lord*, 117 Wn.2d 829, 867, 822 P.2d 177 (1991)). Fundamental fairness is required in order for the integrity of the legal system to be sustained. Here, the disparate sentences imparted on Mr. Giancoli—who is serving a death-in-prison sentence—and his similarly situated co-defendant—whose de facto death-in-prison sentence was reversed—violates the most basic notions of fundamental fairness, equal protection under the law, and purpose of the SRA. See *State v. Handley*, 115 Wn.2d 275, 290–91, 796 P.2d 1266 (1990); U.S. Const. amend. XIV; RCW 9.94A.010 (noting that among the purposes of the SRA to ensure that punishment is

proportionate to the seriousness of the offense and is "commensurate with the punishment imposed on others committing similar offenses.")

For there to be trust in the legal system, it must abide by the most basic notions of fundamental fairness. Fundamental fairness requires adherence to the SRA's primary goal, "to enhance fairness and predictability across similar cases." Beckett & Evans, *supra* at 12. A system of justice wherein an Indigenous defendant serves a death in prison sentence while his white co-defendant---convicted of the same crimes based on the same incident and who was originally sentenced to a de facto death-in-prison sentence---does not violates the most basic notions of fairness and must not be upheld.

IV. CONCLUSION

For the reasons stated above, Amici ask this Court to grant Mr. Giancoli's petition for review.

This document contains 2,373 words per RAP 18.17(c)(9), excluding the parts of the document exempted from the word

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RESPECTFULLY SUBMITTED January 29, 2024.

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CERTIFICATE OF SERVICE

I Certify that on this 29th day of January, 2024, I caused a true and correct copy of this document to be served on all parties by electronically filing this document through the Washington State Appellate Courts Secure Portal.

Signed this 29th day of January, 2024 at Seattle, WA.

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