No. 99744-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH SMITH, A.K.A. GLENN AKERS,

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 REVIEW

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IDENTITY AND INTEREST OF AMICI

The identity and interest of amici are set forth in the Motion for Leave to File that accompanies this memorandum.

INTRODUCTION

Mr. Smith's case presents this Court with an opportunity to apply its juvenile justice jurisprudence to bring the Persistent Offender Accountability Act (POAA) within constitutional bounds, ensuring that the state's harshest punishment is not imposed based on a strike offense committed as a child. The POAA requires that life without parole be imposed on someone who commits three most serious offenses, no matter how young the person may have been at the time of the predicate crimes. The mandatory nature of the statute flies in the face of scientific and legal consensus that mandatory sentencing schemes that fail to account for the diminished culpability of children are constitutionally infirm.

This Court should accept review of the precise question this Court left open in *State v. Moretti*, 193 Wn.2d 809, ¶ 22 n.5, 446 P.3d 609 (2019)—"a significant question of law under the Constitution of the State of Washington," RAP 13.4(b)(3)—and should categorically bar the use of juvenile strike offenses under the POAA. Any other result is inconsistent with this Court's juvenile justice jurisprudence, as it would leave in place a scheme mandating disproportionate punishment on a class of offenders

who are inherently less culpable than those who commit all strike offenses as fully culpable adults. Mr. Smith's case also warrants review to examine the POAA's disproportionate racial impact, "an issue of substantial public interest" under RAP 13.4(b)(4).

ARGUMENT

I. Review Is Warranted to Bring the POAA Within Constitutional Bounds and to Harmonize It With This Court's Juvenile Justice Jurisprudence.

Imposition of life without parole based in part on inherently less-culpable juvenile conduct violates the categorical proportionality principles of article I, section 14 articulated in *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018), as well as this Court's repeated pronouncements that mandatory sentencing schemes that fail to take into account the diminished culpability of children are constitutionally infirm. *Bassett*, 192 Wn.2d 67 (mandating categorical test for claims based on the diminished culpability of children as a class and categorically barring juvenile life without parole); *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017) (requiring consideration of mitigating circumstances of youth at sentencing and holding that courts have full discretion to depart from any adult sentencing range and/or mandatory enhancements); *State v. Gilbert*, 193 Wn.2d 169, 438 P.3d 133 (2019) (sentencing courts possess discretion to consider downward sentences for juvenile offenders regardless of any

sentencing provision to the contrary); *Matter of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021) (heightened protection of article I, section 14 requires *Miller*'s guarantee of individualized sentencing to extend to those aged 18-21 who are convicted of aggravated murder).

The POAA mandates that strike offenses committed as juveniles support a life without parole sentence—the harshest sentence available in Washington. *See* RCW 9.94A.030(34) (an "offender" is either over 18 or under 18 and declined to adult court); RCW 9.94A.030(37) (defining persistent offender as one convicted of a most serious offense who has also been "convicted as an offender on at least two separate occasions" of most serious offenses); RCW 9.94A.570 (requiring life without parole to be imposed on persistent offenders); *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018) (invalidating the death penalty statute and converting all death sentences to life without parole).

The mandatory imposition of life without parole is cruel when applied to the class of offenders who, like Mr. Smith, were convicted of a strike offense as a child. To treat a strike offense committed by a child identically to a strike offense committed by an adult violates the promise of our constitution to protect against cruel punishment. *Bassett* determined that article I, section 14 is more protective in the juvenile sentencing context and requires categorical proportionality analysis for claims based

on the culpability of an offender class, 192 Wn.2d at ¶ 28 (citing *Graham v. Florida*, 560 U.S. 48, 67, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), *as modified* (July 6, 2010)). Children are less criminally culpable than adults, and the characteristics of youth do not support the penological goals of a life without parole sentence. *Id.* at ¶ 44 ; *see also id.* ¶ 39 (because children have "lessened culpability they are less deserving of the most severe punishments."). *Bassett* provides new grounds to find that outdated assumptions about "offenders" and culpability are constitutionally infirm when applied to strike offenses committed by children.

This Court should also accept review to clarify that its proportionality review of recidivist punishment encompasses both the predicate and qualifying offenses. The State's characterization that the sentence was imposed solely on the basis of Mr. Smith's third strike, Answer to Pet. for Rev. at 9-12, contradicts *State v. Fain* and subsequent POAA decisions under article I, section 14, which unambiguously require proportionality review to include all offenses. *Fain*, 94 Wn.2d 387, 397-98, 617 P.2d 720 (1980) (examining "each of the crimes that underlies his conviction as a habitual offender"); *State v. Thorne*, 129 Wn.2d 736, 773-74, 921 P.2d 514 (1996), *abrogated on other grounds by Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (same); *State v. Manussier*, 129 Wn.2d 652, 677, 921 P.2d 473 (1996)

(same); *State v. Rivers*, 129 Wn.2d 697, 713, 714, 921 P.2d 495 (1996) (discussing prior offenses under *Fain* factor 4); *see also Bassett*, 192 Wn.2d, ¶¶ 30-35 (*Fain* adopted individual proportionality analysis because it fit the challenge Fain brought—that his sentence "was grossly disproportionate to his *crimes*") (emphasis added)). To limit proportionality analysis solely to the final "strike" under article I, section 14 would afford less protection than the Eighth Amendment,[1] which is impermissible. *Gregory*, 192 Wn.2d at 36 (Johnson, J., concurring).

The State's argument that the punishment imposed is only for the final "strike" relies upon a sentence in *Moretti*: "[b]ut our proportionality review focuses on the nature of the current offense, not the nature of past offenses." 193 Wn.2d at 832. However, it is unclear that former Chief Justice Fairhurst appreciated how this sentence, if taken literally, would sub silentio reverse *Fain*, *Thorne*, *Manussier*, and *Rivers*. Usually, more is required to reverse 40 years of settled Washington jurisprudence.[2] And this Court is not bound to follow *Moretti* on that point, because *Moretti*

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[1] *Cf. Solem v. Helm*, 463 U.S. 277, 296-97, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) (examining closely both the instant and previous offenses that qualified Helm as a habitual offender); *Rummel v. Estelle*, 445 U.S. 263, 295, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980) (Powell, J., dissenting) (considering each of the victimless crimes underlying LWOP sentence).

[2] *See State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999) ("We will not overrule such binding precedent *sub silentio*."). Justice Fairhurst herself warned against sub silentio overruling of precedent. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) (citing *Studd*, 137 Wn.2d at 548) (where Court has "expressed a clear rule of law . . . we will not —and should not—overrule it sub silentio").

did not actually address the tension between its characterization of recidivist punishment and its duty under article I, section 14 and the Eighth Amendment to review all strikes. *See In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) ("Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court").

Mr. Smith has squarely challenged the cruelty of his punishment under article I, section 14. This Court has a duty to interpret the constitution; after *Gregory*, this Court also has a duty to engage in "a serious reexamination of our mandatory sentencing practices . . . to ensure a just and proportionate sentencing scheme." *Moretti*, 446 P.3d ¶ 50 (Yu, J., concurring). This Court must accept review to consider the POAA's constitutionality as applied to the class of offenders sentenced to die in prison based on strike offenses committed as children.

II. Review Is Warranted to Further Examine the POAA's Disproportionate Racial Impact.

Amici also support Mr. Smith's request that this Court accept review to examine the race disproportionality under the POAA. Pet. for Review at 16-18; *see also* Washington Supreme Court, Open Letter to the Legal Community (June 4, 2020) (committing to examining and

remedying ways in which the legal system perpetuates structural racism). Amici have requested records from the Department of Corrections to obtain more current data about the number of two- and three-strikers who are serving life without parole sentences based on crimes committed as children. As of October 2020, 146 individuals serving life without parole under the POAA had a juvenile offense on their record.[3] The race disproportionality among this group is stark: 46 of 146 are Black. Amici are requesting additional documentation from DOC to determine the exact number of those among this group whose juvenile offenses counted as strikes. If review is granted, and assuming the records are timely provided, amici anticipate having additional data to present to this Court regarding how many people are incarcerated based on crimes committed as children, and the race disproportionality among that group.

Even without specific race disproportionality statistics, this Court is well aware of Washington's long history of severe race disproportionality in incarceration. On March 2, 2011, in a historic symposium at the Temple of Justice, an ad hoc task force presented its findings, recounting a history in which Washington State, in 1980, had the highest rate in the nation of racially disproportionate representation in its

[3] Public records act response from DOC, on file with counsel for amici. Initial records provided by DOC to counsel for amici did not differentiate between those individuals whose juvenile offenses counted as strikes and those whose did not.

prisons.[4] The Court heard that in 1982, "80% of black imprisonment in Washington for serious crimes could not be accounted for based on arrest rates, though by 2009, this had dropped to 45%."[5] Progress, to be sure, but the task force concluded that observed disproportionalities in incarceration could not be due solely to differential crime commission rates, that facially neutral policies had a disparate impact on people of color, and that "racial and ethnic bias distorts decision-making in the criminal justice system, contributing to disparities."[6]

A recent analysis of criminal sentencing in Washington over the last four decades has illuminated how actions by the electorate (through voter initiatives), legislature, prosecutors, and courts have resulted in Black defendants receiving long and life sentences at a disproportionate rate.[7] Specifically, from 1986 to 2017, an average of 3.5% of Washington's population identified as Black, but 19% of those sentenced to prison, over 20% of those receiving long sentences, and 28% of those

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[4] Presentation by Race and Criminal Justice System Task Force, Mar. 2, 2011, https://www.tvw.org/watch/?eventID=2011031372.

[5] Research Working Group, Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L. Rev. 623, 638 (2012), 87 Wash. L. Rev. 1, 15 (2012), 47 Gonz. L. Rev. 251, 265 (2012).

[6] *Id*., 35 Seattle L. Rev. at 629, 87 Wash. L. Rev. at 6, 47 Gonz. L. Rev. at 256.

[7] *See generally* Katherine Beckett & Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State* (Feb. 2020), https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state.

sentenced to life without parole were Black.[8]

The POAA is a significant contributor to this incarceration disproportionality.[9] In 1993, Washington adopted the POAA, which mandates a life without the parole sentence upon a third conviction of a "most serious offense."[10] The impact was immediate. By 1995, 16 offenders had been committed to life without parole pursuant to the POAA to serve sentences that were, on average, 24 years longer than those they would have received under the previous sentencing regime.[11]

And significant racial disproportionality in imposition of the POAA continues to exist 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."[12] The greatest disparity exists for the Black community: "almost 40% of three strikes offenders sentenced are African American, while only 3.9%

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[8] *Id.* at 28.
[9] *Id.* at 31-34.
[10] *See* David Boerner, *Sentencing Policy in Washington, 1992-1995*, in SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 30, at 31 (Michael Tonry & Kathleen Hatlestad eds., 1997). The legislature then expanded the definition of "persistent offender" to include "Two-Strike Sex Offenders," or defendants who received two separate convictions of specified sex offenses. *See* Beckett & Evans, *supra* at 14.
[11] *See* Boerner, *supra* at 32 (Table 2.2. Impact of Three Strikes on Sentences, First Sixteen Cases assumes length of a life without parole sentence based on a 70-year life expectancy; increased average sentence length calculated in years based on the increased sentence length in months as reported in Table).
[12] Columbia Legal Services, *Washington's Three Strikes Law: Public Safety & Cost Implications of Life Without Parole* 7 (2010), https://columbialegal.org/wp-content/uploads/2019/03/CLS-Report_Washingtons-Three-Strikes-Law.pdf.

of the state's population is African American."[13] As of 2009, roughly 10% of the 229 three strikers were convicted of at least one strike offense prior to age 18.[14] It is not unreasonable to assume similar rates of race disproportionality among three strikers with juvenile strikes. Even after those with second-degree robbery strikes are resentenced, Laws of 2021, ch. 141, § 1, it is illogical to conclude that the extreme race disproportionality created by the POAA will not require this Court's attention.

CONCLUSION

Amici urge this Court to accept review so it can bring the POAA within the bounds of this Court's juvenile justice jurisprudence.

DATED this 2nd day of July, 2021.

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[13] *Id.*
[14] *Id.* at 4, 5, 9.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on July 2, 2021, 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 2nd day of July, 2021.

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