SUPREME COURT NO. _____

NO. 57445-4-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEVEN NELSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Grant Blinn & Stanley Rumbaugh, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

RULES, STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

Page

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Steven Nelson asks this Court to grant review of the Court of Appeals' partially published decision in State v. Nelson, No. 57445-4-II, (June 25, 2024) (Appendix).

B. ISSUES PRESENTED FOR REVIEW

1. Whether the imposition of a mandatory life sentence under the three strikes law constitutes cruel punishment under article I, section 14 of the Washington Constitution because of its racially disproportionate impact on Black people?

2. Whether the court abused its discretion by refusing to consider and inquire into Nelson's repeated requests for new counsel based on a breakdown in communication?

3. Whether the court erred in finding a prosecution witness was unavailable to testify because of incompetence or unsound mind?

C. STATEMENT OF THE CASE

1. Procedural history.

Nelson was charged with first degree assault with a deadly weapon for allegedly stabbing Patricia McCray with intent to inflict great bodily harm and/or with a deadly weapon or by force likely to produce great bodily harm. CP 3-4.

Nelson's case first went to trial in December 2021. The jury was unable to reach a verdict and a mistrial was declared. See 1RP[1] 5-565; 2RP 5-55; 3RP 6-7; CP 43-33. Nelson represented himself at his second trial which began in August 2022. A jury found Nelson not guilty of first degree assault but convicted him of second degree assault. CP 80-81. The jury also found that Nelson was armed with a deadly weapon. CP 83.

Nelson's conviction constituted a "third strike" and he was sentenced to life in prison without the possibility of parole

[1] The index to the record citations is in the Brief of Appellant (BOA) at 4-5, n.1.

as a persistent offender. CP 86-101; 5RP 1003-04. The court found Nelson had prior most serious convictions for first degree assault and second degree assault. CP 84-85; 5RP 996-99.

2. Trial evidence.

On January 26, 2021, Cynthia Davis and Marvin Leikam entered a shared residence in Tacoma. Leikam heard a struggle coming from an upstairs second-floor room. 5RP 235-36, 263. Davis believed the noises were caused by items being moved. 2RP 45-46, 57-58. Another resident denied seeing or hearing anything. 5RP 615, 880.

Leikam and Davis were in a romantic relationship. 5RP 234-35, 255. Davis and Nelson were renters at the house. 2RP[2] 42-44, 56; 5RP 245-47, 379-81, 605-07. There had been no prior disturbances from Nelson's bedroom. 5RP 259-60.

Leikam often stayed with Davis at the house despite not being on the lease or paying rent. 2RP 44-45; 5RP 234-35, 255-

[2] Davis's testimony from Nelson's first trial is included because Davis was deemed unavailable to testify at the second trial because of mental illness. 5RP 447-49.

57, 264-65. Davis and Leikam both struggled with mental health issues and alcohol abuse. 5RP 247-52, 280.

Davis and Leikam did not go upstairs for 10 minutes. 2RP 46, 52, 58. When they did, Davis heard a woman say she did not take it and that he was trying to kill her. 2RP 46-47, 59, 61. Davis tried to open the door, but it was locked. 2RP 47, 60-61. Davis told Nelson to open the door and make the woman leave because she was being too loud. 2RP 47-49, 61.

Leikam testified Davis did not follow him until after he went upstairs and demanded Nelson exit the bedroom. 5RP 237-38, 265-66, 268, 271. Leikam heard a woman weeping and sounds for about five seconds. 5RP 236-37, 264, 276. Leikam testified both that he could not hear any specific words, and that he heard the woman say, "you're killing me." 5RP 237-38, 266, 288, 283

When the door opened, Nelson pushed McCray outside. 2RP 48, 62; 5RP 238-39, 268. No one else was inside. 5RP 267. Leikam heard Nelson say, "you fucking bitch. I'm going to kill

you." 5RP 240. Davis and Leikam had never seen McCray before. 2RP 60; 5RP 241-42, 276, 836-37.

Leikam did not see Nelson hit McCray. 5RP 243. Nelson did not appear injured and had nothing in his hands. 2RP 51, 62-63; 5RP 241, 243.

Leikam told Nelson to stay in his room. 5RP 241-42, 272. McCray appeared to Davis to be in shock, but Leikam believed she might have been under the influence. 2RP 51; 5RP 276. Leikam and Davis called 911 and followed McCray outside. 12RP 51-53; 5RP 244, 272, 373-75, 601-02, 619, 642-43, 651. Davis did not see Nelson call 911 or render any aid. 2RP 53.

When police arrived, McCray was walking in the street. 5RP 374, 600-01. McCray was conscious but appeared to be in pain. 5RP 374-75, 405, 602. Police saw a puncture wound on McCray's right shoulder. 5RP 375-76, 602.

McCray identified a white car leaving the house as Nelson's. 5RP 377, 387, 495-96, 603-05, 643-44. Nelson was

the only person inside when the car was stopped by police. 5RP 336-38, 341, 345, 378, 405, 646-49. Police saw apparent blood on Nelson's hands. 5RP 339, 609, 649-50, 654, 660, 693, 696. This was not confirmed through forensic testing. 5RP 346-47, 660, 671-73. Nelson's hands contained no cuts, and he did not request medical aid. 5RP 340, 650, 654, 663-64, 693-95. Nelson denied having been involved in any fights or altercations. 5RP 697, 700, 703, 706.

Blood was found on the stairwell, second-floor hallway walls, and exterior of Nelson's room. 5RP 381, 415, 565-67, 570, 583, 608, 628, 666, 672. Inside Nelson's room, some police officers noticed blood droplets, while others denied seeing any. 5RP 415-16, 565, 628-29. No blood was on the bed. 5RP 583-84. No illegal substances were found. 5RP 411, 621, 627-28.

A knife and hammer were found inside the room. 5RP 384, 392-93, 411, 624, 627. The hammer contained no bloodstains. 5RP 384-85, 392-93, 408, 411-12. The knife had

apparent bloodstains on the handle and 8-inch blade. 5RP 385, 391-92, 553, 558, 562, 565, 577-79, 612-13, 878, 896.

McCray had two wounds to her right back, two on her right chest, and one on her right arm. 5RP 289, 294-98, 313-18, 468, 471. The injuries were three to six centimeters in length and did not require surgery. 5RP 295-97, 316-17, 321. None were life threatening. 5RP 326-29, 477. McCray had no internal bleeding or organ damage, and she was discharged after the wounds were closed with sutures. 5RP 317, 321-22, 326, 329-30, 469-70, 476-77, 500, 844.

At the time of the incident, McCray was homeless. 5RP 418, 529-32. She was a daily user of drugs and alcohol and has multiple prior criminal convictions. 5RP 518-19, 525-26, 791-92. McCray also struggled with untreated mental health issues. 5RP 419-20, 519-23, 789.

On January 26, McCray noticed Nelson and asked what he was doing. Nelson said he was waiting for a haircut. 5RP 422-23, 532-33, 539-41, 774, 787-88. Although she had never

met Nelson before, McCray volunteered that she smoked cocaine. 5RP 423-26, 505, 535, 775-76, 785.

McCray saw Nelson again several hours later. 5RP 424, 778-89. Nelson indicated he had purchased some cocaine. 5RP 425-26, 779, 784. Nelson and McCray spent two hours talking and smoking inside his car. 5RP 427, 781-83, 790-91, 794. Nelson made no threats and did not proposition her for sex. 5RP 782, 794, 798-99.

Eventually Nelson invited McCray to his house. Nelson and McCray continued to talk and smoke inside his room. 5RP 428-30, 794-96. At one point, Nelson and McCray left the house to purchase more cocaine, alcohol, and cigarettes. 5RP 429, 432-33, 783-84, 789-90, 795-96, 800, 804-05. After returning to the house, Nelson asked to McCray to undress and offered her money for sex. Nelson made no threats and did not force McCray. McCray willingly complied and laid naked on the bed. 5RP 430-31, 797-99, 800, 802-03. Nelson remarked

that she passed the test. 5RP 432, 797. No sexual contact occurred. 5RP 431, 799, 802.

Nelson eventually became agitated and started responding to internal stimuli. 5RP 433-34, 807, 811. McCray was also agitated, irritated, and impatient because of her own drug consumption. 5RP 823. She denied taking anything from Nelson. 5RP 488, 804-05.

Nelson accused McCray of withholding cocaine and pulled a knife. 5RP 434-36, 487-88, 796, 808-09, 814-17, 825-27. Nelson told McCray she could not leave, but she acknowledged she could have opened the door and left. 5RP 809, 812, 814-15. Instead, McCray jumped up and began kicking and screaming. Nelson stabbed her four times. 5RP 420-21, 437, 490, 829. Nelson also struck her with his fists. 5RP 493, 840, 845. McCray denied being aggressive or having anything in her hands. 5RP 437-38, 487, 491, 806-07, 828-29, 831.

McCray yelled that Nelson was trying to kill her. He pushed her out of the room when confronted by other people. 5RP 491-93, 833-35. McCray did not ask anyone to call 911 and did not wait for the police to arrive. 5RP 494, 838-39.

Nelson disputed McCray's testimony and asserted self-defense. CP 70-72. After returning home from running errands, he realized he had left his glasses at the barbershop earlier that day and drove to retrieve them. 5RP 852, 854-57, 891

While returning to his car, McCrary appeared and asked him for a light. Nelson offered McCray the lighter in his car. 5RP 858-59. Nelson gave McCray $40 when she told him she was homeless. 5RP 859, 861, 864. McCray accepted Nelson's offer of a home cooked meal. 5RP 862-63. No cocaine or alcohol was purchased or discussed. 5RP 863-65.

Nelson and McCray drove to a grocery store to purchase supplies for dinner. After dinner, Nelson returned to the grocery store to purchase cigarettes and alcohol for McCrary. 5RP 865-66, 891. Nelson and McCray then sat in his room where she

detailed her life struggles. 5RP 866-68, 878. There was no discussion of sexual acts and McCray did not remove her clothes. 5RP 867-68. McCray seemed like an ordinary person to Nelson, and he remarked she had passed the test of functioning normally. 5RP 858, 867.

McCrary left the room to use the bathroom. When she did not return, Nelson found her in an "almost catatonic state." 5RP 867-71, 892. Nelson guided McCray back to his room and tried to reassure her. 5RP 870-71, 892. McCray tried to disrobe and asked Nelson if he smoked crack cocaine. 5RP 870-72.

When McCray's behavior began stabilizing after 30 minutes, Nelson left to use the bathroom. 5RP 870-73, 892. Nelson's wallet was missing when he returned. He asked McCray to return it, prompting her to scream she had not taken it. 5RP 873-75. McCray then pulled a hammer out of her coat pocket and swung it several times at Nelson. Nelson avoided being struck. 5RP 875-76, 878, 893-95. Nelson grabbed a cooking knife that had fallen on the floor, held it up, and told

McCray to stop. When she did not, Nelson struck her on the shoulder and pushed her away. 5RP 876-78, 893-94. He was not trying to kill her. 5RP 878, 900.

McCray did not stop, and instead screamed Nelson was trying to kill her. Nelson struck McCray a second time in the arm, causing her to drop the hammer. 5RP 878-79. Nelson heard a faint knock on his door, opened it, and pushed McCray outside. Nelson closed the bedroom door as Leikam told him to stay inside. 5RP 880-81.

Nelson began picking up his room, and did not remember putting the hammer away and made no attempt to hide the bloody knife. 5RP 882-84, 895-96. Nelson retrieved his wallet from McCray's coat and decided to go to a friend's house for support. 5RP 882-83, 885, 898-99. Nelson told the police nothing had happened that evening to avoid talking with them and end the conversation. 5RP 887. Nelson had not called police himself because of the tenuous relationship between police and black people. 5RP 881.

3. Appeal.

Nelson argued (1) the trial court's refusal to inquire and rule upon Nelson's repeated motions for new counsel in advance of his second trial constituted reversible error; (2) the court erred in finding Davis was unavailable to testify at the second trial because of incompetence or unsound mind; and (3) a mandatory life sentence constitutes unconstitutionally cruel punishment because the persistent offender statute is implemented in a racially disproportionate manner. The Court of Appeals affirmed the conviction and held Nelson did not establish a life sentence constituted cruel punishment. App. 2-12.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The persistent offender statute disproportionately impacts black people, making its imposition cruel punishment under the Washington Constitution

The Persistent Offender Accountability Act (POAA) mandates a life without parole sentence upon conviction for a

third "most serious" offense. State v. Thorne, 129 Wn.2d 736, 746, 921 P.2d 514, 518 (1996); RCW 9.94A.570. But Article I, section 14 of the Washington Constitution prohibits cruel punishment. The mandatory imposition of a life without parole sentence under the POAA violates article I, section 14 because of that sentencing law's disproportionate impact on Black people. This is a significant issue of constitutional law warranting review under RAP 13.4(b)(3).

In 2012, the Task Force on Race and the Criminal Justice System, chaired by Justice Steven González, reported "[t]he fact of racial and ethnic disproportionality in our criminal justice system is indisputable." Research Working Group & Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System, 87 Wash. L. Rev. 1, 4 (2012). Race and ethnicity influence criminal justice outcomes over and above commission rates. Id. "[M]uch of the disproportionality is explained by

facially neutral policies that have racially disparate effects." Id. at 4-5.

The indisputable fact of racial disproportionality manifests itself in the imposition of persistent offender sentences under the three strikes law. Black people are grossly over-represented in serving life sentences under the three strikes law in relation to their general population. Black people constitute 4.4 percent of Washington's population but 38 percent of prisoners serving life without parole sentences under the three strikes law. Nina Shapiro, Washington's Prisons May Have Hit Pivotal Moment As They Eye Deep Cut In Their Population, Seattle Times, Sept. 17, 2020 (citing Dept. of Corrections, U.S. Census data).[3] Even after removal of second

[3]Available at https://www.seattletimes.com/seattle-news/politics/a-transformational-moment-washingtons-prison-system-backs-reforms-as-it-faces-covid-19-budget-cuts-and-protests-over-racial-injustice/ See also Columbia Legal Services, Washington's Three Strikes Law: Public Safety & Cost Implications of Life Without Parole 7 (2010) (as of 2009, almost 40% of three strikes offenders sentenced to life without parole were Black, while comprising only 3.9% of the state's

degree robbery as a strike offense, black people still comprise over 37 percent of the total three-strike sentences imposed. Melissa Lee & Jessica Levin, Justice Is Not a Game: The Devastating Racial Inequity of Washington's Three Strikes Law, Fred T. Korematsu Center for Law and Equality, 125 (June 10, 2024), 7.[4] To its credit, the Court of Appeals observed, "[w]e have serious concerns about the racially disproportionate impact of the POAA." App. at 12.

In State v. Gregory, 192 Wn.2d 1, 5, 427 P.3d 621 (2018), this Court held the state's death penalty was imposed in an arbitrary and racially biased manner and was thus unconstitutional as applied under article I, section 14 of the Washington Constitution. With the death penalty gone, a life

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population) (available at https://columbialegal.org/wp-content/uploads/2019/03/CLS-Report_Washingtons-Three-Strikes-Law.pdf).

[4] available at https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1124&context=korematsu_center

without parole sentence is now the harshest possible sentence in Washington.

In State v. Moretti, Justice Yu, joined by two other justices, wrote that it was "important to recognize the disparate impacts that the criminal justice system has on people of color. This necessarily results in disparate impact in the imposition of life sentences. One size fits all approaches to sentencing reveal the institutional and systemic biases of our society. The effects of disproportionate enforcement of criminal laws against people of color, especially African-Americans, will continue — exaggerated by laws that limit the discretion of trial judges in sentencing decisions." 193 Wn.2d 809, 839, 446 P.3d 609 (2019) (Yu, J., concurring). "The principles set forth in Gregory compel us to ask the same questions about a life sentence without the possibility of parole. Is it fairly applied? Is there a disproportionate impact on minority populations? Are there state constitutional limitations to such a sentence?" Id. at 840.

The Court of Appeals concluded that Nelson had not shown the POAA was administered in a racially disproportionate manner because unlike the death sentence at issue in Gregory, "[t]he POAA is not administered on a case by case basis[.]" App. at 11. Nelson's argument cannot be dispensed with so easily.

The sentence of death was discretionary, not mandatory, so a regression analysis was needed in Gregory to isolate independent variables and figure out whether the race of the defendant factored into the discretionary imposition of that penalty. Gregory, 192 Wn.2d at 19-21. Unlike the discarded death penalty scheme, the POAA permits no judge or jury to exercise discretion on the sentence. RCW 9.94A.570. This Court has already taken "judicial notice of implicit and overt racial bias against black defendants in this state[.]" Gregory, 192 Wn.2d at 22-23. As a result, there is no need to do a regression analysis to try to figure out whether a life sentence is

imposed in a racially disproportionate manner at the sentencing stage.

Unlike the small pool of death penalty inmates, those serving a POAA sentence number in the hundreds. The racial disparity is already indisputable. The only way a contrary conclusion could be reached would be to say that Black people commit third strike offenses at a disproportionate rate that accounts for the disproportionate imposition of the penalty. It is already known that overrepresentation of Black people in the Washington State prison system, and the extent of that racial disproportionality, is not explained by commission rates. Preliminary Report on Race and Washington's Criminal Justice System, 87 Wash. L. Rev. at 13, 15, 21.

If it was not clear before, data now also demonstrates the overrepresentation of Black people that is specific to POAA sentences cannot be explained by reference to prison population, to commission of violent offenses, or to aggravated murder. Justice Is Not a Game, supra, at 5-10. Simply put,

"[t]he data demonstrates that no matter which portion of the three-strikes population is analyzed, severe racial disproportionality persists with respect to Black and Indigenous people." Id. at 7.

The lack of judicial discretion exaggerates and cements the racial disparity by rendering judges powerless to prevent racist outcomes. Seeking to use the point as a sword, the Court of Appeals opined "[t]he POAA is administered the same way no matter who the defendant; *all* offenders who commit three most serious offenses will be sentenced to LWOP." App. at 11. There are obvious flaws with this reasoning.

First, it ignores the broad discretion that police have to arrest and refer charges and the tremendous discretion prosecutors wield at the charging and plea stages, which ultimately informs the stunning overrepresentation of Black people subject to POAA sentence. Discretionary, and racially prejudiced, decisions that ultimately lead to a three-strike

sentence are front-loaded at the arrest, charging, and plea stages rather than backloaded at the sentencing stage.

Second, while the POAA hogties the judge's sentencing authority, it does nothing to reign in the prosecutor's charging discretion. Thorne, 129 Wn.2d at 762, 768. Rather, it insulates such discretion from scrutiny. The POAA effectively shifts authority to decide sentencing consequences from judges to prosecutors because the three strikes charge, if proven, carries a mandatory life sentence. Daniel W. Stiller, Initiative 593: Washington's Voters Go Down Swinging, 30 Gonz. L. Rev. 433, 435 (1995).

Prosecutors tasked with making those charging decisions, and in deciding what kind of plea deal may be offered or accepted to avoid the grim fate of death behind bars, are not immune from racial bias. See Preliminary Report on Race and Washington's Criminal Justice System, 87 Wash. L. Rev. at 25 (recognizing prosecutorial discretion leads to racially disparate outcomes). Indeed, research shows "prosecutorial charging

decisions play out unequally when viewed by race, placing blacks at a disadvantage to whites. Prosecutors are more likely to charge black defendants under state habitual offender laws than similarly situated white defendants." Ashley Nellis, Sentencing Project, The Color Of Justice: Racial And Ethnic Disparity In State Prisons 10 (Jun. 14, 2016).

The Court of Appeals also reasons that "unlike for the death penalty, the Supreme Court has held that the POAA serves the penological goals of retribution, deterrence, and incapacitation." App. at 11-12 (citing Moretti, 193 Wn.2d at 826-30). Importantly, the racial disparity of the POAA was not at issue in Moretti. Racial disparity serves no legitimate penological purpose. See Gregory, 192 Wn.2d at 24 (recognizing that because "the death penalty is imposed in an arbitrary and racially biased manner, it logically follows that the death penalty fails to serve penological goals."). Moreover, more recent studies have found "no credible statistical evidence that passage of three strikes laws reduces crime by deterring

potential criminals or incapacitating repeat offenders." See Katherine Beckett & Heather D. Evans, About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State, 17 (Feb. 2020)[5] (citing Tomislav v. Kovandzic, John J. Sloan, and Lynne M. Vieraitis, "Striking out" as Crime Reduction Policy: The Impact of "Three Strikes' Laws on Crime Rates in U.S. Cities, Justic Quarterly 21, no. 2, 234 (June 1, 2004)).

The Court of Appeals recognized the POAA's "disproportionate impact likely is due to systemic racial injustice throughout the criminal justice system rather than the administration of the POAA." App. at 12. But it reasoned, "We are not in a position to address these systemic problems." Id. It is unclear why the court is not in a position to address these systemic problems. To the contrary, as this Court has unequivocally stated, "we owe a duty to increase access to

[5] Available at https://lsj.washington.edu/sites/lsj/files/documents/research/05-07-20_formatted_aclu_report.pdf

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, 220 Wn.2d 417, 421, 518 P.3d 1011 (2022) (citing Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 1 (June 4, 2020)). Ending racism is a shared "moral imperative." Open Letter to the Legal Community, June 4, 2020.[6]

This Court has the power to make change. And it has a mandate to administer justice in a manner that brings greater racial justice to the criminal justice system. Courts have an obligation to take disproportional racial impact into account in deciding cruel punishment claims under the POAA.

What constitutes cruel punishment is subject to evolving standards of decency. State v. Fain, 94 Wn.2d 387, 396-97, 617 P.2d 720 (1980). Racial disproportionality in the POAA calls for a standard of proportionality review that accounts for the

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[6] Available at https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf

sentencing law's racially disparate impact. There can be no doubt the standard of decency for racial justice has changed since the POAA was enacted almost three decades ago.

Once the defendant has shown the law has a racially disproportionate impact, as Nelson has here, the presumption should be that the disproportion is the result of racial prejudice infecting the decisions leading to that outcome. The burden should then shift to the State to rebut that presumption if possible.

To comply with the prohibition against cruel punishment under article I, section 14, judges must at least have discretion to not impose a life sentence. Better yet, the POAA should be jettisoned altogether because it is irredeemably racist in application.

2. The trial court erred in denying Nelson's request for new counsel absent any inquiry.

Craig Kibbe was appointed to represent Nelson in January 2021. Before jury selection began during his first trial,

Nelson requested Kibbe be replaced. Nelson expressed concerns over Kibbe's treatment of him, whether he would provide "meaningful representation" and explained there was a permanent erosion of trust and respect between them. 1RP 10-12.

The court did not question Nelson or Kibbe about the identified concerns, reasoning instead that Nelson's concerns were "overstated." 1RP 13. The court denied Nelson's motion, finding that it was untimely. 1RP 13.

Nelson did not appear on the third or fourth days of his first trial because of his "dissatisfaction with counsel." 1RP 226, 230-31, 294. The court concluded Nelson's absence was voluntary. 1RP 231-34. Nelson appeared and testified on the fifth day. See 1RP 386-475.

Nelson again requested new counsel several months before his second trial. In a December 26, 2021, letter to Judge Stanley Rumbaugh, Nelson detailed an "absolute breakdown of communication and trust with assigned counsel". CP 137-40. He

cited counsel's delay in providing him with witness statements which impacted his right to cross-examine and confront witnesses. Id. In response, the court noted that it would "not act on ex-parte letters or improperly filed pleadings." CP 141. The court explained that for matters to be considered, "they must be properly filed and placed on the docket with due notice to all parties and in accordance with court rules." Id.

Nelson submitted a "motion for substitution of counsel in lieu of second trial," on January 5, 2022, further detailing a breakdown in communication with counsel, and alleging 14 examples in which Kibbe had undermined his defense, including degrading behavior, a refusal to communicate, and ineffective assistance. CP 142-48. Nelson requested the "court provided a substitute [counsel] or allow me to go pro se." Id. The trial court took no action on Nelson's motion.

Nelson submitted another letter to Judge Rumbaugh on January 10, 2022, confirming "virtually nonexistent" communication between himself and Kibbe, and requesting

substitute counsel for a third time. CP 149-52. The trial court did not inquire into Nelson's concerns telling him to "properly file[]" and docket the motion. CP 153.

On February 25, 2022, Nelson requested to go pro se. 3RP 4-8. Nelson explained "urgent and exigent circumstances" had "prompted me to take on the burden of my own defense," including the absence of "any meaningful representation whatsoever" from Kibbe. 3RP 6. Nelson noted a "complete breakdown in communication with assigned counsel" had "caused a permanent erosion of trust and respect between counsel and I[.]" 3RP 6. The court did not inquire into Nelson's asserted breakdown in communication with Kibbe, but after a colloquy did grant his request to go pro se. CP 47; 3RP 3-18. Kibbe was appointed as standby counsel. 3RP 13-16.

The trial court abused its discretion by summarily refusing to address Nelson's requests for new counsel. By refusing to inquire, the court failed to inform itself of the necessary facts on

which to exercise its discretion. Nelson seeks review under RAP 13.4(b)(3).

Defendants in criminal cases have the right to the assistance of counsel. U.S. Const. amend. VI; Wash. Const., art. I, § 22. The Sixth Amendment requires an appropriate inquiry on the record into the grounds for a motion to substitute counsel, and that the matter be resolved on the merits before the case goes forward. Schell v. Witek, 218 F.3d 1017, 1025 (9th Cir. 2000).

Substitution of counsel is required for good cause. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). Good cause includes a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001).

In reviewing a trial court's refusal to appoint new counsel, three factors are considered: (1) the adequacy of the trial court's inquiry; (2) the timeliness of the motion; and (3) the

extent of the conflict. Id. at 724 (adopting test set forth in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

An adequate inquiry "must include a full airing of the concerns (which may be done in camera) and a meaningful inquiry by the trial court." State v. Cross, 156 Wn.2d 580, 610, 132 P.3d 80 (2006). "Before the [trial] court can engage in a measured exercise of discretion, it must conduct an inquiry adequate to create a sufficient basis for reaching an informed decision." United States v. D'Amore, 56 F.3d 1202, 1205 (9th Cir. 1995). To that end, before ruling on a motion for new counsel, the court must "examine both the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually receives." Stenson, 142 Wn.2d at 723-24.

Here, the trial court made no inquiry whatsoever into Nelson's repeated requests for new counsel. Despite Nelson's repeated assertions there had been "absolute breakdown of

communication and trust" between him and Kibbe, the court refused to inquire into Nelson's concerns. That is not a full airing of concerns required by law.

The Court of Appeals endorsed the view "the issue was never properly before the trial court to give rise to an obligation to inquire[,]" because Nelson never properly filed any motions. App. at 17. Such reasoning undermines the trial court's obligation to "inquire thoroughly" into the factual basis once it learns of the conflict. State v. Thompson, 169 Wn. App. 436, 461, 290 P.3d 996 (2012); United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001).

Indeed, this Court has already held as much in the analogous context of a defendant's request to proceed pro se. In State v. Madsen, this Court emphasized a trial court does not have carte blanche to ignore or deny a motion to proceed pro se when it is put on notice of a defendant's desire. 168 Wn.2d 496, 504, 229 P.3d 714 (2010). The right to self-representation and the right to counsel both stem from the Sixth Amendment and article

I, section 22. Madsen, 168 Wn.2d at 503. There is no reason they should be treated differently.

The trial court is the one with the duty to inquire. The Court of Appeals reasoning also ignores that Nelson's request to go pro se was prompted by the asserted breakdown in communication and trial court's repeated failure to inquire. 3RP 6. Nelson was forced into a Hobson's choice between going pro se or going to trial with counsel he did not trust. Forcing a defendant to choose between current counsel and proceeding pro se is appropriate *only after* the court has validly rejected an unjustified request for substitute counsel. State v. DeWeese, 117 Wn.2d 369, 376-79 816 P.2d 1 (1991).

3. The court erred in finding Davis unavailable to testify because of incompetence or unsound mind.

Davis testified at Nelson's first trial. 2RP 41-64. Before Nelson's second trial, the prosecution alleged Davis's mental health had deteriorated and she was unable to testify again. The prosecution requested Davis be declared unavailable and her

prior testimony be admitted under ER 804(a)(4), (b)(1). 5RP 28-30.

Nelson objected, arguing that because he had not personally cross-examined her, admitting her testimony would violate the Confrontation Clause. 5RP 30-31, 33. The court concluded the Confrontation Clause was satisfied, but whether Davis was "unavailable" under ER 804(a) was at issue. 5RP 31-34, 60.

Leikam testified about Davis's mental health issues. Davis suffered from paranoid schizophrenia, schizoaffective disorder, and attention deficit hyperactivity disorder. 5RP 36-37. Davis's mental health had gradually deteriorated since Leikam had known her. 5RP 36-38, 44-46. Davis had stopped taking her medication and refused to contact her treatment providers. 5RP 38-39.

Davis knew her name, where she was, and "has a clear memory, but she may not be able to articulate that well or stick to the issues at hand." 5RP 42, 47-48. Leikam explained, "Yes,

she remembers what happened, and she knows what she should say, but she seems to be defiant against the legal system and vengeful against society." 5RP 42. Leikam elaborated, "[I]f we needed her in here, she might mistakenly say something totally irrelevant or ridiculously silly about what is going on here today." 5RP 43, 48. Leikam both described Davis's recent conversations as "irrational, totally incoherent," and also as "grounded in reality at the present time" and "[s]he can articulate her concerns, her issues, her desires." 5RP 40-43, 47-48.

Nelson argued Leikam's testimony did not accurately explain what Davis's mental health status was and that her status should be determined by a mental health processional. 5RP 50. The trial court ruled the record did not establish Davis was unavailable under ER 804. 5RP 60-61.

Two days later, the prosecutor "confirmed" Davis had been involuntarily detained for attempting to light a neighbor's lawn on fire, and urinating and defecating in the street. 5RP

394, 444-45. The prosecution called Tacoma Police officer Jeffrey Thiry to testify about this fact. 5RP 441.

Thiry attempted to serve Davis with a material witness warrant at Leikam's house but was unable to contact anyone. Thiry also received no response from Leikam's phone number. 5RP 441-43. Thiry did not attempt to locate Davis anywhere else. 5RP 443. Davis was suspected of committing arson on August 30, 2022, and been involuntary detained at Tacoma General Hospital until September 7. 5RP 444-45. Davis was scheduled to be transferred to a "secured facility" that evening. 5RP 445.

Nelson did not cross-examine Thiry and when asked if he had "any reason why the Court should not admit the prior testimony upon a finding that Ms. Davis is not availabile to testify," Nelson responded no. 5RP 446.

The court granted the motion to admit Davis's prior testimony. 5RP 448. Davis's prior testimony was read to the

jury, and they were instructed they could consider and evaluate it the same as any other witness. 5RP 589-90.

Adult witnesses are presumed competent to testify. State v. Smith, 97 Wn.2d 801, 802-03, 650 P.2d 201 (1982); RCW 5.60.020; ER 601; CrR 6.12(a). Competence turns on whether the witness was able to accurately perceive the events at the time and remember and relate them when called to testify. State v. Karpenski, 94 Wn. App. 80, 100-01, 971 P.3d 553 (1999), abrogated on other grounds, State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003).

An adult witness is incompetent to testify if she is of "unsound mind," or incapable of receiving and relating accurate impressions of the facts about which they are examined. RCW 5.60.050. "Unsound mind" means "the total lack of comprehension or the inability to distinguish between right and wrong." Smith, 97 Wn.2d at 803. The term does not mean those who merely have limited cognitive abilities or a history of mental

health disorders. State v. Watkins, 71 Wn. App. 164, 171, 857 P.2d 300 (1993).

A witness who is found to be incompetent to testify is "unavailable" for purposes of the Confrontation Clause. See State v. Doe, 105 Wn.2d 889, 895, 719 P.2d 554 (1986) (recognizing that a child who is incompetent to testify is likewise "unavailable" as a witness for purposes of ER 804(a)). ER 804(a)(4) defines "unavailability" of a witness to include those "unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity[.]"

The burden is on the party opposing the witness to show incompetence. State v. S.J.W., 170 Wn.2d 92, 102, 239, P.3d 568 (2010); Smith, 97 Wn.2d at 803. A trial court's determination of competency is reviewed for an abuse of discretion. State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967).

The Court of Appeals failed to even reach the merits of Nelson's arguments, concluding that "Nelson waived this argument on appeal because he failed to renew his objection

regarding the sufficiency of the evidence of Davis's unavailability." App. at 18. Because this conclusion misapprehends the record and law and presents a significant question of law under the Washington Constitution, Nelson seeks review under RAP 13.4(b)(3).

Nelson objected to Davis's purported unavailability, arguing that admitting her prior testimony would violate the Confrontation Clause. 5RP 30-31, 33. The Court of Appeals waiver analysis fails to acknowledge that further objections would have been futile for two reasons.

First, Nelson's Confrontation Clause argument had already been rejected by the trial court. 5RP 32. The purpose of an objection is to alert the trial court to error "so that any mistakes can be corrected in time to prevent the necessity of a second trial." State v. McDonald, 74 Wn.2d 141, 145, 443 P.2d 651 (1968). Where an objection would be a futile gesture, it is not required. See State v. Moen, 129 Wn.2d 535, 547-48, 919 P.2d 69 (1996) (where no corrective purpose can be served by

an objection, the lack of an objection will not preclude appellate review); State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996) (issue properly before appellate court where objection would have been "a useless endeavor").

Second, Nelson did not withdraw his earlier objection to Davis's unavailability. Nelson simply did not articulate any additional reasons why Davis's prior testimony would not be admissible "*upon a finding* that Ms. Davis is not availability to testify[.]" 5RP 446 (emphasis added).

The Court of Appeals' waiver theory is unsupported by authority and the record. This Court should grant Nelson's petition and consider his arguments on the merits.

E. CONCLUSION

Nelson respectfully asks this Court to grant review.

I certify that this document contains 6,148 words, excluding those portions exempt under RAP 18.17.

DATED this 24th day of July, 2024.

Respectfully submitted,
NIELSEN KOCH & GRANNIS, PLLC

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

June 25, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEVEN KEITH NELSON, Appellant.	No. 57445-4-II PART PUBLISHED OPINION

MAXA, P.J. – Steven Nelson appeals his sentence of life without release/parole (LWOP) as authorized under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570. Nelson was convicted of second degree assault, and he had two previous strike offenses: separate convictions of first degree assault and second degree assault.

Nelson argues that the POAA is unconstitutional as applied because it is administered in a racially disproportionate manner. He relies on the framework that the Supreme Court used to hold that the death penalty was unconstitutional in *State v. Gregory,* 192 Wn.2d 1, 22, 427 P.3d 621 (2018). He also relies on a declaration from appellate counsel attached as an appendix to his opening brief providing data regarding the number of Black defendants compared to the number of White defendants given LWOP sentences under the POAA. That data was not presented to the trial court, and Nelson did not argue in the trial court that his LWOP sentence was unconstitutional.

The State filed a motion to strike Nelson's evidence in the appendix and all argument based upon such evidence, arguing that the submission of such evidence violated RAP 9.11. The State also argues that Nelson cannot raise this issue for the first time on appeal because his claim

does not constitute manifest constitutional error. On the merits, the State argues that the evidence is insufficient to establish a constitutional violation.

We (1) deny the State's motion to strike because we may take judicial notice of the evidence, the evidence provided was from reputable sources, and the State challenged the reliability of the evidence in its response brief; (2) exercise our discretion to consider Nelson's constitutional argument for the first time on appeal; and (3) hold that although Nelson shows that the POAA may have a racially disproportionate impact, he has not shown that the POAA is administered in a racially disproportionate manner as found in *Gregory*.

Therefore, we hold that the POAA is not unconstitutional as applied. We reject Nelson's additional arguments on the merits in an unpublished portion of this opinion. Accordingly, we affirm Nelson's conviction and sentence, but we remand for the trial court to strike the crime victim penalty assessment (VPA) from the judgment and sentence.

FACTS

In January 2021, Patricia McCray was living on the street and met Nelson outside of her tent. They purchased crack cocaine and went back to Nelson's residence and drank and smoked together. Nelson became agitated and paranoid, and accused McCray of stealing the drugs or his money. He then grabbed a knife and stabbed McCray multiple times.

The State charged Nelson with first degree assault. After a mistrial, a second trial was held and the jury found Nelson guilty of second degree assault while armed with a deadly weapon.

Nelson stipulated that he previously had been convicted of two other felonies that were defined as most serious offenses – first degree assault and second degree assault. RCW 9.94A.030(32)(a)-(b). These convictions are considered strike offenses under the POAA. RCW

9.94A.030(37)(a)(i)-(ii). Because Nelson's current offense of second degree assault while armed with a deadly weapon also was a strike offense, the trial court sentenced Nelson to LWOP.

Nelson appeals his sentence.

ANALYSIS

A. STATE'S MOTION TO STRIKE

The State filed a motion to strike Nelson's evidence in the appendix of his opening brief and all argument based upon such evidence because (1) such evidence was not a part of the appellate record, (2) Nelson's appellate counsel prepared the evidence making it an improper declaration and inadmissible testimony, and (3) the State did not have an opportunity to challenge the reliability of the evidence. We deny the State's motion.

First, although Nelson did not present his evidence in the trial court, we may still consider the evidence as part of the appellate record. Courts "take 'judicial notice of implicit and overt racial bias against [B]lack defendants in this state' and . . . will consider such historical and contextual facts when deciding cases." *State v. Hawkins*, 200 Wn.2d 477, 501, 519 P.3d 182 (2022) (quoting *Gregory,* 192 Wn.2d at 22). The court in *Hawkins* stated,

> We have also recognized the judiciary's role in perpetuating racism within the justice system and have committed to changing that. In line with that appreciation of historical and contextual accuracy, we have considered a wide variety of data when making our decisions. In some cases involving racially disproportionate outcomes, we have considered statistical evidence that was developed as part of the record. In other cases, we have considered available data, history, and context, even if it was not developed as part of the record. In other words, the judicial branch can rely on history and context on issues of race to the same extent that courts have always relied on history and context to analyze all other issues.

200 Wn.2d at 501 (citations omitted).

Second, the evidence Nelson provides in the appendix does not represent "testimony" of his appellate counsel. Although Nelson's attorney submitted a declaration, it merely states how

and where he gathered the evidence. He maintains that the evidence provided was from reputable sources, such as the Washington State Caseload Forecast Council, the United States Census Bureau, Columbia Legal Services, and the Sentencing Guidelines Commission.

Third, although the State makes a sound argument that they should have an opportunity to challenge the reliability of the evidence, it did so in its response brief. Not only does the State challenge the data, but it provides its own evidence from a task force research working group and the Sentencing Project.

The State notes that in *Gregory*, the Supreme Court granted the State's request to hold a hearing to challenge the report upon which the defendant relied. 192 Wn.2d at 12-13. Although no hearing was actually held, the commissioner solicited additional information through interrogatories, filings, and follow-up questions. *Id.* at 13. But in that case the defendant had commissioned an expert study, and the State had concerns about the researcher's statistical methodology and reliability. *Id.* at 12.

Here, Nelson's attorney did not commission his own study for the purpose of his argument. Instead, he gathered existing statistics and data from reputable sources and submitted them in the format of an appendix. And just like in *Gregory*, the State was still able to express its disagreement and overall assessment of the appendix in its response brief.

Therefore, we deny the State's motion to strike.

B. CONSIDERATION OF UNPRESERVED ARGUMENT

The State argues that Nelson did not preserve the POAA issue for appeal because he did not challenge the constitutionality of the POAA at the trial court. The State claims that the issue does not constitute manifest constitutional error under RAP 2.5(a)(3) because it depends solely

on evidence outside the record that was not submitted to the trial court. We exercise our discretion to consider this issue.

RAP 2.5(a) states that the "appellate court may refuse to review any claim of error which was not raised in the trial court." However, a party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). And we have discretion to consider unpreserved claims even if they do not involve manifest constitutional errors. *See State v. Clare*, ___ Wn. App. 2d ___, 544 P.3d 1099, 1103 (2024). In addition, we may exercise our discretion to reach the issue presented in order to further clarify the law. *State v. Grott*, 195 Wn.2d 256, 270, 458 P.3d 750 (2020).

The State cites to *State v. Davis*, 175 Wn.2d 287, 290 P.3d 43 (2012), *abrogated in part* by *Gregory*, 192 Wn.2d 1. In *Davis*, the defendant brought a motion to dismiss in the trial court, arguing that the death penalty violated the Washington Constitution. *Davis*, 175 Wn.2d at 343. The motion was based on federal law and uncited statistics. *Id.* On appeal, the defendant supported this argument with statistics and data, but the Supreme Court struck that evidence. *Id.* The court held that the argument was not manifest because the record was insufficient to review it. *Id.* at 344. The court stated, "we have a severe lack of information on the death penalty's implementation, which makes it difficult for us to perform any meaningful analysis." *Id.* at 345.

As in *Davis*, the trial court record is insufficient for us to review Nelson's constitutional claim. And because the trial court was not provided with the data Nelson has submitted on appeal, the alleged constitutional error may not be manifest.

On the other hand, Nelson's argument is based on state law and reputable statistics, which we have decided not to strike. And the Supreme Court has acknowledged that "Black defendants appear to receive [LWOP] sentences at a far greater rate than white defendants."

State v. Jenks 197 Wn.2d 708, 712, 487 P.3d 482 (2021). Therefore, we exercise our discretion under RAP 2.5(a) to consider Nelson's argument that the POAA is unconstitutional.

C. CONSTITUTIONALITY OF PERSISTENT OFFENDER ACCOUNTABILITY ACT

Nelson argues that the POAA is unconstitutional as applied because it is administered in a racially disproportionate manner. He argues that we should apply the same analysis the Supreme Court used in *Gregory* to invalidate the death penalty. Although Nelson raises serious concerns about the racially disproportionate impact of the POAA, he has not shown that the POAA is administered in a racially disproportionate manner as found in *Gregory*. Therefore, we disagree.

1. Legal Principles

Article I, section 14 of the Washington Constitution provides, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." "This court has 'repeated[ly] recogni[zed] that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment.' " *Gregory*, 192 Wn.2d at 15 (quoting *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000)).

We review constitutional challenges de novo. *State v. Ross*, 28 Wn. App. 2d 644, 646, 537 P.3d 1114 (2023), *review denied*, 2 Wn.3d 1026, 544 P.3d 30 (2024). Statutes are presumed constitutional and the challenger has the burden to show unconstitutionality. *Id.* "An as-applied challenge to a statute's constitutionality requires examination of the statute in the specific circumstances of the case." *Id.* If a court holds that a statute is unconstitutional as applied, the statute is not invalidated, but instead its application is prohibited in the specific context and future similar contexts. *Id.*

Under the POAA, a persistent offender is an offender who has on three separate occasions committed felonies that are most serious offenses. RCW 9.94A.030(37)(a)(i)-(ii). RCW 9.94A.030(32) defines "most serious offense" as any class A felony as well as a number of other offenses. Sentencing courts must count all prior adult convictions for most serious offenses as "strikes." *State v. Reynolds*, 2 Wn.3d 195, 200, 535 P.3d 427 (2023). After three strikes, the offender *must* be sentenced to LWOP. RCW 9.94A.570. A trial court lacks discretion to impose any other sentence. *State v. Crawford*, 159 Wn.2d 86, 101, 147 P.3d 1288 (2006).

Before being convicted of his current offense, Nelson had two separate prior convictions of first degree assault and second degree assault. Both are defined as most serious offenses. RCW 9.94A.030(32)(a)-(b). In addition, Nelson's current offense of second degree assault is defined as a most serious offense. RCW 9.94A.030(32)(b). Because Nelson now has been convicted on three separate occasions for most serious offenses, he fits within POAA's definition of a persistent offender.

2. *Gregory* Decision

Nelson argues that the POAA is unconstitutional as applied under the framework the Supreme Court used for finding the death penalty unconstitutional in *Gregory,* 192 Wn.2d 1.

In *Gregory*, a jury convicted the defendant of aggravated first degree murder. 192 Wn.2d at 6. The same jury, and another jury on remand for resentencing, concluded that there were not sufficient mitigating circumstances to merit leniency and sentenced the defendant to death. *Id.* at 6-7.

At the time, Washington's capital punishment statutes – contained in chapter 10.95 RCW – provided for a special sentencing proceeding where either a judge or a jury would determine

whether there were sufficient mitigating circumstances to merit leniency when a defendant was found guilty of aggravated first degree murder. *Id.* at 10. If such circumstances were present, then the defendant would be sentenced to LWOP. *Id.* If the defendant instead was sentenced to death, then the sentence would automatically be reviewed by the Supreme Court. *Id.* The court was required to determine "(a) whether there was sufficient evidence to justify the judge's or jury's finding in the special sentencing proceeding, (b) whether the death sentence [was] excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant, (c) whether the death sentence was brought about through passion or prejudice, and (d) whether the defendant had an intellectual disability." *Id.*

The defendant in *Gregory* challenged the constitutionality of the death penalty, claiming that his death sentence was random, arbitrary, and impermissibly based on his race. *Id.* at 11. The defendant commissioned a study by Katherine Beckett and Heather Evans (Beckett report) on the effect of race and the county of conviction on the imposition of the death penalty. *Id.* at 12. The Beckett report concluded that "black defendants were four and a half times more likely to be sentenced to death than similarly situated white defendants." *Id.* The State raised concerns about the statistical analysis in the report and filed a report by its own expert. *Id.* at 12-13. The court ordered a hearing before the Supreme Court Commissioner, who provided a report outlining the disagreements between the experts and evaluating the strengths and weaknesses of the defendant's analysis. *Id.* at 13.

After running additional models as requested by the commissioner, Beckett summarized her findings on race as follows:

> "[F]rom December 1981 through May of 2014, special sentencing proceedings in Washington State involving Black defendants were between 3.5 and 4.6 times as likely to result in a death sentence as proceedings involving non-Black defendants

> after the impact of the other variables included in the model has been taken into account."

Id. at 19 (quoting Resp. to Comm'r's Suppl. Interrogs. at 16 (Sept. 29, 2017)). The court gave "great weight to Beckett's analysis and conclusions." *Id.*

The Supreme Court stated that the most important consideration was whether the evidence showed that race had a "meaningful impact on imposition of the death penalty." *Id.* at 20. The court emphasized that it made this determination "by way of legal analysis, not pure science." *Id.* As a result, the court declined to require "indisputably true social science to prove that our death penalty is impermissibly imposed based on race." *Id.* at 21.

The court stated, "Given the evidence before this court and our judicial notice of implicit and overt racial bias against black defendants in this state, we are confident that the association between race and the death penalty is *not* attributed to random chance." *Id.* at 22. The court concluded, "When the death penalty is imposed in an arbitrary and racially biased manner, society's standards of decency are even more offended. Our capital punishment law lacks 'fundamental fairness' and thus violates article I, section 14." *Id.* at 24 (quoting *State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984)).

The Supreme Court further held that the death penalty failed to serve the penological goals of retribution and deterrence. *Gregory*, 192 Wn.2d at 24. Beckett's analysis demonstrated that there was " 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' " *Id.* at 25 (quoting *Furman v. Georgia*, 408 U.S. 238, 313, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (White, J., concurring)). The court stated, "To the extent that race distinguishes the cases, it is clearly impermissible and unconstitutional." *Gregory*, 192 Wn.2d at 25.

3. Analysis

Nelson argues that the POAA is unconstitutional because it is administered in a racially disproportionate manner. The Supreme Court in *Jenks* acknowledged "serious concerns about the racially disproportionate impact of the POAA." 197 Wn.2d at 712. The court stated, "Black defendants appear to receive [LWOP] sentences at a far greater rate than white defendants" and "the legislature itself acknowledged this in drafting ESSB 5288, noting that '[t]here is racial disparity in how the persistent offender statute is enforced. Four percent of the population [of Washington] is African American yet a disproportionate number have been convicted as persistent offenders.' " *Id.* (quoting S.B. REP. ON S.B. 5288, 66th Leg., Reg. Sess. (Wash. 2019)). But the court stated that the constitutional issue was not before the court and that "[s]uch constitutional consideration must await the appropriate case." *Id.* at 712-13.

Gregory found the death penalty was unconstitutional because of the racial disparity in assessing the death penalty. 192 Wn.2d at 24. However, imposition of a LWOP sentence under the POAA involves a different procedure than the imposition of the death penalty addressed in *Gregory*.

The prosecutor had discretion whether to seek the death penalty. Under former RCW 10.95.040(1)-(2) (1981), the prosecutor had to file within 30 days a notice of a special sentencing proceeding to determine whether the death penalty should be imposed. If no notice was filed, the prosecutor could not request the death penalty. Former RCW 10.95.040(3). The concurring opinion in *Gregory* noted that prosecutors in only three counties had filed death notices since 2000, meaning that where a crime was committed was a deciding factor in whether the death penalty was imposed. 192 Wn.2d at 44 (Johnson, J., concurring).

If the death penalty was sought, the judge or the jury had discretion as to whether there were sufficient mitigating circumstances to merit leniency from a death sentence. *Gregory*, 192 Wn.2d at 10. And if the defendant was sentenced to death, then it was in the Supreme Court's discretion as to whether the sentence was proportionate. *Id.* Proportionality review was conducted on an individual basis. *Id.* at 26. " 'At its heart, proportionality review will always be a subjective judgment as to whether *a particular death sentence* fairly represents the values inherent in Washington's sentencing scheme for aggravated murder.' " *Id.* (quoting *State v. Pirtle*, 127 Wn.2d 628, 687, 904 P.2d 245 (1995)).

Under the POAA, the prosecutor has discretion whether to charge a strike offense. But after a conviction, the application of the POAA does not involve any discretion of the prosecutor or a judge/jury or a proportionality review. A defendant is sentenced to LWOP when they have been convicted of any felony that is considered a most serious offense and they were convicted on at least two separate occasions of felonies that were considered most serious offenses. RCW 9.94A.030(37)(a)(i)-(ii). The statute provides a list of felonies that are considered most serious offenses, including first and second degree assault. RCW 9.94A.030(32)(a)-(b). In other words, a LWOP sentence is automatic if the defendant has been convicted of three separate most serious offenses.

Because Nelson was previously convicted of first and second degree assault, he was sentenced to LWOP when he was again convicted of second degree assault. The POAA is not administered on a case by case basis as the death sentence was administered in *Gregory*. The POAA is administered the same way no matter who the defendant; *all* offenders who commit three most serious offenses will be sentenced to LWOP. Further, unlike for the death penalty,

the Supreme Court has held that the POAA serves the penological goals of retribution, deterrence, and incapacitation. *State v. Moretti*, 193 Wn.2d 809, 826-30, 446 P.3d 609 (2019).

Like the Supreme Court in *Jenks*, we have serious concerns about the racially disproportionate impact of the POAA. However, this disproportionate impact likely is due to systemic racial injustice throughout the criminal justice system rather than the administration of the POAA. We are not in a position to address these systemic problems.

Nelson has not shown that the POAA is administered in a racially disproportionate manner as in *Gregory*. Therefore, we hold that the POAA is not unconstitutional as applied.

CONCLUSION

We affirm Nelson's conviction and sentence, but remand for the trial court to strike the VPA from the judgment and sentence.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

UNPUBLISHED PORTION

In the unpublished portion of this opinion, we hold that (1) the trial court did not violate Nelson's right to counsel when it failed to inquire into his requests for new defense counsel because Nelson never properly filed any motions on which the trial court could rule; (2) regarding the trial court's finding that a witness's prior testimony could be admitted because she was unavailable to testify, Nelson waived his right to confrontation argument on appeal because he failed to renew his objection regarding the sufficiency of the evidence of the witness's unavailability in the trial court; and (3) as the State concedes, the trial court should strike the $500 VPA from the judgment and sentence.

ADDITIONAL FACTS

Relevant Witnesses

Cynthia Davis rented a room in the same house in which Nelson lived. Davis and her boyfriend, Marvin Leikam, were present in the house when Nelson assaulted McCray. They did not witness the assault, but they saw McCray come out of Nelson's room covered in blood.

Mistrial

Nelson's first trial took place in December 2021. The morning before trial began, Nelson expressed that he was unhappy with defense counsel and requested to continue the trial in order to obtain a different lawyer. The trial court stated that Nelson's motion was untimely and that it would not continue the trial nor appoint new counsel.

Davis testified and was subject to cross-examination by defense counsel. The jury was unable to reach a verdict, and the trial court declared a mistrial.

Requests for New Counsel

Shortly after the mistrial, Nelson sent a letter to the trial court requesting assignment of new counsel because there was a breakdown of communication and trust with his defense counsel. The court filed the letter and forwarded copies to the prosecutor and defense counsel. But the court noted that it "does not act on ex-parte letters or improperly filed pleadings. If matters are to be considered by the Court, they must be properly filed and placed on the docket with due notice to all parties and in accordance with court rules." Clerk's Papers (CP) at 141.

Nelson then sent to the trial court a "Motion for Substitution of Assigned Counsel in Lieu of Second Trial." CP at 142-47. It was filed with the court as "Correspondence to Court." CP at 142. Nelson outlined the breakdown of communication between him and defense counsel. The trial court took no action.

Nelson again sent another letter to the trial court noting the breakdown of communication between him and defense counsel. The court again filed the letter and forwarded copies to the prosecutor and defense counsel. But the court again noted that it "does not act on ex-parte letters or improperly filed pleadings. If matters are to be considered by the Court, they must be properly filed and placed on the docket with due notice to all parties and in accordance with court rules." CP at 153.

In February 2022, Nelson appeared before the trial court and requested to represent himself due to a breakdown in communication with defense counsel. After a lengthy colloquy, the court determined that Nelson was making this request knowingly and intelligently and allowed Nelson to represent himself. The court appointed the previous defense counsel as standby counsel.

Davis's Prior Testimony

The State filed a motion to admit the prior testimony of Davis from the first trial. The State argued that Davis was unavailable under ER 804(a)(4) because of mental illness, and therefore her prior testimony was admissible under ER 804(b)(1). Because Nelson cross-examined her at the previous trial, the trial court stated that the right to confrontation was not at issue but whether Davis was unavailable was "more of a gray area." Rep. of Proc. (RP) (August 29, 2022) at 32-34.

The trial court heard testimony from Leikam as an offer of proof. Leikam testified that Davis had paranoid schizophrenic disorder, schizoaffective disorder, and attention deficit hyperactivity disorder. He also testified that during the previous nine months, he noticed that Davis's mental health issues had gradually gotten worse to "monumentally worse." RP (August

29, 2022) at 38. Leikam stated that this was because she stopped taking her medications and refused to touch base with treatment providers.

But Leikam also testified that Davis had normal memory and was still grounded in reality. Although she "may not be able to articulate that well or stick to the issues at hand," she had a clear memory. RP (August 29, 2022) at 47.

Nelson argued that Leikam's testimony did not accurately explain what Davis's mental health status was and that her status should be determined by a mental health professional. The trial court ruled that the record did not establish that Davis was unavailable under ER 804.

Two days later, the State brought forward new information regarding Davis's mental health status. The previous night, Davis attempted to light her neighbor's lawn on fire, defecated and urinated in the street, and was involuntarily detained. She would not be released for at least a week.

Jeffrey Thiry, a sergeant with the Tacoma Police Department (TPD), testified that when he tried to locate Davis for trial, he learned that she was suspected of committing arson and that TPD officers had involuntarily committed her. The designated crisis responder told Thiry that Davis had been transferred to the hospital and that she would be transported to a secured facility that night. Thiry stated that Davis would be detained for a week.

Nelson did not cross-examine Thiry. When the trial court asked Nelson if he had "any reason why the Court should not admit the prior testimony" upon finding that Davis was unavailable, he responded, "No, Your Honor." RP (August 31, 2022) at 446. The court then granted the State's motion to admit Davis's prior testimony. Nelson did not object.

A transcript of Davis's testimony from the first trial was read to the jury during the second trial. Nelson did not object.

Conviction and Sentence

The jury found Nelson guilty of second degree assault while armed with a deadly weapon. In October 2022, the trial court sentenced Nelson and determined that Nelson was indigent. However, the trial court imposed the $500 VPA.

Nelson appeals his conviction and sentence.

ANALYSIS

A. RIGHT TO COUNSEL

Nelson argues that the trial court violated his right to counsel when it failed to inquire into his repeated motions for new counsel. We disagree.

1. Legal Principles

Article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee a criminal defendant the right to assistance of counsel. When a defendant requests substitute counsel, the request must be timely and stated unequivocally. *State v. Elwell*, 199 Wn.2d 256, 272, 505 P.3d 101 (2022). The trial court must decide whether the relationship between defense counsel and the defendant has completely collapsed. *Id.*

When reviewing the trial court's ruling, we consider " '(1) the extent of the conflict, (2) the adequacy of the [trial court's] inquiry, and (3) the timeliness of the motion.' " *Id.* at 272-73 (quoting *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018)). When a trial court learns of a conflict between counsel and a defendant, the court has " 'an "obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction" ' sufficient to reach an informed decision." *State*

v. Davis, 3 Wn. App. 2d 763, 790, 418 P.3d 199 (2018) (quoting *State v. Thompson*, 169 Wn. App. 436, 462, 290 P.3d 996 (2012)).

We review trial court decisions relating to differences between defense counsel and a defendant for an abuse of discretion. *Elwell*, 199 Wn.2d at 273.

2. Analysis

Here, Nelson never properly filed any motions on which the trial court could rule. Nelson sent two letters to the trial court, to which the court responded each time that it would not act on ex-parte letters and that Nelson must properly file a motion. Nelson also sent to the court a motion requesting new counsel, but it was filed with the court as a "Correspondence to Court," and not as a properly filed motion. CP at 142-47.

When the trial court granted Nelson's request to represent himself, Nelson did not ask for substitution of counsel. He only requested to proceed pro se.

Nelson claims that the trial court abused its discretion when it required him to comply with court rules because Pierce County Local Rule (PCLR) 7(a)(3)(A), which states the process for properly filing motions, does not apply to criminal cases. But CR 5, which governs the service and filing of pleadings and other papers in civil cases, also governs the service and filing of written motions in criminal cases. CrR 8.4.

Nelson also claims that the trial court should have inquired into the basis of his request for new counsel once the court learned of the conflict. But Nelson never properly filed any motions and so the issue was never properly before the trial court to give rise to an obligation to inquire into the conflict between Nelson and defense counsel.

Therefore, we hold that the trial court did not violate Nelson's right to counsel.

B. WITNESS UNAVAILABILITY

Nelson argues that the trial court erred when it found Davis unavailable to testify, and therefore violated his right to confrontation when it admitted Davis's prior trial testimony. The State argues that Nelson waived this argument on appeal because he failed to renew his objection regarding the sufficiency of the evidence of Davis's unavailability. We agree with the State.

Under RAP 2.5(a), "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." However, an exception applies for manifest errors affecting a constitutional right. RAP 2.5(a)(3). But Nelson does not claim manifest error; he argues that he properly objected in the trial court.

Initially, Nelson objected to the State's motion when he argued that Leikam's testimony did not accurately explain what Davis's mental health status was and that her status should be determined by a mental health professional. But he did not renew this objection when the State presented new evidence two days later.

After Thiry testified about Davis's unavailability, the trial court asked Nelson if he had "any reason why the Court should not admit the prior testimony" upon finding that Davis was unavailable. RP (August 31, 2022) at 446. Nelson responded, "No, Your Honor." RP (August 31, 2022) at 446. And when the court granted the State's motion to admit Davis's prior testimony and a transcript of Davis's testimony from the first trial was read to the jury, Nelson did not object either time.

The record shows that Nelson did not renew his previous objection regarding Davis's availability to testify. Therefore, we hold that Nelson waived this argument on appeal.

C. CRIME VICTIM PENALTY ASSESSMENT

Nelson argues, and the State concedes, that the $500 VPA should be stricken from his judgment and sentence. We agree.

Effective July 1, 2023, RCW 7.68.035(4) prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). For purposes of RCW 10.01.160(3), a defendant is indigent if they meet the criteria in RCW 10.10.010(3). Although this amendment took effect after Nelson's sentencing, it applies to cases pending on appeal. *Ellis*, 27 Wn. App. 2d at 16.

The trial court sentenced Nelson in October 2022 and determined that Nelson was indigent. The State concedes that the VPA should be stricken. Therefore, on remand the trial court must strike the VPA from the judgment and sentence.

CONCLUSION

We affirm Nelson's conviction and sentence, but we remand for the trial court to strike the VPA from the judgment and sentence.

MAXA, P.J.

We concur:

J., J.

CHE, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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