No. 100873-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL REYNOLDS,
Petitioner.

MEMORANDUM OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, KING COUNTY DEPARTMENT OF PUBLIC DEFENSE, 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. Reynolds is sentenced to die in prison under the Persistent Offender Accountability Act based, in part, on a strike offense he committed as a child. A predicate strike committed by a child—whose culpability is categorically diminished by the neurobiological differences of the developing brain—cannot aggravate the guilt of the third strike to the same extent as a predicate strike committed by a fully culpable adult. But 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. This aspect 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. Mr. Reynold's case also warrants review to examine the POAA's disproportionate racial impact. RAP 13.4(b)(4).

ARGUMENT

I. Review Is Warranted to Resolve Lower Courts' Misunderstanding of *State v. Moretti* and Prevent the Sub Silentio Overruling of *State v. Fain* and Decades of this Court's Proportionality Jurisprudence.

The constitutionality of the POAA under article I, section 14 as applied to those serving life without parole based on juvenile predicates is an unresolved legal question explicitly left open by this Court in *Moretti*. *Moretti*, 193 Wn.2d at 821 n.5 ("We express no opinion on whether it is constitutional to apply the POAA to an offender who committed a strike offense

as a juvenile."). The significance of this constitutional issue warrants review.

All three divisions of the Court of Appeals have explicitly or implicitly expressed the need for resolution of this constitutional issue. In *State v. Smith*, Division Three explicitly asked this Court to answer the question left open by *Moretti*, stating, "We encourage the Washington Supreme Court to directly address this important constitutional issue." *State v. Smith*, noted at 16 Wn. App. 2d 1041, 2021 WL 568530, at *9 (2021), *review denied*, *State v. Smith*, No. 99744-6 (Sept. 23, 2021).[1] Division Three declined to address the issue on the merits when raised for the first time on appeal because the court did not believe the error could be "manifest" within the meaning of RAP 2.5(a), as the law does not yet bar juvenile predicates. *Smith*, 2021 WL 568530 at *9 ("Because the law does not clearly support [appellant's] position, we decline to do

[1] Order Denying Pet. for Rev., *State v. Smith*, No. 99744-6 (Sept. 23, 2021).

so for the first time on appeal.").

On the other hand, Division One in *State v. Simmons* and Division Two in *In re Pers. Restraint of Williams* treated the precise question left open by *Moretti* as already being settled by *Moretti*. *State v. Simmons*, noted at 19 Wn. App. 2d 1039, 2021 WL 4947119, at *8 (Oct. 5, 2021); *In re Pers. Restraint of Williams*, 18 Wn. App. 2d 707, 720-23, 493 P.3d 779 (2021).

In *Simmons*, Simmons raised the same challenge under article I, section 14 to the use of juvenile strikes under the POAA, but the lower court declined to reach the issue. Division One felt compelled to follow *Moretti*'s characterization of recidivist punishment being imposed solely on the basis of the third strike, and summarily rejected the very question that *Moretti* left open. *Simmons*, 2021 WL 4947119, at *8 ("we are bound to similarly follow the reasoning set out in *Moretti*").

Simmons also erroneously considered *Smith* to be

"precedent,"[2] *Simmons*, 2021 WL 4947119, at *8, even though *Smith* had not reached the merits and instead had expressly asked this Court to resolve the open question, *Smith*, 2021 WL 568530, at *9.

Division Two in *Williams* disregarded decades of this Court's precedent presented by Mr. Williams, all of which require proportionality review to encompass both the predicate and qualifying offenses. Instead, it followed *Moretti*'s statement

[2] The *Simmons* court also erroneously noted two other Court of Appeals decisions, *State v. Teas* and *State v. Vasquez*, as "precedent." *Simmons*, 2021 WL 4947119, at *8. These two cases do not present the same legal question as presented in *Simmons*, *Williams*, *Smith*, or in the instant case. Neither *Teas* nor *Vasquez* involved the use of a juvenile predicate under the POAA. *See Simmons*, 2021 WL 4947119, at *8 (citing *State v. Teas*, 10 Wn. App. 2d 111, 119-20, 131-35, 447 P.3d 606 (2019) (holding that *Moretti* controlled where Mr. Teas's predicate strike was classified as a "youth strike" rather than a juvenile strike, as the record did not show exactly when the predicate strike occurred, only that Mr. Teas was between the age of 17-19), *review denied*, 195 Wn.2d 1008 (2020)); *see also id.* (citing *State v. Vasquez*, 9 Wn. App. 2d 1037, 2019 WL 2537939 (June 20, 2019) (holding *Bassett* inapplicable to a non-POAA sentence imposed on a 23-year-old convicted of murder), *review denied*, 194 Wn.2d 1005 (2019)).

that proportionality review focuses only on the third strike. *Williams*, 18 Wn. App. 2d at 722 ("We follow *Moretti* and conclude that we must consider only the third strike offense in determining whether Williams's life without release sentence is unconstitutional.").

Moretti does not control the novel legal question of whether the POAA's use of juvenile strikes violates article I, section 14, and both commissioners of this Court have deemed it an open question.[3] *Moretti*'s characterization of recidivist punishment as focusing on the nature of the current offense, if taken literally, would *sub silentio* overrule decades of this

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[3] On a motion to transfer *In re Williams* to this Court, the commissioner acknowledged the question of juvenile strikes was explicitly left open by *Moretti*. Ruling Denying Mot. to Transfer at 4-5, *In re Williams*, No. 100222-0 (Sept. 8, 2020). In denying Mr. Williams's motion for discretionary review, the deputy commissioner acknowledged that use of juvenile strikes was an open question and "one of undoubted significance." Ruling Denying Review at 3, *In re Williams*, No. 100222-0 (Jan. 25, 2022).

Court's proportionality jurisprudence,[4] as well as contravene the seminal Eighth Amendment proportionality cases examining the punishment in light of *both* the predicate and qualifying offenses.

State v. Fain and subsequent POAA decisions under article I, section 14 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) (same), *abrogated on other grounds by Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *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

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

prior offenses under *Fain* factor 4); *see also State v. Bassett*, 192 Wn.2d 67, ¶¶ 30-35, 428 P.3d 343 (2018) (*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,[5] which is impermissible. *State v. Gregory*, 192 Wn.2d 1, 36, 427 P.3d 621 (2018) (Johnson, J., concurring).

II. Review Is Warranted to Harmonize the Treatment of Juvenile Strikes with this Court's Juvenile Justice Jurisprudence.

All three Courts of Appeals have wrestled with the challenge to use of juvenile predicates due to this Court's statements that, in the POAA context, punishment is for the last

[5] *Cf. Solem v. Helm*, 463 U.S. 277, 296-97, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) (examining closely the instant and previous offenses that qualified Helm as 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 crime underlying LWOP sentence).

strike. Proportionality review encompasses both predicate and qualifying strikes. However, even if the punishment is only for the qualifying strike, the Court must still reach the merits. Predicate strikes committed by children, whose culpability is categorically diminished by the neurobiological differences of the developing brain, cannot aggravate the third strike to the same extent as predicate strikes committed by adults.

This Court should accept review to harmonize the POAA with its 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, including 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 at ¶ 35, 44 (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 mandatory imposition of life without parole is cruel when applied to the class of offenders who, like Mr. Reynolds, were convicted of a strike offense as a child. To treat a strike offense committed by a child as aggravating the qualifying strike to the same extent as a strike offense committed by an adult violates the promise of our constitution to protect against cruel punishment. *Bassett* 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, 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.

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

Amici also support Mr. Reynold's request to examine the race disproportionality under the POAA. Pet. for Review at 26-28. Amici have requested records from the Department of Corrections to obtain more current data about the number of three-strikers 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.[6] The race disproportionality among this group is stark: 46 of 146 are Black. Amici have requested additional documentation from DOC to determine the number of those among this group who committed strike offenses as children and were counted as strikes.[7] If review is granted, amici anticipate having additional data to present to this Court regarding how many people are serving life without parole based on strike offenses committed as children, and the race disproportionality among that group.

Even without specific race disproportionality statistics of this group, this Court is well aware of Washington's long history of severe race disproportionality in incarceration. In a

[6] Public records act response from DOC, on file with counsel for amici.

[7] Initial records provided by DOC to counsel for amici did not differentiate between individuals whose juvenile offenses counted as strikes and those whose did not.

historic symposium at the Temple of Justice in 2011, an ad hoc 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."[8]

A recent analysis of criminal sentencing in Washington over the last four decades has illuminated how actions by the electorate, legislature, prosecutors, and courts have resulted in Black defendants receiving long and life sentences at a disproportionate rate.[9] Specifically, from 1986 to 2017, an

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[8] 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, 629 (2012), 87 Wash. L. Rev. 1, 6 (2012), 47 Gonz. L. Rev. 251, 256 (2012); Presentation by Race and Criminal Justice System Task Force, Mar. 2, 2011, https://www.tvw.org/watch/?eventID=2011031372.

[9] *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-

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 sentenced to life without parole were Black.[10]

The POAA is a significant contributor to this incarceration disproportionality.[11] "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% of the state's population is African American."[13] As of 2009, roughly 10% of the 229 three strikers were convicted of

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wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state.

[10] *Id.* at 28.

[11] *Id.* at 31-34.

[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.

[13] *Id.*

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.

CERTIFICATE OF COMPLIANCE WITH RAP 18.17

Undersigned counsel certifies that, pursuant to RAP 18.17(b), the document contains 2,484 words, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificates of compliance and signature

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

blocks, and pictorial images, and therefore meets the word count limitation of amicus curiae memoranda of 2,500 words as required by RAP 18.17(c)(9).

DATED this 24th day of June, 2022.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on June 24, 2022, 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 24th day of June, 2022.

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