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No. 99344-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Personal Restraint Petition of

ROBERT R. WILLIAMS,

Petitioner.

BRIEF OF AMICUS CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of amicus curiae are set forth in the Motion for Leave to File that accompanies this brief.

INTRODUCTION

An uncomfortable, inconvenient truth is that Black people, and in particular Black men, are imprisoned at rates far in excess of their relative proportion of Washington's population.[1] But this truth that some may feel discomfited or inconvenienced by is a matter of liberty or confinement for many Black people. For some, it is a matter life or death.

Disproportionality in incarceration is, in part, a product of structural racism. The executive, legislature, and the courts in Washington State have been on notice about the role structural racism plays in this state's criminal justice system since the issuance in December 1990 of the *Final Report of the Washington State Minority and Justice Task Force*.[2] In March 2011, this Court was apprised that structural racism continued to play a role in producing observed race disproportionality in incarceration.[3]

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[1] *See infra* Part I (documenting disproportionality in incarceration).

[2] *See generally Final Report of Washington State Minority and Justice Task Force*, Section VI: Criminal Matters, https://www.courts.wa.gov/committee/pdf/TaskForce.pdf. [hereinafter *1990 Final Report*]. Of particular note is the report's acknowledgment of the possibility of institutional bias stemming from the impact criminal history has on sentencing recommendations. *Id*. at 172 (noting criminal history as a factor that "may perpetuate an institutional racial and ethnic bias where none may be intended by the individual [Community Correction Officer]").

[3] *See* Research Working Grp. of Task Force on Race & Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L.

Since then, this Court has acknowledged and/or addressed structural racism in the criminal justice system in at least three important instances: when it ruled the death penalty as applied was unconstitutional;[4] when it adopted GR 37 and constitutionalized it in a later case;[5] and most recently when it ruled that this state's strict liability drug possession statute was unconstitutional.[6] This Court has demonstrated that it is not powerless to address structural racism. Instead, this Court has used its

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Rev. 623, 627-28, 651-53 (2012) (concluding that disproportionate minority representation in Washington prisons is largely "explained by facially neutral policies that have racially disparate effects") [hereinafter *Preliminary Report*].

[4] *State v. Gregory*, 192 Wn.2d 1, 18-24, 427 P.3d 621 (2018). Importantly, this Court's holding that the death penalty is imposed in an arbitrary and racial manner in violation of Washington constitution, article I, section 14 did not require an explicit finding that Mr. Gregory, an African American male, was himself subjected to discrimination. This Court in essence acknowledged and addressed structural racism in the application of the death penalty in Washington.

[5] *See* GR 37; *State v. Jefferson*, 192 Wn.2d 225, 249-251, 429 P.3d 467 (2018). For example, GR 37(h), which states that "(i) having prior contact with law enforcement officers," "(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling," and "(iii) having a close relationship with people have been stopped, arrested, or convicted of a crime," are presumptively invalid reasons for exercising a peremptory strike of a prospective juror because these reasons have been associated with improper jury selection in Washington State acknowledges and addresses structural racism. In *Jefferson*, this Court's refashioning of *Batson* to require "an objective inquiry based on the average reasonable person—defined here as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated ways," 192 Wn.2d at 249-50, acknowledges and addresses structural racism.

[6] *See State v. Blake*, No. 96873-0, slip op. at 14, n.10, and 26 (Feb. 25, 2021). Though this decision did not provide a remedy to directly address structural racism, the Court explicitly acknowledged structural racism in two important regards. First, it acknowledged the danger of criminalizing innocent conduct. *Id*. at 14 n.10 (discussing potential problems presented by facially neutral policies that produce racially disparate effect) (citing *Preliminary Report*, 35 Seattle U. L. Rev. at 627-28, 651-53). Second, the Court noted legislative acquiescence to *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981), and *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004), even though "[t]he drug statute that they interpreted has affected thousands upon thousands of lives, and its impact has it young men of color especially hard." *Blake*, slip op. at 26 (citing *Preliminary Report*, 35 Seattle U. L. Rev. at 651-56).

authority to acknowledge and address structural racism.

Courageously, this Court has called on itself to look within, to acknowledge that "[a]s judges, we must recognize the role we have played in devaluing black lives."[7] When considering relief for those facing the pandemic in congregate settings such as prisons, the Court should continue to acknowledge and address the uncomfortable, inconvenient truth that structural racism has contributed to race disproportionality in the criminal justice system, especially in incarceration.

Though the court below correctly found that article I, section 14 of the Washington constitution is more protective in this conditions-of-confinement context, its test is flawed because it allows lower courts to defer to the Department of Corrections's (DOC) determination of whether a petitioner poses a risk to public safety without consideration of the penological goals of continued confinement. A test that allows DOC's conclusory determination regarding public safety to be outcome-determinative abdicates the judicial function to an administrative agency and quite likely will perpetuate the same structural racism that has resulted in race disproportionality in incarceration.

[7] Letter from Wash. State Supreme Court to Members of Judiciary & Legal Cmty. 1 (June 4, 2020), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf [https://perma.cc/QNT4-H5P7].

ARGUMENT

I. Black Persons, and Black Men in Particular, Are Overrepresented in the Incarcerated Population and, as a Consequence, Are Disproportionately Exposed to COVID-19.[8]

Persons who identify solely as Black or African American constitute 4.4% of Washington's population,[9] yet they make up 18.1% of individuals incarcerated in Washington prisons.[10] Though the combined race and gender breakdown of individuals confined in Washington prisons is not provided, 93.6% of those confined are male.[11]

Though Black people in Washington prisons are not at greater risk of getting COVID-19 than are other people in prison,[12] all persons in

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[8] Native American and Latinx people are also overrepresented in Washington prison population. Native Americans constitute 6% of the incarcerated population though only 1.9% of Washington's population identifies solely as American Indian or Alaska Native; Latinx people constitute 15.2% of the incarcerated population though only 13% of Washington's population identifies solely as Hispanic or Latina/o. *Compare* Wash. Dep't of Corr., *Fact Card*, Dec. 31, 2020, https://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf (last visited Feb. 28, 2021) [hereinafter *DOC Fact Card*] *with* U.S. Census, *Quick Facts: Washington, Population estimates July 1, 2019*, https://www.census.gov/quickfacts/WA#qf-headnote-a (last visited Feb. 28, 2021) [hereinafter *Census Quick Facts*]. This amicus brief focuses, though, on Black disproportionality. Amicus notes that incomplete information and possible inconsistencies about how individuals are categorized by DOC and the U.S. Census further complicates precise determinations of overrepresentation, especially with regard to those who report as belonging to more than one racial category and how "Hispanics" are counted, including that the interplay between racial and ethnic categories further complexifies reporting on "Hispanics." None of this, though, takes away from the fact that Black persons are overrepresented in incarceration.

[9] *Census Quick Facts*, *supra*.

[10] *DOC Fact Card*, *supra*.

[11] *Id.*

[12] As reflected by DOC's COVID dashboard, the rate of infection among racial groups corresponds roughly to the demographic proportion of the incarcerated population – white inmates constitute 70.6% of confirmed COVID infections and 68% of the

prison are at higher risk of getting COVID-19 than is the general population in Washington. One out of three persons imprisoned in Washington has tested positive for COVID-19, a rate over eight times higher than the state as a whole.[13] This is expected because congregate settings such as Washington prisons do not allow for effective social distancing and expose residents of those facilities to a heightened risk of contracting COVID-19. *See generally* Br. of Amici Curiae Public Health and Human Rights Experts, at Part IV.C. (discussing heightened risk for COVID-19 spread in correctional facilities).

To the extent that Black people are overrepresented in Washington prisons, they face a disproportionate risk of contracting COVID-19. Compounding this is the fact that in Washington, as reported by the Washington State Department of Health, "Black populations" with COVID-19 have hospitalization rates nearly three times higher and death rates nearly two times higher than "white populations" with COVID-19.[14]

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incarcerated population; Black inmates represent 16.8% infections and 17.8% of DOC's population, and Native American inmates make up 6.2% of COVID cases and 5.9% of the population. Wash. Dep't of Corr., *Covid-19 Data*, https://www.doc.wa.gov/corrections/covid-19/data.htm#confirmed (last visited Feb. 23, 2021).

[13] *See* Marshall Project, *A State-by-State Look at Coronavirus in Prisons*, https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons (scroll to "What's happening in your state" and select "Washington" from drop-down menu) (last visited Mar. 1, 2021, webpage updated 5:05 p.m., Feb. 26, 2021).

[14] Wash. Dep't of Health, *Covid-19 morbidity and mortality by race, ethnicity, and spoken language in Washington state*, (Feb. 17, 2021), at 5, https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/data-tables/COVID-

Further, COVID-19 is more dangerous for older individuals and those suffering from certain underlying health conditions. *See* Br. of Amici Curiae Public Health and Human Rights Expert, at Part IV.B.

II. Black Overrepresentation in Washington Prisons Is Partly a Product of Structural Racism.

In *Gregory*, this Court took judicial notice of the "implicit and overt racial bias against black defendants in this state." 192 Wn.2d at 22. *See also State v. A.M.*, 194 Wn.2d 33, 63, n.9, 448 P.3d 35 (2019) (McCloud, J., concurring) (noting that racial disparities in drug enforcement are one of the primary drivers of the "color gap" in Washington's courts, prisons, and jails); *Blake*, slip op. at 14, n.10 (*citing Preliminary Report* 35 Seattle U.L. Rev. at 627-28, 651-53 (2012)). A new 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.[15] These long sentences may have contributed to create a prison population that is not only racially disproportionate but is also aging, with more than 1 in 5

19MorbidityMortalityRaceEthnicityLanguageWAState.pdf (last visited Mar. 1, 2021). Similar differences in health outcomes exist for other minorities. *Id*.

[15] *See generally* Katherine Beckett & Heather D. Evans, *About Time: Hong 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.

prisoners (21.5%) being 51 years of age or older, and nearly 1 in 25 (3.8%) being 66 or older.[16]

Beginning with the passage of the Sentencing Reform Act ("SRA") in 1981, the Washington legislature dramatically revised the sentencing structure to prioritize retribution and incapacitation of criminal defendants over their rehabilitation.[17] The SRA abolished parole release for defendants sentenced after its passage.[18] It also implemented a new sentencing scheme where the length of a sentence is determined by the seriousness of the offense and by the defendant's criminal record (known as the offender score).[19] The stated purpose of the SRA was to enhance fairness and predictability across cases.[20] However, this new framework functionally diminished judicial discretion and instead shifted discretionary power to the legislature,[21] which classifies sentences based on their perceived seriousness and sets sentencing ranges for various offense categories, and to prosecutors, who decide which crimes to charge and what pleas are offered and accepted, and thus which sentencing range is ultimately applicable.

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[16] *DOC Fact Card*, https://www.doc.wa.gov/docs/publications/reports/100-QA002.pdf (figure obtained by adding percentage of population in age bands) (last visited Mar. 1, 2021).
[17] Beckett & Evans, *supra* at 6.
[18] RCW 9.94A.130 (1984) (recodified in 2001 as RCW 9.94A.575).
[19] Beckett & Evans, *supra* at 12.
[20] RCW 9.94A.010 (stating purpose).
[21] *Id.*

In 1993, Washington, through voter initiative, adopted the Persistent Offender Accountability Act (POAA), which mandated life sentences without the possibility for parole or reduction by good time, upon a third conviction of offenses designated by the legislature as "most serious."[22] 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.[23]

Washington voters and the legislature took additional steps that increased the length of sentences through the adoption of the so-called Hard Time for Armed Crime Act and through legislative changes governing the calculation of offender scores for purposes of sentencing under the SRA and provided for mandatory sentence enhancements.[24]

By the turn of the century, Washington's Sentencing Guidelines Commission sounded the alarm that these changes to the sentencing

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[22] *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). A few years after passage of the POAA, the legislature 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. Additional offenses were added to the list of "two strike" offenses in 1997, further increasing the number of people who were eligible for life sentence without the opportunity for parole. *See* RCW 9.94A.030(38)(b).

[23] *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).

[24] *See* Beckett & Evans, *supra* at 19-21 (discussing these changes).

structure were having a racially disparate effect.[25] In its 2003 analysis, it found that 25% of life sentences were imposed against Black defendants, despite the fact that they composed only 3% of the state's population at the time.[26] Six of the 16 life sentences given under the three-strikes law that year were imposed on Black defendants.[27] Among offenses that did not qualify for life sentences, Black men received aggravated sentences—higher than the standard range—at a slightly higher rate than white men.[28]

Against this backdrop of lengthening sentences, the legislature increased the number of youth who were eligible for prosecution in adult court, and thus subject to lengthier sentences, with the passage of the Youth Violence Reduction Act (YVRA) in 1994.[29] Under the YVRA, 16 and 17 year old children charged with certain felonies are automatically "declined" from jurisdiction in the juvenile system and are prosecuted to adult courts.[30] The Washington State Institute for Public Policy estimated

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[25] Wash. Sentencing Guidelines Comm'n, *Disproportionality and Disparity in Adult Felony Sentencing* (Dec. 2003), http://www.cfc.wa.gov/Publications.htm.
[26] *Id.* at 25
[27] *Id.*
[28] *Id.* at 24.
[29] Wash. State Inst. for Pub. Policy, *The Effectiveness of Declining Juvenile Court Jurisdiction of Youth* (Dec. 2013), https://www.wsipp.wa.gov/ReportFile/1544/Wsipp_The-Effectiveness-of-Declining-Juvenile-Court-Jurisdiction-of-Youth_Report.pdf.
[30] RCW 13.04.030. The statute was amended in 2018 in an attempt to address racial disparities in auto-decline, in part by reducing the number of crimes that previously resulted in youths 16 or 17 years-old at the time of offense being subject to exclusive adult court jurisdiction. S.B. 6160, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

in 2013 that approximately 1,300 youth have been tried in the adult system under this law.[31] Some evidence suggests that Black children are disproportionately represented among automatic declines—in 2007, the Sentencing Guidelines Commission found that Black youth were over-represented in the number of automatic declines at about 10 times their proportion to the population.[32] In FY 2013, 34.9% of children who were auto-declined were Black youth.[33] Because a decline determination hinges on the charged offense, increased prosecutorial discretion may play a role in this disparity.[34]

Further, between 1980 and 2000, while the legislature was rewriting the State's juvenile court and sentencing schema, drug law enforcement and arrests intensified markedly.[35] As was acknowledged in a

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[31] Wash. State Inst. for Pub. Policy, *supra* at 1.
[32] Wash. St. Sentencing Guidelines Comm'n, *Disproportionality and Disparity in Juvenile Sentencing: Fiscal Year 2007*, at 4 ((May 2008) http://www.cfc.wa.gov/PublicationSentencing/DisparityDisproportionality/Juvenile_DisparityDisproportionality_FY2007.pdf.
[33] Wash. State Partnership Council on Juv. Just., *A Summary of Washington State Data and Recent Study Findings: The Transfer of Youth (under age 18) to the Adult Criminal Justice System*, https://dcyf.wa.gov/sites/default/files/pdf/decline_Final.pdf.
[34] *Cf.* Robert D. Crutchfield et al., *Racial and Ethnic Disparities in the Prosecution of Felony Cases in King County: Final Report*, Washington State Minority and Just Commission (1995), https://www.courts.wa.gov/committee/pdf/November%201995%20Report.pdf. Though this study did not focus on charging of juveniles, this 1995 study found that prosecutors in King County were significantly less likely to file charges against white defendants than they were against defendants of color and that, even when accounting for legally relevant factors, King County prosecutors tended to recommend longer confinement sentences for Black defendants. *Id*. at 32-33, 39.
[35] Katherine Beckett, Kris Nyrop & Lori Pfingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 Criminology 105, 106 (2006).

recent decision by this Court, "criminal laws are enforced against marginalized communities at disproportionate rates," and, in the case of drug enforcement, Black communities were particularly harmed by increased police activity during this time. *Blake*, slip op. at 18 (Stephens, J., concurring in part, dissenting in part). For example, during the period from January 1999 to April 2001, the Seattle Police Department made 2,786 arrests for the delivery of five serious drugs (other than marijuana); "Blacks comprised 64.2 percent of those arrested"[36] though Black persons made up only 8.4% of Seattle's population.[37] However, a data-driven analysis of drug markets and law enforcement in Seattle found that this racial disparity in arrest rates is neither attributable to the reality of the local drug economy or a function of public health, safety, or civilian concerns.[38]

The accumulated actions of the electorate, legislature, police, prosecutors, and other state actors had a disparate impact on the Black communities. 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

[36] *Id*. at 118.
[37] *Id*. at 117 (2000 U.S. Census data).
[38] *Id.* at 129-31.

sentenced to life without parole were Black.[39] During the COVID-19 pandemic, these lengthy sentences are of particular concern because they are likely being served by individuals like Mr. Williams who are medically vulnerable due to a combination of race, age, and underlying medical conditions.

III. This History and the Structural Racism that Has Contributed to the Overrepresentation of Black People in Washington Prisons Must Inform How Cruel Punishment Is Assessed.

Recently, this Court has repeatedly acknowledged that race has played an improper role in Washington's criminal justice system and has unfairly impacted people of color. *See, e.g., Blake,* slip op. at 18 (Stephens, J., concurring in part, dissenting in part) ("the fact of racial and ethnic disproportionality in our criminal justice system is indisputable" and noting that "criminal laws are enforced against marginalized communities at disproportionate rates"); *Jefferson,* 192 Wn.2d at 249-50 (modified *Batson* test asks whether "the average reasonable person—defined here as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts current decision making in nonexplicit, or implicit, unstated ways"); *Gregory,* 192 Wn.2d at 18-19 (holding that the imposition of the death penalty, because

[39] Beckett & Evans, *supra* at 28.

administered in an arbitrary and racially biased manner, was cruel and therefore unconstitutional). The *Gregory* Court noted the ample evidence in Washington's case law and history of discrimination to support the specific finding that "the association between race and the death penalty is *not* attributed to random chance." 192 Wn.2d at 22-23 (citing numerous cases and other sources documenting this point) (emphasis in original).

As discussed above in Part I, the overrepresentation of Black people in Washington prisons means that some Black people, because of structural racism, face a disproportionate risk of contracting COVID-19, with possibly life-threatening outcomes because of the confluence of race, age, and medical conditions. Paraphrasing *Gregory*, this disproportionate risk of serious health consequences, including possibly death, can be traced to Washington's case law and history of discrimination.

This is the context within which Mr. Williams's claim must be judged. The test, to be applied to Mr. Williams, must be responsive to the effects of structural racism, including the acts of the electorate, legislature, police, prosecutors, and the courts, that has, in an arbitrary and racially biased manner, placed certain individuals in increased jeopardy because of the pandemic. The test must allow for robust consideration whether continued imprisonment under these circumstances satisfy legitimate penological goals.

Mr. Williams offers a burden-shifting test. Pet'r's Supp. Br. at 10-12. Amici American Civil Liberties Union of Washington et al. offer objective cruelty as the "touchstone" for assessing whether the current exigent circumstance presented by the pandemic requires a reassessment of whether ongoing prison incarceration for certain individuals remains constitutionally permitted. Br. of Amici Curiae American Civil Liberties Union of Washington et al., at Part II. In choosing the appropriate test or standard, and in applying it, this Court must give heed to the historical treatment of racial minorities and the role that structural racism has played in creating a racially disproportionate population in Washington prisons that is unfairly subjected to the risk and harm of COVID-19.

CONCLUSION

Addressing structural racism is not simple, nor is it easy to do. But this Court has shown itself capable of acknowledging and in some instances directly redressing the effects of structural racism. Amicus urges the Court to do so once again.

DATED this 2nd day of March, 2021.

Respectfully Submitted:

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on March 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 March, 2021.

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