NO. 100873-2

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL REYNOLDS, JR.,

Petitioner.

STATE'S ANSWER TO BRIEF OF AMICI CURIAE FRED T. KOREMATSU CENTER ET AL.

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A. INTRODUCTION

The Persistent Offender Accountability Act ("POAA") represents a judgment by the people of Washington that, where an offender repeatedly commits certain very serious offenses despite intervening opportunities to reform their behavior, permanent removal from society is warranted, both to protect the community from that offender and to deter other offenders from repeatedly committing "strike" offenses. The logic of this decision does not depend on an assumption that every strike by every defendant is equally blameworthy. Instead, it reflects a determination that, regardless of the mitigating circumstances that might be present in any particular strike offense, once a defendant has committed a strike, been sentenced, committed a second strike, been sentenced, and still gone on to commit a third strike, a sufficiently strong pattern has been established to conclude that the defendant is either unable or unwilling to stop committing strike offenses.

Because it is the *repetition* of serious offenses that justifies a life-without-parole sentence under the POAA, and not the defendant's individualized blameworthiness for those offenses, article I, section 14, does not require consideration of the facts underlying a defendant's prior strike offenses when assessing whether the POAA sentence imposed for the third strike is unconstitutionally disproportionate. This Court made all this clear in Moretti,[1] and this Court should reject amici's argument to reach a contrary holding in this case. This Court should also decline to consider incomplete demographic data outside the appellate record.

B. ISSUES RAISED BY AMICI

1. This Court has already determined that article I, section 14 of the Washington State Constitution permits the imposition of a life-without-parole sentence on a fully formed adult recidivist whose pattern of repeatedly committing "strike"

[1] State v. Moretti, 193 Wn.2d 809, 446 P.3d 609 (2019).

offenses began at age 19 regardless of any mitigating factors that may attach to the first strike offense, because a POAA sentence punishes only the final strike. Does article I, section 14 require a different result for an adult recidivist whose pattern of repeatedly committing strike offenses began at age 17?

2. Should this Court decline to consider data added to the record at the eleventh hour when that data excludes a sizeable class of POAA offenders with very different racial demographics and, thus, is not a reliable measure as to whether amici's proposed holding would reduce racial disproportionality?

C. ANSWER TO AMICI CURIAE

This Court granted review of the Court of Appeals' holding that Reynolds may constitutionally be sentenced to life without parole under the POAA for attempted second-degree rape with a deadly weapon and first-degree burglary with a deadly weapon and sexual motivation committed at age 33, after failing to reform his behavior following prior convictions

for attempted first-degree robbery committed at age 17 and first-degree robbery and first-degree burglary committed at age 21.

Amici curiae The Fred T. Korematsu Center for Law et al. address several different parts of analysis in which this Court must engage. Some of amici's arguments, such as whether Reynolds has established a national consensus against the consideration of juvenile-age adult court convictions and whether a categorical bar analysis should look at the facts of prior strikes, have been adequately addressed in the State's prior briefs or are controlled by Moretti. Others, such as whether Moretti's holding that a gross disproportionality analysis focuses only on the current offense contradicts this Court's prior holdings, and whether the demographic data presented by Reynolds and Amici for the first time in this Court require this Court to do so, warrant additional discussion.

1. AMICI IDENTIFY NO VALID REASON TO ABANDON MORETTI'S HOLDING THAT AN ARTICLE I, SECTION 14, CHALLENGE TO A PERSISTENT OFFENDER SENTENCE DOES NOT LOOK AT THE FACTS UNDERLYING PRIOR STRIKE OFFENSES.

The main thrust of amici's brief is that this Court should consider the facts underlying Reynolds' prior strikes when assessing whether it is unconstitutionally cruel to impose a life-without-parole sentence on him for dragging M.G. out of her workplace at knifepoint and violently attempting to rape her, after having been convicted twice previously of strike offenses and rejecting opportunities to reform his behavior.[2] Amici do

[2] Although amici frame their argument in terms of looking at "all three strike offenses," Br. of Amici at 4, the POAA imposes a life-without-parole sentence on all "persistent offenders," a category that includes both offenders convicted of three "most serious offenses"—commonly referred to as "strikes"—and offenders convicted of two qualifying sex offenses—commonly referred to as "sex strikes." RCW 9.94A.030(37); RCW 9.94A.570. Washington courts apply the same analytical framework for article I, section 14, challenges by both types of persistent offenders. E.g., State v. Gimarelli, 105 Wn. App. 370, 380-82, 20 P.3d 430 (2001) (applying Fain factors in second-sex-strike case) (94 Wn.2d 387, 617 P.2d 720

not squarely grapple with the fact that this Court has already rejected this contention in State v. Moretti, 193 Wn.2d 809, 446 P.3d 609 (2019). In Moretti, this Court explicitly held that only the facts of the current offense are relevant in both a categorical bar analysis and an individualized disproportionality analysis of a POAA sentence, because only the current offense is being punished. Id. at 826, 832.

Although Amici claim to request only a "clarification" of Moretti's holding on this point, what they in fact seek is a reversal of that holding and the adoption of a contrary holding that a cruel punishment analysis under article I, section 14, looks at the facts of the current strike *and* prior strikes.[3] Br. of Amici at 4-5, 7 n.4. The Court should reject such arguments for

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(1980); State v. Morin, 100 Wn. App. 25, 29, 995 P.2d 113 (2000) (same).

[3] As explained in the State's briefing below, even if this Court were to change its analytical framework and include Reynolds' prior strikes in its analysis, Reynolds would still fail to establish that his sentence is grossly disproportionate to his offenses. Br. of Respondent at 42-45.

multiple reasons, starting with the fact that amici neither ask this Court to overrule Moretti nor establish that its holding on this point is incorrect and harmful. See State v. Otton, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) ("[T]his court will reject its prior holdings only upon a clear showing that an established rule is incorrect and harmful." (internal quotation marks omitted)). Additionally, as discussed below, neither precedent nor logic supports the analytical framework advanced by amici.

a. Moretti Is Consistent with This Court's Post-Fain Precedent.

Amici are mistaken when they assert that Moretti's holding—that a cruel punishment analysis does not look at the facts of prior strikes—contradicts prior decisions of this Court such as Witherspoon,[4] Thorne,[5] Rivers,[6] and Lee.[7] Br. of

[4] State v. Witherspoon, 180 Wn.2d 875, 329 P.3d 888 (2014).

[5] State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996).

[6] State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996).

[7] State v. Lee, 87 Wn.2d 932, 558 P.2d 236 (1976).

Amici at 6-7. Significantly, none of these cases addressed the question of which offenses should be considered when evaluating a cruel punishment challenge to a POAA sentence. As such, no holding on this issue exists in those cases to contradict Moretti's holding. Amici are therefore incorrect when they assert that adhering to Moretti would "sub silentio reverse" these prior decisions. Br. of Amici at 7 n.4.

Equally importantly, this Court did not actually consider the facts underlying the prior strikes when evaluating the constitutionality of the third-strike sentences imposed in cases like Witherspoon, Thorne, Rivers, and Lee. For example, in Witherspoon, this Court never mentioned the defendant's prior strike offenses until *after* it had applied all four Fain factors and held that Witherspoon's life sentence did not violate article I, section 14. State v. Witherspoon, 180 Wn.2d 875, 889, 329 P.3d 888 (2014). This Court mentioned that "Witherspoon was an adult when he committed all three of his strike offenses" only to demonstrate how abundantly clear it was that United

States Supreme Court decisions regarding juvenile sentencing had no applicability to Witherspoon's case. Id. at 890.

In Thorne, this Court similarly confined its constitutional analysis of the defendant's POAA sentence to the offenses for which he was currently being sentenced. State v. Thorne, 129 Wn.2d 736, 773-76, 921 P.2d 514 (1996). When this Court stated, in analyzing the fourth Fain factor, that "[t]he offenses which are the basis for the convictions and sentence in this appeal are serious, violent offenses," the Court was referring to Thorne's *current* offenses for first-degree kidnapping and first-degree robbery, not his prior convictions for first- and second-degree robbery. Id. at 777. At no point did this Court discuss the facts underlying Thorne's prior strike offenses. Id. at 750-76.

Rivers was a companion case issued on the same day as Thorne and authored by the same justice. State v. Rivers, 129 Wn.2d 697, 712, 921 P.2d 495 (1996). Like Thorne, Rivers never discussed the facts underlying the defendant's prior strike

offenses, and looked only at the current offense when applying the Fain factors. Rivers contains the exact same statement as Thorne that "[t]he offenses which are the basis for the convictions and sentence in this appeal are serious, violent offenses," even though Rivers was only convicted of one current strike offense. Id. at 714. However, it is not at all clear that this sentence was intended to refer to Rivers' prior strike offenses, as amici contend. Br. of Amici at 6. The entire paragraph in which that statement appears is a carbon copy of the same paragraph in Thorne, raising a strong possibility that the sentence on which amici rely merely reflects a "copy and paste" error rather than true consideration of Rivers' prior strikes. Compare Rivers, 129 Wn.2d at 714, with Thorne, 129 Wn.2d at 775-76. Even if this Court did intend to refer to Rivers' prior strike offenses, it clearly did not feel that the facts underlying those convictions were relevant to its analysis, as it never discussed them. Rivers, 129 Wn.2d at 714.

Lee similarly offers little support for amici's contention that Moretti was an aberration in considering only the current offenses in its article I, section 14, analysis. State v. Lee, 87 Wn.2d 932, 558 P.2d 236 (1976). Not only did Lee address Washington's pre-POAA recidivist statute, under which an offender could be sentenced as a habitual offender upon a third conviction for any felony, but this Court never discussed the facts of Lee's prior strike offenses. Id. Although this Court did note the strike offenses of which Lee had previously been convicted, that reference was sandwiched between a statement that Lee's life sentence was punishment for only his final strike and a statement that "[h]e received the life sentence for the second robbery conviction. His punishment is not disproportionate to the underlying offense." Id. at 937.

These cases demonstrate that Moretti's rejection of the argument amici advance here was consistent with this Court's prior caselaw. Although Fain itself looked at all three convictions, the habitual offender statute in effect at that time

imposed a life sentence "after any three felonies," however minor. Fain, 94 Wn.2d at 397-99. The POAA, in contrast, imposes a life sentence only after three convictions for "most serious" offenses or two convictions for select "most serious" sex offenses. RCW 9.94A.030(37). This extreme narrowing of the pool of offenses that warrant a life sentence when committed repeatedly removes the concerns that led this Court to look at all three strike offenses in Fain.

Moreover, the Fain court looked only at "objective" characteristics of Fain's prior strikes—the crime of conviction and the value obtained. Fain, 94 Wn.2d at 397-98. The Court noted the importance of "us[ing] objective standards" when employing a proportionality analysis "to minimize the possibility that the merely personal preferences of judges will decide the outcome of each case." Id. at 397. The Fain court did not evaluate subjective mitigating factors that might have lessened the defendant's culpability for his prior strikes below that of a typical offender convicted of the same offenses, as

Reynolds and amici would have this Court do here. Id. at 397-98.

Subsequent decisions that followed Fain in mentioning prior strikes also did so without discussion of the underlying facts of the prior strikes. See, e.g., State v. Magers, 164 Wn.2d 174, 193, 189 P.3d 126, 136 (2008) (considering Fain factors and noting only the existence of past convictions for second-degree assault and first-degree burglary, without discussion of the underlying facts, before concluding that POAA sentence was not grossly disproportionate).

Furthermore, Fain did not, as amici contend, "already harmonize[]" examination of prior strikes in a proportionality review with what amici concede is a "long-established" principle that a recidivist sentence does not impose punishment for prior offenses. Br. of Amici at 9. Fain never acknowledged that long-established principle; the Fain court merely referenced the fact that it has "long deferred to the legislative judgment that repeat offenders may face an enhanced penalty because of

their recidivism" in explaining that Fain was not challenging the facial constitutionality of the habitual offender statute. Fain, 94 Wn.2d at 390-91.

b. Logic Does Not Support the Analytical Framework Advanced by Amici.

Just as precedent does not provide a basis to overrule Moretti's holding regarding the proper scope of the constitutional analysis, neither does logic. As noted above, amici do not dispute the correctness of this Court's repeated holdings that a POAA sentence does not impose punishment for prior strikes. The Fain factors are intended to assess whether a sentence is grossly disproportionate to the offense being punished. Moretti, 193 Wn.2d at 830. Amici offer no logical explanation for why the proportionality of a sentence *to the offense being sentenced* would turn on the facts of offenses *not* being sentenced.

If this Court were to adopt the arguments of Reynolds and amici and hold that the constitutionality of a POAA sentence depends on the facts of the prior offenses that

aggravate the defendant's culpability for the current offense, such a holding would logically extend far beyond the bounds contemplated by amici. If a defendant's possibly-youth-influenced[8] culpability for his first strike were relevant, then there would be no logical reason why reductions in culpability unrelated to youth—whether for a first strike or a second—would not be equally relevant. Suddenly trial courts would be

[8] Although amici assert that culpability for a first strike committed as a juvenile is always lower than for a first strike committed as an adult, this is not the case. Br. of Amici at 12 (asserting without authority that a juvenile's culpability "is always diminished by the neurobiological differences of the developing brain"); see State v. Gregg, 9 Wn. App. 2d 569, 581, 444 P.3d 1219 (2019) (rejecting presumption that a juvenile's youth is a mitigating factor), aff'd, 196 Wn.2d 473, 474 P.3d 539 (2020). Youth is not a per-se mitigating factor that renders every juvenile less culpable than an adult would be. State v. Ramos, 187 Wn.2d 420, 434, 387 P.3d 650 (2017); see also, e.g., State v. Anderson, 200 Wn.2d 266, 269, 516 P.3d 1213 (2022) (holding de facto life sentence not barred where juvenile offender's crimes do not reflect mitigating qualities of youth). This is particularly true when one considers the array of offenses that qualify as strikes. For example, many 17-year-olds' culpability for first-degree rape or attempted murder would be far higher than a 25-year-old's culpability for a second-degree assault that consisted of throwing a single punch in a bar fight and breaking the victim's orbital bone.

required to conduct mini-trials regarding a defendant's moral culpability for each prior strike—and whether it was reduced by youth, mental health struggles, a minimal role as an accomplice, or a host of other reasons—before imposing a POAA sentence.[9] This would directly contradict one of the key goals of the POAA: to institute "simplified sentencing practices that both the victims and persistent offenders can understand." Thorne, 129 Wn.2d at 771-72. Nothing in article I, section 14, or this Court's precedent requires such an unworkable state of affairs.

The analytical framework advanced by Reynolds and amici also ignores the fact that it is the mere *repetition* of strike offenses that aggravates a defendant's culpability for his final

[9] Logic would also suggest that, if culpability for prior offenses that aggravate the current offense is relevant, a defendant could challenge a standard range non-POAA sentence as unconstitutionally cruel on the grounds that he is less culpable for the prior felony offenses that contribute to his offender score—whether due to youth or any other reason—than a typical defendant with the same score.

strike, regardless of the facts underlying the prior strikes. Moretti, 193 Wn.2d at 826 (citing Lee, 87 Wn.2d at 937). A defendant may have one reason why his culpability for his first strike offense is lower than some defendants who commit the same offense, and a different reason why his culpability for his second strike offense is lower than some defendants who commit the same offense. But the people of Washington are entitled to decide that after a certain number of strike offenses, it stops mattering *why* the defendant is committing them.

Regardless of the reasons, that defendant has demonstrated that he is either unable or unwilling to stop committing strike offenses. Society is not required to give such a defendant unlimited strikes before calling him "out." Moreover, a defendant who commits strike offenses at the ages of 17, 21, and 33 is no more likely to suddenly change his pattern of behavior in his mid-thirties than an offender who committed strike offenses at the ages of 19, 21, and 33. Both offenders' culpability for their first strike may or may not have

been reduced by their youth, but by the time they commit their third strike that point becomes irrelevant, because both offenders have demonstrated that they will continue committing strike offenses if they are released back into the community.

For all these reasons, this Court should reject amici's implicit request to overrule Moretti and should continue to hold that an article I, section 14, analysis of a POAA sentence does not involve examination of the facts of a defendant's prior strike offenses.

2. THIS COURT SHOULD DECLINE TO CONSIDER INCOMPLETE AND MISLEADING EVIDENCE OUTSIDE THE APPELLATE RECORD.

Amici contend that the data compiled by Reynolds' counsel establishes not only racial disproportionality between the population of Washington and the population of offenders serving third-strike sentences, as Reynolds contends in a section of his supplemental brief that the State has moved to strike, but that an even greater disproportionality exists between the population of Washington and the population of third-strike

offenders who committed their first strikes before the age of 18. Br. of Amici at 22-26. Amici argue that this disproportionality "undermines the penological goals of the POAA" and this Court should consider it in its categorical bar analysis when exercising its independent judgment, which requires consideration of "'whether the challenged sentencing practice serves legitimate penological goals.'" Moretti, 193 Wn.2d at 823 (quoting State v. Bassett, 192 Wn.2d 67, 87, 428 P.3d 343 (2018)); Br. of Amici at 26-27. This Court should decline to make decisions based on the data presented by amici because it is incomplete and misleading, was added to the record at the eleventh hour without adversarial testing, and does not allow this Court to conclude that any disparity results from systemic racism in the application of the POAA as opposed to elsewhere in society.

a. This Court Should Not Consider Evidence Outside the Appellate Record on a Point Not Argued by Reynolds.

Amici build on incomplete demographic data regarding POAA offenders presented by Reynolds for the first time in his supplemental brief and urge this Court to conclude, based on that data, that the POAA does not serve legitimate penological goals in permitting an adult court conviction for an offense committed at age 17 to serve as a strike for purposes of classifying a defendant as a persistent offender. Specifically, amici argue that the data establishes that consideration of first strikes committed at age 17 exacerbates the racial disproportionality of Washington's prison population. Reynolds has never made this argument, and this Court "do[es] not consider issues raised first and only by amicus." Mains Farm Homeowners Ass'n v. Worthington, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993).

Moreover, the data on which amici rely was not presented to the trial court or the Court of Appeals and is not

part of the record on appeal. RAP 9.1(a) (appellate record is limited to clerk's papers, exhibits, and the report of proceedings in the trial court); RAP 9.11 (requirements for adding new facts to an appellate court record). The State has no ability at this late point in the appellate process to comb through the raw data on which amici rely to see whether it has been accurately coded and summarized by amici, and given the small sample sizes at issue, a single instance of incorrectly recording a data point could have an outsized impact on the statistical conclusions that amici attempt to draw. This Court should not make decisions based on a one-sided summary of evidence that has not been fairly tested through the adversarial process, particularly on points raised by a non-party at the eleventh hour. See State v. Russell, 125 Wn.2d 24, 49, 882 P.2d 747 (1994) ("[T]he adversary process is a means by which those who practice 'bad' science may be discredited, while those who practice 'good' science may enjoy the credibility they deserve.").

b. The Data Cited by Amici Presents a Skewed Picture by Excluding a Subset of POAA Offenders With a Very Different Racial Makeup.

As noted in footnote one above, this Court's holding in this case will apply equally to all defendants sentenced under the POAA, whether they qualify as "persistent offenders" on the basis of three convictions for "most serious offenses" or on the basis of two convictions for qualifying serious sex offenses. RCW 9.94A.030(37); RCW 9.94A.570. There is simply no logical basis to conclude that the constitution forbids consideration of a juvenile-age strike for purposes of three-strikes sentencing but not for two-sex-strikes sentencing. Yet the data on which amici rely for their assertion that "the POAA is a significant contributor to . . . incarceration disproportionality" entirely excludes all POAA offenders who received life-without-parole sentences on the basis of two qualifying sex strikes. Br. of Amici at 23; Appendix to Br. of Amici at 2 (data presented is "a subset of the data presented by Mr. Reynolds in his supplemental brief of all three-strikes

sentences under the POAA"); Appendix to Suppl. Br. of Petitioner at 2 (declaration of Lila Silverstein stating she "included only three-strikes cases, not two-strikes cases").

Although the State is unable, in the time available, to conduct a thorough analysis of the data included and excluded by amici over the life of the POAA, a brief look at recent Caseload Forecast Council reports from the past five years reveals that the data regarding two-sex-strikes offenders paints a very different picture than the data discussed by amici:

Year	Proportion of two-sex-strikes offenders identified as:		No. of two-sex-strikes sentences compared to no. of three-strikes sentences
	Black	White	
2021[10]	0%	100%	1:5
2020[11]	20%	60%	5:10

[10] Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing Fiscal Year 2021, at 56-59 (Tables 14.A and 14.B), available at <https://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2021.pdf>.

[11] Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing Fiscal Year 2020, at 57-62 (Tables 14.A and 14.B), available at <https://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2020.pdf>.

2019[12]	0%	100%	2:8
2018[13]	0%	50%	2:6
2017[14]	20%	80%	5:9

While there are fewer two-sex-strikes sentences imposed under the POAA offenders than three-strikes sentences, the sample size for both is so small in any given year that the exclusion of two-sex-strikes offenders from amici's analysis severely calls into question whether the POAA as a whole actually exacerbates the racial disproportionality observed in the much larger general prison population to a statistically

[12] Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing Fiscal Year 2019, at 57-61 (Tables 14.A and 14.B), available at <https://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2019.pdf>.

[13] Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing Fiscal Year 2018, at 57-60 (Tables 14.A and 14.B), available at <https://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2018.pdf>.

[14] Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing Fiscal Year 2017, at 57-61 (Tables 14.A and 14.B), available at <https://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2017.pdf>.

significant degree.[15] And given that only a small portion of POAA sentences are predicated on a first strike committed before age 18, amici present insufficient evidence to conclude that forbidding consideration of adult court convictions for strike offenses committed before age 18 would reduce the racial disproportionality of Washington's prison population in any statistically significant way. This Court should decline to decide important constitutional questions based on the incomplete and untested information presented by Reynolds and amici.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to reject the arguments of amici curiae.

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[15] Statistically significant findings are harder to detect with small sample sizes. Nayak, B.K., Understanding the Relevance of Sample Size Calculation, Indian J Ophthalmol. 2010 Nov-Dec; 58(6):469-70, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2993974>.

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DATED this 30th day of December, 2022.

Respectfully submitted,

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