NO. 88086-7

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALLEN EUGENE GREGORY,

Appellant.

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

BRIEF OF *AMICI CURIAE*, 56 FORMER AND RETIRED WASHINGTON STATE JUDGES, A FORMER U.S. ATTORNEY, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION-WASHINGTON, CHURCH COUNCIL OF GREATER SEATTLE, CATHOLIC MOBILIZING NETWORK, FAITH ACTION NETWORK, FRIENDS COMMITTEE ON WASHINGTON PUBLIC POLICY, LEAGUE OF WOMEN VOTERS OF WASHINGTON, MURDER VICTIMS FAMILIES FOR RECONCILIATION, TWO LAW SCHOOL PROFESSORS, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND WASHINGTON DEFENDER ASSOCIATION.

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INTRODUCTION

Notwithstanding the acknowledged arbitrariness that flowed from state capital sentencing schemes in effect at the time of *Furman v. Georgia*, 408 U.S. 238, 251, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the United States Supreme Court declined to strike down categorically the death penalty as violative of the Eighth Amendment. Believing instead that "a carefully drafted statute" could "ensure[] … the sentencing authority is given adequate information and guidance," *Gregg v. Georgia*, 428 U.S. 153, 195, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the Court sanctioned further state experimentation. Since that time, there has been much tinkering but little progress.

Rather than a model of consistency and fairness, Washington's death-sentencing scheme is anything but. In words that have just as much force today as they did in 1972, Justice Douglas wrote that an African-American convicted of a capital offense "is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty." *Furman*, 408 U.S. at 251 (Douglas, J., concurring). Black defendants in the State of Washington are four and a half times more likely than white defendants to receive a sentence of death, according to a recent study. And the sort of economic disparities that concerned the plurality in *Furman* are just as

prevalent today as they were back then. *Id*. In the State of Washington, one can escape the death penalty by committing one's crime in a poor county instead of a rich one. And the safety valve promised by proportionality review has time and again failed to function as the critical check against arbitrariness for which it was intended. A system riddled with such readily identifiable flaws runs afoul of Washington's Constitution and can no longer be condoned or sanctioned.

The lack of fundamental fairness in the administration of the death penalty helps to explain why Washington has rejected the punishment in practice. Since 2004, Washington has endured over 1,800 intentional homicides; yet, it has imposed only three death sentences and performed a single execution. With such infrequent application, the death penalty has "cease[d] to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." *Furman*, 408 U.S. at 311 (White, J., concurring).

It is now clear after a forty-plus year experiment that the "*Furman*-fix" was no fix at all. The Washington scheme unfailingly results in arbitrary death sentences, sentences predicted by geography and race rather than the gravity of the crime and the circumstances of the accused's life, and sentences devoid of any legitimate penological purpose. This Court should hold that the persistent inability to administer the punishment

in a way that ensures equality and avoids arbitrariness, and the equally persistent on-the-ground rare use of the death penalty in Washington, render the State's death penalty "cruel" under Article 1, section 14 of the Washington Constitution.[1]

I. IDENTITY AND INTEREST OF AMICI

The identities and interests of amici are set forth in the Motion for Leave to Participate as Amici Curiae filed with this brief.

II. STATEMENT OF THE CASE

The following summary is based on the facts and citations to the record in the briefs of the parties. Mr. Gregory was sentenced to die for a single aggravated murder conviction, while the worst mass murder cases in this State, including one tried just last year, have not resulted in a death sentence. Mr. Gregory was a young, African-American man with no prior violent convictions and an otherwise minimal criminal history, accused of committing a capital offense in one of the very few counties in Washington that ever seeks the death penalty. This Court initially reversed Mr. Gregory's death sentence due to prosecutorial misconduct, only to have it imposed again as a result of the repeated misconduct described in his brief on appeal and borne out in the record below.

[1] The arguments set out below pertain to Arguments 2, 3, and 14 in Appellant's Opening Brief, and Arguments 2 and 3 in Appellant's Reply Brief.

III. WASHINGTON'S DEATH-SENTENCING SCHEME IS UNCONSTITUTIONALLY ARBITRARY, RACIALLY DISCRIMINATORY, UNRELIABLE, AND PENOLOGICALLY INEFFECTIVE.

Washington's proscription against "cruel" punishment bars not only "certain modes of punishment[,]" but also "disproportionate sentencing." *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996). Disproportionate sentencing, in turn, includes sentencing based on either of the twin evils of "random arbitrariness and the imposition of the death sentence based on race." *State v. Gentry*, 125 Wn.2d 570, 633, 888 P.2d 1105 (1995). Further, in assessing whether the death penalty is cruel under Washington's Constitution, this Court looks to community standards as well as objective indicia concerning its use. *Gentry*, 125 Wn.2d at 631; *see also State v. Campbell*, 103 Wn.2d 1, 31-35, 691 P.2d 929 (1984).

For a variety of reasons, use of the death penalty in Washington State has steadily decreased—to the point that today it is near its record low. *See infra* § IV (outlining such evidence in detail). As we explain, given this decreased use, Washington's death penalty is impermissibly "cruel."

In contrast with the death penalty's declining use, one thing that has *not* fluctuated after nearly four decades of tinkering with capital

punishment protocols is its inherent arbitrariness. As was the case at the time of *Furman*, impermissible factors far divorced from the nature of the crime(s) and the circumstances of the accused's life continue to serve as the sole predictors of who lives and who dies. Geography, race, economics, and other irrelevant or impermissible factors drive capital sentencing in Washington. As shown below, the result is a failed system, a broken system—one that is neither reliable in its imposition nor meaningful in the penological results it achieves.

Washington's Constitution demands more. Under its current form, the institution of the death penalty in this State cannot rationally, fairly, or constitutionally stand.

A. Washington's Limited Remaining Use of the Death Penalty Is Inherently Arbitrary.

Despite this State's post-*Gregg* legislative efforts and this Court's attempts to interpret the capital sentencing statute fairly and faithfully, Washington death sentences remain hopelessly "disproportionate to the sentences imposed in similar cases." *State v. Cross*, 156 Wn.2d 580, 641, 132 P.3d 80 (2006) (Johnson, C., J., dissenting).

One need look no further than this case to see such evidence. Mr. Gregory was convicted of a sex offense during the course of a murder. In Washington, defendants sentenced to life in prison for committing

similar offenses "far outnumber those who receive the death penalty for such crimes." *State v. Davis*, 175 Wn.2d 287, 380, 290 P.3d 43 (2012) (Fairhurst, J., dissenting). And, a more offender-specific inquiry reveals that time and again, the most egregious Washington murders have never resulted in the State's most serious punishment. Gary Ridgway (convicted of strangling and killing 48 women), Benjamin Ng (13 first-degree murder convictions), and Kwan Fai Mak (same) all received sentences of life. So, too, did Robert Yates Jr., who pleaded guilty to thirteen counts of murder in Spokane County.[2] As Justice Charles Johnson explained, these cases exemplify the utter arbitrariness inherent in this State's capital punishment system, where the execution of a capital murderer, as was found constitutionally intolerable in *Furman*, is akin to being struck by lightning. *Cross*, 156 Wn.2d at 652 (Johnson, J., dissenting). And it's a stubbornly ongoing problem, as exemplified by the fact that "[t]wo recent juries delivered life sentences in worst-of-the-worst capital murder cases"—the deliberate murder of a police officer in King County and a sextuple murder of a family, including young children, in Carnation. Editorial,

[2] Yates was, however, separately tried and convicted of two murders in Pierce County for which he received the death penalty, which further evidences the geographical disparities referenced below.

County Should Not Seek The Death Penalty Again, Seattle Times, July 30, 2015.[3]

The promises of *Gregg* have proven empty and our system broken when one who has murdered six members of his ex-girlfriend's family is permitted to live while Mr. Gregory faces the ultimate punishment. What these cases demonstrate is that "[o]ne could better predict whether the death penalty will be imposed on [our] most brutal murderers by flipping a coin than by evaluating the crime and the defendant."[4] *Davis*, 175 Wn.2d at 388 (Fairhurst, J., dissenting). As the Connecticut Supreme Court recently found in interpreting its own constitutional provisions, the post-*Gregg* command of "individualized sentencing requirement inevitably allows in through the back door the same sorts of caprice and freakishness that the court sought to exclude in *Furman*" and "necessarily opens the

[3] *Available at* http://www.seattletimes.com/opinion/editorials/county-should-not-seek-the-death-penalty-again/.

[4] *See also id*. at 376-77 ("[c]onsidering the crime and the defendant, it is impossible to predict whether a defendant convicted of a brutal aggravated murder will be sentenced to life in prison or death"); *Cross*, 156 Wn.2d at 651-52 (Johnson, J., dissenting) (describing Washington's death penalty as plagued by arbitrariness, a "staggering flaw"); Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 Wash. L. Rev. 775, 867 (2004) (extensive review of Washington trial judge reports results in the conclusion that Washington's death penalty is infected by arbitrariness); *Godfrey v. Georgia*, 446 U.S. 420, 440, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980) (Marshall, J. concurring) ("The task of eliminating arbitrariness in the infliction of capital punishment is proving to be one which our criminal justice system--and perhaps any criminal justice system--is unable to perform."); *Dist. Attorney for Suffolk Dist. v. Watson*, 381 Mass. 648, 665, 411 N.E.2d 1274 (1980) (holding Massachusetts's death penalty unconstitutional under its state constitution because it "is inevitable that the death penalty will be applied arbitrarily").

door to racial and ethnic discrimination in capital sentencing." *Conn. v. Santiago*, 318 Conn. 1, 108, 122 A.3d 1, *reh'g denied*, 319 Conn. 912 (2015) (footnote omitted).

1. Roots of arbitrariness: geography and budgets.

Historically, "[t]he majority of … cases [that have resulted in sentences of death have been] concentrated in five counties, beginning with King, followed by Pierce, and then Snohomish, Yakima, and Spokane counties." Peter A. Collins et al., *An Analysis of the Economic Costs of Seeking The Death Penalty in Washington*, 27-28 (Jan. 1, 2015).[5] Indeed, Pierce County prosecutors have sought the death penalty in forty-five percent of aggravated murder cases. Katherine Beckett & Heather Evans, *The Role of Race in Washington State Capital Sentencing*, 1981-2014, at 20 ("Beckett").[6] By contrast, since 1981, other counties—such as Okanogan—have *never* sought a capital prosecution, despite the occurrence of aggravated murders comparable to those in Pierce County and to Mr. Gregory's aggravated murder. *Id.* Still others, such as Cowlitz, Whatcom, Skagit, and Benton, do so only rarely. *Id.* These statistics confirm what some members of this Court have long suspected:

[5] *Available at* http://www.deathpenaltyinfo.org/documents/WashingtonCosts.pdf.

[6] *Available at* https://lsj.washington.edu/sites/lsj/files/research/capital_punishment_beckettevans_10-1.6.14.pdf.

Eligibility for the death penalty in the State of Washington is largely contingent upon the location in which the murder occurs. *Davis*, 175 Wn.2d at 387-88 (Fairhurst, J., dissenting) (suggesting the Court should "carefully watch" whether "the county in which a crime is committed, rather than the crime or the defendant, may determine who receives the death penalty").

Are the worst of the worst Washington murders limited to five counties, or does some other reason explain such geographical disparities? The answer is as simple as it is unconstitutionally impermissible: resources. "Counties spend hundreds of thousands of dollars – and often many millions – simply to get a case to trial." Governor Inslee's Remarks Announcing a Capital Punishment Moratorium (Feb. 11, 2014) ("Inslee Remarks").[7] Indeed, one study concluded that a "death penalty trial costs more than double the amount spent on a non-death penalty trial." Mark Larranaga, *A Review of the Costs, Length, and Results of Capital Cases in Washington State*, Washington Death Penalty Assistance Center (2004).[8]

For example, one recent case involving two co-defendants cost King County $6.7 million—and that was before the case had even gone to

[7] *Available at* http://www.governor.wa.gov/sites/default/files/documents/20140211_death_penalty_moratorium.pdf.

[8] *Available at* http://abolishdeathpenalty.org/wp-content/uploads/2013/08/WAStateDeathPenaltyCosts.pdf.

trial. Joel Moreno, *Court Costs in Carnation Murder Case Reach Nearly $7 Million,* Komonews.com (Sept. 25, 2013).[9] Another exceeded $4 million. Lael Henterly, *Holding Three Simultaneous Death Penalty Trials in King County Is Unprecedented—and Hugely Expensive*, The Stranger, Nov. 12, 2014.[10] *See also* Final Report of the Death Penalty Subcommittee of the Committee on Public Defense (documenting high costs of capital trials).[11] While it is notable that in both instances, juries returned sentences of life imprisonment without parole, more importantly, most counties cannot even afford to have capital trials in the first place.

These finance-based geographic discrepancies thus arise because prosecution expenses in this State are mostly borne by individual counties, most of which cannot afford to put forth the resources necessary to mount a capital prosecution. As the Clallam County Administrator recently explained, if his county "had a death penalty case, and had to pay $1

[9] *Available at* http://www.komonews.com/news/local/Court-costs-in-Carnation-murder-case-reach-nearly-7M-225449392.html.

[10] *Available at* http://www.thestranger.com/seattle/holding-three-simultaneousdeath-penalty-trials-in-king-county-is-unprecedentedandmdashand-hugely expensive/Content?oid=20991684.

[11] *Available at* http://www.wsba.org/~/media/Files/WSBA-wide%20Documents/wsba%20death%20penalty%20report.ashx.

million (in legal costs), [it would] go bankrupt." Jonathan Martin, *How the Death Penalty Can Bankrupt a County*, Seattle Times, Feb. 18, 2014.[12]

Likewise, a Yakima County court administrative consultant posited, "In Yakima County, we have no reserves left. If we overspend on a death penalty case, money has to come from somewhere." Chris Bristol, *Death Penalty: The cost is high*, Yakima Herald-Republic, Mar. 19, 2011. As these statements reflect, whether a criminal defendant may be subject to the death penalty is, at the outset, dependent upon the depth of the pockets of the community in which the crime took place—not, as constitutionally required, by the egregiousness of the offense and the circumstances of the defendant's life. Editorial, *County Should Not Seek The Death Penalty Again*, Seattle Times (July 30, 2015) ("A death penalty delivered based on ZIP code—not justice—is not justice at all.").[13]

The tremendous resource disparity among Washington's thirty-nine counties means that decisions to seek the death penalty will be influenced by a county's financial ability to support a death case rather than the nature of the crime and the merits of the case. Accordingly, similarly situated defendants in different counties who commit equally

[12] *Available at* http://blogs.seattletimes.com/opinionnw/2014/02/18/how-the-death-penalty-can-bankrupt-a-county/.

[13] *Available at* http://www.seattletimes.com/opinion/editorials/county-should-not-seek-the-death-penalty-again/.

heinous crimes will be subject to different treatment. One may risk losing his very life, while another, a mere county over, has his life spared. The difference will be determined based not upon their actions but rather upon the financial resources available to the county. That's precisely the type of arbitrariness post-*Gregg* changes have failed to fix and which are cruel under this State's Constitution.

2. Proportionality review has failed to correct the problem.

As Appellant describes, far from narrowing the class of capital offenders, following *Gregg*, the Washington Legislature has significantly expanded it. Appellant Opening Brief ("App. Op. Br.") at 269-76. Indeed, since 1995, the list of aggravating circumstances has mushroomed from ten to fourteen. *Id.* And, on account of the geographic and economic disparities discussed above, juries have been tasked with deciding the fate of an arbitrarily-selected cross-section of eligible offenders. *See supra* § III.A.1. These jurors then infuse yet another layer of arbitrariness into the equation, as they tend to make sentencing determinations based not on the only appropriate considerations—magnitude of the offense and characteristics of the offender—but rather on impermissible considerations, such as race. *See infra* § III.B.

Though the Washington Legislature embraced proportionality review as a constitutional fail-safe, the requirement has failed to play the critical role for which it was designed. *Davis*, 175 Wn.2d at 396 (in the wake of *Gregg*, the Washington Legislature revised its death penalty statute so that it was "nearly identical to Georgia's statute, including the requirement of comparative proportionality review by the Washington State Supreme Court") (Fairhurst, J., dissenting).

Indeed, as Justice Johnson lamented, from the inception of our State's modern death penalty statute,[14] the Court has struggled with carrying out its statutorily-mandated proportionality review. *Cross*, 156 Wn.2d at 642. And, in the nearly ten years since *Cross*, nothing has changed that would mitigate the concerns identified there. New, more rigorous statutory protocols have not been enacted. Nor has this Court refined its approach. And thus, predictably, systemic arbitrariness has persisted.

Application of this Court's "statutory mandate to consider similar cases" reveals "that the death penalty is not imposed generally in similar cases in Washington State." *Davis*, 175 Wn.2d at 376 (Fairhurst, J., dissenting). Illustrative is Mr. Gregory's case. No matter what proportionality review standard is employed, when compared with serial

[14] RCW 10.95.130(2)(b).

murderers and those convicted of killing entire families or law enforcement officers, the appropriate sentence here is life without parole. *See supra* § III.A. When meaningfully subjected to this Court's proportionality review, this case should not go the way of those before it.

A contrary conclusion would confirm what Justice Fairhurst recently noted, "randomness . . . plagues our system." *Davis*, 175 Wn.2d at 386 (Fairhurst, J., dissenting). Rather than "the worst of the worst" being "subject to the death penalty, what has happened is the worst offenders escape death." *Cross*, 156 Wn.2d at 641 (Johnson, J., dissenting); *see also Davis*, 175 Wn.2d at 376-377 ("Considering the crime and the defendant, it is impossible to predict whether a defendant convicted of a brutal aggravated murder will be sentenced to life in prison or death.") (Fairhurst, J., dissenting).

B. Washington's Limited Remaining Use of the Death Penalty Is Inherently and Impermissibly Racially Discriminatory.

The arbitrariness described above alone renders Washington's capital sentencing scheme unconstitutionally cruel. The pervasive and intractable role of racial discrimination in the scheme provides not just additional support, but also a powerful moral imperative to constitutionally ban executions.

In 1972, Justice Douglas voiced his suspicions concerning the outsized role racial discrimination plays in the capital sentencing process. *Furman*, 408 U.S. at 251 (Douglas, J., concurring). Forty years later, Justice Wiggins identified the same concerns. *Davis*, 174 Wn.2d at 389 (Wiggins, J., dissenting). The suspicions and unresolved questions on the minds of Justices Douglas and Wiggins—more than four decades apart—are no longer mere suspicions and no longer unresolved. Abundant evidence demonstrates that, regrettably, racial discrimination pervades this State's criminal justice system. And such discrimination is perhaps nowhere better documented than in the capital sentencing decisions determining who lives and who dies.

To begin, Washington's capital sentencing scheme is not a stand-alone outfit. It exists, instead, within the confines of the State's larger criminal justice system—a system fraught with racial bias. *See* Research Working Group & Task Force on Race, the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L. Rev. 623, 628-29 (2012) (as cited favorably, *inter alia*, in *State v. Saintcalle*, 178 Wn.2d 34, 42, 309 P.3d 326 (2013)). As the Task Force has found, people of color in Washington face significantly harsher treatment in the juvenile justice system, in sentencing outcomes, in terms of imprisonment for felony drug offenses, in the context of significant

pretrial release decisions, as to drug arrest rates, and in the searches of minority drivers. *Id.*

The Task Force found that these disparities were not the result of mere happenstance, but instead of "racial and ethnic bias [that] distorts decision-making at various stages in the criminal justice system, contributing to disparities." *Id.* at 629. Further, "race and racial bias matter in ways that are not fair, that do not advance legitimate public safety objectives, that produce disparities in the criminal justice system, and that undermine public confidence in our legal system." *Id.*

What's more, eradicating such discrimination proves more difficult in an era where unconscious biases have replaced the overt racism of yesterday. As the Court has explained, "[r]acism now lives not in the open but beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus." *Saintcalle*, 178 Wn.2d at 46; *id.* at 87-88 (Gonzales, J., concurring) ("In other words, race can subconsciously motivate a peremptory challenge that the attorney genuinely believes is race-neutral"); *id.* at 119 (Chambers, J., dissenting) (citing the Court's "understanding of the pernicious effect of unconscious racism on a fair system of justice").

As evinced in this case among others,[15] the death penalty does not stand apart from the disparities and discrimination, both conscious and unconscious, documented at length by the Task Force and this Court. It is rather a creature of racial discrimination and disparity. Indeed, the Beckett Study reveals without question that Washington's capital sentencing scheme is by no means immune from these disturbing racial dynamics.

Using regression analysis to control for non-race variables, researchers isolated the impact of the defendant's race as a sentence predictor, and considered whether (and to what extent) race substantially increased the odds that a jury will impose death. Beckett at 14-15. The study concluded that case characteristics explain only a small portion—21 percent—of the variation in jury decisions to impose or not impose the death penalty. Beckett at 29. Within the roughly 79 percent of unexplained variation, "race of the defendant has had a marked impact on sentencing in aggravated murder cases in Washington State since the adoption of the existing statutory framework." Beckett at 33. Indeed, the study concluded that "juries were *four and one half times more likely* to

[15] Mr. Gregory is a black man convicted of killing and raping a white woman. His brief before this Court documents the numerous ways in which racial bias unsurprisingly infected his trials from start to finish. App. Op. Br. at 209-18. Amici adopt these facts and arguments but need not repeat them here.

impose a sentence of death when the defendant was black than . . . they were in cases involving similarly situated white defendants." Beckett at 33 (emphasis in original and second emphasis removed).

When Justice Powell declared more than forty years ago in *Furman* that "discriminatory imposition of capital punishment is far less likely today than in the past," *Furman*, 408 U.S. at 450 (Powell, J., dissenting), he did so without the benefit of data to support (or undermine) his belief that discrimination in the imposition of the death penalty was less likely. But this Court today *does* have the data to support the opposite conclusion.

Forged in fires that marred our early Nation,[16] the death penalty is the poison tip of the spear of racial discrimination still wounding this State's criminal justice system. While the Court's work to heal and prevent further wounds must be constant, given the qualitative difference between death and all other punishments, *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), a constitutionally appropriate place to start would be where the effects of racial discrimination are the most

[16] *See* Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (Aug. 2010) (cited favorably in *Saintcalle*, 178 Wn.2d at 45). The report documents the relationship between early capital trials and the lynching of black citizens. *Id.* at 10.

consequential: capital sentencing. *See, e.g.*, *Santiago*, 318 Conn. at 140 (the application of the death penalty "fails to comport with our abiding freedom from cruel and unusual punishment" for a multitude of reasons, including the "racial, ethnic, and socio-economic biases that likely are inherent in any discretionary death penalty system"); *Suffolk Dist*., 381 Mass. at 670 (the "death penalty requires special scrutiny for constitutionality" and thus the persistence of racial discrimination in its application mandates its invalidation under the state constitution). The existing data is sufficient and the legal authority compelling to hold that a regime in which juries sentence black defendants to death at a rate of more than four times their white peers violates the Washington Constitution.

C. The Death Penalty Is Cruel Because It Is Wholly Unreliable.

Since the Supreme Court reinstated the death penalty in 1976, over 1,400 people have been executed. Death Penalty Information Center ("DPIC"), Executions by Year Since 1976.[17] During that time, 156 death row inmates have been exonerated, the most recent being October 12, 2015. DPIC, The Innocence List.[18] Even more troubling, there is convincing evidence that states have executed actually innocent defendants. *See Glossip v. Gross*, 135 S. Ct. 2726, 2756-58, 192 L. Ed. 2d

[17] *Available at* http://www.deathpenaltyinfo.org/executions-year.

[18] *Available at* http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row.

761 (Breyer, J., dissenting), *reh'g denied*, 136 S. Ct. 20 (2015); Maurice Possley, *Fresh Doubts Over a Texas Execution*, Washington Post, Aug. 3, 2014 (discussing case of Cameron Todd Willingham);[19] James Liebman, *The Wrong Carlos: Anatomy of a Wrongful Execution* (Columbia University Press 2014 ed.) (discussing case of Carlos DeLuna).

These alarming reports and statistics have prompted one federal judge to conclude that the "best available evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed and that, on the other hand, convincing proof of their innocence often does not emerge until long after their convictions." *United States v. Quinones*, 205 F. Supp. 2d 256, 257 (S.D.N.Y. 2002), *rev'd by United States v. Quinones*, 313 F.3d 49 (2d Cir. 2002).

Proving the point is Justice Scalia's unwitting attempt to make an innocent prisoner a poster child for the death penalty. Responding to Justice Blackmun's famous pronouncement two decades ago that he would "no longer . . . tinker with the machinery of death," *Callins v. Collins*, 510 U.S. 1141, 1145, 114 S. Ct. 1127, 127 L. Ed. 2d 435 (1994), Justice Scalia held out Henry McCollum as an example of the sort of

[19] *Available at* http://www.washingtonpost.com/sf/national/2014/08/03/fresh-doubts-over-a-texas-execution/.

egregious offender deserving of execution. *Id.* at 1143 (1994) (Scalia, J., concurring in denial of certiorari) (consider "the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. . . How enviable a quiet death by lethal injection compared with that!"). Recently, however, the person Justice Scalia identified as the "worst of the worst" was exonerated by DNA evidence, found to have been wrongfully convicted, and released. *See* Johnathan M. Katz and Eric Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. Times, Sept. 2, 2014.[20]

Washington is by no means immune from the inevitable fallibility that flows from a system dependent upon human operators. In the case of Benjamin Harris, for example, prosecutors extracted a confession from him in which he claimed *two* shooters were involved in the murder. *Harris v. Blodgett*, 853 F. Supp. 1239, 1256-57, 1263 (W.D. Wash. 1994). Based, in part, on that evidence, Mr. Harris was convicted and sentenced to death. *Id.* A decade later, his conviction was reversed on ineffective grounds because, among other reasons, forensic evidence demonstrated there could only have been *one* shooter. *Id*. Unable to mount a case

[20] *Available at* http://www.nytimes.com/2014/09/03/us/2-convicted-in-1983-north-carolina-murder-freed-after-dna-tests.html?_r=0. Law enforcement officials working on behalf of the "deadliest D.A." in the country extracted a confession from the mentally retarded defendant. *Id.* DNA evidence exonerated him thirty years later.

against him following reversal, the charges were subsequently dismissed. Maureen O'Hagan, *Exonerated But Never Set Free*, Seattle Times, Mar. 31, 2003.

Where Mr. Harris' case exposed the infirmities undergirding our state capital sentencing system, the curtain has been fully pulled back in dozens of other non-capital cases. Indeed, 38 innocent Washington prisoners have been exonerated. *See* University of Michigan Law School, *The National Registry of Exonerations*.[21] For example, Donovan Allen, Ted Bradford, Jeramie Davis, Larry Davis, and Alan Northrop were all wrongfully convicted of serious crimes of rape or murder before DNA evidence proved their innocence. *Id.*[22] Significantly, Mr. Gregory's own capital prosecution is the fruit of the State's wrongful pursuit, and initial wrongful conviction, of sexual assault charges, built on perjured testimony. App. Op. Br. at 152-53.

As Justice Stevens recently noted, the risk of killing an innocent person, which can never be entirely eliminated, is a "sufficient argument against the death penalty: society should not take the risk that that might happen again, because it's intolerable to think that our government, for

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[21] *Available at* https://www.law.umich.edu/special/exoneration/Pages/browse.aspx.

[22] *See also* The Innocence Project, DNA Exoneration Cases by State, *available at* http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA&c5=WA.

really not very powerful reasons, runs the risk of executing innocent people." *See* Columbia Law School, *Professor James Liebman Proves Innocent Man Executed, Retired Supreme Court Justice Says*, Jan. 26, 2015.[23]

D. No Valid Penological Objectives Justify Continuing This Fatally-Flawed System.

Mindful of these myriad flaws, this Court must also consider what reasons, if any, exist for continuing with the death penalty experiment. The United States Supreme Court has repeatedly acknowledged that a punishment without penological purpose is necessarily cruel and unusual. *See, e.g*., *Kennedy v. Louisiana*, 554 U.S. 407, 441-42, 128 S. Ct. 2641, 2661, 171 L. Ed. 2d 525 (2008) (citing *Gregg*, 428 U.S. at 173, 183, 187); *Atkins v. Virginia*, 536 U.S. 304, 319, 122 S. Ct. 2242, 2251, 153 L. Ed. 2d 335 (2002). "*Gregg* instructs that capital punishment is excessive when it … does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Kennedy*, 554 U.S. at 441.

When the infliction of capital punishment no longer serves a penological purpose, its imposition represents "the pointless and needless

[23] *Available at* https://www.law.columbia.edu/media_inquiries/news_events/2015/january2015/stevens-liebman.

extinction of life with only marginal contributions to any discernible social or public purposes." *Furman*, 408 U.S. at 312. It would therefore also be cruel within the meaning of the Washington State Constitution. *See State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000) ("the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment").

In its current form, capital punishment in Washington serves neither retribution nor deterrence. As Appellant has demonstrated in his opening brief, the arbitrary nature of Washington's unpredictable death penalty gravely diminishes any deterrent or retributive value the death penalty could have. *See* App. Op. Br. at 108-09. This is particularly true given the structurally-driven delays necessitated to engage in constitutionally adequate review.

Washington's two involuntary executions since 1978 took an average of thirteen years after the initial conviction. The majority of Washington's death row inmates today have had pending cases for more than fifteen years. "[L]engthy delay undermines the death penalty's penological rationale." *Glossip*, 135 S. Ct. at 2765 (Breyer, J., dissenting). Furthermore, "[d]espite 30 years of empirical research . . . , there remains no reliable statistical evidence that capital punishment in fact deters potential offenders." *Baze v. Rees*, 553 U.S. 35, 79, 128 S. Ct. 1520,

1550, 170 L. Ed. 2d 420 (2008) (Stevens, J., concurring in judgment). "In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment." *Id.* (footnote omitted); *see also* Inslee Remarks (declaring "there is no credible evidence that the death penalty is a deterrent to murder").

Consequently, Washington's capital punishment scheme serves neither the purpose of retribution nor deterrence. Thus, this State's irreversible and ineffectual execution of a prisoner in its custody would serve no valid penological justification. Such a system cannot stand alongside the protections of the Washington State Constitution.

IV. THE DEATH PENALTY CANNOT BE RECONCILED WITH EVOLVING STANDARDS OF DECENCY.

The constitutional flaws inherent in Washington's capital sentencing scheme outlined above are no secret. They are known by the prosecutors deciding whether to bring capital charges in the first instance, by the trial judges active in capital (and potentially capital) trials, by the defense lawyers whose participation helps shape the practice, by the citizenry ultimately called to serve as jurors in capital cases, and, of course, by the Governor. The burgeoning awareness of the flaws in the scheme has led to a steady decline in this State's reliance on capital

punishment—both in new death sentences and in executions actually carried out. The culmination was Governor Inslee's 2014 announcement of a State moratorium on executions. This decline has constitutional significance.

Like its federal counterpart, the definition of "cruel" punishment under the Washington Constitution is "not static; rather, it 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980) (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630 (1958)). "In questions regarding the interpretation of Const. art. 1, § 14, [this Court] look[s] to current community standards, objective indicia of which include the statutes and cases of other jurisdictions as well as our own." *Gentry*, 125 Wn.2d at 631; *see also Campbell*, 103 Wn.2d at 34-35 (looking to "current community standards" within and outside Washington in analyzing state constitutional challenge to Washington's death penalty).

All objective indicators—number of death sentences, executions, and executive action—demonstrate that the death penalty offends contemporary standards of decency.

A. With Juries Increasingly Refusing to Impose Sentences of Death and a Moratorium on Executions, Capital Punishment Is at a Standstill in Washington.

Although capital punishment remains statutorily authorized, its actual administration in this State reveals a functional disuse of the practice. Washington State has increasingly rejected the death penalty as a punishment for aggravated murder throughout the last half-century—and particularly in the last ten years.

Indeed, in the decade between 2004 and 2013, there were over 1,800 intentional homicides committed in Washington State. *See* Federal Bureau of Investigation, Crime Statistics.[24] During that same time period, only three murder trials resulted in a death sentence. The trend toward disuse of new capital sentences is most recently seen in two King County cases. A jury convicted Joseph McEnroe of killing six members of his girlfriend's family on Christmas Eve 2007, but it refused to impose a sentence of death. Likewise, the jury in Christopher Monfort's case returned a vote for life even after finding him guilty of killing a police officer. The dramatic decrease in death verdicts offers compelling evidence of community standards being against the use of capital punishment.

[24] State-by-state homicide statistics for each of these years are available at http://www.fbi.gov/stats-services/crimestats.

And the paltry number of new death sentences omits the views of the part of the community that opposes the death penalty in all cases. Because capital juries are composed entirely of death-qualified venire members—i.e., those who will commit to considering and imposing the death penalty in an appropriate case—verdicts reflect the consensus of only that portion of the community. *See Lockhart v. McCree*, 476 U.S. 162, 165, 106 S. Ct. 1758, 1760, 90 L. Ed. 2d 137 (1986); *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); *see also Baze*, 553 U.S. at 84 (Stevens, J., concurring in judgment) ("The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive."). And yet, increasingly, juries continue to choose imposition of a term of imprisonment over the death penalty.

As support for imposing sentences of death wanes, so too have executions. In the decades before 1960, Washington executed 105 inmates. In contrast, over the past fifty years, Washington has only executed five inmates, three of whom waived their appeals and

volunteered for execution.[25] Only one of those executions was carried out during the last decade.[26]

And, on account of the moratorium Governor Inslee put in place in 2014, there is no reason to believe executions will resume any time soon.[27] Prior to officially suspending executions, Governor Inslee conducted an extensive study of the death penalty in the State, speaking to "law enforcement officers, prosecutors, former directors of the Department of Corrections, and the family members of the homicide victims," touring the state penitentiary and execution chamber, meeting with current corrections officers working there, and studying the cases of each man on death row. *See* Inslee Remarks. After that careful review, the Governor announced he would not sign death warrants during his term of office due to concerns about inequalities and injustices in the system.[28] He remarked on the frequency of court reversals of convictions and death sentences, the negative impact of the resulting uncertainty on the victims' families, the

[25] Wash. Dep't of Corrections, Persons Executed Since 1904 in Washington State, *available at* http://www.doc.wa.gov/offenderinfo/capitalpunishment/executedlist.asp (Westley Dodd, 1/5/93; Charles Campbell 5/27/94; Jeremey Sagastegui, 10/13/98; James Elledge, 828/01; Cal Brown, 9/10/10). The Death Penalty Information Center collects data on which inmates volunteer for execution and identifies Dodd, Sagastegui, and Elledge as volunteers in Washington. The list for Washington is available at http://www.deathpenaltyinfo.org/views-executions.

[26] *See supra* text accompanying note 25.

[27] Gov. J. Inslee Announces Capital Punishment Moratorium, *available at* http://www.governor.wa.gov/news-media/gov-jay-inslee-announces-capital-punishment-moratorium.

[28] *Id*.

high cost of capital prosecutions, the lack of evidence that the penalty serves any deterrent purpose, and the failure to apply the punishment to only the most heinous offenders.[29]

Governor Inslee's statements connect the State's trend away from the death penalty with its many flaws. He joins a chorus of Washington voices expressing similar concerns and calling for the remaining trickle of capital cases to be cut off. The Washington State Bar observed that "Washington's death penalty system has manifested some of the frailties that have promoted other states to stay executions . . . [and] prompted state and federal judges to express doubts about the fairness and constitutionality of the death penalty itself." Brief of the Washington State Bar Association as Amicus Curiae at 2-3, *In re Stenson* (2008) (No. 82332-4). The Bar Association of King County—Washington's largest county—passed a resolution in 2013 calling for the end of the death penalty in Washington.[30] *See* Andrew Prazuch, *KCBA Calls for End to Death Penalty*. Politicians from both parties have called for the same, as have former Department of Corrections death row captain Dick Morgan, former chief of the Seattle Police Department Norm Stamper, and former

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[29] *Id*.

[30] *Available at* https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=02&Year=2013&AID=execdir.htm (last visited Jan. 6, 2016).

Governor Dan Evans. *See* Thanh Tan, *Poll: Should Washington state repeal the death penalty*, Seattle Times Blog, Mar. 7, 2013.[31]

As combined with these important Washington voices, the infrequency of death sentences and executions in the State prove "community standards" have developed against the death penalty—a critical consideration given the Supreme Court's repeated recognition of the importance of the "direction of change" when reviewing use of the death penalty. *Roper v. Simmons*, 543 U.S. 551, 566, 125 S. Ct. 1183, 1193, 161 L. Ed. 2d 1 (2005) (quoting *Atkins*, 536 U.S. at 315). "Judged in that way, capital punishment has indeed become unusual." *Glossip*, 135 S. Ct. at 2774 (Breyer, J., dissenting). The evolving standards of decency within the State reflect that, in Washington, the death penalty has become a "cruel" punishment.

B. Washington's Disuse of the Death Penalty Is Consistent with the National Trend.

The intractable difficulties in administering the death penalty fairly and consistently in Washington mirror familiar national problems. Disuse of the death penalty in Washington correspondingly accords with a strong and growing national abandonment of the punishment. Appellant

[31] *Available at* http://blogs.seattletimes.com/opinionnw/2013/03/07/poll-should-washington-state-repeal-the-death-penalty/ (last visited June 30, 2015).

persuasively catalogs the national abandonment in his brief, and Amici fully adopt this argument. *See* App. Op. Br. at 111-115.

In the interim, since Appellant has submitted his briefs, two United States Supreme Court Justices have invited briefing to address the continued constitutionality of the death penalty in light of the decline in the use of the death penalty. *See Glossip*, 135 S. Ct. at 2755-77 (Breyer, J., dissenting, joined by Justice Ginsburg). As Justice Breyer detailed, executions in this country have become exceptionally rare in all but a few jurisdictions. *Id*. In addition to the Governor of Washington, the governors of three other states, Colorado, Pennsylvania, and Oregon have indefinitely suspended executions. In total, thirty-three jurisdictions have either abolished the death penalty or executed one or fewer inmates per decade over the past half-century.[32]

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[32] Capital punishment is now prohibited entirely in nineteen jurisdictions: AK, CT, HI, IL, IA, ME, MD, MA, MI, MN, NJ, NM, NY, ND, RI, VT, WV, WI, and the District of Columbia. *See* DPIC, States With and Without the Death Penalty, *available at* http://www.deathpenaltyinfo.org/states-and-without-death-penalty. Though subject to a statewide referendum, the Nebraska Legislature repealed the death penalty in May 2015. Julie Bosman, *Nebraska to Vote on Abolishing Death Penalty After Petition Succeeds*, N.Y. Times, Oct. 16, 2015. Moreover, at least seven other states, the federal government, and the U.S. military exhibit a significant degree of long-term disuse. New Hampshire, which has only one occupant on its death row, has not performed an execution in 86 years. *See* DPIC, State by State Database, *available at* http://www.deathpenaltyinfo.org/state_by_state; DPIC, Searchable Execution Database, *available at* http://www.deathpenaltyinfo.org/views-executions. Wyoming has executed one person in fifty years and its death row is empty. *Id.* The U.S. military has not executed anyone since 1961. *Id.* Idaho, Kentucky, Montana, South Dakota, and the Federal Government have performed only three executions each over the past fifty years. *Id.* Kansas, as the *Hall* Court noted, "has not had an execution in almost five decades." *Hall v. Florida*, ___U.S. ___, 134 S. Ct. 1986, 1997, 188 L. Ed. 2d 1007 (2014).

Even traditionally active death jurisdictions have recently seen dramatic decreases in the number of death sentences imposed and executions carried out. In Texas, Oklahoma, Louisiana, Mississippi, Alabama, Arizona, Florida, North Carolina, and South Carolina, death sentences and executions have both decreased dramatically over the past decade. *See* DPIC, Death Sentences in the United States From 1977 By State and By Year[33]; DPIC, Searchable Execution Database.[34] Indeed, in 2015, "[e]xecutions in the United States . . . fell to their lowest number in nearly 25 years, and new death sentences imposed by courts declined to levels not seen since the early 1970s." Timothy Williams, *Executions by States Fell in 2015, Report Says*, N.Y. Times, Dec. 16, 2015.[35] These drops are not an aberration, but rather the result of a long, consistent national march away from capital punishment. This is a march Washington can and should join with a finding by this Court that the punishment is unconstitutionally cruel.

Moreover, of the sixteen death sentences carried out by these nine jurisdictions, seven have involved inmates who volunteered for execution. DPIC, Information on Defendants Who Were Executed Since 1976 and Designated as Volunteers, *available at* http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers.

[33] *Available at* http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008.

[34] *Available at* http://www.deathpenaltyinfo.org/views-executions.

[35] *Available at* http://www.nytimes.com/2015/12/16/us/executions-by-states-fell-in-2015-report-says.html?_r=0.

V. CONCLUSION

Washington's death penalty scheme fails to fulfill the promises that led the United States Supreme Court to continue the death penalty experiment in *Gregg*. For all of the constitutional and statutory safeguards in place, there is currently no rubric, no multi-factor test, which can so mitigate the myriad failings in Washington's capital punishment system that it becomes constitutional. To the contrary, a system where the location and county coffers matter more than the nature of the crime, where race predicts who will be executed, and where evidence of systemic flaws dwarf any claims of efficacy is nothing but cruel—so cruel that it violates Washington's Constitution and must be banned.

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