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NO. 88522-2


RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

CHRISTOPHER JOHN MONFORT,

Defendant.

FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER, JUDGE

**STATE'S ANSWER TO MONFORT'S
CROSS-MOTION FOR DISCRETIONARY REVIEW**

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney

DEBORAH A. DWYER
Senior Deputy Prosecuting Attorney
Attorneys for Plaintiff

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

ORIGINAL

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A. IDENTITY OF RESPONDING PARTY

Respondent, the State of Washington, seeks the relief designated in part B.

B. STATEMENT OF RELIEF SOUGHT

The State asks this Court to deny Monfort's cross-motion for discretionary review under RAP 4.2(e)(2).

C. FACTS RELEVANT TO MOTION

Most of the relevant facts of this case have been set forth in the pleadings already filed with this Court. The following relevant facts may be helpful to the Court's determination of Monfort's cross-motion for discretionary review.

In July of 2012, Monfort argued that the death penalty notice in this case should be stricken because the State "failed to comply with the mandates of RCW 10.95.040." Appendix G to State's Motion for Discretionary Review, at 1. In particular, Monfort argued that the facts and circumstances of the crime "are not relevant" to the prosecutor's decision to seek the death penalty. Id. at 11. Monfort argued that the prosecutor in this case violated RCW 10.95.040 by considering the facts and circumstances of the

crime in deciding whether to seek the death penalty. In its oral ruling denying the motion to strike the death penalty notice on this basis, the trial court stated “the argument that the [S]tate cannot consider the crime in weighing mitigating factors defies logic and requires a strained interpretation of the statute.” Appendix A to State’s Motion for Discretionary Review, at 23. On March 6, 2013, the trial court entered its written order, denying the defense motion to strike the death penalty notice on this basis. Appendix C to State’s Motion for Discretionary Review, at 1.

In September of 2012, Monfort filed a motion to strike the death penalty notice in this case based on social science research conducted by academics participating in the Capital Jury Project (hereinafter “CJP”). In sum, based on interviews with jurors from capital cases in other states, these academics have concluded that the juries in those cases were confused by the jury instructions presented to them and failed to follow the law. In its oral ruling on February 22, 2013, the trial court concluded that, “[t]he court, while finding Dr. Foglia’s testimony wholly credible is not persuaded that voir dire by competent counsel cannot adequately result in the exclusion of jurors who will not follow the law,” and “careful wording of jury instructions can deal with all of the flaws that the defense

has addressed with the exception of the statutory verdict form, which, indeed, is confusing. But the court will invite the parties to submit an explanatory instruction.” Appendix A to State’s Motion for Discretionary Review, at 24-25. On March 6, 2013, the trial court ruled “the defendant’s motion to strike the death notice because jurors in other states and other cases were confused by the instructions given in other states and other cases is denied.” Appendix C to State’s Motion for Discretionary Review, at 1. The trial court also ruled “the defendant’s motion to strike the death notice because the Washington Pattern Instructions are confusing is denied.” Id.

D. GROUNDS FOR RELIEF AND ARGUMENT

The two issues identified in Monfort’s cross-motion for discretionary review do not meet the criteria set forth in RAP 2.3(b). Therefore, this Court should deny the defendant’s cross-motion for discretionary review. As this Court has stated, “[a] party moving for discretionary review of an interlocutory trial court order bears a heavy burden” to demonstrate that immediate review is justified. In re Grove, 127 Wn.2d 221, 235, 897 P.2d 1252 (1995).

1. MONFORT'S CLAIM THAT THE PROSECUTING ATTORNEY VIOLATED RCW 10.95.040 BY CONSIDERING THE FACTS OF THE CRIME IN DECIDING WHETHER TO SEEK THE DEATH PENALTY DOES NOT SATISFY THE REQUIREMENTS FOR DISCRETIONARY REVIEW.

The trial court did not commit obvious error or probable error in denying Monfort's motion to dismiss the notice of special sentencing proceeding on the basis that the prosecuting attorney violated RCW 10.95.040 by considering the facts of the charged crime in deciding whether to seek the death penalty. Viewed within the context of the constitutional requirements imposed by the United States Supreme Court, the plain language of the relevant Washington statutes demonstrates that the presence or absence of mitigating circumstances must be considered in relation to the facts and circumstances of the crime. The trial court properly ruled that the prosecutor did not violate the statute by considering the facts and circumstances of the crime.

As the United States Supreme Court explained in Kansas v. Marsh, 548 U.S. 163, 173-74, 126 S. Ct. 2516, 2524-25, 165 L. Ed. 2d 429 (2006) (emphasis added):

Together, our decisions in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*), and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of

Stewart, Powell, and STEVENS, JJ.), establish that a state capital sentencing system must: 1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime. See *id.*, at 189, 96 S.Ct. 2909. So long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed. See *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion) (citing *Zant v. Stephens*, 462 U.S. 862, 875-876, n. 13, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)).

In order for a state's death penalty scheme to be constitutional it must be both narrowing and individualized. A scheme is individualized if it allows the decision maker to decide punishment based on both the facts of the crime and the defendant's personal characteristics. *Id.* As the Court explained in *Gregg v. Georgia*, "[w]e have long recognized that '[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'" *Gregg*, 428 U.S. at 189 (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55, 58 S. Ct. 59, 82 L. Ed. 43 (1937)) (emphasis added).

This Court has found that RCW 10.95 et seq. establishes a constitutional death penalty procedure because it both narrows the class of persons eligible for the death penalty and requires an individualized determination of whether the death penalty is appropriate in a particular case. State v. Rupe, 101 Wn.2d 664, 699, 683 P.2d 571 (1984); Campbell v. Wood, 18 F.3d 662, 674-75 (9th Cir. 1994), cert. denied, 511 U.S. 1119 (1994). Individualization occurs twice under Washington's statutes: when the prosecuting attorney decides whether to seek the death penalty, and when the jury decides whether to impose the death penalty. As to the first step, RCW 10.95.040(1) provides that:

If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

As to the second step, RCW 10.95.060(4) provides that:

Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In construing a statute, a court's primary objective is to ascertain and carry out the legislature's intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). If the meaning of the statute in question is clear from its plain language, legislative intent is derived from the plain meaning of that statutory language alone; no further interpretation is necessary. State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). The plain meaning of a statutory provision is to be discerned from the ordinary meaning of the language at issue, but not viewed in isolation; rather, the court must consider the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. Jacobs, 154 Wn.2d at 600-01.

Monfort argues that in regard to the first step of individualization contained in RCW 10.95.040(1)—the prosecuting attorney's decision to seek the death penalty—the prosecuting attorney may not consider the facts of the crime. The claim is contradicted by the plain language of the relevant statutes, and it defies common sense. RCW 10.95.040 requires the prosecuting attorney to consider "whether there is reason to believe that there are not sufficient mitigating circumstances to merit leniency."

RCW 10.95.070 sets forth a non-exclusive list of "relevant factors" that the trier of fact may consider in deciding whether there are sufficient mitigating circumstances to merit leniency. These relevant factors include:

- (2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;
- (3) Whether the victim consented to the act of murder;
- (4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;
- (5) Whether the defendant acted under duress or domination of another person;
- (6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect.
- (8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

This list of non-exclusive mitigating circumstances conclusively demonstrates that the facts of the crime must be considered in determining whether "there are not sufficient mitigating circumstances to merit leniency," as required by both RCW 10.95.040(1) and 10.95.060(4). For example, the facts of the crime must be considered in determining whether the murder was committed while the defendant was under an extreme mental

disturbance. The facts of the crime must be considered in determining whether the victim consented to the act of murder. The facts of the crime must be considered in determining whether the defendant was an accomplice to a murder committed by another person and the defendant's participation was relatively minor. The facts of the crime must be considered in determining whether the defendant acted under duress. The facts of the crime must be considered in determining whether the defendant's capacity to appreciate the wrongfulness of his conduct was substantially impaired at the time of the murder. And finally, the facts of the crime, and particularly the defendant's relationship with or the lack of any relationship with the victim, must be considered in determining whether there is any likelihood that the defendant will pose a danger to others in the future.

This Court's cases impliedly recognize what is obvious from a sensible reading of the plain language of the statutory scheme: that consideration of the facts of the crime is a crucial aspect of a prosecutor's decision to seek the death penalty. See State v. Davis, 175 Wn.2d 287, 357, 290 P.3d 43 (2012) (noting that the strength of the case as well as mitigating evidence properly influences a prosecutor's decision not to seek the death penalty);

Rupe, 101 Wn.2d at 700 (noting that "prosecutors exercise their discretion in a manner which reflects their judgment concerning *the seriousness of the crime or insufficiency of the evidence*" in determining whether to seek the death penalty) (emphasis added); State v. Campbell, 103 Wn.2d 1, 26-27, 691 P.2d 929 (1984) (same, quoting Rupe, 101 Wn.2d at 700).

Statutes must be interpreted to avoid absurd results. J.P., 149 Wn.2d at 450. The legislature is presumed to intend that its enactments should not result in absurdity. State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1983).

Monfort's proposed interpretation of RCW 10.95.040(1) would lead to absurd results and in all likelihood render Washington's death penalty scheme unconstitutionally arbitrary. How could a prosecuting attorney make a rational decision as to whether to seek the death penalty without considering the facts of the crime?

Monfort's proposed construction would also be impossible to implement. How could the prosecuting attorney shield himself or herself from the facts of the crime so as to consider only potentially mitigating evidence?

In short, the prosecuting attorney must consider the facts and circumstances of the crime in deciding whether to seek the death penalty. The trial court did not commit obvious or probable error in ruling that the prosecuting attorney did not violate RCW 10.95.040(1) in this case by considering the facts and circumstances of the crime in deciding whether to seek the death penalty.

In addition, the trial court's ruling does not render further proceedings useless or substantially limit Monfort's freedom to act. RAP 2.3(b)(1) and (2). Monfort is free to raise this claim of error on direct appeal should he be convicted.

Monfort argues that this Court should accept review of this issue because the Court has accepted review in State v. McEnroe, No. 88410-2. However, the issue raised in Supreme Court No. 88410-2 is different both substantively and procedurally from the issue that Monfort raises here. In McEnroe, this Court granted the State's motion for discretionary review of the trial court's ruling striking the notice to seek the death penalty because, in the trial court's view, the prosecutor improperly considered the "strength" of the evidence. The trial court in McEnroe, like the trial court in this case, rejected the defense argument that the prosecutor could not

consider the facts and circumstances of the crime at all when deciding whether to seek the death penalty. Accordingly, the pending appeal in McEnroe does not provide any reason to grant Monfort's cross-motion for discretionary review.¹

Finally, Monfort argues that review should be accepted due to public interest in the death penalty, and the expense incurred by capital litigation. If this were the standard, this Court would be required to accept interlocutory appeal of every issue litigated in each case in which the death penalty is sought, no matter how lacking in merit. In all cases, including those in which the death penalty is sought, the standards of RAP 2.3(b) must be met to warrant interlocutory appeal.

2. MONFORT'S CLAIM THAT THE DEATH NOTICE SHOULD HAVE BEEN STRICKEN BECAUSE SOME SOCIAL SCIENTISTS HAVE CONCLUDED THAT JURORS IN OTHER CAPITAL CASES IN OTHER STATES HAVE BEEN CONFUSED BY JURY INSTRUCTIONS IN THOSE CASES DOES NOT SATISFY THE REQUIREMENTS FOR DISCRETIONARY REVIEW.

Monfort argues that this Court should accept interlocutory review of the trial court's denial of his motion to strike the death penalty based on the conclusion by some social scientists that

¹ Indeed, in the McEnroe case, this Court previously denied the defense motion for discretionary review on the precise issue presented in this cross-motion by order of this Court on October 6, 2010 in Supreme Court No. 84693-6.

jurors in capital cases in other states have been confused by the instructions given in those cases. Monfort makes no argument that this issue meets the standards of RAP 2.3(b), and for this reason alone review of this issue should be denied.

The trial court did not commit obvious or probable error in denying Monfort's motion to strike the death penalty notice on this basis. The trial court reasonably concluded that any flaws identified by the CJP research into prior cases from other states can be addressed in careful jury selection and careful wording of the jury instructions in this case. Appendix A to Motion for Discretionary Review, at 24-25. See In re PRP of Yates, ___ Wn.2d ___, 2013 WL 991900 (March 14, 2013) (refusing to prescribe a single method of jury selection in capital cases and finding the jury instructions and statutory question constitutional).

In short, Monfort argued below that Washington's death penalty is unconstitutional in light of the conclusions drawn by the social scientists involved in the CJP, although Washington's scheme was not the subject of the study and no Washington jurors were interviewed as part of the study. Statutes are presumed to be constitutional, and the party challenging a statute has the burden of proving it unconstitutional beyond a reasonable doubt. State v.

Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). The Constitution does not require a capital sentencing process to be a rigid and mechanical application of factors. Barclay v. Florida, 463 U.S. 939, 950, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983). As long as jurors' discretion is guided in a constitutionally adequate way, and their decision is not wholly arbitrary, the constitutional demands are met. Id. It is impossible to attain a perfect procedure, and the Constitution does not require such. McCleskey v. Kemp, 481 U.S. 279, 313, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

Below, Monfort fell far short of proving beyond a reasonable doubt that Washington's death penalty scheme is unconstitutional, based on the conclusion of some social scientists that jurors in other states have been confused by the jury instructions in those cases, or did not follow the instructions. The flaws in the methodology used and the conclusions drawn by the CJP have been outlined at length in the Prosecution's Response To Defendant's Motion To Strike Death Penalty Notice of Special Sentencing Proceeding, Convene Separate Juries, and Request Evidentiary Hearing, attached hereto as Appendix A. The CJP findings were not uncontested below, as Monfort claims, and the trial court certainly did not adopt them. Beyond those flaws,

however, it must be noted that the individual or collective thought processes of jurors "inhere in the verdict" and cannot be used to impeach a jury verdict. State v. Ng, 110 Wn.2d 32, 43-44, 750 P.2d 632 (1988). As such, it makes little sense to allow the statements of other jurors, in other cases, from other states, using other instructions, to be used to challenge the constitutionality of the potential decision of Monfort's future jury, even before the jury has been selected and instructed and a verdict rendered. The trial court did not commit obvious or probable error in rejecting this challenge.

Additionally, Monfort argues that notice of intent to seek the death penalty should have been stricken because CJP's research indicates that the outcome of cases in other states may have been influenced by race: either the race of the defendant, the race of the victim or the racial composition of the jury. None of the evidence presented in this case purports to show that the death penalty has been imposed in an unconstitutionally disproportionate way in the state of Washington.² Should Monfort be convicted of aggravated murder, and should the jury decide that there are not sufficient mitigating circumstances to merit leniency, this Court will conduct a

² There were no Washington jurors interviewed in the CJP. See Appendix to Monfort's Cross-Motion for Discretionary Review, at 252 n.2.

proportionality review of the death sentence. This proportionality review is the exclusive province of this Court on review of a jury's imposition of the death penalty, pursuant to the plain language of RCW 10.95.130. State v. Elmore, 139 Wn.2d 250, 300-01, 985 P.2d 289 (1999). There is no statutory authority for the trial court to engage in a proportionality review with the purpose of foregoing a special sentencing proceeding. Id. The trial court did not commit obvious or probable error in refusing to engage in such a review and refusing to strike the notice of intent to seek the death penalty on this basis.

It should be noted that a majority of this Court recently concluded that proportionality review is not simply an inquiry into sentencing percentage comparisons, and that the most recent review of aggravated first degree murder prosecutions does not reveal any racial disproportionality. Davis, 175 Wn.2d at 363. There has been no testimony or evidence presented in this case that there is statistically significant racial disproportionality in imposition of the death penalty in this State. This issue is not ripe for review, and does not meet the standards set forth in RAP 2.3(b).

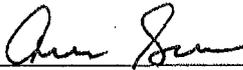
E. CONCLUSION

The two issues raised by Monfort in his cross-motion for discretionary review do not meet the standards for discretionary review. The cross-motion for discretionary review should be denied.

DATED this 20th day of March, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney

By:  for
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Plaintiff
Office WSBA #91002

APPENDIX A

FILED
KING COUNTY, WASHINGTON
OCT 26 2012
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 09-1-07187-6 SEA

vs.

CHRISTOPHER MONFORT,

Defendant.

PROSECUTION'S RESPONSE TO
DEFENDANT'S MOTION TO STRIKE
DEATH NOTICE OF SPECIAL
SENTENCING PROCEEDING,
CONVENE SEPARATE JURIES, AND
REQUEST EVIDENTIARY HEARING

I. INTRODUCTION¹

The defendant is charged with arson in the first degree, three counts of attempted murder in the first degree, and aggravated murder in the first degree. The prosecution has alleged that the aggravated murder charge involves a further aggravating circumstance: that the victim was a law enforcement officer who was performing his official duties at the time of the murder and the defendant knew or should reasonably have known this. In his most recent motion, the defendant argues that the court should strike the notice of the death penalty proceeding, or, in the alternative, convene separate juries to determine guilt and punishment. The defendant requests an evidentiary hearing on this motion.

¹ Portions of this pleading previously appeared in State v. McEnroe and Anderson, King County Nos. 07-C-08716-4 SEA and 07-C-08717-2 SEA, State's Response to "Motion to Strike Notice of Special Sentencing Proceedings, or in the Alternative to Convene Separate Juries, and Request for Evidentiary Hearing."

PROSECUTION'S RESPONSE TO DEFENDANT'S
MOTION TO STRIKE DEATH NOTICE OF SPECIAL
SENTENCING PROCEEDING, CONVENE
SEPARATE JURIES, AND REQUEST
EVIDENTIARY HEARING - 1

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 The defendant does not allege any infirmity with Washington law. Instead, he argues that
2 this court should decline to conduct a special sentencing proceeding because the jury cannot be
3 entrusted to render a just verdict on his punishment. His claims are based solely on interviews
4 conducted with other jurors in past capital cases in other states (the Capital Jury Project,
5 hereinafter "CJP"), on interviews conducted with 26 Highline Community College paralegal
6 students, and on a "linguistic analysis" of selected WPIC jury instructions. Essentially, the
7 defendant anticipates that his jury will be unable to comprehend and/or will deliberately violate
8 the court's instructions, will prematurely decide he deserves execution, and will be racist.

9 The court need not conduct an evidentiary hearing in this case. The United States
10 Supreme Court and the Washington Supreme Court have already rejected the defendant's
11 substantive arguments, and, as will be discussed in turn, each of the arguments based on the
12 CJP's alleged conclusions is wholly without merit. The defendant's "linguistic analysis" – to the
13 extent that it is coherent – is unpersuasive. At the very least, the defendant has failed to meet his
14 burden of showing beyond a reasonable doubt that Chapter 10.95 RCW is unconstitutional.
15 Moreover, convening separate juries for the guilt and penalty phases (absent unforeseen
16 circumstances like a remand for a second penalty phase) is not available as a remedy based on
17 Washington Supreme Court precedent; the defendant is inviting the Court to build error into this
18 case by suggesting a procedure that will not be upheld on appeal.

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23 PROSECUTION'S RESPONSE TO DEFENDANT'S
24 MOTION TO STRIKE DEATH NOTICE OF SPECIAL
SENTENCING PROCEEDING, CONVENE
SEPARATE JURIES, AND REQUEST
EVIDENTIARY HEARING - 2

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

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II. LAW AND ARGUMENT

A. THE MOTION IS WITHOUT MERIT BASED ON EXISTING PRECEDENT AND ON ITS FACE.

As a preliminary matter, a court "will presume that a statute is constitutional and it will make every presumption in favor of constitutionality[.]" State v. Glass, 147 Wn.2d 410, 422, 54 P.3d 147 (2002). A party challenging the constitutionality of a statute bears the burden of proving unconstitutionality beyond a reasonable doubt. City of Spokane v. Douglass, 115 Wn.2d 171, 177, 795 P.2d 693 (1990). The presumption of constitutionality may be overcome only in exceptional cases. City of Seattle v. Eze, 111 Wn.2d 22, 28, 759 P.2d 366 (1988).

It is well-settled that "[a] person may not urge the unconstitutionality of a statute unless he is harmfully affected by the particular feature of the statute alleged to be violative of the constitution." State v. Rowe, 60 Wn.2d 797, 799, 376 P.2d 446 (1962). Moreover, "[o]ne who challenges the constitutionality of a statute must claim infringement of an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general framework of the statute." Id. Put another way, a person challenging a statute may not challenge it on grounds that it may conceivably be applied unconstitutionally to others in situations not before the court. New York v. Ferber, 458 U.S. 747, 767, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). This Court must apply these standards in examining the defendant's claims based on the CJP.

In the sections that follow, the State will explain why the defendant's claims fail on a number of bases. First, under the United States Supreme Court decision in McClesky v. Kemp, a sociological study is not a sufficient basis to find that the death penalty is unconstitutionally arbitrary if all the study can show is a *risk* that improper considerations may result in a death

PROSECUTION'S RESPONSE TO DEFENDANT'S
MOTION TO STRIKE DEATH NOTICE OF SPECIAL
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Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 sentence. The CJP is just such a study, as are the questionnaires distributed to the community
2 college students -- if they can be a considered a study at all .

3 Second, under both United States Supreme Court and Washington Supreme Court
4 precedent, jurors are presumed to follow their instructions pursuant to constitutionally-mandated
5 procedures that are designed to minimize the risk of arbitrariness. The CJP ignores this
6 presumption, which is fundamental to the criminal justice system, and as such, its conclusions
7 should not be considered.

8 Next, the State will briefly address the merits of each of the seven "fatal flaws" in capital
9 jury sentencing that the CJP has purportedly identified. The State will then address the
10 defendants' claim that the CJP shows that Chapter 10.95 RCW offends the Washington
11 Constitution.

12 Lastly, the State will address the defendant's request for this Court to adopt the position
13 of two trial courts in New Mexico that separate juries are warranted because of the CJP.

14 Throughout this response brief, the State has made every effort to emphasize the
15 applicable law rather than articles and other non-legal materials, particularly those from
16 obviously biased sources. The exceptions to this general approach occur where it was necessary
17 to show that there are prevailing views other than those presented by the defense. This approach
18 is intentional, as the applicable law defeats the defendants' claims *ex ante*.

- 19 1. Under the United States Supreme Court's decision in *McClesky v. Kemp*,
20 the results of a statistical analysis of data collected in a sociological study
21 are not sufficient to prove beyond a reasonable doubt that capital
22 sentencing is arbitrary in violation of the Eighth Amendment.

23 In *McClesky v. Kemp*, the United States Supreme Court was presented with "the
24 question whether a complex statistical study that indicates a risk that racial considerations enter

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W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 into capital sentencing determinations proves that [a defendant's] capital sentence is
2 unconstitutional under the Eighth and Fourteenth Amendments." McClesky v. Kemp, 481 U.S.
3 279, 283-84, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). In McClesky, the defendant sought
4 federal habeas relief from his death sentence, claiming "that the Georgia capital sentencing
5 process is administered in a racially discriminatory manner." McClesky, 481 U.S. at 285. In
6 support of his claim, the defendant proffered a statistical study (the Baldus study) that purported
7 to establish racial discrimination in the imposition of the death penalty under the Georgia capital
8 sentencing statute. Id.

9 The Baldus study examined over 2,000 murder trials in Georgia to determine whether
10 there was a disparity in the imposition of the death penalty based on the defendant's race or the
11 victim's race. The researchers concluded that African-American defendants, such as McClesky,
12 whose victims were white "have the greatest likelihood of receiving the death penalty." Id.
13 Apparently recognizing that the facts of a case affect capital sentencing decisions, the Baldus
14 study attempted to account for such effects by assigning cases to categories based on the
15 "estimated aggravation level of the offense." Id., n. 5. This analysis indicated that racial factors
16 play a role in sentencing only in the "mid-range" of cases, *i.e.*, cases in which the facts of the
17 murder do not appear so aggravated as to be the most significant factor in the jury's decision-
18 making process. Id.

19 The defendant in McClesky presented the Baldus study to the federal district court as
20 evidence that his sentence was the result of racial discrimination. The district court found
21 serious flaws in the Baldus study and, as a result, found that the study failed to support the
22

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Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
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1 defendant's claims.² *Id.* at 288-89. On appeal, by contrast, the federal court of appeals *assumed*
2 that the Baldus study established "systematic and substantial disparities" in Georgia capital
3 sentencing based on race, *Id.* at 289. Nonetheless, the court of appeals still rejected the
4 defendant's claims, concluding that the Baldus study did not establish either that death sentences
5 in Georgia, including the defendant's, were imposed arbitrarily and capriciously, or that the
6 defendant's death sentence violated equal protection under the Fourteenth Amendment. *Id.*
7 Indeed, the court of appeals concluded that the Baldus study *confirmed* the constitutionality of
8 the Georgia capital sentencing procedures. *Id.* at 290.

9 The United States Supreme Court agreed with the court of appeals. As did the court of
10 appeals, the Supreme Court assumed the validity of the Baldus study for purposes of its decision.
11 However, the Court did not assume that the study established that "racial considerations actually
12 enter into any sentencing decisions in Georgia." *Id.* at 292 n. 7. In declining to make such an
13 assumption, the Court explained: "Even a sophisticated multiple-regression analysis such as the
14 Baldus study can only demonstrate a *risk* that the factor of race entered into some capital
15 sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing
16 decision." *Id.* (emphasis in original).

17 With that view of the relevance of the study in mind, the Court addressed the defendant's
18 claims. First, the Court addressed the Fourteenth Amendment equal protection claim, noting that
19 such a claim necessarily required the defendant to prove "that the decision makers in *his* case

20
21 ² See *McClesky v. Zant*, 580 F. Supp. 338 (N.D. Ga. 1984) for the district court's detailed
22 criticisms of the Baldus study and the defendant's resulting arguments.

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W554 King County Courthouse
516 Third Avenue
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1 acted with discriminatory purpose.” Id. at 292 (emphasis in original). The Court rejected the
2 Baldus study as sufficient to meet the defendant’s burden. In so doing, the Court acknowledged
3 that it “has accepted statistical disparities as proof of intent to discriminate in certain limited
4 contexts.” Id. at 293. However, the Court distinguished capital sentencing proceedings from
5 those contexts. As the Court explained, “the nature of the capital sentencing decision, and the
6 relationship of the statistics to that decision, are fundamentally different from the corresponding
7 elements” in the cases in which the Court has accepted statistics as proof of a discriminatory
8 intent. Id. at 294. The most important difference is that capital sentencing decisions involve
9 “consideration of innumerable factors that vary according to the characteristics of the individual
10 defendant and the facts of the particular capital offense.” Id. Thus, unlike in other kinds of
11 cases, “there is no common standard by which to evaluate defendants who have or have not
12 received the death penalty.” Id. n. 14.

13 The Court also distinguished capital sentencing proceedings from other cases in which
14 statistics are relevant by noting that, in those contexts, “the decision maker has an opportunity to
15 explain the statistical disparity.” Id. at 296. The Court noted that this is *not* the case when a
16 capital defendant relies on statistics to establish that the jury in his case acted improperly,
17 because “Controlling considerations of public policy dictate that jurors cannot be called to testify
18 to the motives and influences that led to their verdict.” Id. (alterations and quoted authority
19 omitted). The Court further observed that even if such testimony from jurors could be received,
20 it would not undermine the ultimate result in any event:

21 Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal,
22 because a legitimate and unchallenged explanation for the decision is apparent
23 from the record: [the defendant] committed an act for which the United States
24 Constitution and [State] laws permit imposition of the death penalty.

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Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
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(206) 296-9000, FAX (206) 296-0955

1 Id. at 296-97.

2
3 Finally, the Court rejected the Baldus study as insufficient to meet the defendant's burden
4 to prove the equal protection claim by noting that the defendant "challenges decisions at the
5 heart of the State's criminal justice system." Id. at 297. A state's implementation of criminal
6 laws for the protection of its citizens "necessarily requires discretionary judgments." Id. Thus,
7 the fundamentally discretionary nature of capital sentencing decision-making completely
8 undermines the usefulness of statistical data to show the decision-maker's purported intentional
9 racial discrimination.

10 The Court in McClesky also rejected the defendant's Eighth Amendment claim. In so
11 doing, the Court began its analysis by reviewing its post-Furman³ decisions restricting capital
12 sentencing. The Court noted that its post-Furman decisions created a twofold approach to capital
13 sentencing decision-making. "First, there is a required threshold below which the death penalty
14 cannot be imposed," and states must establish rational criteria for determining when that
15 threshold has been met. Id. at 305. "Second, States cannot limit the sentencer's consideration of
16 any relevant circumstance that could cause it to decline to impose the death penalty." Id. at 306.

17 Next, the Court turned to whether the defendant had established that those requirements
18 had not been met in his case. First, the Court rejected the claim that the Georgia statute was
19 facially invalid because it resulted in disproportionate sentences — that is, because defendants
20 similarly situated to McClesky received sentences other than death. In so doing, the Court
21 explained that the Georgia statute was valid on its face because it provided "procedures that

22 ³ See Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

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Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0953

1 focus the sentencer's discretion 'on the particularized nature of the crime and the particularized
2 characteristics of the individual defendant[.]'" *Id.* at 308 (quoting *Gregg v. Georgia*, 428 U.S.
3 153, 207, 96 S. Ct 2909, 49 L. Ed. 2d 859 (1976) (White, J., concurring)).

4 Next, the Court addressed the defendant's claim that the Georgia statute was "arbitrary
5 and capricious in *application*, and therefore his sentence is excessive, because racial
6 considerations may influence capital sentencing decisions in Georgia." *Id.* at 308. In also
7 rejecting this claim, the Court concluded that the Baldus study did *not* establish that jurors make
8 capital sentencing decisions based on race. At most, the Court explained, the statistics "*may*
9 *show only a likelihood* that a particular factor entered into some decisions." *Id.* (emphasis
10 supplied). The Court found that this is not particularly surprising, given the discretionary nature
11 of jury decision-making. The Court recognized that there is always risk that racial prejudice, or
12 other kinds of prejudice, will influence jury decision-making. That did not, however, lead the
13 Court to prohibit jury decision-making altogether. To the contrary, the Court recognized that "it
14 is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race
15 or color prejudice.'" *Id.* (quoting *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 309, 25 L.
16 Ed. 664 (1880)).

17 The Court also recognized the rather obvious notion that perfection in capital sentencing
18 is not the applicable standard because "there can be no perfect procedure" for making capital
19 sentencing decisions. *Id.* (quotation omitted). In other words, perfection is simply not possible,
20 nor is it constitutionally required. But the Court observed that, despite imperfections in jury
21 decision-making, the rule for ensuring that constitutional guarantees are met is that "the mode for
22

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Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9800, FAX (206) 296-0955

1 determining guilt or punishment itself has been surrounded with safeguards to make it as fair as
2 possible." Id. (alteration and quotation omitted).

3 The Court in McClesky provided two additional reasons for rejecting the defendant's
4 Eighth Amendment claim. "First, McClesky's claim, taken to its logical conclusion, throws into
5 serious question the principles that underlie our entire criminal justice system." Id. at 314-15.
6 The Court astutely observed that the defendant's reasoning and reliance on statistical analysis
7 could apply to similar claims of arbitrary sentencing based on a potentially infinite number of
8 factors, such as the defendant's or the victim's facial characteristics or physical attractiveness.
9 Id. at 317-18. However, "[t]he Constitution does not require that a State eliminate any
10 demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a
11 criminal justice system that includes capital punishment." Id. at 319.

12 Second, the Court concluded that "McClesky's arguments are best presented to the
13 legislative bodies." Id. As the Court stated,

14 It is the legislatures, the elected representative of the people, that are constituted
15 to respond to the will and consequently the moral values of the people.
16 Legislatures also are better qualified to weigh and evaluate the results of statistical
17 studies in terms of their own local conditions and with a flexibility of approach
18 that is not available to the courts.

19 Id. (quotation marks omitted).

20 As the foregoing explication demonstrates, the reasons the Court in McClesky rejected
21 the Baldus study as insufficient to establish the unconstitutionality of the Georgia statute apply
22 perforce to the defendant's reliance on the CJP in an attempt to establish the unconstitutionality
23 of Chapter 10.95 RCW.⁴ Like the claims in McClesky, the defendant's claim depends upon a

24 ⁴ The fact that the defendant relies on the CJP instead of the Baldus study does not change the
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1 showing of a causal relationship between the alleged improprieties and the jury's decision-
2 making.

3 In McClesky, it was not enough that the Baldus study (even assuming its validity)
4 established a racial disparity in sentencing. To succeed in both the equal protection claim and
5 the Eighth Amendment claim, the defendant had to show that his death sentence was imposed
6 because of his race and the race of his victim. See McClesky, 481 U.S. at 292 (to prevail on the
7 equal protection claim the defendant had to prove that the jury in his case acted with a
8 discriminatory purpose), and at 311 (to prevail on the Eighth Amendment claim the defendant
9 had to establish a constitutionally unacceptable risk that race was a reason for his sentence; an
10 unacceptable risk is not established by showing a likelihood that race was a factor). Thus,
11 simply showing that the defendant was more likely to receive the death penalty than a white
12 defendant, or an African-American defendant whose victim was not white, was not sufficient to
13 establish that his jury imposed his sentence based on race.

14 Similarly, to succeed in this claim, the defendant must establish a causal link between a
15 jury's decision to impose the death penalty and the juror misconceptions purportedly
16 demonstrated by the results of the CJP. In other words, under McClesky, it is not enough for the
17 defendant to provide statistics that show (assuming their validity) that jurors' perceptions of their
18 decision-making are inconsistent with Supreme Court decisions. Rather, the defendant must

19 analysis. Other courts faced with challenges based on the CJP have applied the same reasoning
20 as McClesky and rejected the defendants' claims based on the CJP. See United States v. Llera
21 Plaza, 179 F.Supp.2d 444, 450 n. 5 (E.D. Penn. 2001); United States v. Regan, 228 F.Supp.2d
22 742, 746-747 (E.D. Va. 2002); United States v. Sablan, 2006 WL 1028780, *8 (D.Colo. 2006)
(not reported in F.Supp.2d); United States v. Mikos, 2003 WL 22110948, *17-18 (N.D.Ill. 2003)
(not reported in F.Supp.2d); Riel v. Ayers, Jr., 2008 WL 2008 1734786, *15-16 (E.D. Cal. 2008).

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Daniel T. Satterberg, Prosecuting Attorney
W354 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 establish that the jurors' perceptions would cause their death sentences. The defendant's primary
2 problem, of course, is that he cannot even establish, with any degree of statistical certainty, that
3 he will receive the death penalty. Thus, he must establish that no King County, Washington jury
4 would impose the death penalty but for the juror misconceptions purportedly identified by the
5 CJP. In that respect, the defendant has a much higher burden than the defendant in McClesky,
6 who had only to prove that *his* jury imposed the death penalty on an improper basis.

7 In McClesky, the Court based many of its reasons for finding the Baldus study
8 insufficient on the necessity of a causal relationship between the racial disparity found in the
9 Baldus study and the jury's decision-making. For example, the Court noted that each capital
10 sentencing decision depends on the unique characteristics of the defendant, the unique
11 circumstances of the crime, and the unique composition of the jury. Id. at 294-95. As a result,
12 the Court concluded that capital sentencing involves too many variables for statistical analysis to
13 be useful in determining the reasons for any particular sentencing decision. Id. That reasoning
14 applies to the present case. Given the number of variables involved in capital sentencing
15 decisions, the statistics on which the defendant relies are not any more capable of establishing
16 the reasons for any given decision than the statistics presented in McClesky.

17 The defendant may suggest that the CJP study is too different from the Baldus study for
18 McClesky to apply to this claim. In fact, the differences in the CJP study suggest that it is *less*
19 capable of establishing the reasons behind any given sentencing decision than the Baldus study.
20 For example, the CJP study includes jurors from 13 or 14 different states, each with a different
21 capital sentencing statute and, as a result, with different jury instructions. Although the
22 framework of some of the statutes might be similar, no two statutes or sets of instructions are

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Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 identical. Thus, the CJP adds the differences in statutes and jury instructions to the other
2 innumerable variables that would have affected the sentencing decisions in each individual case.
3 The Court in McClesky also rejected the Baldus study as insufficient to establish the defendant's
4 claims because the results of the study and the conclusions of juror bias drawn from those results
5 were not rebuttable. This reason is also related to the necessity for a causal link between the
6 study results and the sentencing decision. Based on the Baldus study, the defendant in McClesky
7 asked the Court to assume that his sentence was imposed because of his race and the race of his
8 victim. The Court declined to do so where it was impossible for the State to rebut the
9 assumption because long-standing public policy dictates that "jurors cannot be called to testify to
10 the motives and influences that led to their verdict." Id. at 296 (alteration and quotation
11 omitted). Washington also recognizes such public policy. See Gardner, 60 Wn.2d 836, 841, 376
12 P.2d 651 (196); State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988); State v. Jackman, 113
13 Wn.2d 772, 777-78, 783 P.2d 580 (1989); Havens, 70 Wn. App. 251, 256, 825 P.2d 1120, rev.
14 denied, 122 Wn.2d 1023 (1993)..

15 The fact that the CJP relies on statements by jurors that the law and public policy dictates
16 should not be considered as grounds for impeaching a jury verdict invalidates the use of the CJP
17 as grounds for finding Chapter 10.95 RCW unconstitutional. By his reliance on the results of the
18 CJP, the defendant attempts to accomplish what he could not otherwise do -- he attempts to
19 challenge the validity of his (as-yet-unimposed) sentence by the use of evidence of jurors'
20 statements about the "motives and influences that led to their verdict[s.]" See McClesky, 481
21 U.S. at 296. A defendant cannot use jurors' statements about their decision-making to challenge
22 the constitutionality of their decision. It makes little sense to allow a defendant to use the

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W554 King County Courthouse
516 Third Avenue
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(206) 296-9000, FAX (206) 296-0955

1 statements of other jurors, in other cases from other states, to challenge the constitutionality of
2 the decision of his jury, even before that decision has been made.

3 Like the defendant in McClesky, the defendant here does not establish a specific
4 deficiency with Washington's death penalty statute. Instead, he attempts to establish the statute's
5 unconstitutionality by statistical information purporting to establish that protections provided by
6 the statute are not being implemented.

7 No Washington jurors were involved in the CJP study. The defendant attempts to
8 remedy this problem by citing to a survey conducted in Washington by a person retained by the
9 defendant for that purpose, Wanda Foglia.⁵ The defendant argues that the results of Foglia's
10 study "showed the same problems that were found in the CJP data."⁶ But Foglia did not
11 interview actual jurors, who had been subjected to voir dire, sworn, instructed by a judge, and
12 had heard the arguments of counsel. She simply distributed a six-page questionnaire to 26
13 paralegal students at Highline Community College.^{7 8} Although the defendant repeatedly
14 describes the students as "Washington mock jurors," the questionnaire never directs the students
15 to consider themselves jurors. Indeed, it presents them with the jury's verdict of guilt as a fait
16 accompli having nothing to do with them ("After the jury found [the defendant] guilty of
17 aggravated murder..." Questionnaire at 3). Finally, the questionnaire never asks the students to
18

19 ⁵ Foglia's Declaration is Exhibit B to Defendant's Motion.

20 ⁶ Defense Motion at 18.

21 ⁷ The questionnaires are at Exhibit PP of Defendant's Motion.

22 ⁸ Nowhere in Foglia's 33-page declaration does she acknowledge the sample size of her survey.
23 Instead, she refers to "data from Washington college students between the ages of 18 and
24 63," suggesting a large (and presumably representative) group. Foglia Declaration at 4. It is
only the actual data – the questionnaires themselves, Exhibit PP to Defendant's Motion, that
reveal that in her survey, n = 26.

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W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 reach a verdict on punishment. The students were not "mock jurors," they were just doing
2 homework.

3 The Washington Supreme Court has concluded that Chapter 10.95 RCW complies with
4 the requirements of the Eighth Amendment and Article 1, section 14 of the Washington
5 Constitution (which are interpreted coextensively). State v. Cross, 156 Wn.2d 580, 621-24, 132
6 P.3d 80 (2006); State v. Yates, 161 Wn.2d 714, 792-93, 168 P.3d 359 (2007); *see also* State v.
7 Dodd, 120 Wn.2d 1, 20-22, 838 P.2d 86 (1992) ("Gunwall⁹ factors do not demand that we
8 interpret Const. art. 1, § 14 more broadly than the Eight Amendment"). That court, like the
9 McClesky Court, has also refused to invalidate a death sentence based solely on the speculative
10 claim that the jury's sentencing decision may be arbitrary because it could be based on racial
11 prejudice. In re Personal Restraint of Davis, 152 Wn.2d 647, 753-54, 101 P.3d 1 (2004).
12 Therefore, this Court must presume that the sentence imposed at the defendant's trial will be
13 constitutionally valid, absent "exceptionally clear proof" to the contrary. McClesky, 481 U.S. at
14 297.

15 The defendant has not offered the required clear proof to the contrary. Rather, he has
16 attempted to bolster speculation based on statistical evaluation of decade-old responses by some
17 jurors, in a fraction of the death penalty trials that have occurred in fewer than half the states that
18 have such trials, and with the results of a brief questionnaire filled out by 26 paralegal students in
19 Washington. His effort to imbue the questionnaire with even the dubious statistical significance
20 of the CJP is unconvincing. For example, Foglia's declaration touts the sample size of the CJP

21 _____
22 ⁹ *See* State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

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W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 (1198 jurors) as a source of its high "confidence interval." Foglia Declaration at 7. Foglia does
2 not, however, report a "confidence interval" for her Washington study (or its sample size of 26).
3 This does not prevent her from reporting the results of her Washington "study" in Washington to
4 three decimal places (e.g., 87.5%) . Foglia Declaration at 9.

5 Like the Baldus study in McClesky, the CJP study (and perforce Foglia's questionnaire)
6 are not sufficient to establish anything more than a likelihood (at most, assuming the studies'
7 validity) that a jury could impose the death penalty for an improper reason. This is not sufficient
8 to establish an Eighth Amendment claim. See McClesky, 481 U.S. at 308 (statistics show at
9 most only a likelihood of improper decision-making, which is insufficient to establish a
10 constitutionally unacceptable risk of improper decision-making under the Eighth Amendment).

11 In sum, this Court should apply McClesky as binding precedent, as the principles at issue
12 are the same, and deny the defendant's motion.

13 2. The Capital Jury Project relies on faulty assumptions regarding the
14 requirements of Supreme Court Eighth Amendment jurisprudence and
ignores the presumption that jurors can and do follow their instructions.

15 The purported purpose of the CJP was to investigate whether jurors adhere to
16 constitutional requirements for making capital sentencing decisions. This purpose assumes a set
17 of constitutionally-mandated requirements that *jurors* must follow in reaching their sentencing
18 decisions. That assumption is erroneous. United States Supreme Court decisions do not
19 establish a set of specific requirements that *jurors* must follow in their capital sentence decision-
20 making. Rather, in the wake of Furman v. Georgia, the Court established the over-arching
21 requirements that *states* must follow to ensure that the death penalty will not be imposed "under
22 *sentencing procedures* that create[] a substantial risk that it would be inflicted in an arbitrary and

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W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
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1 capricious manner.” Gregg, 428 U.S. at 188 (emphasis supplied). In the cases following
2 Furman, beginning with Gregg, the Court established what *states* must do to “minimize the risk
3 of wholly arbitrary and capricious action.” Id. at 189. In each of those cases, the Court imposed
4 requirements on the *states* to provide procedures to minimize the risk of arbitrariness and caprice
5 in capital sentencing. It did not impose those requirements directly upon the jurors themselves.

6 For example, in Gregg, the Court required states to provide a bifurcated trial in which
7 issues of guilt and sentencing are decided separately so that the jury can be “apprised of the
8 information relevant to the imposition of sentence and provided with standards to guide its use of
9 the information.” Id. at 195. This is a requirement imposed on states, not on the individual
10 jurors, as is true of all of the requirements discussed below as well.

11 In Woodson v. North Carolina, 428 U.S. 280, 303, 96 S. Ct. 2978, 49 L. Ed. 2d 944
12 (1976), the Court required states “to allow the particularized consideration of relevant aspects of
13 the character and record of each convicted defendant before the imposition upon him of a
14 sentence of death.” Similarly, in Jurek v. Texas, 428 U.S. 262, 271, 96 S. Ct. 2950, 49 L. Ed. 2d
15 929 (1976), the Court required capital sentencing statutes to allow the juries to “consider on the
16 basis of all relevant evidence not only why a death sentence should be imposed, but also why it
17 should not be imposed.” The Court elaborated on that requirement in Lockett v. Ohio, 438 U.S.
18 586, 605, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), holding that “a statute that prevents the
19 sentencer in all capital cases from giving independent mitigating weight to aspects of the
20 defendant’s character and record and to circumstances of the offense proffered in mitigation
21 creates the risk that the death penalty will be imposed in spite of factors which may call for a less
22 severe penalty.” The Court, therefore, required capital sentencing statutes to allow juries to

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Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 consider any fact about the defendant or his crime that the defendant proffers as a reason not to
2 impose the death penalty. Id. The Court again elaborated on this requirement in Mills v.
3 Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), holding that capital
4 sentencing statutes may not require unanimous agreement of the existence of mitigating factors
5 before they may be considered. Therefore, the Court required the jury instructions to clearly
6 inform the jury that mitigating circumstances need not be found unanimously.

7 In Godfrey v. Georgia, 446 U.S. 420, 427, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the
8 Court noted that Furman requires a capital sentencing statute to provide “a meaningful basis for
9 distinguishing the few cases in which [the death penalty] is imposed from the many cases in
10 which it is not” (quoting Furman, 408 U.S. at 313). As a result, the Court required capital
11 sentencing statutes to “define the crimes for which death may be the sentence” by clear and
12 objective standards. Godfrey, 446 U.S. at 428.

13 In Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 38 L. Ed. 2d 841 (1985), the
14 Court established requirements for jury selection to maximize to the greatest extent possible that
15 a juror who is selected to serve in a capital case would perform “his duties as a juror in
16 accordance with his instructions and his oath.” Such requirements include excusing for cause a
17 venire member whose views about the death penalty would prevent him or her from following
18 the court’s instructions. Wainwright, 469 U.S. at 424. In Morgan v. Illinois, 504 U.S. 719, 729,
19 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992), the Court applied its decision in Wainwright to
20 prospective jurors who will automatically vote for the death penalty in every case. Such jurors,
21 the Court explained, “will fail in good faith to consider the evidence of aggravating and
22 mitigating circumstances as the instructions require him to do.” Morgan, 504 U.S. at 729.

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W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 Therefore, the Court required trial courts to excuse for cause any prospective juror who indicates
2 that he or she would automatically vote for the death penalty regardless of the evidence of
3 mitigating circumstances. Id., at 739.

4 In Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985),
5 the Court recognized that its previous decisions required "that the sentencing process should
6 facilitate the responsible and reliable exercise of sentencing discretion." The Court held that
7 "state-induced suggestions that the sentencing jury may shift its sense of responsibility to an
8 appellate court" undermine that requirement, and are thus not allowed. Caldwell, 472 U.S. at
9 330.

10 In Turner v. Murray, 476 U.S. 28, 37, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986), the court
11 established another requirement for jury selection: when the defendant is accused of "an
12 interracial crime," the trial court must allow the defendant's counsel to inform prospective jurors
13 of the race of the victim and question them on the issue of racial bias. The Court considered
14 such jury selection procedures sufficient to minimize the risk that racial prejudice would remain
15 undetected. Turner, 476 U.S. at 36.

16 In Simmons v. South Carolina, 512 U.S. 154, 162, 114 S. Ct. 2187, 129 L. Ed. 2d 133
17 (1994), the Court required, under the Due Process Clause,¹⁰ that the jury "be informed of the true
18 meaning of its noncapital sentencing alternative when the State relies on the defendant's future
19 dangerousness as a reason to impose the death penalty." In so doing, the Court recognized that
20 clear and adequate jury instructions are the means for minimizing the risk of juror
21 misperceptions about the law. Simmons, 512 U.S. at 171.

22 ¹⁰ The Court declined to address whether the Eighth Amendment requires such an instruction.

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Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 These decisions demonstrate that the Supreme Court has not imposed requirements
2 directly on juries or required individual jurors to conduct their secret deliberations in a particular
3 way. Instead, the Court requires *the states* to meet certain procedural requirements and to
4 provide safeguards to minimize the risk that juries will act arbitrarily or capriciously. The reason
5 for the Court's approach is clear. It is the prerogative of the legislatures to provide for jury
6 sentencing. In making that choice, legislatures presumably understand the inherent problems in
7 jury decision-making, such as jurors' lack of experience or skill in dealing with the kind of
8 information necessary to capital sentencing. The Supreme Court itself has repeatedly
9 acknowledged that jury decision-making is less than perfect. *See Gregg* 428 U.S. at 192;
10 *Lockett*, 438 U.S. at 605; *Zant v. Stephens*, 462 U.S. 862, 884-885, 103 S. Ct. 2733, 77 L. Ed. 2d
11 1134 (1982). The Court also recognizes that jurors bring their own experiences and knowledge
12 to bear on their sentencing decisions. *See Barclay v. Florida*, 463 U.S. 939, 950, 103 S. Ct. 3418,
13 77 L. Ed. 2d 1134 (1983). And yet, the Court has refrained from interfering with jurors'
14 decision-making, relying instead on jurors to exercise their discretion to the best of their ability
15 in accordance with their instructions and oath. As the Court explained in *Barclay*,

16 We have never suggested that the United States Constitution requires that the
17 sentencing process should be transformed into a rigid and mechanical parsing of
18 statutory aggravating factors. But to attempt to separate the sentencer's decision
19 from his experiences would inevitably do precisely that. It is entirely fitting for
20 the moral, factual, and legal judgment of judges and juries to play a meaningful
21 role in sentencing. We expect that sentencers will exercise their discretion in their
22 own way and to the best of their ability. As long as that discretion is guided in a
23 constitutionally adequate way, and as long as the decision is not so wholly
24 arbitrary as to offend the Constitution, the Eighth Amendment cannot and should
not demand more.

Barclay, 463 U.S. at 950-951 (citation omitted).

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W554 King County Courthouse
516 Third Avenue
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1 Therefore, the Court requires that juries be “carefully and adequately guided in their
2 deliberations” through the trial court’s “instructions on the law and how to apply it”. Gregg, 428
3 U.S. at 192-193. In so doing, the Court recognizes that “the members of a jury will have had
4 little, if any, previous experience in sentencing” and that, “[t]o the extent that this problem is
5 inherent in jury sentencing, it may not be totally correctible.” Id. The problem is minimized,
6 however; “if the jury is given guidance regarding the factors about the crime and the defendant
7 that the State, representing organized society, deems particularly relevant to the sentencing
8 decision.” Id. A sentencing decision is constitutional (and not arbitrary or capricious) when it
9 was made by a jury that was carefully and adequately instructed on the statutory guidelines that
10 meet the constitutional requirements of (1) narrowing the class of death-eligible defendants and
11 (2) permitting individualized sentencing based on the defendant’s record and personal
12 characteristics and the circumstances of his crime. Id.; *See also Kansas v. Marsh*, 548 U.S. 163,
13 174, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006).

14 When the legislature adopted Chapter 10.95 RCW, it made the policy judgment that a
15 capital defendant should have the ability to choose to have either a jury or a judge make the
16 sentencing decision. *See* RCW 10.95.050(2). In so doing, the legislature implicitly recognized
17 the advantages and disadvantages of jury decision-making. Nonetheless, in the exercise of its
18 plenary power to provide for capital punishment, the legislature followed the dictates of Furman,
19 Gregg, and their progeny in providing procedures that guide the exercise of juror discretion and
20 that minimize the risk of arbitrary decision-making.

21 Jury decision-making is a fundamental element of our criminal justice system; so
22 fundamental that, as one Supreme Court justice has noted, the right to a jury trial is the only

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W554 King County Courthouse
516 Third Avenue
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(206) 296-9000, FAX (206) 296-0955

1 guarantee provided in both the body of the Constitution (Art. III, § 2, cl. 3) and in the Bill of
 2 Rights (the Sixth Amendment). See Neder v. United States, 527 U.S. 1, 30, 119 S. Ct. 1827, 144
 3 L. Ed. 2d 35 (1999) (Scalia, J., dissenting). It is not solely a right afforded to the defendant -- the
 4 jury is an institution fundamental to the structure of our government; it is a right of the people. In
 5 Georgia v. McCollum, the United States Supreme Court underscored this distinction, ruling that
 6 a defendant may not use peremptory challenges in a racially discriminating manner because this
 7 constitutes "the invasion of the constitutional rights of the excluded jurors in a criminal trial."
 8 505 U.S. 42, 56, 112 S. Ct. 2348, 2357, 120 L. Ed. 2d 33 (1992).

9 The people's right to a jury is as fundamental as their right to vote; the latter gives them
 10 power over the legislature and the former gives them power over the judiciary. Justice Scalia has
 11 observed that this right

12 ...is no mere procedural formality, but a fundamental reservation of power in our
 13 constitutional structure. Just as suffrage ensures the people's ultimate control in the
 14 legislative and executive branches, jury trial is meant to ensure their control in the
 15 judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The
 16 Complete Anti-Federalist 315, 320 (H. Storing ed. 1981) (describing the jury as
 17 "secur[ing] to the people at large, their just and rightful control in the judicial
 18 department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John
 19 Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete
 20 a control ... in every judgment of a court of judicature" as in the legislature); Letter from
 21 Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas
 22 Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people
 23 had best be omitted in the Legislative or Judiciary department, I would say it is better to
 24 leave them out of the Legislative"); Jones v. United States, 526 U.S. 227, 244-248, 119
 S.Ct. 1215, 143 L.Ed.2d 311 (1999). Apprendi carries out this design by ensuring that the
 judge's authority to sentence derives wholly from the jury's verdict. Without that
 restriction, the jury would not exercise the control that the Framers intended.

25 Blakely v. Washington, 542 U.S. 296, 305-06, 124 S. Ct. 2531, 2538-39, 159 L. Ed. 2d 403
 26 (2004) (trial court's sentencing based on court's finding that defendant acted with deliberate
 27 cruelty violated Sixth Amendment).

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Daniel T. Satterberg, Prosecuting Attorney
 W554 King County Courthouse
 516 Third Avenue
 Seattle, Washington 98104
 (206) 296-9000, FAX (206) 296-0955

1 The criminal justice system is not intended to promote only the interests of defense
 2 attorneys and their clients, or prosecutors, or judges. The ultimate decision-maker in the
 3 criminal justice system is the jury, comprised of representatives of the people. The jury is
 4 comprised of the citizenry -- in this defendant's case, the people of King County, Washington.

5 Almost every aspect of a criminal trial is open to the public. But the jury's deliberative
 6 process is a private one. Defendants, defense attorneys, prosecutors, and judges are barred from
 7 the jury room during deliberations. This private process of deliberation, the exclusive province
 8 of the jury, is zealously protected in Washington. The individual or collective thought processes
 9 leading to a verdict "inhere in the verdict" and cannot be used to impeach a jury verdict. State v.
 10 Crowell, 92 Wash.2d 143, 594 P.2d 905 (1979). Jurors' post-verdict statements regarding
 11 matters which inhere in the verdict cannot be used to attack the jury's verdict. Ng, 110 Wash. 2d
 12 at 43-44.

13 If the defendant were convicted, and if a jury determined that death was his appropriate
 14 punishment, post-conviction interviews with the jurors would not be permitted to disturb these
 15 verdicts. Perforce, his speculation now that some jurors might be incapable of following the law
 16 -- based on interviews with other jurors in other, past cases and with the results of a homework
 17 assignment in Washington -- cannot be used to pre-emptively impugn the jury in his case. The
 18 defendant assures the court: "Defense is not seeking to impeach any existing jury verdict."¹¹
 19 Instead, the defendant is attempting something more insidious: speculating that the jury in his
 20 case will commit misconduct, and seeking pre-emptively to avoid that jury's verdict.¹²

21
 22 ¹¹ Defense Motion at 52.

23 ¹² If the defendant feels that the jury cannot be entrusted to properly determine his guilt or
 24 punishment, he should consider waive his jury trial right and seek to present his case to the court.

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Daniel T. Satterberg, Prosecuting Attorney
 W354 King County Courthouse
 516 Third Avenue
 Seattle, Washington 98104
 (206) 296-9000, FAX (206) 296-0955

1 The characterization of an argument as proceeding along a "slippery slope" leading to
2 absurd results is one of the law's more evocative contributions to rhetoric. The image conjured
3 up by this metaphor is an apt illustration of a glaring weakness in the defendant's argument: it
4 would apply not only to the penalty phase, but to the guilt phase of his trial and all jury trials.
5 The defendant alleges jurors engage in "rampant premature decision-making which renders the
6 penalty phase meaningless."¹³ The fallacy of this argument is the assumption that a juror who
7 comes to certain conclusions during a case cannot reach a verdict during deliberations based
8 upon the evidence and the law. But the argument also leads to an absurd result, because it would
9 render not simply the penalty phase "meaningless," but the guilt phase of his trial -- and every
10 other criminal trial -- meaningless as well.

11 The defendant asserts that nearly a third of all jurors in capital cases nationwide made
12 their decision that the defendant should receive the death penalty during the guilt phase of the
13 trial.¹⁴ If true, this means that they also "decided" his guilt before the conclusion of the guilt
14 phase. However, the argument rests upon the fallacious equivalence between a "decision" made
15 by a juror while hearing evidence and a verdict reached during deliberations. If one accepts the
16 logic of the defendant's argument, the jury cannot be entrusted to determine his punishment or
17 his guilt. And because every criminal trial has a guilt phase, this argument would abolish jury
18 trials in Washington.

19 It is ironic that the defendant would have *State v. Monfort* stand for the proposition that a
20 jury may not be entrusted with its traditional role because it is possible that the jury will not
21 follow the court's instructions. Writings found in the defendant's residence after his arrest reveal

22 ¹³ Defense Motion at 18.

23 ¹⁴ Defense Motion at 21.

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Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 that he is an avid proponent of "jury nullification," a doctrine that encourages jurors to acquit
2 defendants who are legally guilty, and seeks to imbue the jury with the ultimate power: the
3 power to disregard the law.

4 The defendant's argument that jurors "prejudge" the evidence is not the only one that
5 ventures recklessly onto this slippery slope. The defendant acknowledges that Washington
6 jurors are presumed to follow the law. But the instructions to the jury, he argues, are so "flawed"
7 that "any presumption that that jurors honor these instructions must be discarded."¹⁵ The
8 presumption should be "discarded," it is said, because a defense expert has opined that
9 Washington's jury instructions in capital cases are "extremely flawed and poorly written."¹⁶
10 Among these flaws, we are told, are "technical vocabulary of the law," "conceptual complexity,"
11 "negatives," and "sentence length."¹⁷ If the instructions in capital cases are rife with such flaws,
12 can there be any doubt that this is true of the Washington Pattern Jury Instructions Criminal
13 (WPICs) in other criminal cases? If Washington's instructions in capital cases are "extremely
14 flawed and poorly written" this malady must extend throughout the WPICs, and by the logic of
15 the defendant's argument, all jury trials (like the presumption that jurors follow the law) should
16 be "discarded."

17 There is no rational reason to limit the defendant's attack on the juries to the penalty
18 phase of a capital trial, and no reason not to extend it to all criminal cases. Taken to its logical
19 conclusion, the defendant's argument is that juries in criminal cases should be abolished.
20
21

22 ¹⁵Defense Motion at 44.

23 ¹⁶Defense Motion at 44.

24 ¹⁷Defense Motion at 45.

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Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 The Washington Constitution reinforces the fundamental importance of the jury, stating:
 2 "The right of trial by jury shall remain inviolate." Const. art. I, § 21. Jury decision-making
 3 provides protection against arbitrary governmental action. As the Supreme Court explained in
 4 Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968),

5 The framers of the constitution strove to create an independent judiciary but
 6 insisted upon further protection against arbitrary action. Providing an accused
 7 with the right to be tried by a jury of his peers gave him an inestimable safeguard
 8 against the corrupt or overzealous prosecutor and against the compliant, biased, or
 9 eccentric judge. If the defendant preferred the common-sense judgment of a jury
 10 to the more tutored but perhaps less sympathetic reaction of the single judge, he
 11 was to have it.

12 On the other hand, as the Supreme Court has also recognized, jury decision-making "has
 13 'its weaknesses and the potential for misuse.'" Duncan, 391 U.S. at 156 (quoting Singer v.
 14 United States, 380 U.S. 24, 35, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965)). The "long debate" over
 15 the "wisdom of permitting untrained laymen to determine the facts" has included "assertions that
 16 juries are incapable of adequately understanding evidence or determining issues of fact, and that
 17 they are unpredictable, quixotic, and little better than a roll of dice." Duncan, 391 U.S. at 156-
 18 57.

19 And yet, the Court has always rejected such assertions as grounds for questioning the
 20 value of jury decision-making. Duncan, 391 U.S. at 157. Instead, the Court has resolved this
 21 conflict by adopting a well-established presumption that juries follow the trial court's
 22 instructions on the law. See Francis v. Franklin, 471 U.S. 307, 324 n.9, 105 S. Ct. 1965, 85 L.
 23 Ed. 2d 844 (1985); Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176
 24 (1987); Weeks v. Angelone, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000);
Romano v. Oklahoma, 512 U.S. 1, 13, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994). This

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 W554 King County Courthouse
 516 Third Avenue
 Seattle, Washington 98104
 (206) 296-9000, FAX (206) 296-0955

1 presumption is well-settled law in Washington as well. Yates, 161 Wn.2d at 763; State v. Ervin,
2 158 Wn.2d 746, 756, 147 P.3d 567 (2006). This presumption is crucial to a system in which jury
3 decision-making plays such a fundamental role. Without the presumption, there is no basis for
4 confidence in any jury verdict, no finality of jury verdicts, and no protection for the
5 confidentiality of jury deliberations that is necessary for free and frank discussion and decision-
6 making. These are the same concerns behind the policy against impeaching the jury's verdict
7 through evidence of the jury's deliberative process. See Tanner v. United States, 483 U.S. 107,
8 119-120, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987); Gardner, 60 Wn.2d at 841; Ng, 110 Wn.2d at
9 43; Jackman, 113 Wn.2d at 777-78; Havens, 70 Wn. App. at 256.. The presumption that juries
10 follow their instructions, like the rule against impeaching jury verdicts with evidence of the
11 deliberative process, is based on the understanding that perfection in jury decision-making is
12 neither possible nor constitutionally required. See Francis v. Franklin, 471 U.S. at 324 n.9;
13 Tanner, 483 U.S. at 120. Imperfections notwithstanding, the framers of the federal and state
14 constitutions concluded that imperfect jury decision-making is preferable to judicial decision-
15 making in criminal cases. The legislature, in adopting Chapter 10.95 RCW, reached the same
16 conclusion.

17 The question presented in this case is as follows: What does the Court do with
18 information that, assuming its validity, quantifies some imperfections in jury capital sentencing?
19 As discussed at length above, the Supreme Court's Eighth Amendment decisions do not place
20 requirements directly on jurors. Rather, these decisions place requirements on the states for
21 providing adequate procedures and guidelines for jurors to follow to minimize the risk of
22 arbitrariness in capital sentencing decisions. The Washington Supreme Court has held that

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W554 King County Courthouse
516 Third Avenue
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1 Chapter 10.95 RCW provides such procedures and guidelines and, therefore, comports with the
 2 requirements of the Eighth Amendment and the Washington Constitution. Yates, 161 Wn.2d at
 3 792-93; Cross, 156 Wn.2d at 622-24. Yet the defendant argues that the procedures and
 4 guidelines are meaningless unless every juror actually follows them in every case, and offer the
 5 results of the CJP and his own "study" as evidence that Washington juries do not and will not.
 6 This argument depends on this Court overriding the long-standing presumption that juries follow
 7 their instructions.

8 The presumption that juries follow their instructions is essential to our criminal justice
 9 system and is doubtless an integral part of the legislature's decision to provide for jury capital
 10 sentencing. With all of its flaws, jury decision-making is a fundamental component of our
 11 criminal justice system precisely because jury decision-making provides unquantifiable benefits
 12 to criminal defendants. *See Duncan*, 391 U.S. at 156-57. Indeed, those benefits likely account
 13 for evidence that (1) when judges and juries disagree on the imposition of the death penalty,
 14 juries are half as likely to impose the death penalty,¹⁸ and (2) in the approximately 90 cases filed
 15 after Chapter 10.95 RCW was passed in which the State of Washington filed a notice of special
 16 sentencing proceeding, 32 juries imposed the death penalty.¹⁹

17
 18
 19
 20 ¹⁸ Defense Motion, Exhibit C (Bowers, William J. and Foglia, Wanda D., Still Singularly
 21 Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing, Criminal Law
 Bulletin, p. 52, *citing* Harry Kalven, Jr. and Hans Zeisel, The American Jury (1966)).

22 ¹⁹ *See Appendix A* (Loginsky, Pam, The Death Penalty in Washington), p.6.

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 W554 King County Courthouse
 516 Third Avenue
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1 In sum, ignoring the presumption and declaring Chapter 10.95 RCW unconstitutional
2 because of a claim based on a social study that jurors do not follow their instructions is
3 tantamount to declaring the constitutional right to a jury unconstitutional.

4 The CJP study also fails to account for protection against arbitrary sentencing decisions
5 provided by mandatory appellate review. The United States Supreme Court has repeatedly
6 recognized the importance of appellate review in guarding against arbitrary capital sentencing.
7 See Gregg, 428 U.S. at 198; Zant, 462 U.S. at 890; Proffitt v. Florida, 428 U.S. 242, 258-59, 96
8 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). Indeed, the Court views mandatory appellate review as a
9 primary source of protection against arbitrary capital sentencing. Id. The Washington Supreme
10 Court holds that view as well. Cross, 156 Wn.2d at 624; Dodd, 120 Wn.2d at 15. Thus, to the
11 extent the CJP results are assumed to be valid in establishing that jurors sometimes fail to
12 understand or follow their instructions, the possibility that such errors will lead to an arbitrary or
13 capricious death sentence is minimized by mandatory appellate review.

14 The potential value of the CJP, and studies like it, is not that it provides a basis for
15 overriding the crucial presumption that juries follow their instructions. Rather, its potential value
16 is in the identification of possible weaknesses in jury capital sentencing and the creation of
17 procedures to minimize those weaknesses. If jurors cannot understand their instructions, then
18 better instructions can be provided; if judges are not identifying and excluding all biased jurors,
19 then better procedures for doing so can be devised. Assuming it is valid, the CJP does nothing
20 more than confirm what the Supreme Court long ago recognized (*see Zant*, 462 U.S. at 885) and
21 the legislature certainly knew when it adopted Chapter 10.95 RCW – that jury capital sentencing
22 is not perfect. The results of the CJP are not, however, sufficient to establish beyond a

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W554 King County Courthouse
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1 reasonable doubt that Chapter 10.95 RCW cannot be applied in a constitutional manner in this
2 case.

3 The State readily acknowledges that it would be foolish to suggest that the jury system
4 functions flawlessly and that it cannot and should not continue to be improved. Interviews with
5 jurors after they have reached verdicts in criminal cases may suggest useful changes in the
6 processes by which jurors are selected or instructed on the law.

7 We do not suggest that trial practices cannot change in the course of centuries and
8 still remain true to the principles that emerged from the Framers' fears "that the
9 jury right could be lost not only by gross denial, but by erosion."

9 Appendi v. New Jersey, 530 U.S. 466, 483-84, 120 S. Ct. 2348, 2359, 147 L. Ed. 2d 435 (2000)
10 (citation omitted). The findings of the CJP should be evaluated and considered by the people of
11 the State of Washington, through its elected politicians and judges. But it is one thing to suggest
12 improvements in instructions or voir dire, and another to suggest that no jury should be allowed
13 to deliberate in the penalty phase of a capital case because the institution itself is so
14 fundamentally flawed.

15 Arizona's suggestion that judicial authority over the finding of aggravating factors
16 may be a better way to guarantee against the arbitrary imposition of the death
17 penalty is unpersuasive. The Sixth Amendment jury trial right does not turn on the
18 relative rationality, fairness, or efficiency of potential factfinders. Appendi, 530
19 U.S., at 498 (SCALIA, J., concurring).

19 Ring v. Arizona, 536 U.S. 584, 587, 122 S. Ct. 2428, 2431-32, 153 L. Ed. 2d 556 (2002)
20 (striking down Arizona statute whereby a judge determined presence or absence of aggravating
21 factors in penalty phase of death penalty cases).

22 Some of the alleged failings of the jury system in capital cases raised by the defendant
23 can easily be avoided by the trial court and the parties. There is no reason why, for example, the

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Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 jury should have any doubts that a defendant sentenced to a life sentence for aggravated murder
2 in the first degree will actually serve his sentence; the prosecution will not argue or imply
3 otherwise. The prosecution would welcome any revisions to the WPIC instructions, drafted by
4 the court or the defendant, which make it easier for the jury to understand the law.

5 It is undisputed that the criminal justice system has a duty to provide jurors with the
6 clearest and most unequivocal instructions on the law, and that the process by which jurors are
7 selected should be as fair as possible. It is striking that the defendant, having created a litany of
8 alleged infirmities with the jury's constitutionally mandated role in criminal cases, does not
9 make motions or recommendations to ameliorate them. Instead, he argues doggedly that because
10 no jury can be entrusted to reach an ultimate decision in his case, he can escape it completely.

11 In sum, the CJP's conclusions are fundamentally flawed in that they are based on an
12 erroneous assumption, *i.e.*, that the United States Supreme Court has established constitutional
13 standards and has imposed those standards directly upon *jurors*. The Court has established
14 constitutional standards that *states* must abide by to ensure that capital sentencing, while not
15 perfect, is conducted according to procedures designed to minimize the risk of arbitrariness.
16 Jurors are then presumed to follow the instructions they are given pursuant to those procedures.
17 This Court should deny the defendants' motion on this basis as well.

18 3. The CJP's conclusions that capital sentencing is "fatally flawed" are in
19 themselves fatally flawed.

20 In his motion, the defendant identifies seven so-called "fatal flaws" in capital sentencing
21 based on the CJP. Defense Motion, at 3-4. In the section that follows, the State will briefly
22 address each of these points.

23 a. Premature decision-making

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W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 The defendant contends that the CJP shows that approximately half of the jurors surveyed
2 made a decision on sentencing before the penalty phase began, and that approximately 30% of
3 the jurors decided that the sentence should be death. Defense Motion, at 19-20. Even assuming
4 these conclusions to be valid -- a point the State does not concede -- these statistics also
5 necessarily show that approximately 70% of the jurors surveyed either did not make an early
6 decision on sentencing or they decided early that the sentence should not be death. This is
7 certainly not sufficient to demonstrate beyond a reasonable doubt that the death penalty in
8 Washington is unconstitutional.

9 Moreover, in Washington, prospective jurors are instructed *before voir dire even begins*
10 in pertinent part as follows:

11 The laws of the State of Washington establish a two phase procedure for
12 determining whether or not the death penalty should be imposed.

13 In the first phase you must decide whether the State has proved the charge
14 of premeditated first degree murder with aggravating circumstances beyond a
15 reasonable doubt.

16 If a defendant is found not guilty of premeditated first degree murder with
17 aggravating circumstance [on all counts] during the first phase, [or is found guilty
18 of a lesser-included crime on all counts,] your service on this case will be
19 completed.

20 However, if you find the defendant guilty of the crime of premeditated
21 first degree murder with aggravating circumstances [on any count], then you will
22 be reconvened for a second phase called a sentencing phase.

23 During the sentencing phase proceeding you may hear additional evidence
24 and you will hear argument concerning the penalty to be imposed. You will then
retire to determine whether the death penalty should be imposed or whether the
punishment should be life in prison, without the possibility of release. In making
this determination, you will be asked the following question:

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W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
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1 Having in mind the crime of which the defendant has been found guilty,
2 are you convinced beyond a reasonable doubt that there are not sufficient
mitigating circumstances to merit leniency?

3 If you unanimously answer "yes" to this question, the sentence will be
4 death. If you do not unanimously answer "yes," or if you unanimously answer
"no," the sentence will be life imprisonment without the possibility of release or
5 parole.

6 A mitigating circumstance may be any relevant fact about the defendant or
7 the offense that suggests to you a reason for imposing a sentence other than death.
Mitigating circumstances will be defined more specifically at a later point. If you
8 find that the State has not proven the absence of sufficient mitigating
circumstances, the punishment will be life in prison, without the possibility of
release.

9 On the other hand, if you find that the State has met its burden of proof,
10 the penalty will be death. In order to find that the State has met its burden of
proof concerning the absence of sufficient mitigating circumstances, you must be
11 unanimous. If you are not unanimous, the defendant will not be sentenced to
death, but will receive a sentence of life in prison without possibility of release or
12 parole.

13 Because you may become a juror in this case and possibly be required to
14 participate in the sentencing phase determination involving the question of the
death penalty, each of you can expect to be individually questioned about your
15 views, if any, about the death penalty and the extent to which these views might
influence your decisions in this case.

16 WPIC 31.01.

17 In sum, Washington jurors are told in advance that the trial will be bifurcated, they are
18 told what they will be asked to decide in each phase of the trial, they are instructed that the State
19 has the burden of proving both guilt and the lack of sufficient mitigating circumstances beyond a
20 reasonable doubt, and they are generally informed as to what constitutes a mitigating
21 circumstance (*i.e.*, virtually anything). In this way, Washington courts minimize the risk that
22 jurors will reach premature conclusions about a case by informing them from the outset exactly

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1 what will be expected of them in terms of their decision-making. The CJP does not account for
2 this, and its conclusions are thus inapplicable.

3 The defendant asserts that the questionnaires filled out by 26 Highline Community
4 College students reveal that the Washington "mock jurors" were also inclined to "prematurely
5 decide the sentence." Defendant's Motion at 20. But the students who filled out Foglia's
6 questionnaire were not asked to render a verdict on punishment before the penalty phase. In fact,
7 the questionnaire never asked the students to reach a verdict at all -- and it never told the students
8 that they were acting as jurors of any kind, mock or otherwise. They were given a brief factual
9 scenario pertaining to a crime charged in a capital case, copies of WPIC instructions, and asked:

10 After the jury found Mr. Johnson guilty of aggravated murder but before you
11 heard any evidence or testimony about what the punishment should be, do you
12 think Mr. Johnson should be given...[a death sentence, a life sentence, or
13 undecided].

14 Exhibit PP, Defendant's Motion. It is hardly surprising that jurors may have opinions about a
15 case before that case is concluded. Indeed, this doubtless occurs in *any* case, not just capital
16 murder cases. As the defendant points out in his motion, jurors are subjected to upsetting and
17 sometimes gruesome evidence, and, in cases like his, they are presented with overwhelming
18 evidence of guilt. The defendant's argument based on the CJP and Foglia's questionnaire is
19 fundamentally flawed: the natural human response to strong evidence of guilt for a heinous
20 crime -- *i.e.*, having feelings and forming opinions -- does not make the decision ultimately
21 rendered unconstitutionally arbitrary. Indeed, if such were the case, then the jury system itself is
22 unconstitutional because it is made up of human beings.

23 b. Failure of jury selection to remove death biased jurors and overall
24 biasing effect of jury selection itself

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W554 King County Courthouse
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1 The defendant contends that the CJP identified a certain percentage of jurors who sat on
 2 capital cases "believing the death penalty was the only appropriate penalty for many of the kinds
 3 of murder." Defense Motion, at 25. However, the data cited do not indicate whether these jurors
 4 sat on cases involving the "kinds of murder" they purportedly "believed" should result in death,
 5 or whether, in spite of their purported beliefs, these jurors were able to set their personal feelings
 6 aside and decide the case according to the applicable law. The data most certainly do not
 7 indicate that these jurors lied in order to avoid disqualification with some nefarious purpose to
 8 affect the outcome of the case. The defendant's efforts to extrapolate the results of the CJP to
 9 Washington with Foglia's questionnaire (filled out by students, not jurors) are even more
 10 strained and implausible.

11 The fact that jurors and former jurors have beliefs about the death penalty is not
 12 surprising. This fact does not, however, make the death penalty unconstitutional beyond a
 13 reasonable doubt. The CJP does not suggest that statistically significant numbers of jurors are
 14 lying about their beliefs (and thus, committing misconduct) during voir dire in order to sit on a
 15 jury and sentence a defendant to death based on those beliefs. And again, it bears mentioning
 16 that because the CJP did not survey any jurors in Washington -- and, Foglia's questionnaire
 17 notwithstanding, no credible survey of Washington jurors has been conducted -- there is no
 18 evidence that categorically pro-death jurors are being seated in Washington cases. Indeed, the
 19 only case in which something like this has happened in Washington involved a juror who
 20 apparently lied about his *opposition* to the death penalty during voir dire in order to obstruct its
 21 imposition. That case resulted in a verdict of 11 to 1 in favor of death, and thus, a life sentence.²⁰

22
 23 ²⁰ See Appendix B (Report of the Trial Judge, *State v. James Dykgraaf*, No. 86-1-00111-5), p.13.
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1 Moreover, given that the CJP jurors were questioned a decade after their jury service was
2 complete, the life-changing experience of sitting as a juror on a capital case likely contributed to
3 the jurors' purported beliefs in the first instance.

4 In sum, as is the case with each of the CJP's alleged findings, the conclusion does not
5 logically flow from the factual premise asserted.

6 Nonetheless, the defendant further asserts that the process of "death qualification"
7 produces juries that are biased in favor of guilt. Defense Motion, at 26-28. Washington courts
8 have repeatedly rejected this argument. *See, e.g., State v. Brown*, 132 Wn.2d 529, 593-01, 940
9 P.2d 546 (1997); *State v. Rupe*, 101 Wn.2d 664, 695-96, 683 P.2d 571 (1984); *State v. Peyton*,
10 29 Wn. App. 701, 707-10, 630 P.2d 1362, rev. denied, 96 Wn.2d 1024 (1981). As the
11 Washington Supreme Court has explained, the goal of voir dire is to select a jury that will follow
12 the law, including the death penalty, not to select a jury more or less likely to acquit the
13 defendant:

14 Tied to the defendant's due process claim is his further claim that the death
15 qualification procedure deprived him of an impartial jury. The State as well as
16 the accused has the right to an impartial jury. Impartiality requires not only
17 freedom from jury bias against the accused and for the prosecution, but freedom
18 from jury bias for the accused and against the prosecution. The voir dire process
19 is designed to cull from the venire persons who demonstrate that they cannot be
20 fair to either side of the case.

21 The guarantee of impartiality cannot mean that the state has a right to
22 present its case to the jury most likely to return a verdict of guilt, nor
23 can it mean that the accused has a right to present his case to the jury
24 most likely to acquit. But the converse is also true. The guarantee
cannot mean that the state must present its case to the jury least likely
to convict or impose the death penalty, nor that the defense must

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1 present its case to the jury least likely to find him innocent or vote for
2 life imprisonment.

3 . . . The logical converse of the proposition that death-qualified
4 jurors are conviction prone is that non-death-qualified jurors are
5 acquittal prone, not that they are neutral.

6 [Smith v. Balkcom, 660 F.2d 573, 579 (5th Cir. 1981), *modified on other grounds*,
7 671 F.2d 858 (5th Cir.).]

8 The United States Supreme Court similarly declined to conclude that
9 jurors who can be fair to both sides of a case are not impartial.

10 [T]he Constitution presupposes that a jury selected from a fair cross-
11 section of the community is impartial, regardless of the mix of
12 individual viewpoints actually represented on the jury, so long as the
13 jurors can conscientiously and properly carry out their sworn duty to
14 apply the law to the facts of the particular case.

15 [Lockhart v. McCree, 476 U.S. 162, 183-84, 106 S. Ct. 1758, 90 L. Ed. 2d 137
16 (1986)]. We thus decline, as did the Fifth Circuit, to define "impartial" as "a
17 middle ground that involves a jury with persons who are in effect defendant
18 prone."

19 [Hughes, 106 Wn.2d at 185-86 (footnotes omitted) (alterations in citations added) (other
20 alterations in original)].

21 Lastly, it bears mentioning that the evidence against the defendant in this case is
22 exceedingly strong. Accordingly, it is exceedingly unlikely that factual innocence will be raised
23 as a defense to these crimes. Therefore, even if the CJP were correct in its conclusion that death-
24 qualified jurors are generally more guilt-prone than non-death-qualified jurors -- a point the State
does not concede -- it is difficult to envision how that would render the death penalty
unconstitutional beyond a reasonable doubt *in this case*.

c. Capital jurors fail to comprehend and/or follow penalty
instructions.

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W554 King County Courthouse
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Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 The defendant next asserts, based on the CJP, that a number of jurors surveyed did not
2 understand their penalty phase instructions, particularly as to the role of mitigation. Defense
3 Motion, at 29-33. This is one argument in particular where the CJP's purported findings cannot
4 be credibly extrapolated to Washington.

5 First of all, Washington is a "non-weighting" state, meaning that the jury is not instructed
6 to weigh the mitigating and aggravating circumstances and decide which is weightier. Rather,
7 Washington expressly and unequivocally instructs its juries (including before voir dire) that the
8 State has the burden of proving beyond a reasonable doubt that there are not sufficient mitigating
9 circumstances to merit leniency. WPIC 31.01; WPIC 31.02; WPIC 31.05; WPIC 31.06. In
10 addition, as previously noted, Washington is unique among states in instructing jurors that there
11 is a presumption of leniency that must be overcome by evidence beyond a reasonable doubt, and
12 that the exercise of mercy in itself can be a reason to spare the defendant from the death penalty.
13 WPIC 31.05; WPIC 31.07. Given the manner in which Washington instructs its juries, and given
14 the significant differences between Washington's instructions and those given in other states, the
15 CJP's conclusion that jurors do not understand their instructions in cases in other states does not
16 support a similar conclusion here.

17 Also, as the Washington Supreme Court has stated,

18 While we do not question that jury instructions in any death penalty case
19 are complicated and lengthy, it is out of an abundance of caution for the
20 defendant's rights that we are so precise. The argument discussed above
21 regarding jury unanimity is graphic evidence of the need for detailed instructions.
22 Precision necessarily entails complexity. We cannot fault trial judges for failing
23 to carefully instruct a jury, and then find error because the instructions are too
24 complicated. The complex nature of the jury instructions is not, in and of itself,
an instructional error of constitutional magnitude warranting review for the first
time on appeal.

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W554 King County Courthouse
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Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 State v. Lord, 117 Wn.2d 829, 880-81, 822 P.2d 177 (1991).

2 The defendant asserts that the questionnaires answered by 26 college students
3 demonstrates that "Washington mock jurors" are alarmingly incapable of understanding the law.
4 But this was a homework assignment -- these were not jurors who had been questioned by the
5 parties during extensive voir dire, had been sworn, had repeatedly been instructed by the court,
6 had heard the arguments of counsel, and had deliberated together to reach a verdict. The
7 defendant retained another "expert" in support of his argument that Washington's pattern
8 instructions are unfathomable to jurors. He claims that "Dr. Stygall determined that
9 Washington's Pattern Jury Instructions for capital cases are extremely flawed and poorly
10 written." Defense Motion at 44.

11 Dr. Stygall is certainly no stranger to poor writing:

12 Throughout this introductory instruction to the jurors about evidence, what
13 evidence consists of, what is excluded from evidence and judgments about
14 witnesses, the listening/reading jurors jumps [sic] from what the court considers
15 evidence and law and that [sic] the jurors must follow the court's rules.²¹

16 Defense Motion, Exhibit B, Declaration of Gail Stygall, page 9. What Stygall seems to find
17 most offensive about WPIC 31.03 is the following paragraph:

18 The order of these instructions has no significance as to their relative importance.
19 They are all important. In closing arguments, the lawyers may properly discuss
20 specific instructions. During your deliberations, you must consider the
21 instructions as a whole.

22 This seemingly straightforward paragraph provokes Stygall to make the following extravagant
23 claim:

24 ²¹ As Stygall observes elsewhere, "Whatever the reason, readers have more difficulty
understanding multiply [sic] embedded sentences than they do short, simple sentences."
Declaration of Stygall at 13.

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W554 King County Courthouse
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1 The statement made in the instructions that the order does not matter is simply impossible
2 cognitively. Order matters in every sort of thinking and “ordering” order away does not
change the need for order.²²

3 Stygall Declaration at 10. Apparently Stygall finds the paragraph from WPIC 31.03 “impossible
4 cognitively” because she interprets it to mean that the order of words in each instruction – rather
5 than the order in which the instructions as a whole are read to the jury – does not matter. But is
6 Stygall’s confusion likely to be shared by Washington jurors? Is Stygall’s confusion a reason to
7 find a Washington criminal statute unconstitutional?

8 Stygall is also troubled by the concluding sentence in WPIC 31.07:

9 The appropriateness of the exercise of mercy is itself a mitigating factor you may
10 consider in determining whether the state has proved beyond a reasonable doubt
that the death penalty is warranted.

11 This instruction would seem rather favorable to a defendant – it reminds the jury that the
12 prosecution has the burden of proof beyond a reasonable doubt and authorizes the jury to be
13 merciful. But according to Stygall, the instruction omits a critical word that she provides, with
14 emphasis:

15 The appropriateness if [sic] the exercise of mercy is itself a mitigating factor
16 [THAT] you may consider in determining whether the state has provide [sic]
beyond a reasonable doubt that the death penalty is warranted.

17 Stygall Declaration at 11 (emphasis in original). Stygall declares: “The emphasis lost for the lay
18 reader in the missing *that* may make the mercy factor less important.” This proposition is
19 unsupported by authority or argument.

20 Stygall’s principal assertion is not limited to the defendant’s case, or to capital
21 prosecutions. She asserts: “[J]ury instructions in general are poorly understood by jurors, with

22 ²² Given the quality of Stygall’s writing, it is perhaps a blessing that her criticism of the WPICs
23 is unaccompanied by any examples of how they might be improved.

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W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
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1 comprehension scores on many instructions well below 50%....Among the group of academic
2 scholars in the area, there is no and was no dispute about whether jurors understood instructions:
3 they didn't." Stygall Declaration at 6.

4 Jury instructions generally and instructions in capital cases should always be considered
5 for improvement. But Sytgall's principal argument – that jurors do not understand instructions –
6 is, like the conclusions of the CJP, an indictment of the jury system itself, not the
7 constitutionality of Chapter 10.95 RCW. As such, it is without merit.

8 d. Jurors believe they are required to return a verdict of death

9 On its face, the CJP's conclusion in this regard is based on "the misconception that the
10 law requires the death penalty if the evidence establishes that the murder was 'heinous, vile or
11 depraved' or the defendant would be 'dangerous in the future.'" Defense Motion, at 33-34.
12 Nowhere in Washington's jury instructions do the words "heinous, vile or depraved" appear.
13 Also, the question of the defendant's potential future dangerousness is phrased as a consideration
14 in *mitigation*, not aggravation; the relevant instruction states that the jury may consider in
15 mitigation that "[t]he defendant is unlikely to pose a danger to others in the future[.]" WPIC
16 31.07 (Appendix A). Moreover, as previously discussed, Washington jurors are instructed
17 repeatedly that a death sentence will be imposed only if the jury finds unanimously that the State
18 has proved beyond a reasonable doubt that there are not sufficient mitigating circumstances to
19 merit leniency. Accordingly, it strains the bounds of logic and common sense to suggest that
20 Washington jurors would believe that the death penalty is mandatory based on two factors that
21 they are not asked to consider.

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W554 King County Courthouse
516 Third Avenue
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1 But for some reason, the questionnaire Foglia drafted for the college students that
2 comprised her survey included this inquiry, explicitly related to the "Guilt Phase of the trial:"

3 6. After reviewing the judges instructions, do you believe that the law
4 requires you to impose a death sentence if the evidence proved that...[the
defendant's] conduct was heinous, vile, or depraved?

5 Motion, Exhibit PP, questionnaire page 4.

6 This question is transparently an effort to bootstrap the CJP's findings to Washington
7 jurors. But the WPIC submitted to the students never defined the terms "heinous, vile, or
8 depraved." The students were left to imagine what the words meant, and whether the conduct
9 the words might describe warranted the death penalty. No significance can be attributed to their
10 answers to that question.

11 e. Jurors evade responsibility for the punishment decision

12 The CJP concluded that a significant number of jurors surveyed did not "view themselves"
13 as most responsible for the decision they make." Defense Motion, at 35. The defendant claims
14 that Foglia's survey of 26 Washington students supports the same conclusion. This conclusion is
15 fundamentally flawed, because it is based on a faulty premise drawn from poorly-worded survey
16 questions.

17 In asking jurors who they think is "most responsible" for the sentence, the CJP apparently
18 reports that close to half of them answered "the defendant," and Foglia determined that more
19 than half of the Washington students came to the same conclusion. Defense Motion, at 35-36.
20 But contrary to what the defendant asserts, this is a correct answer. It is not wrong to assert a
21 defendant who has been found, beyond a reasonable doubt, to have committed aggravated
22 murder in the first degree is the person who is primarily responsible for the punishment for that

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1 crime. Had the defendant not committed the crime, there would be no punishment. Given the
2 question that the CJP jurors and the Washington students were apparently asked, answering that
3 the defendant is the most responsible for whatever sentence he or she received is a completely
4 valid response. To translate these responses into a conclusion that jurors do not take their duties
5 seriously, or worse, that they are cavalier in their decision-making in death penalty cases, is
6 simply absurd.

7 Washington jurors are instructed that if they answer the applicable question in the
8 affirmative, "the sentence will be death." WPIC 31.06 This Court should soundly reject the
9 notion that the jurors called upon to answer this question will not solemnly and seriously
10 discharge their duties.

11 f. The continuing influence of race on juror decision-making

12 The defendant asserts that one of the "fatal flaws in the application of the death penalty in
13 real life" is "racism." He asserts that he is a black and his victim was white, and therefore,
14 apparently, "race is an issue in this capital case." Defense Motion at 38. What does this mean?
15 There is ample evidence that the defendant targeted Timothy Brenton (and Britt Sweeney)
16 because they were police officers. There is no evidence that he targeted them because they were
17 white. There is no evidence that the defendant set bombs to explode when firemen and police
18 responded to the arson fire because he believed or knew the race(s) of his intended victims. And
19 there is no evidence that, when he faced arrest, he attempted to kill Sergeant Nelson because
20 Nelson is white.

21 The defendant provides no factual support for his contention that "race is an issue in this
22 capital case." Instead, he is asserting a statistical correlation: "the data informs us that in the

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W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 context of this case, race will contribute to a greater likelihood of imposition of a death
2 sentence.” Defense Motion at 38. Later, the defendant provides a single statistic in support of
3 this claim, asserting that “since 1981, 18% of the defendants in death penalty cases in
4 Washington have been black, yet blacks only comprise 3.2% of the population.” Defense Motion
5 at 49.

6 The allegation that the death penalty is imposed in Washington on the basis of race has
7 been considered and rejected by the Washington State Supreme Court, most recently in State v.
8 Davis, 2012 WL 4122905 (Sept. 20, 2012). In that case, the Court rejected Davis’ statistical
9 arguments that his death sentence violated the Eighth Amendment because the penalty is
10 imposed in a racially disparate manner.

11 We begin with the observation that the likelihood of a white defendant receiving the
12 death penalty in Washington is practically the same as the likelihood of a black defendant
13 receiving it: 837 of the 57 cases (14 percent) involving an eligible black defendant
14 resulted in a sentence of death, compared to 2539 of the 184 cases (14 percent) involving
15 an eligible white defendant. This court needs no convincing that “[w]e cannot ignore
16 whether the defendant’s race becomes a significant factor in imposing the death penalty.”
17 However, our review of prosecutions for aggravated first degree murders does not reveal
18 that black defendants “have in fact been treated differently,” *id.*, and it certainly does not
19 show that the “sentence of death” in this case is “excessive or disproportionate to the
20 penalty imposed in similar cases.”

21 *Id.*, slip opinion at 35 (footnotes and citation omitted).

22 Based on generalizations regarding both race and gender, the CJP has concluded that
23 white males are more likely to impose the death penalty than African-American males. Defense
24 Motion, at 40-41. Even putting aside the questionable value of such generalizations as applied in
any individual case, they are clearly not a basis upon which to find Chapter 10.95 RCW
unconstitutional.

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Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 First, regional differences among the jurisdictions surveyed by the CJP versus King
2 County, Washington have not been and cannot be accounted for. In other words, jurors in Texas
3 or Alabama are unlikely to reflect the same general social and political views as jurors in King
4 County. For that matter, jurors in Northern California are unlikely to reflect the same general
5 views as jurors in Central or Southern California, as jurors in Spokane County likely do not
6 reflect the views of jurors in King County. In short, any attempt to extrapolate such generalized
7 conclusions to every jurisdiction in the country based on interviews with jurors in 13 or 14
8 selected states is speculative at best.

9 Second, this argument is essentially the same argument made in McClesky v. Kemp, but
10 with a slightly different focus (*i.e.*, the race and gender of the jurors, as opposed to the race of the
11 defendant and/or the victim). As was true in McClesky with the Baldus study, all the CJP can
12 demonstrate (assuming the data are valid) is a potential risk that the race and/or gender of as-yet-
13 unselected jurors might have some impact on the outcome of a case. Under McClesky, this is
14 not a sufficient showing to declare the death penalty in Washington unconstitutional.

15 In this case, there is no reason to believe that a King County jury will make its
16 determination in the guilt or penalty phase of the defendant's trial on the basis of race; to suggest
17 otherwise is unsupported by any relevant statistical evidence, and gratuitously offensive to the
18 people of King County.

19 g. Jurors significantly underestimate the alternative to death

20 Based on its juror interviews, the CJP has concluded that the "sooner jurors think a
21 defendant will be released from prison, the more likely they are to vote for death[.]" Defense
22 Motion, at 38. Washington jurors are explicitly instructed that

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Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 A person sentenced to life imprisonment without the possibility of release
2 or parole shall not have that sentence suspended, deferred, or commuted by any
3 judicial officer. The Indeterminate Sentencing Review Board or its successor
4 may not parole such prisoner nor reduce the period of confinement in any manner
5 whatsoever including but not limited to any sort of good-time calculation. The
6 Department of Corrections or its successor or any executive official may not
7 permit such prisoner to participate in any sort of release or furlough program.

8 WPIC 31.06. It is difficult to envision how much clearer it could be made that a defendant who
9 is not sentenced to death will spend the rest of his or her life in prison. Nevertheless, the
10 defendant cites Foglia's survey of paralegal students for the proposition that Washington jurors
11 would suffer this misconception. The students were asked:

- 12 4. How long do you think someone not given the death penalty for a capital
13 murder in this state usually spends in prison?

14 The median response was 42.5 years – nearly twice the median of any state that was part of the
15 CJP. But the defendant apparently cites this as evidence that jurors “tend to grossly
16 underestimate how long capital murderers not sentenced to death usually stay in prison.”
17 Defendant's Motion at 38. How many years does someone convicted of aggravated murder in
18 Washington and given a sentence of life spend in prison? Is 42.5 years a “gross
19 underestimation” or a reasonable answer?

20 The defendant argues that Washington's-pattern jury instructions “suggest that a verdict
21 of life must be unanimous.” Defense Motion, at 44. In support of this, the defendants cite WPIC
22 31.08, which states *in its current form*,

23 You must answer one question. All twelve of you must agree before you
24 answer the question “yes” or “no.” *If you do not unanimously agree then answer*
“no unanimous agreement.” When you have arrived at an answer, fill in the
verdict form to express your decision.

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WS54 King County Courthouse
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1 WPIC 31.08 (emphasis supplied). The defendant argues that this instruction is "substantially
2 similar" to one found infirm by the Ninth Circuit:

3 You must answer one question. All twelve of you must agree before you
4 answer a question "yes" or "no." When all of you have agreed, fill in the answer
to the question in the verdict form to express your decision.

5 Defense Motion, at 44 (citing Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992)).

6 These two instructions are indeed "substantially similar" in the sense that they contain
7 many of the same words. But they are fundamentally different in every way that matters so far
8 as the Ninth Circuit was concerned. The current instruction makes clear to the jurors that "no
9 unanimous agreement" is a valid option, and that option will result in a life sentence. *See* WPIC
10 35.09 (special verdict form). In other words, the two instructions are similar only if their
11 material differences are ignored.

12 Lastly, the defendant points to a jury question in the Connor Schierman case regarding
13 the possibility of clemency or a pardon and argue that this demonstrates that jurors in
14 Washington underestimate the alternative to the death penalty. Defense Motion, at 46-47. But
15 this question from the Schierman jurors demonstrates nothing other than the jurors' desire to
16 have as much information as possible about sentencing at its disposal. It does not show, as the
17 defendant contends, that jurors "wrongly believe that a life sentence would allow the defendant
18 to go free after a period of time," for the obvious reason that it is indeed possible (albeit
19 extraordinarily unlikely) for a former death-row inmate to receive clemency or be pardoned.

20 4. The defendant's arguments based on the Washington Constitution are
21 contrary to existing authority and without merit.

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W554 King County Courthouse
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Seattle, Washington 98104
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1 The defendant contends that Article 1, section 14 of the Washington Constitution affords
2 broader protection than the Eighth Amendment, and he offers additional arguments in favor of
3 his contention that Chapter 10.95 RCW is unconstitutional. This claim should also be rejected.

4 The defendant cites State v. Bartholomew, 101 Wn.2d 631, 639-42, 683 P.2d 1079
5 (1984) ("Bartholomew II"), for the proposition that Article I, section 14 of the Washington
6 Constitution provides greater protection for capital defendants than the Eighth Amendment.
7 Although Bartholomew II did reach this conclusion in the context of whether uncharged or un-
8 convicted criminal conduct should be admitted during the penalty phase, the Washington
9 Supreme Court has more recently held that the state's Cruel Punishment Clause is coextensive
10 with the Eighth Amendment and provides no greater protection in other contexts regarding the
11 death penalty. See Dodd, 120 Wn.2d at 20-22 (holding that the Gunwall factors "do not demand
12 that we interpret Const. art. 1, § 14 more broadly than the Eighth Amendment" on the issue of
13 whether a death penalty defendant can waive all appellate review other than that required under
14 Chapter 10.95 RCW); Yates, 161 Wn.2d at 792 (holding that the Gunwall factors dictate that the
15 state Cruel Punishment Clause and the Eight Amendment are coextensive in the context of
16 considering the defendant's claim that the death penalty statute is "arbitrary," citing Dodd).

17 In this case, the defendant claims that Washington's death penalty statute is
18 unconstitutional because, according to the CJP, it is applied in an arbitrary fashion. As such, the
19 defendant's claim most closely resembles the claim made in Yates. It in no way resembles the
20 claim made in Bartholomew II. Moreover, it is certainly worth noting that Bartholomew II is a
21 pre-Gunwall case, and the court's post-Gunwall jurisprudence holds that the relevant clauses of
22 the state and federal constitutions are interpreted in the same manner. Therefore, this Court

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W554 King County Courthouse
516 Third Avenue
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(206) 296-9000, FAX (206) 296-0955

1 should reject the defendant's claim that the state constitution should be interpreted more broadly
2 than the federal constitution in this context, in accordance with Yates.

3 Next, the defendant cites the CJP's purported "fatal flaws" and asks this Court to consider
4 them anew in light of the state constitution. Defense Motion, at 40-41. Again, relevant
5 Washington case law holds that the state and federal constitutions provide the same protections
6 when the defendant claims that the death penalty is unconstitutionally arbitrary. *See Yates*,
7 *supra*. But in any event, the CJP's conclusions are without merit no matter which constitution is
8 considered. In other words, conclusions based on faulty premises or contrary to controlling law
9 do not become meritorious under a different governing document.

10 Next, the defendant cites a number of cases to support his argument that the state
11 constitution is offended by the death penalty, but none of them are on point. Defense Motion, at
12 41-42. For instance, in State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980), the defendant was
13 sentenced to life in prison as a habitual criminal for three crimes involving petty fraud from
14 which the defendant obtained a total of less than \$470. Fain, at 397-98. This is clearly not the
15 same as ambushing and murdering an on-duty police officer sitting in his patrol car. The other
16 cases cited by the defendants are similarly unhelpful.

17 As the defendant correctly notes, In re Personal Restraint of Brett, 142 Wn.2d 868, 16
18 P.3d 601 (2001), involved a claim of ineffective assistance of counsel; thus, it has no bearing on
19 the issue before this Court. Also, State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000), held that
20 the death penalty could not be imposed on an accomplice in the absence of "major participation
21 by a defendant in the acts giving rise to the homicide[.]" Roberts, at 505. This is not an issue
22 before the Court, either.

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W554 King County Courthouse
516 Third Avenue
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1 In State v. Davis, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000), the court noted that the
2 defendant was entitled to a fair trial before an unbiased jury. However, after conducting a
3 lengthy analysis of the relevant case law and the record, the court concluded that Davis had not
4 shown that racial prejudice was a significant factor in his case, and that the jury selection process
5 was fair. Davis, at 826-38. This case is of no help to the defendant. And while State v. Walden,
6 131 Wn.2d 469, 932 P.2d 1237 (1997), notes that jury instructions that misstate the law are
7 erroneous, the defendant has not shown that Washington's capital jury instructions are in any
8 way infirm.

9 In State v. Rhodes, 82 Wn. App. 192, 917 P.2d 149 (1996), the court noted the well-
10 settled principle that peremptory challenges cannot be exercised on the basis of race, but the
11 court held that the prosecutor's challenge to the only African-American in the venire was proper
12 because it was exercised for race-neutral reasons. In State v. Burch, 65 Wn. App. 828, 830 P.2d
13 357 (1992), the court held that gender discrimination in jury selection offends the constitution.
14 Neither of these cases inform this Court's analysis.

15 Finally, the defendant cites State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001), for the
16 proposition that a death penalty proceeding must be "fundamentally fair." The issue in Clark
17 was the introduction of not only the defendant's prior conviction for unlawful imprisonment
18 during the penalty phase, but the testimony of a police officer describing the underlying offense,
19 which involved the abduction of a small child. This was reversible error. Id. at 782-83. Again,
20 however, this case does not inform this Court's analysis.

21 Next, the defendant points to some studies that he claims demonstrate the flaws in
22 Washington's death penalty scheme. Defense Motion, at 48-50. As a preliminary matter, none

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W354 King County Courthouse
516 Third Avenue
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1 of these studies provides a basis to find Chapter 10.95 RCW unconstitutional or to strike the
2 death penalty in these cases; rather, these studies are policy documents that would be more
3 appropriately addressed to the legislature. But in any event, these studies are of dubious value.

4 First, it should be no surprise that the ACLU has concluded that Washington's death
5 penalty scheme "is fraught with error," given that a key part of the ACLU's agenda is the
6 abolition of the death penalty, which its website describes as "the ultimate denial of civil
7 liberties." See Appendix C (Capital Punishment page from the ACLU's website).

8 Second, the defendant cites the Washington Supreme Court's report from 2000, in which
9 retired Justice Richard Guy correctly notes that "[c]ourts at all levels make every effort to
10 prevent wrongful convictions and guarantee fairness." Defense Motion, Exhibit VV. This
11 supports the State's position that Washington's death penalty scheme is constitutionally robust.
12 Justice Guy's report further notes that the death penalty is expensive. Id. This does not support
13 the notion that the death penalty is unconstitutional, but again, is an argument that should be
14 addressed to the legislature.

15 Third, the defendant cites the report of the Washington State Bar Association's "Death
16 Penalty Subcommittee of the Committee on Public Defense," which noted that a number of
17 appellate reversals of death sentences, and again, that the death penalty is expensive. Defense
18 Motion, Exhibit TT. The number of appellate reversals could mean one of two things, neither of
19 which is helpful to the defendants' position in this case: 1) that the system is functioning as
20 intended, and courts are scrutinizing death penalty cases carefully and applying a heightened
21 standard of review (which benefits defendants); or 2) that courts are going out of their way to
22 find reasons to overturn death sentences (which benefits defendants). Either way, this does not

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W554 King County Courthouse
516 Third Avenue
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(206) 296-9000, FAX (206) 296-0955

1 demonstrate that the death penalty is unconstitutional. And again, the fact that the death penalty
2 is expensive is an issue for the legislature.

3 Next, the defendant argues that recent polling demonstrates that support for the death
4 penalty is waning, and thus, that "evolving standards of decency" provides a basis to conclude
5 that the death penalty should be found unconstitutional. Defense Motion, at 50-51. As support
6 for this proposition, the defendant cites a poll conducted by the Death Penalty Information
7 Center ("DPIC") concluding that Americans are "losing confidence in the death penalty."
8 Defense Motion, at 53 (citing Exhibit UU). As is true of the ACLU, the DPIC is an organization
9 that advocates for the abolition of the death penalty; as such, its poll is of dubious value and, as
10 one pro-death penalty commentator has noted, was flawed from the start based on the wording of
11 the questions asked. See Appendix D (Crime and Consequences blog, "Predictable DPIC Poll on
12 the Death Penalty").

13 In sum, the defendant has provided no basis upon which this Court could conclude,
14 beyond a reasonable doubt, that Chapter 10.95 RCW runs afoul of the state constitution.

15 D. SEPARATE JURIES ARE NOT AUTHORIZED BY STATUTE, AND THUS,
16 THIS SUGGESTED PROCEDURE IS NOT AVAILABLE ACCORDING TO
17 STATE SUPREME COURT PRECEDENT AND WOULD CONSTITUTE
REVERSIBLE ERROR.

18 The defendant claims that the Court has the authority to hold separate trials for the guilt
19 and penalty phases of his trial because the CJP evidence (and, presumably, the "studies"
20 conducted by Foglia and Stygall) are the "functional equivalent of the 'unforeseen
21 circumstances' that would warrant convening a second jury pursuant to RCW 10.95.050 (3)."
22 Defense Motion at 51.

23 RCW 10.95.050 (3) provides:

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Daniel T. Satterberg, Prosecuting Attorney
W354 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 If the defendant's guilt was determined by a jury verdict, the trial court shall
2 reconvene the same jury to hear the special sentencing proceeding. The
3 proceeding shall commence as soon as practicable after completion of the trial at
4 which the defendant's guilt was determined. If, however, unforeseen
5 circumstances make it impracticable to reconvene the same jury to hear the
6 special sentencing proceeding, the trial court may dismiss that jury and convene a
7 jury pursuant to subsection (4) of this section.

8 Having endeavored to persuade the court that the WPIC are incomprehensible to Washington
9 jurors, the defendant uses a similar tactic, and tries to subvert the plain meaning of a criminal
10 statute. The "unforeseen consequences" contemplated by RCW 10.95.050 (3) are those that
11 develop after the jury returns its verdict of guilt -- they do not include arguments advanced by the
12 defendant before the trial begins. Unforeseen circumstances include, for example a remand on
13 the death penalty question, as in State v. Bartholomew, 104 Wn.2d 844, 710 P.2d 196 (1985).

14 "[A]bsent unforeseen circumstances, the trial court is required to reconvene the same jury
15 for the penalty phase of the trial." State v. Mak, 105 Wn.2d 692, 718 P.2d 407 (1986),
16 reconsideration denied, certiorari denied, 107 S.Ct. 599, habeas corpus granted, 754 F.Supp
17 1490, affirmed and remanded 970 F.2d 614, certiorari denied 113 S.ct. 1363, affirmed and
18 remanded 972 F.2d 1340 (jury heard evidence in guilt phase of defendant's involvement in
19 robberies that he was not charged with; this was not an "unforeseen circumstance" warranting a
20 new jury for penalty phase).

21 In State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), *overruled on other grounds*,
22 Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), the
23 Washington Supreme Court held that the trial court lacked the authority to convene a jury to
24 determine the existence of aggravating factors in the wake of Blakely v. Washington, 542 U.S.
296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In the absence of an express statutory procedure

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1 that would allow for convening a jury on aggravating factors, the court reasoned, the court was
2 not at liberty to create one because to do so would "usurp the power of the legislature." Hughes,
3 154 Wn.2d at 151-52.

4 The court reiterated in State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007),
5 that the judiciary did not have the "inherent authority" to empanel a jury for the purpose of
6 considering aggravating factors under the Sentencing Reform Act because the legislature had not
7 expressly provided for such a procedure. In reaching this conclusion yet again, the court cited
8 State v. Martin, 94 Wn.2d 1, 7, 614 P.2d 164 (1980), wherein the court had held that it would not
9 "imply a 'special sentencing provision' that would allow the death penalty to apply to those who
10 pleaded guilty, in the absence of any statutory provision allowing a jury to be empanelled
11 following a guilty plea." Pillatos, 159 Wn.2d at 469. As the court noted, "[w]e said [in Martin]
12 we '[did] not have the power to read into a statute' such a provision, and that the statute did not
13 allow us to convene a jury solely to consider death." Pillatos, 159 Wn.2d at 469-70 (quoting
14 Martin, 94 Wn.2d at 8) (alteration within internal quotation marks in original, other alterations
15 supplied).

16 There are no unforeseen circumstances here. Therefore, it is very likely that if this Court
17 were to adopt the defendants' request for separate juries, that procedure would be declared
18 invalid on appeal. Indeed, the Washington Supreme Court observed in 1986 that separate juries
19 for the guilt and penalty phases of a capital trial was "not possible" because the applicable statute
20 "mandates" a single jury. Hughes, 106 Wn.2d at 187, 721 P.2d 902 (1986). Even though the
21 defendants' current lawyers invite consideration of that procedure, an appellate claim would
22 doubtless assert ineffective assistance of counsel for recommending a prohibited procedure.

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W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 Given the Washington Supreme Court's prior holdings that it will not imply a sentencing
2 procedure where one does not expressly exist in the statute, the likely outcome would be to
3 invalidate the penalty phase verdict if that verdict were to be in favor the death penalty.

4 The defendant notes two decisions by trial courts in New Mexico to convene separate
5 juries for the guilt and penalty phases, and he urges this Court to do the same. Defense Motion,
6 at 53-55. As discussed, separate juries are simply not an option in these circumstances under
7 Washington law, and thus, granting the defendants' request for separate juries would result in
8 reversible error.

9 Moreover, the fact that two trial courts in New Mexico have found the CJP study to be a
10 sufficient basis to grant such a request should be outweighed by the fact that other courts have
11 found it to be an insufficient basis to either convene separate juries or dismiss a death notice.

12 As noted in footnote 3, a number of federal trial courts have rejected requests for separate
13 juries or motions to declare the death penalty constitutional based on the CJP. See United States
14 v. Llera Plaza, 179 F.Supp.2d 444, 450 n. 5 (E.D. Penn. 2001); United States v. Regan, 228
15 F.Supp.2d 742, 746-747 (E.D. Va. 2002); United States v. Sablan, 2006 WL 1028780, *8
16 (D.Colo. 2006) (not reported in F.Supp.2d); United States v. Mikos, 2003 WL 22110948, *17-18
17 (N.D.Ill. 2003) (not reported in F.Supp.2d); Riel v. Avers, Jr., 2008 WL 2008 1734786, *15-16
18 (E.D. Cal. 2008). This is true of at least three state courts as well.

19 For example, in State v. Azania, 865 N.E.2d 994 (Ind. 2007), the Indiana Supreme Court
20 rejected the assertion supported by the CJP that "the bias in favor of the death penalty becomes
21 unavoidable and overwhelming" because the defendant had been in prison for so long awaiting
22 retrial that the jurors would assume his "future dangerousness." Azania, 865 N.E.2d at 1007-08.

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W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
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1 In rejecting the CJP's position, the court correctly observed that jurors are presumed to follow
 2 their instructions, and that "future dangerousness" is not an aggravating circumstance under
 3 Indiana law. Id. The same is true in Washington.

4 In Wade v. State, 41 So.3d 857 (Fla. 2010), the Florida Supreme Court rejected the CJP's
 5 conclusions that "death-qualification" results in a biased jury and that capital jurors make
 6 premature decisions about sentencing. Wade, 41 So.3d at 872-74. The court found both of these
 7 arguments squarely at odds with United States Supreme Court precedent, and in conflict with
 8 state law requiring a single jury for both phases of a capital trial. Id. The same is true in
 9 Washington.

10 Finally, it bears mentioning that a California appellate court has recently held as follows:

11 We need not analyze or discuss in detail Dr. Foglia's testimony and the
 12 voluminous exhibits Lewis presented in support of his motion. As already noted,
 13 both the California Supreme Court and the United States Supreme Court have
 14 "rejected the claim that separate juries are required [in capital sentencing cases]
 15 because jurors who survive the jury selection process in death penalty cases are
 16 more likely to convict a defendant." [citation omitted] Even if we were to
 17 assume the research Lewis presented was valid, it fails to show a demonstrable
 18 reality that any of the jurors *in this case* would be unable to follow the law as set
 19 forth in the court's instructions or would refuse to listen to and to weigh the
 20 evidence in an appropriate manner and is thus insufficient to constitute good
 21 cause within the meaning of section 190.4(c). [citation omitted] In this regard,
 22 we agree with the court's finding, in denying Lewis's motion to declare the death
 23 penalty unconstitutional, that Lewis's "reliance on the [CJP] Study, interpretation
 24 and analysis at best only demonstrates a *potential* risk of premature decision
 making in death penalty cases," and Lewis "has not proved that inappropriate
 factors will, in fact, play a role in [his] case."

20 People v. Lewis, 2010 WL 1317881 (Cal. App. 4th Dist. 2010) (not reported in Cal. Rptr. 3d)

21 (citations omitted, other alterations and emphasis in original).

22 In sum, the suggestion that separate juries could be convened for the guilt and penalty
 23 phases would be highly unlikely to survive appellate scrutiny given the relevant authorities set

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 W354 King County Courthouse
 516 Third Avenue
 Seattle, Washington 98104
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1. forth above. This Court should reject the defendants' suggestion to build reversible error into
 2. these proceedings. Accordingly, this Court must decide instead whether the defendants have
 3. carried the burden of showing that Chapter 10.95 RCW is unconstitutional beyond a reasonable
 4. doubt based on the purported conclusions of the CJP. For the reasons set forth below, the answer
 5. to this question is a resounding "no."

6. A. THE COURT SHOULD DECIDE THIS MOTION WITHOUT AN
 7. EVIDENTIARY HEARING.

8. The defendant urges this Court to hold an evidentiary hearing on the constitutionality of
 9. Washington's death penalty statute based on the CJP, a questionnaire completed by 26 students,
 10. and Stygall's "linguistic analysis" of the WPIC. This Court should deny that request.

11. It is well-settled law in the state of Washington that a court cannot review aspects of the
 12. jury deliberation process that inhere in the verdict. Gardner v. Malone, 60 Wn.2d 836, 841, 376
 13. P.2d 651 (1962); State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988). The mental processes by
 14. which jurors reach their decisions are all factors inhering in the verdict, and the verdict cannot be
 15. impeached on that basis. Havens, 70 Wn. App. at 256; Jackman, 113 Wn.2d at 777-78; Ng, 110
 16. Wn.2d at 43. If a defendant challenges a jury's verdict based on "the juror's motive, intent, or
 17. belief, or describe their effect upon him," then the matter inheres in the verdict and cannot be
 18. reviewed. Gardner, 60 Wn.2d at 841; State v. Forsyth, 13 Wn. App. 133, 138, 533 P.2d 847
 19. (1975). This rule reinforces the importance of "the policy favoring stable and certain verdicts
 20. and the secret, frank and free discussion of the evidence by the jury." State v. Balisok, 123
 21. Wn.2d 114, 117-18, 866 P.2d 631 (1994).

22. Thus, if a defendant is barred from challenging the jury's verdict *in his or her own case*
 23. based on evidence of the thought processes of the individual jurors who rendered that verdict, it

24. PROSECUTION'S RESPONSE TO DEFENDANT'S
 MOTION TO STRIKE DEATH NOTICE OF SPECIAL
 SENTENCING PROCEEDING, CONVENE
 SEPARATE JURIES, AND REQUEST
 EVIDENTIARY HEARING - 57

Daniel T. Satterberg, Prosecuting Attorney
 W554 King County Courthouse
 516 Third Avenue
 Seattle, Washington 98104
 (206) 296-9000, FAX (206) 296-0955

1 is clearly not appropriate to hold an evidentiary hearing regarding the constitutionality of a
 2 statute based on the thought processes of jurors who sat on cases *other than* the defendant's.
 3 Indeed, the jurors in question not only sat on cases other than the defendant's, they sat on cases in
 4 other *states*. Accordingly, this motion not only asks this Court to consider information that
 5 inheres in the verdict, it asks this court to consider information that is wholly irrelevant as well.

6 An evidentiary hearing would not enhance the significance of Foglia's questionnaire,
 7 completed by 26 college students, or Stygall's "linguistic analysis" of the WPICs – both of
 8 which are provided to the court, in full, as Exhibits to the defendant's motion. Contrary to the
 9 defendant's representations, Foglia's questionnaire was not completed by "Washington mock
 10 jurors;" it did not even invite the students to assume to role of jurors when answering the
 11 questions. The questions themselves are poorly crafted, and Foglia's interpretation of the
 12 answers, as discussed above, is arguable at best. "English language linguist"²³ Stygall claims
 13 that the WPIC are "poorly written" (and even "impossible cognitively")²⁴ but her own
 14 declaration is strewn with far more egregious examples of these alleged infirmities. It is difficult
 15 to see how Foglia's testimony, or Stygall's, would help the court resolve any issue raised by the
 16 defendant's motion.

17 In sum, this Court should not hold an evidentiary hearing because it would concern
 18 information that cannot be reviewed under Washington law and that on its face fails the basic test
 19 of relevancy.
 20
 21

22 ²³ Stygall Declaration at 1

23 ²⁴ Stygall Declaration at 10.

24 PROSECUTION'S RESPONSE TO DEFENDANT'S
 MOTION TO STRIKE DEATH NOTICE OF SPECIAL
 SENTENCING PROCEEDING, CONVENE
 SEPARATE JURIES, AND REQUEST
 EVIDENTIARY HEARING - 58

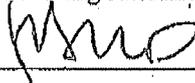
Daniel T. Satterberg, Prosecuting Attorney
 W354 King County Courthouse
 516 Third Avenue
 Seattle, Washington 98104
 (206) 296-9000, FAX (206) 296-0935

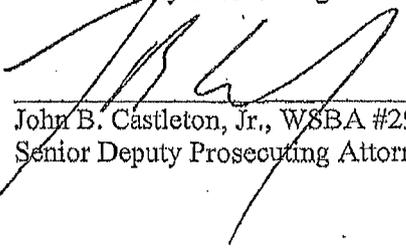
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3
4 III. CONCLUSION

5 The people of the State of Washington, acting through their elected representatives, have
6 the power to abolish the death penalty. Until that time, the people of the State of Washington,
7 acting in accordance with the Washington Constitution and consistently with the U.S.
8 Constitution, have invested a King County jury with the power to determine the defendant's guilt
9 and punishment in a capital case. The defendant's motion to strike the death notice of special
10 sentencing proceeding should be denied, as should his motions to convene separate juries and for
11 an evidentiary hearing.
12

13 RESPECTFULLY SUBMITTED this 26th day of October 2012.
14

15 DANIEL T. SATTERBERG
16 Prosecuting Attorney

17 
18 Jeff Baird, WABA #11731
19 Senior Deputy Prosecuting Attorney

20 
21 John B. Castleton, Jr., WSBA #29445
22 Senior Deputy Prosecuting Attorney

23 PROSECUTION'S RESPONSE TO DEFENDANT'S
24 MOTION TO STRIKE DEATH NOTICE OF SPECIAL
SENTENCING PROCEEDING, CONVENE
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EVIDENTIARY HEARING - 59

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

APPENDIX A

Loginsky, Pam
“The Death Penalty in Washington”

THE DEATH PENALTY IN WASHINGTON

By Pam Loginsky, WAPA Staff Attorney¹

I. ELIGIBILITY

Washington's current death penalty law was enacted May 14, 1981. 1981 Wash. Laws, ch. 138, codified as Chapter 10.95 RCW. To be eligible for a sentence of death, a defendant must commit the crime after his eighteenth birthday and the defendant must not be mentally retarded.

Under Chapter 10.95 RCW, a prosecutor may seek to enhance the penalty available for first degree premeditated² murder by seeking to prove the existence one or more aggravating circumstances. See RCW 10.95.020.³ The existence of such aggravating circumstances are

¹Ms. Loginsky may be reached by phone at 360-753-2175. Her e-mail address is pamloginsky@waprosecutors.org.

The views expressed are those of the author. They do not necessarily represent the views of the Washington Association of Prosecuting Attorneys.

²Premeditation requires proof that the defendant thought over the killing beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

Evidence that a defendant suffered from a mental illness or disability or that a defendant was intoxicated due to alcohol consumption or some other drug can prevent the State from establishing premeditation. These defenses are referred to as "diminished capacity" and "voluntary intoxication."

³ Aggravating circumstances include the following:

- The victim was a law enforcement officer, corrections officer, firefighter, judge, juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; a probation or parole officer, or a newsreporter and the murder was in response to the victim's position.
- At the time of the act resulting in the death, the defendant was either incarcerated in jail or prison or had escaped from such a facility.
- The defendant committed the murder for money.
- The defendant solicited another person to commit the murder and paid that person to commit the murder.
- The defendant committed the murder to obtain or maintain his or her membership in a gang or other group.
- The murder was committed from a motor vehicle or from the immediate area of a motor vehicle.
- The defendant committed the crime to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime.
- There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the defendant.
- The murder was committed in the course of, in furtherance of, or in immediate flight from Robbery

established by acceptance of a guilty plea, by verdict of a jury, or by decision of the trial judge sitting without a jury. *See* RCW 10.95.050(1). If one or more aggravating circumstances is found to exist beyond a reasonable doubt, the defendant will be sentenced to life in prison without the possibility of parole (LWOP) unless the prosecuting attorney filed a timely notice of special sentencing proceeding. *See* RCW 10.95.030. Such a notice must be filed within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. RCW 10.95.040(2). The prosecutor may only file a notice of special sentencing proceeding where there is reason to believe that there are not sufficient mitigating circumstances to merit leniency. RCW 10.95.040(1).

II. CAPITAL TRIALS

If a notice of special sentencing proceeding is filed, there is a two phase proceeding. In the first phase, the jury determines whether the State has proven every element of the offense beyond a reasonable doubt. This stage of the proceedings is similar to any other criminal trial.

If the jury finds the defendant guilty of first degree premeditated murder with aggravating circumstances, the jury is then reconvened for a sentencing phase. During the sentencing phase proceeding the jury may hear additional evidence concerning the penalty to be imposed. Special rules limit the evidence the State may introduce in the sentencing phase to the defendant's prior convictions and one "victim impact witness" per victim.

The defendant in the sentencing phase has a virtual license to introduce any evidence he or she desires. The normal rules of evidence that prohibit hearsay⁴ do not apply to the defendant's presentation. These rules, however, do apply to the State's rebuttal evidence. The defendant is also allowed to make an unsworn statement to the jury (an allocution).

The jury in the sentencing phase decides whether the death penalty should be imposed or whether the punishment should be life in prison, without the possibility of release. In making this determination, the jury is asked the following question:

Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

If the jury unanimously answers "yes" to this question, the sentence will be death. If the jury cannot

in the first or second degree, Rape in the first or second degree, Burglary in the first or second degree or residential burglary, Kidnapping in the first degree; or Arson in the first degree.

- A court order prohibited the defendant from contacting the victim at the time of the victim's death.
- The defendant murdered a "family or household-member" that the defendant had previously subjected to acts of domestic violence.

⁴Hearsay is evidence based on what the witness has heard someone else say, rather than what the witness has personally experienced or observed.

reach a unanimous decision, or if the jury unanimously answers "no", the sentence will be life imprisonment without the possibility of release or parole.

In passing on the above question, the jury is instructed that there is a presumption of leniency. Specifically, the jury is told that:

The defendant is presumed to merit leniency which would result in a sentence of life in prison without possibility of release or parole. This presumption continues throughout the entire proceeding unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.

The jury is further instructed that a mitigating circumstance is a fact about either the offense or about the defendant which in fairness or in mercy may be considered as extenuating or reducing the degree of moral culpability, or which justifies a sentence of less than death, although it does not justify or excuse the offense. Factors that the jury may find to be mitigating include:

- The defendant does not have a significant history of prior criminal activity.
- The murder was committed while the defendant was under the influence of extreme mental disturbance.
- The victim consented to the act of murder.
- The defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor.
- The defendant acted under duress or domination of another person.
- At the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect.
- The age of the defendant at the time of the crime calls for leniency.
- The defendant is unlikely to pose a danger to others in the future.
- Any other mitigating factor that the jury finds to be relevant.

III. POSTCONVICTION PROCEEDINGS

Appeal

If the jury unanimously agrees that the State has met its burden of proving that the mitigating circumstances do not merit leniency, the defendant will be sentenced to die. This death sentence is subject to a mandatory appeal that the defendant cannot waive. The defendant may, and usually does, appeal the conviction also.

This appeal is generally referred to either as an "appeal" or a "direct appeal." This appeal is based solely on "the record." "The record" consists of the documents filed with the superior court, the exhibits admitted at trial, and the transcript of the trial.

The appeal, itself, is heard on "briefs". Each brief is a document of approximately 250-pages. In addition to the briefs, the Washington Supreme Court will hear oral argument regarding the legal issues.

The direct appeal can take two to four years to complete, as an affirmance of the death sentence by the Washington Supreme Court will be followed by a request that the United States Supreme Court review the case. The request to the United States Supreme Court is called a "petition for writ of certiorari" or may be referred to as "seeking cert."

Once the United States Supreme Court denies the defendant's request for review, the Washington Supreme Court will issue its "mandate." A mandate is the document that signals the end of the direct appeal. The mandate also returns the matter to the superior court for the signing of a death warrant.

Shortly after the mandate issues, the defendant will be returned to the superior court from the Washington State Penitentiary in Walla Walla. A very brief hearing is held, during which the court will select a day for the execution that is not less than thirty nor more than ninety days from the date the mandate issued. This execution date is not "real", in that it will be stayed in virtually all cases.

The Washington Supreme Court does not affirm every death sentence or conviction of aggravated first degree murder. Other possible outcomes include:

- A vacation of the death sentence as disproportionate or not based upon sufficient evidence.
- A vacation of the death sentence based upon an error in proceeding, with a remand to the trial court for a new sentencing phase.
- A vacation of the murder conviction, with a remand to the trial court for a new trial on guilt and sentence.
- A vacation of the aggravating circumstances and/or the finding of premeditation,

with a remand to the trial court for imposition of a determinate sentence.

Personal Restraint Petition (PRP)

Once a death warrant is signed, the defendant will file a motion for stay of execution in the Washington Supreme Court. The motion for stay is based upon the defendant's desire to file a "personal restraint petition" or "PRP". A PRP is a collateral attack upon the conviction and sentence. What is meant by the term collateral attack, is that the PRP is not part of the criminal case and the filing of the collateral attack does not upset the validity of the conviction and sentence.

A PRP allows a defendant to raise claims that occurred outside the courtroom. The most common claims include:

- Ineffective assistance of counsel-- the defendant's lawyers were deficient
- *Brady* -- the State withheld information from the defendant
- New evidence
- Jury misconduct

The defendant files his PRP at the Washington Supreme Court. Once the State responds to the PRP, the Washington Supreme Court decides whether an evidentiary hearing (known as a reference hearing) is needed. If an evidentiary hearing is needed, the Washington Supreme Court will return the matter to the superior court and will ask one of the superior court judges to listen to witnesses and to make a decision on credibility. The superior court judge's findings are then sent to the Washington Supreme Court.

If no evidentiary hearing is needed or once the findings from the evidentiary hearing have been received by the Washington Supreme Court, that Court will decide whether oral argument will be held. Eventually, the Washington Supreme Court will issue its opinion on the PRP.

The Washington Supreme Court's opinion on the PRP can take any of the following forms:

- A denial of the PRP, which leaves the defendant's conviction and sentence intact.
- A grant of relief as to the sentence only.
- A grant of relief as to the conviction.

All told, a PRP can take between 2 and 5 years to resolve.

While various statutes and court rules generally limit a defendant to a single PRP, one defendant, who is currently on death row for two 1993 murders, obtained a stay of execution in 2010 to allow the Washington Supreme Court to consider his fifth and sixth PRPs.

FEDERAL HABEAS CORPUS

If a defendant's death sentence survives the PRP process, the defendant will next file a challenge in the federal district court. This challenge is a form of collateral attack, known as "habeas corpus." In the habeas corpus action, the defendant may reassert all of the claims he raised during his direct appeal and his PRP. The district court may hold an evidentiary hearing on some or all of the claims, or may rule based upon memorandums and the oral argument from the attorneys. The proceedings in the district court have lasted between 2 and 10 years.

Ultimately, the district court judge has the option of denying all relief, granting relief as to the sentence only, or granting relief as to both the sentence and the conviction. The losing party, whether the government or the defendant, has the ability to appeal the district court's decision to the Ninth Circuit Court of Appeals.

A three judge panel of the Ninth Circuit Court of Appeals (generally just referred to as the "Ninth Circuit") hears the appeal based upon briefs and oral argument. Once the panel issues its opinion, the losing party may seek "en banc review" by a larger panel of judges or may seek cert. in the United States Supreme Court. This entire process can take 2 to 4 years.

Clemency

Once a defendant exhausts his court remedies, he may request clemency from the governor. A pardon or clemency is an executive act of grace or mercy that relieves an individual from all or part of any punishment imposed by a judgment and sentence for a criminal conviction. Clemency or a pardon does not erase a conviction, rather it excuses all or part of the punishment imposed. Clemency can take the form of a pardon, a reprieve (a delay in the execution of a sentence), or a commutation (reduction of sentence).

A clemency petition is initially heard by the five member Clemency and Pardons Board. That Board makes a recommendation to the Governor. The Governor may accept that recommendation, but is not required to do so.

IV. HISTORICAL EXPERIENCE WITH THE CURRENT LAW

Number of Death Sentences

In the 30 years since the current death penalty statute was enacted, 296 individuals have been convicted of aggravated first degree murder. Thirty of these individuals were not "death eligible" due to youth, mental retardation, or treaty obligations.

Of the 296 individuals who were "death eligible," the State filed notices of special sentencing proceeding in approximately 90 cases. Of those 90 cases, jurors unanimously decided in favor of a death sentence in 32 cases.

The 32 death sentences that have been imposed under the current statute have resulted in the

following:

- The execution of two individuals who challenged their sentences.⁵
- The execution of three individuals who declined to challenge their convictions or sentences.⁶
- Death by suicide of one individual while his direct appeal was pending.⁷
- Nine individuals currently on death row.⁸
- Fifteen individuals whose cases were ultimately resolved with sentences of life imprisonment without the possibility of parole.
- One individual who was ultimately sentenced to a determinate sentence on a conviction for a lesser degree of murder.⁹
- One individual released from prison after the federal courts granted his writ of habeas corpus and the State could not re-prosecute due to the death of a necessary witness.¹⁰

Only three individuals who were convicted of first degree aggravated murder have ever been released from custody prior to their deaths. One is Benjamin Harris, whose death sentence and

⁵Charles Rodman Campbell, executed on May 27, 1994, for three murders committed in 1982. Cal C. Brown executed on September 10, 2010, for a murder committed in 1991.

⁶Jeremy Vargas Sagastegui executed October 13, 1998, for three murders committed in 1995. Westley Allen Dodd executed on January 5, 1993, for three murders committed in 1989. James Homer Ellledge executed on August 28, 2001, for a murder committed in 1998.

⁷Clark Hazen.

⁸Jonathan Lee Gentry convicted June 26, 1991 of fatally bludgeoning 12-year-old Cassie Holden near Bremerton. Darold Ray Stenson convicted on August 11, 1994 for the shooting deaths of his wife, Denise Ann Stenson, and his business partner, Frank Clement Hoerner on March 25, 1993 in Clallam County. Clark Richard Blmore convicted on July 6, 1995 of one count of aggravated first degree murder and one count of Rape in the Second Degree for the rape and murder of the 14-year old daughter of his live-in girlfriend in Whatcom County. Dwayne A. Woods was convicted on June 20, 1997 of two counts of aggravated first degree murder for the murders of Telisha Shaver and Jade Moore. Cecil Emile Davis convicted of one count of aggravated first degree murder on February 6, 1998, for the suffocation/asphyxiation murder of 65-year-old Yoshiko Couch with a poisonous substance after burglarizing her home, robbing and then raping her in 1997 in Pierce County. Dayva Michael Cross convicted June 22, 2001 in King County for the stabbing deaths of his wife Anouchka Baldwin, 37, and stepdaughters Amanda Baldwin, 15, and Salome Holle, 18. Robert Lee Yates Jr. convicted Sept. 19, 2002 in Pierce County of murdering Melinda Mercer, 24, in 1997 and Connie LaFontaine Ellis, 35, in 1998. Conner Michael Schierman convicted May 27, 2010 in King County of murdering Olga Milkin, 28, Lyubov Botvina, 24, Justin Milkin, 5, and Andrew Milkin 3, in 2006.

⁹Michael Kelly Roberts.

¹⁰Benjamin Harris convicted of a 1984 murder and released from custody in 1995 or 1996.

convictions were reversed by the federal courts. Mr. Harris could not be retried as a necessary witness had been killed during his appeals. Two individuals, both of whom committed their murders while in their teens, were granted clemency.¹¹

Legislative Action

Since 1981, a number of bills have been introduced in the Washington Legislature that sought the abolition of the death penalty. *See, e.g.*, Senate Bill 5046 (2011 Regular Session); House Bill 1921 (2011 Regular Session); House Bill 2025 (2005 Regular Session); Senate Bill 6067 (2005 Regular Session); Senate Bill 5414 (1993 Regular Session); Senate Bill 4750 (1986 Regular Session). None of these bills were enacted into law. Even a two year moratorium on executions was rejected by the Legislature. *See* House Bill 1647, § 1(1) (2001 Regular Session).

During this same period of time, the number of aggravating circumstances that will qualify an individual for a possible death sentence was expanded. One of these expansions was by Initiative, and two of these expansions were by legislative action. *See* Laws of 2003, ch. 53, § 96; Laws of 1995, ch. 129, § 17 (Initiative Measure No. 159); Laws of 1994, ch. 121, § 3.

Abolition has, however, recently occurred in other states. Illinois abolished the death penalty in 2011 for crimes committed after the effective date of the new laws. Illinois Governor Pat Quinn, however, commuted the sentences of every prisoner who was on the Illinois death row when the 2011 law was signed. New Mexico abolished the death penalty in 2009, its governor did not commute the sentences of the prisoners who were currently on death row for murders committed prior to 2009.

Current Challenges to Capital Punishment

In the last seven years, the United States Supreme Court overruled prior precedence to hold that the Eighth Amendment of the United States Constitution prohibits the execution of an individual who is mentally retarded or who was under the age of 18 at the time of the murder. *See Roper v. Simmons*, 543 U.S. 551 (2004); *Atkins v. Virginia*, 536 U.S. 304 (2002). Now, the American Bar Association, the National Alliance on Mental Illness (NAMI), National Mental Health Association (NMHA), and the American Psychiatric Association are urging courts to hold that the execution of someone who was mentally ill at the time of the murder also violates the Eighth Amendment.

Washington's death penalty statute contains a requirement that the Washington Supreme Court consider the proportionality of the death sentence. Defendants continue to argue that no death sentence can be upheld under this standard since Gary Ridgeway, the Green River Killer, was sentenced to life in prison without the possibility of parole.

¹¹Susan Cummings, who was convicted for a murder committed when she was 16, had her sentence commuted by Governor Locke in 2004 after she served 20 years in prison. Gerald S. Hankerson, who was convicted for a murder committed when he was 18, had his sentence commuted by Governor Gregoire in 2009, after he has served 20 years in prison.

APPENDIX B

Report of the Trial Judge,
State v. Dykgraaf, No. 86-1-00111-5

DATE FILED: 11/6/86
 (to be indicated by Clerk of Supreme Court)

Questionnaire approved
 for use pursuant to Laws
 of 1981, ch. 138, § 12.

REPORT OF THE TRIAL JUDGE
 Aggravated First Degree Murder Case

Superior Court of CLARK County, Washington
 Cause No. 86-1-00111-5
 State v. JAMES MICHAEL DYKGRAAF

INSTRUCTIONS: Please answer each question. If you do not have sufficient information to supply an answer, please so indicate after the specific question. If sufficient space is not allowed on the questionnaire form for answer to the question, use the back of the page, indicating the number of the question which you are answering, or attach additional sheets.

If more than one defendant was convicted of aggravated first degree murder in this case, please make out a separate questionnaire for each such defendant.

The statute specifies that this report shall, within thirty (30) days after the entry of the judgment and sentence, be submitted to the Clerk of the Supreme Court, to the defendant or his or her attorney, and to the prosecuting attorney.

(1) Information about the Defendant.

(a) Name: DYKGRAAF JAMES MICHAEL Date of Birth: 1/12/63
Last, First Middle

Sex: M F Marital Status: Never Married
Married
Separated
Divorced
Spouse Deceased

Race or ethnic origin of defendant: CAUCASIAN
(Specify)

(b) Number and ages of defendant's children:
NONE

(c) Defendant's Father living: Yes No
If deceased, date of death: _____
Defendant's Mother living: Yes No
If deceased, date of death: _____

(d) Number of children born to defendant's parents: 5

(e) Defendant's education--check highest grade completed:
 1 2 3 4 5 6 7 8 9 10 11 12 College: 1 2 3 4

Intelligence Level: Low
Medium
Above Average
High IQ Score: _____

Further explanation or comment:

(f) Was a psychiatric evaluation performed: Yes No

If yes, did the evaluation indicate that the defendant was:

(i) able to distinguish right from wrong? Yes No

(ii) able to perceive the nature and quality of his or her act? Yes No

(iii) able to cooperate intelligently in his or her own defense? Yes No

(g) Please describe any character or behavior disorders found or other pertinent psychiatric or psychological information:

VARYING DIAGNOSES, INCLUDING "MIXED PERSONALITY DISORDER," "SEXUAL SADISM," AND "NON-SPECIFIC PSYCHO-SEXUAL DISORDER."

(h) Please describe the work record of the defendant:

HE WORKED FOR BURGER KING FOR 3.5 YEARS PROGRESSING TO THE LEVEL OF ASSISTANT MANAGER. HE THEN WORKED AT A HOBBY SHOP FOR APPROXIMATELY ONE YEAR. HE HAD BEEN UNEMPLOYED, HAVING QUIT HIS JOB AT THE HOBBY SHOP, FOR APPROX. 4 MOS. WHEN HE COMMITTED THE INSTANT OFFENSE.

(i) If the defendant has a record of prior convictions, please list:

<u>Offense</u>	<u>Date</u>	<u>Sentence Imposed</u>
ASSAULT 1ST DEGREE WITH INTENT TO RAPE	8/5/76	3+ YRS. - JUVENILE INSTITUTION
_____	_____	_____
_____	_____	_____
_____	_____	_____

(j) Length of time defendant has resided in:

Washington: 23 YRS. County of conviction: 20 YRS. (3 YRS. IN JUV. INSTS.)

- 4 -

(2) Information about the Trial

(a) How did the defendant plead to the charge of aggravated first degree murder?:

Guilty
 Not Guilty
 Not Guilty by reason of insanity

(b) Was the defendant represented by counsel?: Yes No

(c) Please indicate if there was evidence introduced or instructions given as to any defense(s) to the crime of aggravated first degree murder:

	<u>Evidence</u>	<u>Instruction(s)</u>
Excusable Homicide	<input type="checkbox"/>	<input type="checkbox"/>
Justifiable Homicide	<input type="checkbox"/>	<input type="checkbox"/>
Insanity	<input type="checkbox"/>	<input type="checkbox"/>
Duress	<input type="checkbox"/>	<input type="checkbox"/>
Entrapment	<input type="checkbox"/>	<input type="checkbox"/>
Alibi	<input type="checkbox"/>	<input type="checkbox"/>
Intoxication	<input type="checkbox"/>	<input type="checkbox"/>
Other specific defenses:		
<u>LESSER INCLUDED OFFENSE OF MURDER 1ST DEGREE AND 2ND DEGREE</u>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>

(d) If the defendant was charged with other offenses which were tried in the same trial, list the other offenses below and indicate whether defendant was convicted:

	<u>Convicted</u>	
N/A _____	Yes <input type="checkbox"/>	No <input type="checkbox"/>
_____	Yes <input type="checkbox"/>	No <input type="checkbox"/>
_____	Yes <input type="checkbox"/>	No <input type="checkbox"/>
_____	Yes <input type="checkbox"/>	No <input type="checkbox"/>

(e) What aggravating circumstances, as set forth in Laws of 1981, ch. 138 § 2, were alleged against the defendant and which of these circumstances were found to have been applicable?:

<u>Aggravating Circumstances Alleged</u>	<u>Found Applicable</u>	
RAPE _____	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
ROBBERY _____	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
BURGLARY _____	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
COVER UP HIS IDENTITY AS PERPETRATOR _____	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>

(f) Please provide the names of each other defendant tried jointly with this defendant, the charges filed against each other defendant, and the disposition of each charge:

Name: N/A

<u>Offenses Charged</u>	<u>Disposition</u>
_____	_____
_____	_____
_____	_____
_____	_____

Name: _____

Offenses Charged

Disposition

<u>Offenses Charged</u>	<u>Disposition</u>

(3) Information Concerning the Special Sentencing Proceeding

(a) Date of Conviction: _____

Date special sentencing proceeding commenced: _____

(b) Was the jury for the special sentencing proceeding composed of the same jurors as the jury that returned the verdict to the charge of aggravated first degree murder? Yes No

If the answer to the above question is no, please explain:

(c) Was there, in the court's opinion, credible evidence of any mitigating circumstances as provided in Laws of 1981, ch. 138, § 7?

Yes No

If yes, please describe:

DEFENDANT WAS SHOWN TO HAVE A "MIXED PERSONALITY DISORDER."

- 7 -

- (d) Was there evidence of mitigating circumstances, whether or not of a type listed in Laws of 1981, ch. 138, § 7, not described in answer to (3)(c) above? Yes No

-----If yes, please describe: -----

DEFENDANT'S FATHER WAS SHOWN TO HAVE BEEN DOMINEERING, RELIGIOUSLY RIGID, ABUSIVE TOWARD FAMILY MEMBERS AND HAD SEXUALLY ABUSED DEFENDANT'S SISTERS.

- (e) How did the jury answer the question posed in Laws of 1981, ch. 138, § 6(4), that is: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" Yes No

- (f) What sentence was imposed? LIFE W/O PAROLE

(4) Information about the Victim

- (a) Was the victim related to the defendant by blood or marriage?

Yes No

If yes, please describe the relationship: _____

- (b) What was the victim's occupation, and was the victim an employer or employee of the defendant?

SHE WAS A TEACHER'S AID AT A PRE-SCHOOL AND AN AEROBICS INSTRUCTOR.

- 8 -

(c) Was the victim acquainted with the defendant, and if so, how well?

NO, THEY WERE STRANGERS. HOWEVER, THEY LIVED FOUR HOUSES APART, BUT HAD NEVER MET.

(d) If the victim was a resident of Washington, please state: _____

Length of Washington residency: 24 YEARS

County of residence: CLARK

Length of residency in that county: 1.5 YEARS

(e) Was the victim of the same race or ethnic origin as the defendant?

Yes No

If no; please state the victim's race or ethnic origin:

(f) Was the victim of the same sex as the defendant?

Yes No

(g) Was the victim held hostage during the crime?

Yes No

If yes, for how long: UP TO ONE HOUR

(h) Please describe the nature and extent of any physical harm or torture inflicted upon the victim prior to death:

HELD IN BONDAGE WITH BOTH HER ARMS AND LEGS TIED TO HER BED; SEXUALLY ASSAULTED; FORCED TO BEG THE DEFENDANT TO HAVE SEX WITH HER; STRANGLED FOR AT LEAST 3 TO 5 MINUTES; SHOT AT POINT BLANK RANGE IN THE NECK WITH A SAWED OFF SHOTGUN CAUSING A GAPING WOUND.

- (i) What was the age of the victim? 24
- (j) What type of weapon, if any, was used in the crime?
LIGATURE, KNIFE, SAWED-OFF SHOTGUN

(5) Information about the Representation of Defendant

(If more than one counsel represented the defendant, answer each question separately as to each counsel. Attach separate sheets containing answers for additional counsel.)

- (a) Name of counsel: RACHEL PETERSON AND MICHAEL FOISTER
- (b) Date on which counsel was secured: FEBRUARY 1986
- (c) Was counsel retained or appointed? If appointed, please state the reason therefor:
APPOINTED--DEFENDANT STATED HE WAS WITHOUT FUNDS
- (d) How long has counsel practiced law, and what is the nature of counsel's practice?
TEN YEARS - PRIMARILY CRIMINAL LAW, SOME GENERAL PRACTICE/TEN YEARS PRIMARILY CRIMINAL LAW, 3 YEARS DEP. PROSECUTOR.
- (e) Did the same counsel serve at both the trial and the special sentencing proceeding, and if not, why not?
YES

- 10 -

(6) General Considerations

- (a) Was the race or ethnic origin of the defendant, victim, or any witness an apparent factor at trial?

Yes No

If yes, please explain:

- (b) What percentage of the population of the county is the same race or ethnic origin as the defendant?

	<u>Race</u>	<u>Ethnic Origin</u>
Under 10%	<input type="checkbox"/>	<input type="checkbox"/>
10 - 25%	<input type="checkbox"/>	<input type="checkbox"/>
25 - 50%	<input type="checkbox"/>	<input type="checkbox"/>
50 - 75%	<input type="checkbox"/>	<input type="checkbox"/>
75 - 90%	<input type="checkbox"/>	<input type="checkbox"/>
Over 90%	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

If there appears to be any reason to answer this question with respect to a county other than the county in which the trial was held, please explain:

- 11 -

- (c) How many persons of the defendant's or victim's race or ethnic origin were represented on the jury?

Defendant: 12

Victim: 12

Further explanation or comment:

- (d) Was there any evidence that persons of any particular race or ethnic origin were systematically excluded from the jury?

Yes

No

If yes, please explain:

THERE WERE 2 BLACK PERSONS ON THE PANEL ONE WAS CALLED AND PEREMPTORILY CHALLENGED FOR HIS VIEWS ON THE DEATH PENALTY.

- (e) Was the sexual orientation of the defendant, victim, or any witness an apparent factor at trial?

Yes

No

If yes, please explain:

(f) Was the jury specifically instructed to exclude race, ethnic origin, or sexual preference as an issue?

Yes No

(g) Was there extensive publicity in the community concerning this case?

Yes No

(h) Was the jury instructed to disregard such publicity?

Yes No

(i) Was the jury instructed to avoid any influence of passion, prejudice or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding?

Yes No

(j) Please describe the nature of any evidence suggesting the necessity for instructions of the type described in 6(f) through 6(i) above which were given:

NONE

- (k) General comments of the trial judge concerning the appropriateness of the sentence, considering the crime, the defendant, and other relevant factors:

THE JURY VOTED 11-1 IN FAVOR OF IMPOSING THE DEATH PENALTY. THE LONE DISSENTING JUROR INDICATED TO HIS FELLOW VENIREMAN THAT HE HAD A STRONG PHILOSOPHICAL OPPOSITION TO THE DEATH PENALTY THAT HE HAD NOT REVEALED DURING VOIR DIRE. HE TOLD OTHER JURORS AT THE END OF THE GUILT PHASE THAT HE WOULD NEVER VOTE TO IMPOSE THE DEATH PENALTY.

(7) Information about the Chronology of the Case

- | | |
|---|-----------------|
| (a) Date of offense: | <u>1/13/86</u> |
| (b) Date of arrest: | <u>2/7/86</u> |
| (c) Date trial began: | <u>9/2/86</u> |
| (d) Date jury returned verdict: | <u>9/23/86</u> |
| (e) Date post-trial motions ruled on: | <u>10/30/86</u> |
| (f) Date special sentencing proceeding began: | <u>9/29/86</u> |
| (g) Date sentence was imposed: | <u>10/30/86</u> |
| (h) Date this trial judge's report was completed: | <u>11/3/86</u> |

JOHN SKIMAS

TRIAL JUDGE

APPENDIX C

ACLU webpage regarding capital
punishment

SEARCH

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Capital Punishment

The capital punishment system is discriminatory and arbitrary and inherently violates the Constitutional ban against cruel and unusual punishment. The ACLU opposes the death penalty in all circumstances, and looks forward to the day when the United States joins the majority of nations in abolishing it.

HOME › SAFE COMMUNITIES › FAIR SENTENCES › CAPITAL PUNISHMENT

Share

The ACLU Capital Punishment Project (CPP) works to abolish the death penalty nationally through direct representation as well as through strategic litigation, advocacy, public education, and mentoring and training programs for capital defense teams. Read more about the Capital Punishment Project »

MAKE A DIFFERENCE

Your support helps the ACLU oppose capital punishment and defend a broad range of civil liberties.

There are many factors that make it impossible that the death penalty will ever be fair or just. These include:

Lack of effective counsel: Many capital defenders lack the resources and training to provide adequate counsel to their clients. Unfortunately, quality of counsel is a good predictor of who will live and who will face execution.

Execution methods: There are significant problems with the five methods currently used to execute people (lethal injection, electrocution, firing squad, hanging and the gas chamber), all of which violate the constitutional ban on cruel and unusual punishment.

Executing the innocent: Hundreds of people have been released from death row after being found innocent of the crime for which they were convicted. For others, serious doubts about their guilt didn't come to light until it was too late. We cannot risk executing even one innocent person.

Junk science: Too often, unreliable testimony based on faulty methods and beliefs is introduced in death penalty cases. This ranges from disproven fire science theories used to back arson charges to wrongful characterizations based on the race of the defendant.

Executing the mentally ill: Standards for protecting the mentally ill and intellectually disabled from execution are far too low, and there are far too many people with severe mental illness on death row. Executing people suffering from mental illness constitutes cruel and unusual punishment.

Racial disparities in the death penalty: Racial bias pervades the death penalty, from jury selection through decisions about who faces execution.

It is increasingly impossible to ignore the truth that the death penalty is deeply flawed. More and more people are calling for its end, and 17 states have abolished the death penalty since it was reinstated. The ACLU will continue to work with its affiliates and partner organizations around the country to abolish it once and for all.

Actions

End the Death Penalty in Your State (map): The state of Georgia has executed Troy

BLOG OF RIGHTS

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Breaking the Addiction to Incarceration: Weekly Highlights

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Davis, despite serious concerns that he was wrongly convicted in 1989 of killing a police officer.

This case makes clear that the death penalty system in the United States is broken beyond repair. It is arbitrary, discriminatory and comes at an enormous cost to taxpayers, and it must be ended.

Resources

The Case Against the Death Penalty: The American Civil Liberties Union believes the death penalty inherently violates the constitutional ban against cruel and unusual punishment and the guarantees of due process of law and of equal protection under the law. Furthermore, we hold that the state should not arrogate unto itself the right to kill human beings - especially when it kills with premeditation and ceremony, in the name of the law or in the name of its people, or when it does so in an arbitrary and discriminatory fashion.

Death Penalty 101: Some facts and numbers on the death penalty.

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See all ACLU Capital Punishment cases

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TAKE ACTION

END THE DEATH PENALTY

The death penalty system in the United States is broken beyond repair. It is arbitrary, discriminatory and comes at an enormous cost to taxpayers, and it must be ended.

End the Death Penalty! »

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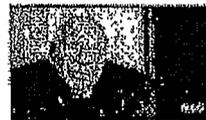
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 This is the website of the American Civil Liberties Union and the ACLU Foundation.
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APPENDIX D

Crime and Consequences blog post
regarding DPIC poll

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Predictable DPIC Poll on the Death Penalty

November 16, 2010 3:29 PM | Posted by Kent Scheldegger | 0 Comments

The Death Penalty Information Center has announced its poll on (what else?) the death penalty. To anyone familiar with DPIC, it will come as no surprise, as Doug Berman notes at SL&P, "that this latest poll was conducted in a way designed to prompt anti-death-penalty responses."

For example, they ask people which of four statements they agree with, all beginning, "The penalty for murder should be ..."

Note the singular. One penalty for all murders. Should we be surprised that only 1/3 of the people think all murderers should be executed? Of course not.

Later, they go on to read the people "facts" about the death penalty that are not facts or that are misleading half truths. They drag out the tired, discredited "innocence list," and state as a "fact" that "Since 1973, 138 people have been released from death row after being exonerated of their crimes." We have been through that many times.

Then there is, "Over the past 30 years, states in the South have accounted for 80 percent of all executions and have the highest murder rate. States in the Northeast have accounted for less than 1 percent of all executions and have the lowest murder rate." The implication, of course, is the false assumption that this correlation proves causation, and the Southern states would have lower murder rates if they got rid of their death penalties.

Uh huh. The City of Chicago has a lot of snow plows and significant problems with snow on the streets. The City of Miami has no snow plows and no snow problems. Therefore, Chicago should get rid of its snow plows so it will be more like Miami. That argument is just as valid as the DPIC's argument.

File this poll in the trash can.

Update: Now this is disappointing. Warren Richay in the Christian Science Monitor reports the DPIC's poll uncritically, "without noting the problems. The only people quoted are Dieter and his hired pollster, Celinda Lake. Warren is usually sharper than that. Well, at least he noted that DPIC is "an anti-death-penalty organization."

Categories: Death Penalty

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the respondent, Suzanne Elliott, at Suzanne-elliott@msn.com, containing a copy of the State's Answer to Monfort's Cross-Motion for Discretionary Review, in STATE V. MONFORT, Cause No. 88522-2-1, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

Done in Seattle, Washington

03-20-13

Date

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the respondent, Todd M Gruenhagen, at todd.gruenhagen@acapd.org; Stacey Lee MacDonald, at stacey.macdonald@acapd.org; Carl Franz Luer, at carl.luer@acapd.org, containing a copy of the State's Answer to Monfort's Cross-Motion for Discretionary Review, in STATE V. MONFORT, Cause No. 88522-2-I, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

03-20-13
Date

OFFICE RECEPTIONIST, CLERK

To: Ly, Bora
Subject: RE: State of Washington v. Christopher John Monfort/Case # 88522-2

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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Ly, Bora [<mailto:Bora.Ly@kingcounty.gov>]
Sent: Wednesday, March 20, 2013 3:48 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Dwyer, Deborah; 'suzanne-elliott@msn.com'; Summers, Ann; Luer, Carl-acapd.org; Gruenhagen, Todd-acapd.org; 'stacey.macdonald@acapd.org'; Whisman, Jim
Subject: State of Washington v. Christopher John Monfort/Case # 88522-2

Dear Supreme Court Clerk:

Attached for filing in the above-referenced case, please find the **State's Answer to Monfort's Cross-Motion for Discretionary Review**.

Please let me know if you should have difficulties with this electronic filing. Thank you.

Sincerely,

Bora Ly
Paralegal
Criminal Division, Appellate Unit
King County Prosecutor's Office
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Phone: 206-296-9489
Fax: 206-205-0924
E-Mail: bora.ly@kingcounty.gov

For

Debbie Dwyer
Ann Summers
Senior Deputy Prosecuting Attorneys
Attorneys for the Plaintiff