

Sep 26, 2016, 11:45 am

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No. 88906-6
THE WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

BYRON EUGENE SCHERF,

Appellant.

FILED *E*
OCT 04 2016
WASHINGTON STATE
SUPREME COURT *bph*

AMICUS BRIEF OF
THE FAIR PUNISHMENT PROJECT,
THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE &
JUSTICE AND
THE PROMISE OF JUSTICE INITIATIVE

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ORIGINAL

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INTEREST OF THE AMICI CURIAE¹

The Fair Punishment Project (“FPP”) is a joint project of the Charles Hamilton Houston Institute for Race and Justice and the Criminal Justice Institute, both at Harvard Law School. The mission of the Fair Punishment Project is to address ways in which our laws and criminal justice system contribute to excessive punishment for offenders.

The Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) at Harvard Law School was founded by Charles Ogletree in 2005. The Institute continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. The Charles Hamilton Houston Institute marshals resources to advance Houston's dreams for a more equitable and just society.

The Promise of Justice Initiative (PJI) is a non-profit organization founded in 2009 in New Orleans, Louisiana, to address issues of injustice. PJI, amongst other work, drafts policy papers and files amicus briefs in the state and federal courts, including the United States Supreme Court.

In June 2013, the Promise of Justice Initiative filed a federal complaint on behalf of death row inmates suffering inhumane heat conditions on death row in Louisiana. The Fifth Circuit Court of Appeal found these conditions to violate the Eighth Amendment, which as yet have not been remedied. See *Ball v. LeBlanc*, 792 F.3d 584 (5th Cir. 2015). PJI continues challenge the

¹ *Amici curiae* states that counsel for *amicus* authored this brief in its entirety. No person or entity other than *amicus*, its supporting organizations, and its counsel made a monetary contribution to the preparation of this brief. This brief does not purport to convey the position of Harvard Law School.

constitutionality of death sentences in Louisiana. See e.g. *Tucker v. Louisiana*, 136 S. Ct. 1801 (2016)(Breyer J., Ginsburg, J., dissenting)(“At the time of the murder, Tucker was 18 years, 5 months, and 6 days old. . . , and he had an IQ of 74. . . . Tucker was sentenced to death in a Louisiana county (Caddo Parish) that imposes almost half the death sentences in Louisiana, . . . Given these facts, Tucker may well have received the death penalty not because of the comparative egregiousness of his crime, but because of an arbitrary feature of his case, namely, geography.”). In justifying the constitutionality of the death sentence imposed on the 18 year old, with a 74 IQ, Louisiana specifically referenced – *inter alia* – the State of Washington’s retention of the death penalty as evidence that there is not “a national consensus against the death penalty or a consistent direction of change away from the death penalty as a viable sentence for an adult murder.” *Tucker v. Louisiana*, 2015 U.S. Briefs 946, 9 (U.S. Apr. 14, 2016)(asserting “thirty-one states, plus the United States government and military, maintain the death penalty (Appendix B -- Death Penalty Information Center, States with and without the Death Penalty as of July 1, 2015, at <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>)”). Because states such as Louisiana, Texas, and Alabama justify their use of the death penalty based upon, *inter alia*, the statutory provision for the death penalty in the State of Washington, amici has a strong interest in this Court assessing the evolving standards of decency within the state.

INTRODUCTION

The death penalty is inconsistent with the standards of decency that prevail in Washington and, therefore, constitutes “cruel” punishment under the Washington Constitution. The prohibition against “cruel punishment” is “not static; rather, -- like the Eighth Amendment -- it ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’” *State v. Fain*, 94 Wash.2d 387, 397 (1980), quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958). While this Court’s analysis is informed by the doctrine developed by the United States Supreme Court, the assessment of the constitutionality of capital punishment is its own.

This Court examines objective indicators within the State to determine whether capital punishment is consistent with contemporary community standards. *See State v. Gentry*, 125 Wash.2d 570, 631 (1995). When it does so, the answer is clear: the state uses the death penalty so rarely that it has been effectively abandoned. Washington has imposed only three death sentences and carried out just one execution since 2003. This disuse demonstrates a consensus against capital punishment, which, although statutorily available, has nearly become a penalty “so offensive to society as never to be inflicted.” *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (Brennan, J., concurring).

Washington is at the forefront of a movement occurring more broadly across the country.² In recent years, operation of the death penalty has been reduced to a handful of states, primarily in the former Confederacy, and, even in those states, to a handful of counties. While isolated counties may retain a

² Carol S. Steiker, Jordan M. Steiker, *Abolition in Our Time*, 1 Ohio St. J. Crim. L. 323 (2003).

commitment to capital punishment, the rest of the country – and quite clearly the State of Washington – has evolved.

I. THE WASHINGTON CONSTITUTION PROHIBITS PUNISHMENT THAT IS CRUEL UNDER THE EVOLVING STANDARDS OF DECENCY

Article 1, Section 14 of the Washington State Constitution provides, “Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.” This provision, “like the Eighth Amendment, proscribes disproportionate sentencing in addition to certain modes of punishment.” *State v. Manussier*, 129 Wash.2d 652, 674 (1996). The definition of “cruel” punishment under the Washington Constitution, mirroring the Eighth Amendment, evolves with community standards regarding the acceptability of a punishment. *Fain*, 94 Wash.2d at 397.

A. The United States Supreme Court’s Doctrine Informs this Court’s Interpretation of the State’s Prohibition Against Cruel Punishments

Because of the marked similarities between the relevant provisions of the Washington and United States Constitutions, the Supreme Court’s Eighth Amendment framework informs this Court’s analysis of the State Constitution. *See e.g., State v. Reece*, 110 Wash.2d 766, 781 (1988) (“[T]his court may find federal reasoning persuasive even while construing our own constitution”); *State v. Dodd*, 120 Wash.2d 1, 22 (1992)(utilizing federal precedent to determine whether a capital defendant can, consistent with the Washington State Constitution, waive appellate review).

Although this Court examines similar metrics while interpreting the Washington Constitution, this Court has repeatedly recognized that the state constitutional prohibition on “cruel punishment” affords greater protections

than the Eighth Amendment. *State v. Roberts*, 142 Wash.2d 471, 506 (2000); *Manussier*, 129 Wash.2d at 674; *Fain*, 94 Wash.2d at 392. Ultimately, whether this Court finds the Washington Constitution provides greater protection in the death penalty context than the Eighth Amendment, or merely conducts a consistent independent assessment of standards of decency within this State, amici believe the Court will conclude that capital punishment has been rendered cruel, unnecessary and excessive.

B. The United States Supreme Court Has Identified A Clear Doctrine For Assessing Whether A Punishment is Constitutional

Over the past forty years, the United States Supreme Court has established the constitutional framework for assessing whether a punishment is cruel and unusual. The Court's cases derive their core from the principal, articulated in *Trop v. Dulles*, that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(plurality opinion). The "standard of extreme cruelty" remains stable over time; yet, "its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008), quoting *Furman*, 408 U.S. at 382 (Burger, C. J., dissenting).

To gauge whether a punishment practice has fallen outside these evolving standards, the Court looks to objective indicia of societal consensus. See *Atkins*, 536 U.S. at 312. Legislative authorization of a punishment is one indicia, but "[t]here are measures of consensus other than legislation." *Kennedy*, 554 U.S. at 433; see also *Graham v. Florida*, 560 U.S. 48, 62 (2010) (finding a societal consensus against juvenile life without parole sentences for non-homicide offenses even where the vast majority of jurisdictions formally

authorized the practice). Because it is a “well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime,” *Atkins*, 536 U.S. at 315, legislative activity may reflect an acceptance of harsh punishment in the abstract that does not, in fact, exist in practice. Therefore, “[a]ctual sentencing practices are an important part of the Court’s inquiry into consensus.” *Graham*, 560 U.S. at 62. Under this analysis, the Court will consider not only actual sentences imposed, *id.*, but also the number of executions. *Roper v. Simmons*, 543 U.S. 551, 564-65 (2005).

C. The Critical Question for this Court is Whether the Standards of Decency in Washington Render Capital Punishment Cruel

Because the Washington Constitution is also tethered to the evolving standards of decency, this Court must employ a similar analysis to determine the permissibility of capital punishment within the State. “In questions regarding the interpretation of Const. art. 1, § 14, we look to current community standards, objective indicia of which include the statutes and cases of other jurisdictions as well as our own.” *Gentry*, 125 Wash.2d at 631.

The state constitutional issue presented necessarily requires a focus on the objective indicia of consensus currently existing within the State. *See State v. Campbell*, 103 Wash.2d 1, 31-34 (1984)(looking to “current community standards” within Washington in analyzing a state constitutional challenge to Washington’s death penalty). Recently, the Connecticut Supreme Court – considering a similar issue – explained that the question for the State Supreme Court is whether the standards of decency have evolved inside their borders:

We do agree with our sister courts, however, that, under the state constitution, the pertinent standards by which we judge the fairness, decency, and efficacy of a punishment are necessarily those of

Connecticut. Although regional, national, and international norms may inform our analysis; ... the ultimate question is whether capital punishment has come to be excessive and disproportionate in Connecticut.

State v. Santiago, 122 A.3d 1, 30 (Conn. 2015) citing *District Attorney v. Watson*, 381 Mass. 648, 661, 664-65 (1980) (holding that death penalty violated state constitution on basis of contemporary standards of decency in Massachusetts). The relevant standards of decency are necessarily local: only the moral judgments of the citizenry of this State can define the bounds of its constitutional guarantees.³

II. THE EVOLVING STANDARDS OF DECENCY DEMONSTRATE THAT CAPITAL PUNISHMENT IN WASHINGTON IS CRUEL

The current community standards in Washington indicate that capital punishment is excessive, unnecessary, and as a result a “cruel punishment” in violation of the Washington Constitution.

A. Washington’s Near Total Abandonment of Capital Punishment Demonstrates a Consensus Against its Use

Although capital punishment remains authorized by law, administration of the penalty reveals a consensus that the punishment is excessive and, therefore, unconstitutional. *Fain*, 94 Wash.2d at 396-97 (in determining constitutional proportionality, “courts have sought to use objective standards to minimize the possibility that the merely personal preferences of judges will decide the outcome of each case.”). Washington has

³ See *Santiago*, 122 A.3d. at 32-55 (examining the societal consensus against the death penalty within Connecticut in holding the death penalty violates the state constitution); *State v. Lyle*, 854 N.W. 378, 389 (Iowa 2014)(relying, in part, on the consensus “building in Iowa in the direction of eliminating mandatory minimum sentencing” in holding the application of mandatory minimums to juvenile offenders violates the Iowa Constitution); *Van Tran v. State*, 66 S.W.3d 790, 804 (Tenn. 2001)(examining the consensus within Tennessee to conclude that the execution of mentally retarded persons violates the Tennessee State Constitution).

increasingly rejected the death penalty as a punishment over the last half-century—and particularly in the last ten years. “Statistics about the number of executions may inform the consideration whether capital punishment ... is regarded as unacceptable in our society.” *Kennedy*, 554 U.S. at 433. In the decades before 1960, Washington executed 105 inmates. In contrast, in the past fifty years, Washington has only executed five inmates, three of whom waived their appeals and volunteered for execution.⁴ Only one of those executions was carried out during the last decade.⁵ Moreover, given Governor Inslee’s imposition of a moratorium on executions, there is no likelihood executions will resume in the near future.⁶

Nor are Washington juries imposing death sentences following aggravated murder convictions. Between 2003 and 2015, there were over 2300 intentional homicides committed in Washington State.⁷ During that same time period, only three trials resulted in a death sentence.⁸ In death penalty cases, “the jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved,’ and . . . it is thus important to look to

⁴ A list of all executed inmates in Washington is kept by the Washington Department of Corrections and is available at <http://www.doc.wa.gov/offenderinfo/capitalpunishment/executedlist.asp>. The Death Penalty Information Center collects data on which inmates volunteer for execution and is available at <http://www.deathpenaltyinfo.org/views-executions>.

⁵ *Id.*

⁶ <http://www.governor.wa.gov/news-media/gov-jay-inslee-announces-capital-punishment-moratorium>

⁷ State-by-state homicide statistics for each of these years is compiled by the Federal Bureau of Investigation and available at <http://www.fbi.gov/stats-services/crimestats>. From 2003 to 2014, there were 2,181 intentional homicides in Washington State. Although precise 2015 statistics are not yet available, on average over the past 12 years, 181 intentional homicides are committed in the State each year.

⁸ Data on death sentences by state and year is compiled by the Death Penalty Information Center and available at <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008>

the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried.” *Coker v. Georgia*, 433 U.S. 584, 596 (1977), quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976)(concluding that the death penalty for rape of an adult woman is unconstitutional, in part, because 9 out of 10 rape cases had not resulted in a death sentence).⁹ These decisions, made by citizens who actually implement the death penalty, are substantially more relevant than statements by pundits or public opinion polls. See *Santiago*, 122 A.3d at 54 (finding a statewide consensus in Connecticut against the death penalty where, “[a]lthough some opinion polls continue to reflect public support for the death penalty in theory, in practice, our state has proved increasingly unwilling and unable to impose and carry out the ultimate punishment”).

The total number of death sentences imposed is a particularly telling measure of consensus because it reflects not only the decision of the jury itself, but also the exercise of discretion by locally-elected prosecutors handling potentially capital cases. See *Enmund v. Florida*, 458 U.S. 782, 796 (1982)(noting that lack of death sentences for felony murder “tend to indicate that prosecutors, who represent society’s interest in punishing crime, consider the death penalty excessive for accomplice felony murder.”). This “examination of

⁹ Even these incredibly low numbers actually overstate the degree to which Washington’s citizenry supports the death penalty. Because capital juries are entirely composed of death-qualified members, *i.e.*, those who will commit to considering and imposing the death penalty in an appropriate case, verdicts reflect the consensus of only this portion of society. See *Lockhart v. McCre*, 476 U.S. 165 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985). The significant segment of the population that is entirely opposed to capital punishment is excluded from service and therefore, its views are unrepresented in this metric. *Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring)(“The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive”).

actual sentencing practices ... where the sentence in question is permitted by statute discloses a consensus against its use.” *Graham*, 560 U.S. at 62.

Effectively conceding that the punishment is unnecessary, and faced with the futility of seeking a death sentence in their communities, the Washington Association of Prosecuting Attorneys favors asking voters if the punishment should be retained.¹⁰ However, this Court does not defer to referenda to assess the constitutionality of a punishment, and the infrequency of death sentences and executions in Washington, answers the question posed: the standards of decency have evolved to reflect that the death penalty is a “cruel” punishment. Whatever a referendum vote returned, it could not replace this Court’s own independent assessment that the penalty was unnecessary, excessive, and as such cruel.

B. Washington’s Abandonment of the Death Penalty Is Consistent with a Nationwide Trend Away from Its Use.

The consensus against the death penalty in Washington leads a strong and growing rejection of the punishment nationwide. *See Gentry*, 125 Wash.2d at 631 (“In questions regarding the interpretation of Const. art. 1, § 14, we look to current community standards, objective indicia of which include the statutes and cases of other jurisdictions as well as our own”). Since 2006, seven states have abolished capital punishment, and it is now entirely prohibited in twenty jurisdictions.¹¹ Significantly, as the Court noted in *Atkins* and *Simmons*, the

¹⁰ While certainly not dispositive, the position of the Washington Association of Prosecuting Attorneys Association, calls into question the necessity of capital punishment. *See* King County Prosecuting Attorney’s Office, *Washington Association of Prosecuting Attorneys Support Referendum on the Death Penalty* (November 12, 2015).

¹¹ The twenty jurisdictions without any death penalty are AK, CT, DE, HI, IL, IA, ME, MD, MA, MI, MN, NJ, NM, NY, ND, RI, VT, WV, WI, and the District of Columbia. In addition,

trend is clear. *Atkins*, 536 U.S. at 315-316 (“It is not so much the number of these States that is significant, but the consistency of the direction of change.”); *Simmons*, 543 U.S. at 566 (same). The abandonment of capital punishment is broad, non-partisan, and based upon a broad set of circumstances, including moral aversion to the death penalty,¹² cost, and an acknowledgment of the unsuccessful efforts to regulate capital punishment.¹³

In counting states that have abandoned capital punishment, the Supreme Court has also included Oregon, which has “suspended the death penalty and executed only two individuals in the past forty years.” in *Hall v. Florida*, 134 S. Ct. 1986, 1997 (2014). Like Oregon and Washington, the governors in Colorado and Pennsylvania have indefinitely suspended executions. In *Enmund v. Florida*, the Court observed “it would be relevant if prosecutors rarely sought the death penalty for accomplice felony murder, for it would tend to indicate that prosecutors, who represent society’s interest in punishing crime, consider the death penalty excessive.” 458 U.S. at 796. Surely the elected Governor of a state represents that interest as well, and when the elected Governor goes so far – not just to articulate a policy concern over capital punishment but to suspend its application, the decision is strong evidence that the punishment is excessive. In Washington, Colorado and

the Nebraska legislature voted to repeal the state’s death penalty last year, but that measure will be subject to a voter referendum before it takes effect.

¹² Cf Mark Berman, *Pope Francis Tells Congress Every Life is Sacred, Says the Death Penalty Should be Abolished*, Washington Post, September 24, 2015; see also His Holiness Pope Francis, *Lettera Del Santo Padre Francesco Al Presidente Della Commissione Internazionale Contro La Pena Di Morte Dal Vaticano*, March 20, 2015 available at http://w2.vatican.va/content/Francesco/it/letters/2015/documents/papa-francesco_20150320_lettera-pena-morte.html

¹³ See Harvard Law Today, *Steiker Study Inspires Withdrawal of Death Penalty Section from Model Penal Code*, January 7, 2010 available at <https://today.law.harvard.edu/steiker-study-inspires-withdrawal-of-death-penalty-section-from-model-penal-code/>

Pennsylvania, the number of executions also mirrors Oregon's disuse the Court identified in *Hall*. Particularly given the infrequency with which the death penalty has been used, the executive moratoria made official what the citizenry of these states had embraced for years: the end of capital punishment.

Seven other states and the federal government¹⁴ exhibit a significant degree of long-term disuse.¹⁵ New Hampshire, which has only one occupant on its death row, has not performed an execution in 86 years. Kansas has not executed anyone since 1965. Wyoming has executed one person in fifty years and its death row is empty. Idaho, Kentucky, Montana, South Dakota, and the Federal Government have performed only three executions each over the past 50 years. Moreover, of the 16 death sentences carried out by these jurisdictions, seven have involved inmates who volunteered for execution. In total, thirty-four jurisdictions have either abolished the death penalty or executed one or fewer inmates per decade over the past half-century.

Among states that continue to use capital punishment, there has been a substantial decline in the number of death sentences imposed and executions performed. In 2015, only 49 new death sentences were imposed nationally, an all-time post-*Furman* low.¹⁶ Executions have also steadily decreased for over a decade and are at their lowest levels in twenty-five years, with only six states

¹⁴ The United States Military has not executed anyone since 1961. Whatever this signifies with respect to the consensus analysis, it speaks volumes to the question of purpose: the death penalty is a punishment that the military has clearly determined is not necessary.

¹⁵ Data on executions is compiled by the Death Penalty Information Center and is available at <http://www.deathpenaltyinfo.org/executions-united-states>.

¹⁶ Death Penalty Information Center, *The Death Penalty in 2015: Year-End Report*, available at <http://deathpenaltyinfo.org/documents/2015YrEnd.pdf>.

performing a total of 28 in 2015.¹⁷ Moreover, even within these states, the practice has narrowed to a handful of counties. See *Glossip v. Gross*, 135 S.Ct. 2726, 2761-62 (2015) (Breyer, J., *dissenting*)(noting that “in 2012, just 59 counties (fewer than 2% of counties in) the country accounted for all death sentences imposed.”). The trend has only increased: only 16 of the 3,143 counties have imposed five or more death sentences between 2010 and 2015.¹⁸ Disturbingly, these counties share “a history of overzealous prosecutions, inadequate defense lawyering, and a pattern of racial bias and exclusion.”¹⁹

These deficiencies lead to “wrongful conviction of innocent people, and the excessive punishment of persons who are young or suffer from severe mental illnesses, brain damage, trauma, and intellectual disabilities.”²⁰ For example, in Duval County, Florida, Angela Corey, deemed America’s “cruellest prosecutor,” recently pursued death for a defendant with a severe mental illness and a low IQ. In Maricopa County, Arizona, rampant misconduct contributed to at least two of the county’s five death row exonerations since 1976.²¹ Similarly, personality driven prosecutions caused Caddo Parish, Louisiana to lead the nation per capita in death sentences.²² *But see Tucker v. Louisiana*, 136 S. Ct. 1801, 1801-1802 (2016)(Breyer, J., Ginsburg, J., *dissenting from denial of cert.*).

¹⁷*Id.*

¹⁸ FAIR PUNISHMENT PROJECT, TOO BROKEN TO FIX PART 1: AN IN-DEPTH LOOK AT AMERICA’S OUTLIER DEATH PENALTY COUNTIES 2 (2016) (hereinafter, *Too Broken*), available at <http://fairpunishment.org/wp-content/uploads/2016/08/FPP-TooBroken.pdf>.

¹⁹ *Too Broken*, *supra* note 14.

²⁰ *Id.*

²¹ *Id.*

²² FAIR PUNISHMENT PROJECT, AMERICA’S TOP FIVE DEADLIEST PROSECUTORS, HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY, (June 2016), available at http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf

III. EXERCISE OF THIS COURT'S INDEPENDENT JUDGMENT REVEALS THE DEATH PENALTY IS CRUEL

“Legislative authority is ultimately circumscribed by the constitutional mandate forbidding cruel punishment.” It is therefore this Court’s independent “duty to determine whether a legislatively imposed penalty is constitutionally excessive.” *Fain*, 94 Wash.2d at 402; *see also State v. Santiago*, 122 A.3d 1, 30 (Conn. 2015)(noting “independent duty” to determine whether “penalty remains constitutionally viable as the sensibilities of our citizens evolve.”). When this Court exercises its independent judgment, it is clear that the death penalty is disproportionate and, therefore, cruel.

A. *Capital Punishment Serves No Legitimate Penological Purpose*

When the infliction of capital punishment no longer serves a penological purpose, its imposition represents “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.” *Furman*, 408 U.S. at 312. Punishment without penological purpose is necessarily cruel. *Kennedy*, 554 U.S. at 441. The purposes purportedly served by capital punishment are “retribution and deterrence.” *Gregg*, 428 U.S. at 183. Capital punishment, as it is administered in Washington, serves neither.

1. The Death Penalty Does Not Deter Murder

There is no reliable evidence that the death penalty deters murder. In a 2012 analysis of several deterrence studies, the National Research Council concluded, “research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates.” *See also Baze*, 553 U.S. 35, 79 (Stevens, J., concurring in judgment)(“The legitimacy of deterrence as an acceptable

justification for the death penalty is also questionable, at best. Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment.”)(footnote omitted); *Glossip*, 135 S.Ct. at 2768 (Breyer, J., dissenting)(discussing why death penalty is unlikely to deter murder). Even without resort to statistical analysis, however, it is obvious that a punishment as infrequently imposed as the death penalty is in Washington can serve no deterrent purpose.

2. The Death Penalty Does Not Contribute Any Significant Retributive Value Beyond That Afforded By A Sentence of Life Without Parole

Retribution is the principle that “most often can contradict the law’s own ends,” because, “[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing constitutional commitment to decency and restraint.” *Kennedy*, 554 U.S. at 420. Though the death penalty must be reserved for only the most aggravated homicides committed by the most culpable offenders, *see, e.g., Atkins*, 536 U.S. at 319, experience demonstrates that a number of systemic factors—overzealous prosecution, inadequate defense lawyering, and the imprecision of assessing the culpability of people with serious functional impairments—undermine the ability of jurors to accurately assess whether death is the appropriate sentence. Moreover, whether it is the historical connection between capital punishment and lynching, or the contemporary findings that racial disparities continue to plague the death penalty in Washington and other states, it is hard to escape the conclusion that

in the context of the death penalty race and retribution remain inextricably tied.²³

B. The Death Penalty Is Not Reserved For The Most Aggravated Offenses or the Most Culpable Offenders.

The United States Supreme Court has consistently attempted to limit the imposition of capital punishment to “a narrow category of the most serious crimes,” in order to ferret out those crimes which, while severe, are not deserving of the ultimate punishment. *Atkins*, 536 U.S. at 319; *Kennedy* (banning the death penalty for non-homicide offenses); *Godfrey*, 446 U.S. at 433 (requiring states to narrow their homicide statutes).

While the imposition of the ultimate sanction of death is undeniably rare, this infrequency has not ensured the punishment is limited to the most culpable offenders. “The tension between general rules and case-specific circumstances has produced results not altogether satisfactory.” *Kennedy*, at 436. “Justice Breyer recently noted that numerous studies “indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought not to affect application of the death penalty, such as race, gender, or geography, often do.” *Glossip*, 135 S.Ct. at 2760 (Breyer, J., dissenting).

The same issues exist within the State of Washington. Justices of this Court, after reviewing sentences in numerous aggravated murder cases, have

²³ See Justin D. Levinson, Robert J. Smith, & Daniel Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 2 (2014).

noted a disconnect between the egregiousness of the crime and the sentence ultimately imposed. Justice Fairhurst observed, “[c]onsidering the crime and the defendant, it is impossible to predict whether a defendant convicted of a brutal aggravated murder will be sentenced to life in prison or death.” *State v. Davis*, 175 Wash.2d 287, 376-77 (2012)(Fairhurst, J., dissenting). Justice Johnson similarly noted, “[t]he death penalty is like lightning, randomly striking some defendants and not others. ... No rational explanation exists to explain why some individuals escape the penalty of death and others do not.” *State v. Cross*, 156 Wash.2d 580, 652 (2006)(Johnson, J., dissenting).

Nor is the death penalty reserved for the most culpable offenders. “[D]efendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.” *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), quoting *California v. Brown*, 479 U.S. 538, 545 (1987)(O’Connor, J., concurring). Thus, the death penalty should be limited to those offenders with “a consciousness materially more depraved” than that of the typical person who commits a murder. *Godfrey*, 446 U.S. at 433. The execution of a person with insufficient culpability serves no retributive purpose, and “violates his or her inherent dignity as a human being.” *Hall*, at 1992; *see also Atkins*, at 320 (barring the death penalty for intellectually disabled offenders who, regardless of offense, are insufficiently culpable for execution); *Simmons*, at 569-71(same, for juvenile offenders).

The concern over retributive excess necessarily extends to offenders with severe mental illness, traumatic brain injuries and other functional deficits

that have a tendency to degrade the quality of thought processes. *See e.g., Porter v. McCollum*, 558 U.S. 30, 43-44 (2009)(recognizing mitigating value of a defendant’s “brain abnormality and cognitive deficits,” as well as “the intense stress and mental and emotional toll” that army service can have on an individual); *State v. Cross*, 156 Wash.2d 580, 634 (2006)(defendant’s “abusive childhood and medically diagnosed personality disorders . . . do not necessarily render a death penalty disproportionate, though they are certainly grounds for the jury to show mercy”).

Despite the numerous procedural safeguards in place, a substantial proportion of the executed and condemned suffer or suffered from limited intellectual ability, severe mental illness, addiction, or an abusive upbringing such that death is neither a just nor a constitutionally proportionate sentence.²⁴ *See, e.g., State v. Davis*, 175 Wash.2d 287, 322-24 (2012)(“Davis’s IQ declined . . . to 74,” some “experts opined that Davis suffered from a learning disability, impaired neuropsychological functioning, and antisocial, borderline, and “schizotypal personality disorders,” and other “experts diagnosed him with a cognitive disorder not otherwise specified and major depression with psychotic features”); *State v. Cross*, 156 Wash.2d 580, 593 (2006)(“Cross has a long history of mental illness” and “has attempted suicide at least two times,” during which he “injured his brain and spine”); *State v. Brown*, 132 Wash.2d 529, 552 (1997)(defendant suffered from untreated manic mood disorder).

²⁴ Smith, Robert J., Cull, Sophie, and Robinson, Zoe, *The Failure of Mitigation?*, 65 *Hastings L. J.* 1221 (June 2014).

Perhaps more troubling are the many impairments or disadvantages of which a jury and court are entirely unaware. The failure of defense counsel to discover and present mitigation is but one area of tremendous concern.²⁵ Another is the not uncommon circumstance where mitigation is entirely waived by a defendant. In those cases, there is simply no way to know what hidden factors or impairments may drive a defendant's plainly irrational opposition to the jury's consideration of mitigating information. *See, e.g., Godinez v. Moran*, 509 U.S. 389, 416-17 (1993) (Blackmun, J., dissenting) ("Just a few months after he attempted to commit suicide, Moran essentially volunteered himself for execution: He sought to waive the right to counsel, to plead guilty to capital murder, and to prevent the presentation of any mitigating evidence on his behalf. The psychiatrists' reports supplied one explanation for Moran's self-destructive behavior: his deep depression"). In at least six cases, including four of the five executions Washington performed in the past half-century, the jury never heard any mitigation evidence and therefore was unable to make a reliable, moral determination about the personal culpability of the defendant. *State v. Elledge*, 144 Wash.2d 62, 77 (2001); *State v. Woods*, 143 Wash.2d 561, 608 (2001); *State v. Sagastegui*, 135 Wash.2d 67, 88 (1998); *State v. Dodd*, 120 Wash.2d 1, 25 (1992); *State v. Campbell*, 103 Wash.2d 1, 29 (1984). It is evident, therefore, that there remains a systemic risk of executing a defendant who does not deserve execution.

C. There Remains an Unacceptable Risk of Executing the Innocent

²⁵*See, e.g.,* Stephen Bright, *Counsel for the Poor: The Death Penalty Not for the Worst Crime but for the Worst Lawyer*, 103 YALE LAW JOURNAL 1835 (1994).

It is now incontrovertible that startling numbers of innocent people have been sentenced to death. *See Glossip*, 135 S.Ct. at 2756-58 (Breyer, J., dissenting). Advances in forensic evidence, particularly DNA testing, have contributed to a substantial number of exonerations in capital cases – 156 to date.²⁶ Even more troubling, there is growing concern that states have executed actually innocent defendants.²⁷ As Justice Stevens recently noted, the risk of killing an innocent person, which cannot be entirely eliminated, is a “sufficient argument against the death penalty: society should not take the risk that that might happen again, because it’s intolerable to think that our government, for really not very powerful reasons, runs the risk of executing innocent people.”²⁸

D. On Objective Review, the Operation of Capital Punishment is Cruel

The operation of capital punishment in Washington is cruel.

1. Due Process Required to Prevent Wrongful Executions Results In Unconstitutional Delay In Punishment

Condemned prisoners spend decades awaiting execution.²⁹ Because of the “special need for reliability and fairness in death penalty cases,” any

²⁶ *Id.* The number of exonerations is harrowing in its own right, but particularly so when considering the human aspect of the individual cases. As just one example, in a 1994 case, Justice Scalia used Henry McCollum as a poster child for the death penalty for his purported role in “the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. How enviable a quiet death by lethal injection compared with that!” *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Scalia, J., concurring). Twenty years after that opinion, Henry McCollum was exonerated. *See* Jonathan Katz and Erik Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. TIMES (Sept. 2, 2014).

²⁷ *See Glossip*, 135 S.Ct. at 2758 (Breyer, J., dissenting); Maurice Possley, *Fresh Doubts Over a Texas Execution*, WASHINGTON POST (Aug. 3, 2014) (discussing case of Cameron Todd Willingham); James Liebman, *The Wrong Carlos: Anatomy of a Wrongful Execution* (Columbia University Press 2014 ed.) (discussing case of Carlos DeLuna).

²⁸ *See also* Robert Sanger, *CACJ’S Past President Robert Sanger Interviews United States Supreme Court Justice John Paul Stevens*, California Attorneys for Criminal Justice, Feb. 21, 2016, available <http://www.cacj.org/Resources/Educational-Video-Archive/Interview-with-Justice-Stevens.aspx>. *See also* Columbia Law School, *Professor James Liebman Proves Innocent Man Executed, Retired Supreme Court Justice Says* (Jan. 26, 2015).

²⁹ *See* Department of Corrections of Washington State, *Capital Punishment in Washington State*, available at <http://www.doc.wa.gov/offenderinfo/capitalpunishment/>

death sentence necessarily carries with it a long delay between its initial pronouncement and its eventual execution. *Glossip*, 135 S.Ct. at 2764 (Breyer, J., dissenting), quoting *Simmons*, 543 U.S. at 568. Such lengthy terms in isolation cause “numerous deleterious harms” to an inmate’s physical and mental health. *Glossip*, 135 S.Ct. at 2765 (Breyer, J., dissenting).³⁰ Therefore, the imposition of decades of extraordinarily severe and isolating confinement raise significant constitutional questions of their own. See, e.g., *Davis v. Ayala*, 135 S.Ct. 2187, 2210 (2015)(Kennedy, J., concurring)(acknowledging courts need to consider the constitutionality of the long-term solitary confinement of death row prisoners). A significant corollary of this delay is that the individual facing eminent execution is different than the defendant who committed the offense. Though experience teaches that many prisoners undergo significant transformation while incarcerated,³¹ the death penalty leaves no room for a person to establish that he is capable of redemption. Capital punishment thus undermines the very dignity of human life that it was designed to protect.

2. Current Execution Methods Involve Torture or a Lingered Death

³⁰ See *Ball v. LeBlanc*, 792 F.3d 584 (5th Cir. 2015); see also Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQUENCY 124, 130 (2003)(solitary confinement can cause prisoners to experience “anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations”).

³¹ See Wilbert Rideau, IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE (Knopf Doubleday Publishing Group 2010); see also Mark Davis, *Former inmates rally to save murderess from death*, The Atlanta Journal-Constitution, 21 Sept. 2015, (noting that “[a] loose-knit collection of former female convicts credit [Kelly] Gissendaner [executed in 2015 in Georgia] with giving them hope behind bars, ministering to them through an air vent” and one of those woman said: “Killing Kelly is essentially killing hope ... Kelly is the poster child for redemption”). Available at: <http://www.myajc.com/news/news/former-inmates-rally-to-save-murderess-from-death/nnkBb/>.

There also remains “a substantial, constitutionally unacceptable risk” of suffering in the current administration of capital punishment. *Baze*, 553 U.S. at 52. Punishments are “cruel” when they “involve torture or a lingering death.” *In re Kemmler*, 136 U.S. 436, 447 (1890); *Manussier*, 129 Wash.2d at 676. Medical practitioners refuse to participate in executions and pharmaceutical companies refuse to supply the drugs traditionally used to execute inmates. Faced with shortages, prison administrators have made impromptu substitutions, often without any scientific basis or study.³² These experiments have led to botched executions, in which the condemned do not die quietly or painlessly, but rather writhe in agony before they suffocate and finally expire.³³

CONCLUSION

All of the factors discussed above undermine the constitutionality of capital punishment within Washington State. As Justice Stevens observed:

Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time... While Justice Thomas would apparently not rule out a death sentence for a \$50 theft by a 7-year-old, ... the Court wisely rejects his static approach to the law. Standards of decency have evolved since 1980. They will never stop doing so.

Graham, 560 U.S. at 85 (Stevens, J., concurring). Such a change has occurred here. It is the province and duty of this Court to recognize it.

³² Jeffrey Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC MONTHLY (June 2015).

³³ See Jeffrey Stern, *supra* note 37; Michael L. Radelet, *Examples of Post-Furman Botched Executions*, Death Penalty Information Center, Feb. 2, 2016 available at <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions?scid=8&did=478>. But see *State v. Broom*, 146 Ohio St. 3d 60, 81 (Ohio 2016) (O’Neill, J., dissenting) (observing that second execution attempt on petitioner aver “a botched attempt” constituted “cruel and unusual punishment.”).

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Good afternoon,

Attached please find the following documents to file in *State of Washington v. Byron Eugene Sherf* - No. 88906-6:

1. Motion for Leave to File Brief of Amici Curiae
2. Amicus Brief of The Fair Punishment Project, The Charles Hamilton Houston Institute for Race and Justice and The Promise of Justice Initiative

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Please let me know if you need any additional information to file this.

Thank you,

Erin Weinkauff

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