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NO. 88906-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BYRON E. SCHERF,

Appellant.

ANSWER TO BRIEF OF
AMICI CURIAE

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I. ISSUE

Have amici curiae provided adequate reason for this court to abandon its repeated holding that the death penalty does not inherently violate the Washington Constitution?

II. STATEMENT OF THE CASE

The facts are set out in the Brief of Respondent.

III. ARGUMENT

A. AMICI HAVE PROVIDED NO FACTUAL BASIS FOR REJECTING A PENALTY THAT IS EXPLICITLY RECOGNIZED BY THE WASHINGTON CONSTITUTION, HAS EXISTED FOR ALMOST THE ENTIRE HISTORY OF THE STATE, AND THE LEGISLATURE HAS REPEATEDLY REFUSED TO ALTER.

Capital punishment has existed in Washington almost throughout the state's history. The state constitution specifically refers to death as a legitimate penalty. See Const., art. 1, § 3 ("No person shall be deprived of *life* ... without due process of law"), § 20 ("All persons charged with crime shall beailable by sufficient sureties, *except for capital offenses*"). The death penalty was abolished in 1913, but it was reinstated 6 years later. See Laws of 1913, ch. 167 § 1 (abolishing death penalty); Laws of 1919, ch. 112 (reinstating death penalty). Every time courts have invalidated a death penalty statute, the legislature or the people have reinstated it. Compare State v. Baker, 81 Wn.2d 281, 501 P.2d 284 (1972)

(holding death penalty statute invalid because of lack of standards), with Laws of 1975-76, 2nd ex. sess., ch. 9 (Initiative no. 316) (enacting mandatory death penalty); compare Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (holding mandatory death penalty statutes invalid), with Laws of 1977, 1st ex. sess., ch. 206 (re-enacting death penalty); compare State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981) (holding statute invalid because defendant could avoid death penalty by pleading guilty) with Laws of 1981, ch. 138 (fixing problem identified in Frampton).

In recent years, the legislature has repeatedly rejected proposals to eliminate the death penalty. In every legislative session since 2009, bills to abolish the death penalty have been introduced in both houses. Not one of them made it out of committee. HB 1909 (2009-10), SB 5476 (2009-10), HB 1921 (2011-12), SB 5456 (2011-12), HB 2468 (2012), SB 6283 (2012), HB 1504 (2013-14), SB 5372 (2013-14), HB 1739 (2015-16), SB 5639 (2015-16). The last time the Legislature made a substantive

change to the death penalty statutes¹, it was to *expand* availability of the death penalty to certain domestic violence cases. Laws of 1998, ch. 305, § 1.

An effort to change the death penalty law through the initiative process was likewise unsuccessful. In 2013, an initiative was filed to abolish the death penalty. Initiative no. 1258 (2013). It did not receive sufficient signatures to qualify for the ballot.

As the Brief of Respondent pointed out, this court has repeatedly upheld the constitutional validity of the death penalty. Brief of Respondent at 139-40, citing State v. Davis, 175 Wn.2d 287, 342-45 ¶¶ 105-12, 290 P.3d 43 (2012), cert. denied, 134 S.Ct. 62 (2013); State v. Yates, 161 Wn.2d 714, 792-93 ¶¶ 117-119, 168 P.3d 359 (2007), cert. denied, 554 U.S. 922 (2008); and State v. Cross, 156 Wn.2d 580, 621-25 ¶¶ 82-95, 132 P.3d 180, cert. denied, 549 U.S. 1022 (2006). The last time the court reached this conclusion, it pointed to the "severe lack of factual information on the death penalty's information." This problem was not solved by attaching new data to the defendant's brief. It had to be resolved by

¹ A 2010 amendment changed terminology relating to intellectual disability, but it made no substantive changes. Laws of 2010, ch. 94, §§ 3-4.

factual presentations at the trial court level. Davis, 175 Wn.2d at 344-45 ¶¶111-12.

The amicus brief suffers from these same problems. The “facts” supporting their arguments consist largely of citations to websites and law review articles. Amici go so far as to cite their *own* reports as “facts” supporting re-interpretation of the Washington constitution. Brief of Amici at 11, n. 18, 22 (citing reports from amicus Fair Punishment Project). Conspicuously absent from the brief is any discussion of the facts of *this case*.

For example, amici claim that the death penalty lacks any valid deterrent or retributive purpose. These propositions are highly debatable. See, e.g., Glossip v. Gross, ___ U.S. ___, 135 S.Ct. 2726, 2748-49, 192 L.Ed.2d 761 (2015) (Scalia, J., concurring) (discussing deterrent and retributive value of the death penalty). But even if these complaints were valid in some cases, they have no possible relevance to *this case*, where the defendant was already serving a sentence of life imprisonment without possibility of parole. If there were no death penalty, what deterrence would there be for this crime? And what retribution could be imposed on a person who was already serving the maximum sentence allowed by

law? Does the constitution really require that the penalty for the murder of Jayme Bindle be *nothing*?

Similarly, amici complain about the possibility of “wrongful conviction of innocent people, and the excessive punishment of persons who are young or suffer from severe mental illness, brain damage, trauma, and intellectual disabilities.” Brief of Amici at 11. In *this* case, however, there has been no serious claim that the defendant is innocent. He was 52 years old at the time of the murder – which is far from young. There is no evidence that he suffers from severe mental illness, brain damage, or any intellectual disability. Nor is there any indication that his race played any part in the prosecutor’s or the jury’s decision. The hypothetical possibilities that amici suggest simply have no relevance to the defendant’s case. Amici have provided no valid reason for this court to abandon its oft-repeated approval of a penalty that has existed for most of the State’s history.

B. AMICI HAVE PROVIDED NO REASON FOR THIS COURT TO ABANDON ITS ESTABLISHED TEST FOR WHETHER A PARTICULAR PENALTY IS INHERENTLY “CRUEL.”

Amici claim that the death penalty inherently constitutes “cruel punishment” in violation of Article 1, § 14 of the Washington Constitution. Their argument is a mish-mash of Federal and State

law. They invite this court to analyze the state constitution in light of the “framework” used by the United States Supreme Court. Brief of Amici at 2. Using that framework, that court has consistently held that the death penalty is constitutional. See, e.g., Baze v. Rees, 553 U.S. 35, 47, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008).

Amici, of course, do not want this court to follow that holding. Instead, they want this court to pull a test out of federal law, and then apply it so as to reach an opposite result. This court should reject that invitation. The meaning of article 1, § 14, is a matter of state law, not federal law. See State v. Fain, 94 Wn.2d 387, 393, 617 P.2d 720 (1980). In interpreting that provision, this court should apply its own precedents, not half-follow federal precedents. Under those precedents, the death penalty is constitutionally permissible so long as it is carried out in a proper manner.

C. UNDER THIS COURT’S ESTABLISHED TEST, THIS COURT WILL INTERFERE WITH LEGISLATIVE DISCRETION TO ESTABLISH A MODE OF PUNISHMENT ONLY IF THE PUNISHMENT IS SIMILAR TO THE MODES THAT “DISGRACED THE CIVILIZATION OF FORMER AGES.”

Article 1, § 14, like the Eighth Amendment, implicates two prohibitions. First, it “proscribes certain modes of punishment.” Second, it requires that otherwise permissible sentences be “commensurate with the crimes for which such sentences are

imposed.” State v. Fain, 94 Wn.2d 387, 395-96, 617 P.2d 720 (1980). With regard to the latter proportionality requirement, this court has applied “objective standards” based on four factors: (1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction.” Id. at 397. Here, however, the crime involved is the most severe recognized by Washington law. The issue is not whether the death penalty is excessive for that specific crime – it is whether it is impermissible for *any* crime. The factors laid out in Fain are unsuitable for answering that question.

In determining whether a particular mode of punishment is inherently “cruel,” this court has applied the following analysis:

In the matter of penalties for criminal offenses, the rule is that the discretion of the Legislature will not be disturbed by the courts, except in extreme cases. It would be an interference with matters left by the Constitution to the legislative department of the government for us to undertake to weigh the propriety of this or that penalty fixed by the Legislature for specific offenses. So long as they do not provide cruel and unusual punishments, such as disgraced the civilization of former ages, and make one shudder with horror to read of them, as drawing, quartering, burning, etc., the Constitution does not put any limit upon legislative discretion.

State v. Feilen, 70 Wash. 65, 68, 126 P. 75 (1912). As already discussed, the death penalty is one that has been in effect for most of the history of this state. Consequently, it does not inherently fall within the ban of article 1, § 14.

Amici do not even mention this court's established test for deciding whether a penalty is inherently "cruel." Instead, they ask this court to create a new test, based on the supposed existence of a "consensus" in Washington against imposition of that penalty. This court, however, has no special expertise in determining the will of the people of this state. Under the Washington Constitution, that is the task of the people's representatives in the legislature. "As we have consistently held, the determination of penalties for crimes is a legislative function." State v. Thorne, 129 Wn.2d 736, 767, 921 P.2d 514, 528 (1996). If there were truly a consensus against the death penalty in Washington, one would expect the legislature to take some action to limit or abolish it. Instead, they have repeatedly rejected bills to do so. If this defied the public will, one would expect the people to exercise their power to enact laws themselves. Instead, an attempt to abolish the death penalty via initiative measure failed to qualify for the ballot. There is simply no basis for

this court to assume that it understands the will of the people of Washington better than their elected representatives.

Amici point to the Governor's "moratorium" announcement. The Brief of Respondent pointed out that the Governor has been unwilling to transform his words into action. Brief of Respondent at 140. That fact has remained true during the ensuing year. The Governor has yet to stay a single execution or commute a single death sentence. If he truly believed that the sentence imposed in this case offended the conscience of the people of Washington, he would commute that "offensive" sentence – in which case, we would no longer be arguing about its validity. Since he has not done so, it is clear that – at the very least – he entertains grave doubts whether there is any true "consensus" against imposition of the death penalty in this case. Again, this court is not in any better position to understand the people's will than the Governor.

As evidence of the supposed "consensus," amici point to the small number of cases in which prosecutors are seeking the death penalty. This fact simply indicates a desire to reserve the death penalty for the most egregious cases. If this court were to accept this as evidence of a "consensus" against the death penalty, prosecutors would be encouraged to seek that penalty in more

cases, rather than see it abrogated. Surely this court does not wish to send a message to prosecutors that they need to seek the death penalty *more often*.

When prosecutors do decide that a case is sufficiently egregious to warrant the death penalty, juries frequently agree. This is apparent from the data set out in the Brief of Appellant at 244-47. Over the period 2006 to 2014, Washington prosecutors sought the death penalty in three cases – and obtained a jury verdict in *all three*. During the previous 10 years (1996 to 2005), prosecutors sought the death penalty in 20 cases and obtained a jury verdict in 8. These data provide no evidence of any consensus against the death penalty. To the contrary, they indicate that in those few egregious cases that prosecutors view as warranting the death penalty, many jurors agree with that conclusion.

Amici claim that the death penalty is unconstitutional because of problems in implementation. For example, they complain of excessive delays in adjudicating capital cases. Most of these delays, however, are the result of proceedings initiated by defendants. If these proceedings are resulting in undue delays, the solution is more expeditious adjudication – not abolishing the death penalty.

Amici likewise complain about current execution methods. Again, if lethal injection is carried out improperly, this court can intervene. Problems that are experienced in individual cases are a basis for granting appropriate relief in those cases – not for invalidating a constitutionally-valid penalty.

In short, there is no basis for this court to abandon its long-held view that the death penalty does not inherently violate the Washington constitution. Questions of criminal justice policy and implementing the public will are properly left to the people's elected representatives. If a consensus against the death penalty ever emerges in Washington, this court will not need to search for evidence of its existence.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on October 24, 2016.

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IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

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BYRON E. SCHERF,

Appellant.

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 28th day of October, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO BRIEF OF AMICI CURIAE

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and Rita J. Griffith, griff1984@comcast.net; Mark A. Larranaga, mark@jamlegal.com and Thomas W. Hillier, II, twhillier2@yahoo.com

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

Signed at the Snohomish County Prosecutor's Office this 28th day of October, 2016.



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