NO. 88086-7

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ALLEN EUGENE GREGORY,
Appellant.

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

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

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[1] The identities and interests of amici were set forth in the Motion for Leave to Participate as Amici Curiae filed alongside their principal submission in this case. *See* Br. of Amici Curiae 56 Former and Retired Washington State Judges, et al. Since that time, nineteen additional former judges have chosen to join in support of this brief. They are: Judge Leonard Costello, Art Verharen, Anthony Wartnik, Richard McDermott, Kimberley Prochnau, John Meyer, Susan Cook, Palmer Robinson, Susan Hahn, Bruce Heller, Ron Kessler, Vicki Hogan, Charles Burdell, Evan Sperline, Greg Sypolt, Carol Fuller, Jay Roof, Kathleen O'Connor, and Russ Hartman. One of the former judges who signed the 2016 submission, Glenna Hall, is now deceased. And the Friends Committee on Washington Public Policy, which joined the prior brief, is now named Quaker Voice on Washington Public Policy.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Federal Cases**



**State Cases**

**Other Authorities**

## INTRODUCTION

The Beckett Report concluded that black defendants are more than four times more likely than white defendants to be sentenced to death in the State of Washington. Katherine Beckett & Heather Evans, Race, Death, and Justice: Capital Sentencing in Washington State, 1981-2014 (2016) (Beckett Report). This brief provides external evidence that unequivocally shows that racial bias toward black defendants is pervasive in the criminal justice system, that there is no evidence that black defendants are treated more favorably in Washington's criminal justice system, and that the Beckett Report should therefore be given weight by this Court.

The Commissioner recognized the Beckett Report's use of a .10 p-value and a one-tail test is appropriate if "evidence external to the statistical analysis strongly suggests that there is *little chance that black defendants are treated less harshly, as opposed to equally or more harshly*, than nonblack defendants." Comm. Report 62 (emphasis added). Although the Commissioner leaves the ultimate consideration of this question to the Court, *id.* at 62-63, this brief explains how no evidence suggests that black defendants are treated less harshly, while abundant evidence of implicit and overt racial bias *against* black defendants exists.

This brief also addresses additional reasons for this Court to conclude Washington's death penalty violates the state constitution. As Amici explained in their opening submission, *see* Br. of *Amici Curiae* 56 Former and Retired Washington State Judges, et al ("ACLU Br."), Washington's death penalty process is inherently arbitrary, it is woefully unreliable and therefore cruel, it serves no valid penological purpose, and it offends contemporary standards of decency. These considerations remain just as, if not more, applicable since Amici filed their brief. The defendant's briefs and the briefs of amici demonstrate numerous ways in which Washington's death penalty system violates Washington's Constitution, and this Court should so hold.

## I. COMPELLING EVIDENCE SHOWS THAT BLACK DEFENDANTS ARE TREATED MORE HARSHLY IN CAPITAL CASES.

The glaring disparity in black defendants receiving the death penalty in Washington highlighted by the Beckett Report is but one manifestation of a systemic problem that has been discussed and acknowledged for decades: Study after study since the advent of the modern death penalty, as well as research on behavioral psychology (discussed below) confirms that juries sentence black defendants to death more often than white defendants. *Infra* at 5-7; *cf. McCleskey v. Kemp*, 481 U.S. 279, 287, 107 S.Ct. 1756, 95 L. Ed. 2d 262 (1987) (describing

study of more than 2,000 capital cases finding that black defendants who killed white victims were most likely to receive the death penalty and defendants of any race were 4.3 times as likely to receive a death sentence for killing white victims than non-white victims).

The Commissioner invited consideration of external evidence to rule out the possibility that black defendants are treated *less* harshly in capital sentencing than non-black defendants, as a means of validating the methodological basis for the Beckett Report's conclusions. Comm. Report 62-63. As explained below, the available evidence corroborates the racial disparities found by the Beckett Report and collectively supplies a sound basis for finding Washington's death penalty unconstitutional.

That considerable evidence of overt and implicit bias in Washington and across our society bolsters the Beckett study is not just common sense[2]; it is also the product of more formal statistical analysis. Statisticians have long recognized the concept of "convergence" or "convergent validity"—the notion that, if "several studies . . . all point in

[2] It is also consistent with persistent racial discrimination in capital sentencing the U.S. Supreme Court has repeatedly attempted to correct. *See, e.g.*, *Tharpe v. Sellers*, No. 17-6075, 2018 WL 311568, at *1 (U.S. Jan. 8, 2018) (per curiam) (detailing "remarkable" affidavit submitted seven years after capital trial in which juror in black defendant's Georgia capital case characterized some "black people" as "N****s" and questioned whether "black people even have souls"); *Buck v. Davis*, 137 S. Ct. 759, 778, 197 L.E.d. 2d 1 (2017) (holding that a death sentence based on race "is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are").

the same direction," broader "extrapolation" and "generalization" from any one of those studies is acceptable. Federal Judicial Center, *Reference Manual on Scientific Evidence* 222-23 (2011)[3]; see also Phoebe C. Ellsworth, *Legal Reasoning and Scientific Reasoning*, 63 Ala. L. Rev. 895, 901, 914 (2012) ("[I]n science, certainty is often achieved by examining a coalescence of many studies, using many methods, each with different flaws and different strengths, so that one's methodological strengths compensate for the methodological weaknesses of others, ultimately producing a 'convergent validity' that is stronger than the validity of any single study.").

Thus, the Commissioner correctly recognized that the Beckett Report's methodological choices (in particular, its use of a "one-tailed test" and its treatment of "p values") can be found appropriate based on "evidence external to the statistical analysis …." Report at 62. The external evidence is clear: Bias—both implicit and overt—continues to plague our justice system.

[3] The Reference Manual on Scientific Evidence includes a guide to statistics intended to "describe[] the elements of statistical reasoning" to "help judges and lawyers . . . understand statistical terminology [and] . . . see the strengths and weaknesses of statistical arguments." Reference Manual at 213. The Commissioner's Report relied on this manual at length. See Report at 3.

### A. Implicit Bias is Pervasive.

"Unlike explicit bias (which reflects the attitudes or beliefs that one endorses at a conscious level), implicit bias is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control." *State v. Walker*, 182 Wn.2d 463, 491 n.4, 341 P.3d 976, 991 n.4 (2015) (McCloud, J., concurring). Courts have "recognize[d] the proven impact of implicit biases on individuals' behavior and decision-making," "especially as it relates to racial bias." *United States v. Ray*, 803 F.3d 244, 259–60 (6th Cir. 2015*); see also, e.g., State v. Plain*, 898 N.W.2d 801, 817 (Iowa 2017); *Shirley v. Yates*, 807 F.3d 1090, 1110 n.26 (9th Cir. 2015).

"[S]ocial cognition research has provided stunning evidence of implicit bias." Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1490 (2005). The "state-of-the-art measurement tool" used to examine the presence and results of implicit bias is the "Implicit Association Test" (IAT), which measures the strength of respondents' association of positive and negative characteristics with a particular race. *Id.* at 1509-10.

Millions of people have taken the test since it was introduced about 20 years ago. Ted A. Donner, *Implicit Bias in the Law: An Important*

*Focus for 2017*, 29 DCBA Brief 5, 6 (2017).[4] The results show "extremely widespread" bias: "Most people tend to prefer white to African-American." Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 Cal. L. Rev. 969, 971 (2006). By 2005, about 100 studies had documented this tendency. Kang, *supra* at 1512.

Moreover, there is "overwhelming evidence that implicit bias measures are dissociated from explicit bias measures," *i.e.*, self-reporting of prejudice. *Id.* at 1512-13. Most people, even those vehemently opposed to racism, are conditioned to exhibit bias against minorities. This "might not be so disturbing . . . if the results did not predict actual behavior." Jolls, *supra*, at 971. But "those who demonstrate implicit bias also manifest this bias in various forms of actual behavior." *Id.* at 972.

"Jurors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors." Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 Harv. L. & Pol'y Rev. 149, 150 (2010). Numerous studies show the influence of race in juror decision making, providing disturbing evidence that a defendant's race plays a role in how jurors vote. Jennifer S. Hunt,

[4] This test is available to anyone at https://implicit.harvard.edu/implicit/.

*Race, Ethnicity, and Culture in Jury Decision Making*, 11 Ann. Rev. L. & Soc. Sci. 269, 271-72 (2015) (comprehensive review of available studies).

In one recent example, study participants were given the IAT test discussed above and also asked to evaluate hypothetical criminal cases. Mock jurors with higher implicit-bias scores tended to associate guilt with black defendants. And those same jurors were more willing to conclude that black defendants were guilty where the evidence was ambiguous. Justin D. Levinson et al., *Guilty by Implicit Racial Bias*, 8 Ohio St. J. Crim. L. 187, 201-207 (2010). In other studies, mock jurors have been found more likely to recommend the death penalty for black defendants—especially when the victim is white. Hunt, *supra*, at 272-73; Mona Lynch & Craig Haney, *Capital Jury Deliberation*, 33 L. & Human Behavior 481, 487, 492-94 (2009).

Because implicit bias affects a number of outcomes in the justice system, from jury selection to deliberation to verdict, it would be extraordinary if implicit bias did not play an insidious role in capital cases. Implicit bias by itself "strongly suggests that there is little chance that black defendants are treated less harshly … than nonblack defendants." Report at 62.

### B. Overt Bias Continues to Taint Every Part of the Criminal Justice System in Washington, Creating Harsher Outcomes for Black Defendants.

The Commissioner expressed "hope" that racial stereotypes of black men as violence prone, observed in other states, may "not significantly affect sentencing in capital cases in Washington, which has a different history than some regions of the country." Comm. Report 62. Unfortunately, Washington has its own deeply troubled history of racial discrimination. *See* Task Force on Race & the Criminal Justice System, Seattle School of Law, *Race & Washington's Criminal Justice System* 10-14 (2012); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 807-813, 127 S. Ct. 2738, 168, L. Ed. 2d 508 (2007) (Breyer, J. dissenting). And there continue to be enormous race-based disparities in Washington's criminal justice system. *Infra* at 9-10.

Washington's case law provides ample proof of overt bias, including in capital cases. *See, e.g.*, *State v. Monday*, 171 Wn.2d 667, 676-79, 257 P.3d 551, 556-57 (2011) (reversing case in which prosecutor argued to the jury that "'black folk don't testify against black folk[,]'" and referred to the police as "po-leese" in the examination of black witness); *In re Gentry*, 179 Wn.2d 614, 632, 316 P.3d 1020, 1029 (2014) (prosecutor heckled black defense attorney—one of the attorneys on this brief—in a death-penalty trial with "Where did you learn your ethics? In

Harlem?"); *Walker*, 182 Wn.2d at 488 n. 2 (McCloud, J., concurring) (describing prosecutor's use of inflammatory, racially-charged images "highlighting the defendant's race—his blackness—in a case where that had absolutely no relevance," including a photograph of defendant's family superimposed with a quote including the n word); *cf. State v. Dhaliwal*, 150 Wn.2d 559, 582, 79 P.3d 432, 444 (2003) (Chambers, J., concurring) ("From the beginning to the end of Paramjit Dhaliwal's trial, the prosecution maintained a theory of the case that relied in part upon impermissible stereotypes of the Sikh religious community."); *Turner v. Stime*, 153 Wn.App. 581, 594, 222 P.3d 1243, 1249 (2009) (requiring new trial based on jurors' racist remarks regarding Japanese American attorney).

Just last month, the Washington State Attorney General's Office issued a report recognizing that when it comes to racial disparities in the criminal justice system, "Washington State is not unique." *See* Office of the Attorney General of Washington State, *Consolidating Traffic-Based Financial Obligations in Washington State* 9 (Dec. 1, 2017).[5] Another recent report identified a number of signs that racial bias creates harsher

[5] *Available at* http://www.atg.wa.gov/reports-legislature.

outcomes for black defendants in the state. Task Force Report, *supra*, at 5. Among them:

- Black defendants convicted of felony drug crimes are 62% more likely to be sentenced to prison than similarly situated White defendants.
- Black defendants are less likely than similarly situated White defendants to receive sentences that fell below the standard range.
- Juvenile black defendants receive longer sentences than similarly situated white juveniles.

*Id.* Other studies have repeatedly documented harsher treatment of African Americans in Washington.[6]

The evidence of implicit bias coupled with overt racism in Washington's legal system confirms the Beckett study's findings and answers the Commissioner's question: None of the available evidence even remotely suggests that black defendants in Washington are treated more favorably than their white counterparts. Indeed, this corroborating external evidence should lead the Court to assign great weight to the study's conclusions.

[6] *See, e.g.*, Knute Berger, *Our dishonorable past: KKK's Western roots date to 1868*, Crosscut (Mar. 20, 2017), available at http://crosscut.com/2017/03/history-you-might-not-want-to-know-the-kkks-deep-local-roots-west-california-washington-oregon/?; Catherine Silva, *Racial Restrictive Covenants: Enforcing Neighborhood Segregation in Seattle*, Seattle Civil Rights & Labor History Project, available at http://depts.washington.edu/civilr/covenants_report.htm.

### C. Implicit and Explicit Bias in Jury Selection Reinforces the Study's Findings.

Racial bias is also reflected in juror selection, here in Washington and elsewhere. Because studies show that jurors make more accurate decisions about guilt when they serve on racially balanced panels, bias at juror selection contributes to racial bias at the jury decisionmaking stage. *See* Hunt, *supra*, at 274; *see also* Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Quarterly J. of Econ. 1017, 1017, 1046-47 (2012) (study concluding that "all-white jury pools convict black defendants . . . 16 percentage points[] more often than white defendants").

It is well documented, and this Court is well aware, that the jury selection process in Washington disproportionately excludes people of color. This Court and the United States Supreme Court have long struggled with the issue of racial discrimination in jury selection. *See City of Seattle v. Erickson*, 188 Wn.2d 721, 734, 398 P.3d 1124, 1131 (2017) (peremptory challenge used to strike the only African American on a jury panel); *Foster v. Chatman,* 136 S. Ct. 1737, 1747, 195 L. Ed. 2d 1 (2016); *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013) (peremptory challenge used to strike only remaining African American from the jury); *State v. Rhone*, 168 Wn.2d 645, 648, 229 P.3d 752 (2010) (peremptory challenge used to strike the "only African-American venire member in a

trial of an African-American defendant"). In 2017, this Court held a Symposium on Jury Diversity, where contributors documented the numerous ways racial disparity and racial bias continue to permeate the jury selection process in Washington.[7]

Racial bias in jury selection in death penalty cases is also well documented. For example, in a review of hundreds of capital cases in Philadelphia, one study found significant evidence that "venire members are routinely rejected for jury service because of their race," that prosecutors used their peremptory challenges at a higher rate against black potential jurors than all other venire members, and that their successful strikes had a significant, upward effect on their likelihood of obtaining a capital conviction. David C. Baldus, et al, *The Use of Peremptory Challenges in Capital Murder Trials*, 3 U. Pa. J. Const. L. 3, 64, 106, 128 (2001). These findings have been replicated in other regions. *E.g.*, Catherine M. Grosso, et al., *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1550 (2012).

[7] Washington State Minority and Justice Commission, Supreme Court Symposium, available at https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=symposium&layout=2&parent=work.

Racial bias in jury selection, which contributes to biased jury decisionmaking and itself provides powerful evidence of racial discrimination and structural inequity in the criminal justice system, confirms that the Beckett study's conclusions are valid. Together, the study and other available evidence expose the significant risk of racial bias any time a black defendant is tried for a capital crime. Because that risk cannot be tolerated, this Court must strike down the death penalty.

## II. WASHINGTON'S DEATH PENALTY IS ARBITRARY, UNRELIABLE, AND INEFFECTIVE.

In addition to racial bias, Washington's death penalty scheme is plagued with inherent arbitrariness and unreliability. It is penologically ineffective and irreconcilable with evolving standards of decency. It was unconstitutional two years ago, *see* ACLU Br., and the intervening years have only served to underscore its ongoing unconstitutionality.

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

The Washington Constitution's proscription against "cruel" punishment bars not only "certain modes of punishment[,]" but also "disproportionate sentencing." *State v. Manussier*, 129 Wn.2d 652, 674, 676, 921 P.2d 473 (1996). This Court's "proportionality review[,]" in turn, seeks to root out two distinct evils: "[T]he imposition of the death sentence based on race" and "the systemic problems of random

arbitrariness." *State v. Gentry*, 125 Wn.2d 570, 633, 888 P.2d 1105 (1995). Washington's system of capital punishment fails that review. *See* ACLU Br. 5-14.

Describing the arbitrariness of our state's capital punishment system, members of this Court have lamented "[o]ne could better predict whether the death penalty will be imposed on [our] most brutal murderers by flipping a coin than by evaluating the crime and the defendant." *State v. Davis*, 175 Wn.2d 287, 388, 290 P.3d 43 (2012) (Fairhurst, J., dissenting). Mr. Gregory's case is no exception. ACLU Br. 5-6.

Intervening events since amici first filed in this case confirm the arbitrariness and disproportionality of his sentence. Take the most recent example. Two months ago, a neo-Nazi with a lengthy criminal record, including charges of escape, was convicted of three counts of aggravated first-degree murder. Bill Morlin, *Northwest Jury Convicts Neo-Nazi of Triple Murder*, Southern Poverty Law Center (Nov. 21, 2017).[8] He was sentenced to life without parole. *Id.* Mr. Gregory, on the other hand, was sentenced to death for a single murder. These contrasting outcomes are but the most recent illustration of why "[t]he death penalty [in

[8] *Available at* https://www.splcenter.org/hatewatch/2017/11/21/northwest-jury-convicts-neo-nazi-triple-murder; *see also* Jessica Prokop, *Murderer Brent Luyster Receives Consecutive Life Sentences*, The Columbian (Dec. 15, 2017), available at http://www.columbian.com/news/2017/dec/15/murderer-brent-luyster-denied-new-trial/.

Washington] is like lightning, randomly striking some defendants and not others." *State v. Cross*, 156 Wn.2d 580, 652, 132 P.3d 80 (2006) (Johnson, J., dissenting).

Likewise, the same proportionality review concerns we identified continue to manifest themselves. This Court's statutorily-mandated proportionality review is designed to ensure that only the worst of the worst are subject to the state's most severe and irreversible punishment. But "the administration of capital cases [continues to] def[y] any rational analysis," *id.* at 642; *see* ACLU Br. 12-14, because the only factors that explain imposition of the most serious punishment are unhinged from culpability. "The majority of … cases [that have resulted in sentences of death have been] concentrated in five counties, beginning with King, followed by Pierce, and then Snohomish, Yakima, and Spokane counties." Peter A. Collins et al., *An Analysis of the Economic Costs of Seeking The Death Penalty in Washington State*, 14 Seattle J. for Soc. Just. 727, 745 (2016). This arbitrary geographic disparity continues. When "the county in which a crime is committed, rather than the crime or the defendant … determine[s] who receives the death penalty," the result is fundamentally arbitrary. *Davis*, 175 Wn.2d at 388 (Fairhurst, J., dissenting). *See Glossip v. Gross*, 135 S. Ct. 2726, 2761-62, 192 L. Ed. 2d 761 (2017) (Breyer, J.,

dissenting) (collecting evidence that "imposition of the death penalty heavily depends on the county in which a defendant is tried.").

### B. The Death Penalty is Cruel Because It Is Woefully Unreliable.

Since our initial submission, *see* ACLU Br. 19-23, five more death row inmates in the United States have been exonerated, bringing the total number of exonerations since 1976 to 161.[9] The latest, Gabriel Solache, exonerated on December 21, 2017, endured twenty years of wrongful imprisonment after he was convicted based on a coerced, false confession. Megan Crepeau, *Prosecutors Drop Murder Charges Against 2 Who Allege Cop Beat Them Into Confessing*, Chi. Trib., Dec. 21, 2017.[10] The State of Washington is not immune from these issues of fallibility: Benjamin Harris was sentenced to death but, later, forensic evidence severely undermined his confession, in addition to other flaws in the case. ACLU Br. 21-22.

Even more troubling, the ranks of those executed despite strong evidence of their innocence have continued to grow. *See Glossip*, 135 S. Ct. at 2756-58 (Breyer, J., dissenting) (collecting "convincing evidence that, in the past three decades, innocent people have been executed.").

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[9] *Available at* https://deathpenaltyinfo.org/innocence-list-those-freed-death-row.

[10] *Available at* http://www.chicagotribune.com/news/local/breaking/ct-met-conviction-tossed-ex-detective-guevara-20171221-story.html.

Just last year, Texas executed Robert Pruett for the 1999 stabbing death of a state correctional officer, even though the prosecution's case turned on later-discredited junk forensic science, witnesses were induced to testify using undisclosed threats and promises of reward, and a subsequent DNA test of the murder weapon found no link to either Pruett or the victim. Nathalie Baptiste, *Junk Science? Unreliable Witnesses? No Matter, Texas Plans to Execute Robert Pruett Anyway*, Mother Jones, Oct. 10, 2017.[11]

If anything, a focus on individual cases would lead one to severely underestimate the number of wrongful death sentences: According to one recent study, approximately 4% of those sentenced to death are likely innocent. Samuel R. Gross, et al., *Rate of false conviction of criminal defendants who are sentenced to death*, 111 Proc. Nat'l Acad. Sci. U.S. Am. 7230 (2014). But execution prevents our criminal justice system from righting those mistakes that are an invariable part of any system dependent on human operation. In this respect, capital punishment is *sui generis*—and singularly "cruel."

[11] *Available at* http://www.motherjones.com/crime-justice/2017/10/junk-science-unreliable-witnesses-no-matter-texas-plans-to-execute-robert-pruett-anyway/.

### C. The Death Penalty Serves No Valid Penological Objective.

Because Washington's death penalty scheme serves no legitimate penological purpose—contributing nothing to the State's valid interests in retribution and deterrence—it amounts to a wanton infliction of punishment that is unquestionably "cruel" within the meaning of the Washington State Constitution. *See* ACLU Br. 23-25.

### D. The Death Penalty Offends Contemporary Standards of Decency.

The last two years have only confirmed that the death penalty is unconstitutionally out of step with the "evolving standards of decency that mark the progress of a maturing society." *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980) (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630 (1958)). *See* ACLU Br. 25-33.

The national trend toward abandonment of the death penalty—manifested by the decades-long decline in new death sentences and executions—continues unabated. In 2017, the total number of people sitting on death row across the country fell for the seventeenth straight year, and the number of executions and new death sentences were the second lowest totals in more than a quarter-century. *The Death Penalty in*

*2017: Year End Report*, Death Penalty Information Center.[12] Even jurisdictions that have traditionally accounted for a lion's share of executions, like Alabama and Florida, have seen a decrease in the number of executions and have adopted reforms to abolish outlier practices that contributed to their inordinate use of that penalty. *Id.* *See also Capital Punishment Deserves a Quick Death*, N.Y. Times, Dec. 31, 2017. Public support for capital punishment also continues to decline. In 1994, 80% of the public supported the death penalty; today, that figure is 49%. Baxter Oliphant, *Support For Death Penalty Lowest In More Than Four Decades*, Pew Research Center, Sept. 29, 2016.[13]

Amid this steady march away from the death penalty, the needless and irreversible execution of a prisoner in the State's custody offends contemporary standards of decency—a result that cannot stand under the Washington State Constitution.

## CONCLUSION

For the foregoing reasons, the death penalty scheme in this state fails to comport with Washington's Constitution.

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[12] *Available at* https://deathpenaltyinfo.org/documents/2017YrEnd.pdf.

[13] *Available at* http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/.

DATED this 22nd day of January 2018.
Respectfully submitted,

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NO. 88086-7

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ALLEN EUGENE GREGORY,
Appellant.

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

# CERTIFICATE OF SERVICE

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I hereby certify that on January 22, 2018, I caused to be served the foregoing *Supplemental Brief of Amici Curiae* for *56 Former and Retired Washington State Court Judges, a Former U.S. Attorney, American Civil Liberties Union Foundation, American Civil Liberties Union-Washington, Church Council of Greater Seattle, Catholic Mobilizing Network, Faith Action Network, Friends Committee on Washington Public Policy, League of Women Voters of Washington, Two Law School Professors, Murder Victims Families for Reconciliation, Washington Association of Criminal Defense Lawyers, and Washington Defender Association,* to the parties below, in the manner noted:

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