No. 88086-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALLEN EUGENE GREGORY,

Appellant.

ON APPEAL FROM THE PIERCE COUNTY SUPERIOR COURT
(Honorable Roseanne Buckner)

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE*, WASHINGTON COALITION TO ABOLISH THE DEATH PENALTY

James E. Lobsenz, WSBA No. 8787
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
Attorneys for Amicus Curiae

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Page(s)

Washington Cases

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Constitutional Provisions, Statutes and Court Rules

TABLE OF AUTHORITIES

Other Authorities

TABLE OF AUTHORITIES

Page(s)

I. INTRODUCTION

Twelve years ago, responding to the unfairness of mass murderer Gary Ridgway's life sentence, four members of this Court concluded that the death penalty in Washington State "is like lightening, randomly striking some defendants and not others." *State v. Cross*, 156 Wn.2d 580, 652, 132 P.3d 80 (2006) (dissenting opinion of Justices Johnson, Sanders, Owen and Madsen). The Beckett Report confirms that this is so, and additionally confirms that African American defendants are far more likely to receive the death penalty than white defendants. The imposition of the death penalty in Washington has now been proved to be random, arbitrary and racially discriminatory. As Justice Brennan noted 46 years ago, when death sentences are imposed in a trivial number of cases, the conclusion is inescapable that the State is simply conducting a lottery to see who dies. *Furman v. Georgia*, 408 U.S. 238, 293, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (opinion of Justice Brennan). Amicus asks this Court to end this racially rigged lottery by holding that the results generated by Washington's current death penalty statutes violate Wash. Constitution, art. 1, §14.

II. ARGUMENT

A. THE EVIDENCE NOW BEFORE THIS COURT SHOWS, CLEARLY AND CONVINCINGLY, THAT WASHINGTON'S CAPITAL PUNISHMENT STATUTES HAVE FAILED TO PREVENT OR CORRECT UNACCEPTABLE LEVELS OF ARBITRARINESS AND BIAS AGAINST BLACK DEFENDANTS IN DEATH SENTENCING.

The Commissioner's Report of November 21, 2017 confirms the essence of Petitioner Gregory's arguments. The technical issues it identifies

are not material to the resolution of the constitutional question before the Court: Does the evidence show that Washington's current capital sentencing statutes have failed to prevent the arbitrary and racially biased imposition of death sentences in this State? The answer to that question does not turn on whether African American defendants are "only" 3.558 times more likely than white defendants to be sentenced to death, rather than 4.819 times more likely, as Professor Beckett concluded. *See Commissioner's Report* at 68, 76 n.68. It does not matter whether the probability that these ratios reflect actual race bias is 95.2% or "only" 89.89%. *Id.* Either way, it is clear that Washington's death penalty statutes have permitted arbitrary and racially biased sentencing to persist.[1]

A system that permits this cannot be sustained under Washington's constitution because racially biased and arbitrary death sentencing violates the evolving standards of decency in this State. *See State v. Campbell*, 103 Wn.2d 1, 31, 691 P.2d 929 (1984), quoting *Trop v. Dulles*, 356 U.S. 89, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958). Those standards are apparent in decisions of this Court and the judiciary generally,[2] the acts and

---

[1] What Gregory's evidence shows is consistent with the historical pattern of bias against black defendants in capital cases, and in the criminal justice system generally. *See Brief of Amicus Fred Korematsu Center* at 12-16. This consistency logically (and technically) increases confidence that the Beckett findings are valid and reliable. *See Commissioner's Report* at 61-62.

[2] *See, e.g., City of Seattle v. Erickson*, 188 Wn.2d 721, 734, 398 P.3d 1124 (2017) (exercising discretion to increase protection against "[t]he evil of racial discrimination" in criminal justice); *id.* at 740 (concurring opinion of Justices Yu and Gonzalez); *State v., Monday*, 171 Wn.2d 667, 257 P.3d 551, 558 (2011); *id.* at 680 (Justices Madsen, Fairhurst and Stephens, concurring); Task Force on Race and the Criminal Justice System, Seattle School of Law, *Race and Washington's Criminal Justice System* 10-14 (2012).

statements of the Governor and other executive officers,[3] as well as our State's laws. *See, e.g., Marquis v. City of Spokane*, 130 Wn.2d 97, 110-11, 922 P.2d 43 (1996) (holding Washington Law Against Discrimination is more protective than federal law); *Mackey v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995) (same, noting the Washington legislature's "disdain for discrimination"); RCW 10.95.130(2) (b) and (c) (providing for reversal of death sentences that are disproportionate or influenced by "passion or prejudice"). Indeed, the primary purpose of the law that required collection of the data that Professor Beckett analyzed was to avoid "two systemic problems associated with the imposition of capital punishment: random arbitrariness and imposition of the death sentence in a racially discriminatory manner." *In re Restraint of Stenson*, 153 Wn.2d 137, 148, 102 P.3d 151 (2004).

In its first decision reviewing a Washington death sentence under the present statute, this Court made it clear that our state constitution imposes an even stronger prohibition of arbitrariness and race prejudice than the Eighth Amendment does. *See State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) (adhering to decision partly invalidating

---

[3] *See, e.g.,* "Governor Inslee's remarks announcing a capital punishment moratorium," Feb. 11, 2014, https://www.governor.wa.gov/news-media/gov-jay=inslee-announces-capital-punishment-moratorium (last visited 1/18/2018) ("Equal justice under the law is the state's primary responsibility. And in death penalty cases, I'm not convinced equal justice is being served."); AG Ferguson Proposes Bipartisan Bill to End Washington's Death Penalty, http://www.atg.wa.gov/news-releases/ag-ferguson-proposes-bipartisan-bill-end-washington's-death-penalty (last visited 1/18/2018); "King County Prosecuting Attorney: We Don't Need The Death Penalty," *Seattle Times*, 1/19/18 (https://www.seattletimes.com/opinion/king-countys-prosecuting-attorney-we-dont-need-the-death-penalty/, last visited 1/20/18).

Washington's 1981 capital sentencing statute after remand for reconsideration in light of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1977). The proof of arbitrariness and discrimination in death sentencing in the Beckett Report is far stronger than the similar evidence relied on by the plurality justices in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *See Furman*, at 250-51 (opinion of Justice Douglas);[4] *id.* at 310 (opinion of Justice Stewart);[5] *id.* at 363 (opinion of Justice Marshall).[6] It is also far stronger than the evidence submitted in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)—both because of the magnitude of the racial disparity it shows, and because the disparity is based on the race of the defendant, not, as in *McCleskey*, the race of the victim. The present statutes permit unacceptable discrimination and arbitrariness to infect Washington's capital sentencing scheme. More conclusive proof is neither possible, nor required.

---

[4] "A study of capital cases in Texas from 1924 to 1968 reached the following conclusions: . . . 'Seventy-five of the 460 cases involved codefendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty. 'Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty.'"

[5] "My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."

[6] "Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population." (Footnotes omitted).

The evidence before the Court proves that race bias in capital jury sentencing has persisted under current Washington law. Without definitive proof of their application, the Court has indulged the presumption that these statutes are capable of constitutional application for over 35 years. The Beckett Report powerfully rebuts that presumption—utilizing the very mechanism that the legislature put in place to allow the Court to test it.

Moreover, to the extent there is any remaining doubt about the validity of Beckett's findings and conclusions, it is unlikely to be resolved any time soon. Death sentencing proceedings, and death sentences, have now become so rare in this State that it would take years, and likely decades, for enough additional cases to be added to the universe to significantly change the results or the levels of confidence in them. Moreover, in response to the Governor's moratorium on executions, prosecutors have stopped filing new capital cases. Thus, so as long as the moratorium remains in place no additional evidence will be forthcoming.

B. DISCRIMINATION AND ARBITRARY SELECTION IS THE EVIL THAT THE CRUEL PUNISHMENT CLAUSES WERE ADOPTED TO PREVENT. WHEN THE NUMBER OF EXECUTIONS BECOMES TRIVIAL, THE CONCLUSION THAT THE DEATH PENALTY IS BEING IMPOSED ARBITRARILY IS INESCAPABLE.

Although the victims of discrimination have changed over the centuries, historically the prohibition against cruel punishments has always focused on preventing the selective imposition of harsh punishments upon any unpopular group. In past centuries, the victims of discrimination were religious dissenters and the supporters of parliamentary democracy; today

the victims are primarily people of color. The constitutional prohibition against the discriminatory imposition of severe punishments remains the same:

> Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based not on equal justice, but on discrimination. ***In those days the target was not the blacks or the poor, but the dissenters,*** those who opposed absolutism in government, who struggled for a parliamentary regime, and who opposed governments' recurring efforts to foist a particular religion on the people. [Citation]. But ***the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime.*** One cannot read this history without realizing that the desire for equality was reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment.
>
> In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing ***the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is*** poor and despised, and lacking political clout, or if he is ***a member of a suspect or unpopular minority***, and saving those who by social position may be in a more protected position.

Furman, 408 U.S. at 255 (opinion of Justice Douglas) (emphasis added).

A capital punishment law that is racially neutral on its face, but racially discriminatory as applied, violates both the Eighth Amendment and Wash. Const., art. 1, §14:

> A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. ***A law which, in the***

> ***overall view, reaches that result in practice has no more sanctity than a law which in terms provides the same.***

Id. at 256 (emphasis added).

It is the responsibility of the judicial branch to make sure that facially neutral capital punishment statutes written by the Legislature are not selectively applied to minority groups:

> The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.

Id. at 256. Capital punishment statutes which afford the decision makers too much discretion "are pregnant with discrimination, and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." *Id.* at 257.

When a severe punishment is imposed in the great majority of cases where it is legally available, there is little likelihood that it is being imposed arbitrarily. *Id.* at 276 (Opinion of Justice Brennan). When such a severe punishment is not generally imposed, there is a "substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the Clause, is inflicting the punishment arbitrarily." *Id.* at 276-77. When society reaches the point where "[t]he outstanding characteristic" of its practice of capital punishment "is the infrequency with which we resort to it," the conclusion that the death penalty is being imposed arbitrarily is simply unavoidable:

> When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.

Id. at 293.

Moreover, the less frequent executions become, the more impossible it becomes to contend that the death penalty serves as a credible deterrent. If only a tiny handful of murderers are actually executed, then a would-be murderer will not be deterred from murdering by the possibility of a death sentence because the overwhelming majority of murderers are never executed.

> A rational person contemplating a murder or rape is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; in contrast, the risk of long-term imprisonment is near and great. In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that, as currently administered, the punishment of death is necessary to deter the commission of capital crimes.

Id. at 302. Similarly, when executions are incredibly rare events, the contention that the death penalty is needed in order to achieve retribution fails for the same reason. *Id.* at 304-05 ("The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random few.")

In sum, amicus respectfully submits that the Beckett Report confirms what has long been suspected and argued. In Washington State, where death sentences have been carried out in "a trivial number of cases"

over the past half-century, the administration of the capital punishment system is hopelessly infected with racial discrimination. Washington carries out the death penalty in a thoroughly arbitrary manner. The evidence compels the conclusion that the death sentence of Appellant Gregory must be reversed. The only question is on what specific basis that should be done.

C. THE NARROWEST AND MOST APPROPRIATE GROUND OF DECISION IN THIS CASE IS TO HOLD THAT THE CURRENT WASHINGTON DEATH PENALTY STATUTES VIOLATE THE STATE CONSTITUTION BECAUSE THEY HAVE FAILED TO PREVENT UNACCEPTABLE ARBITRARINESS AND RACE DISCRIMINATION IN DEATH SENTENCING.

As the Court is well aware, Appellant Gregory's case is not the only capital case currently pending in this Court. The capital cases now before the Court raise several challenges to the death sentence imposed there,[7] and the Beckett Report is potentially relevant to a number of those challenges. Ordinarily, the Court would address the narrowest and most case specific challenges first, and avoid constitutional questions if possible. In the unusual circumstances here, however, we believe the jurisprudentially narrowest ground for decision is that the failure of the current Washington death sentencing statutes to control arbitrariness and race discrimination renders them unconstitutional under Article I, sections 3 and 14 of the

[7] See *State v. Byron Scherf*, No. 88906-6; *In re Gentry*, No. 92315-9; *State v. Conner Schierman*, No. 84614-6.

Washington Constitution.[8] This is so for both jurisprudential and practical reasons.

Jurisprudentially, by addressing the current laws' constitutionality first the Court could avoid addressing subsidiary statutory and case-based issues that would be mooted—both in the individual case and in the law generally—by a decision holding the statutes unconstitutional. Rulings on issues like the scope of the "facts and circumstances" of the crime that can be taken into account under RCW 10.95.060(3), or whether a resentencing after reversal is permitted by RCW 10.95.050(4),[9] would be meaningless and a waste of judicial time if those laws, and the death sentencing system of which they are a part, are found unconstitutional.

Moreover, as a practical matter, the Court is likely to find it exceedingly difficult to draw any principled lines between the cases before it and those likely to be filed in light of any new decisional law it might make by any nonconstitutional ruling—except the line of race.[10] And even

---

[8] As its name indicates, amicus supports complete abolition of the death penalty, and does not believe that penalty can be constitutionally imposed through any legal process. However, amicus believes the Court need not reach that issue. That position is consistent with amicus' broader objection to the death penalty in any form, because invalidation of the current death penalty statutes would return the issue to the legislature, where amicus believes current standards of decency would prevent its reenactment—and, of course, if it was reenacted the ultimate constitutional issue would remain for the Court.

[9] See Appellant's Op. Brief, *State v. Gregory*, No. 88086-7 at pages 228-38, 257-64.

[10] In terms of disproportionality, for example, it would be hard to draw any principled line between Allen Gregory's case and Jonathan Gentry's and Clark Elmore's—all three were sentenced for single victim murders that were no more aggravated than those committed by dozens of other defendants that were sentenced to death. *See Gregory Opening Brief* at 64; *State v. Gentry*, 125 Wn.2d 570, 684, 888 P.2d 1105 (1995); *State v. Elmore*, 139 Wn.2d 250, 309, 985 P.2d 289 (1999). In terms of the likely influence of race "passion and prejudice", Gregory's and Gentry's cases are indistinguishable—raising the troubling question of whether the Court could reverse only the African Americans on death row.

if this Court were to dispose of Gregory's case on some grounds other than racial discrimination and arbitrariness, it will inevitably have to reach the same constitutional issues in any event because those issues will continue to be raised in light of the Beckett Report until they are addressed.

Under this Court's established jurisprudence, the constitutional issues it should consider and address first are those arising under the state constitution. *State v. Afana*, 1619 Wn.2d 169, 176, 233 P.3d 879 (2010); *Malyon v. Pierce County*, 131 Wn.2d 779, 790, 935 P.2d 1272 (1997); *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). The very narrowest issue regarding the death penalty in this case is the constitutionality of the statutes under which Gregory's sentence was imposed, not the issue of the constitutionality of the death penalty in general. *See, e.g., Furman*, 408 U.S. at 306 (opinion of Justice Stewart) ("I find it unnecessary to reach the ultimate question" of whether "the death penalty is constitutionally impermissible in all circumstances" and choosing instead to agree with the conclusion that Georgia's death penalty statute was unconstitutional); *Gregg v. Georgia,* 428 U.S. 153, 195, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) ("the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute"). Whether Washington's current death penalty statute violates the Wash. Constitution, art. 1 §14 is the dispositive issue. The Beckett Report makes clear that the current statutes have failed to do what the state constitution requires: provide meaningful protection against arbitrariness and race discrimination in death sentencing.

Although this may be because such arbitrariness and discrimination are inevitable in capital sentencing, the protections in current Washington law are far too lax to allow that conclusion. The 1981 statute significantly and unnecessarily removed a number of protections in prior law; and developments since its enactment have removed them further.

- The 1977 law required the jury to return special verdicts answering two specific questions: "Did the evidence presented at trial establish the guilt of the defendant with clear certainty" and "Are you convinced beyond a reasonable doubt that there is a probability that the defendant would commit additional criminal acts of violence that would constitute a continuing threat to society". Laws of 1977, 1st Ex. Sess., ch. 206, §2(10). A death sentence could only be imposed if the jury answered both those questions in the affirmative, found a statutory aggravator, and found no mitigating circumstance sufficiently substantial to warrant leniency. The 1981 statute eliminated the clear certainty requirement and turned the future dangerousness question into a mere consideration—even though in *State v. Frampton*, 95 Wn.2d 469, 486, 627 P.2d 922 (1981), the Supreme Court had upheld the special questions against constitutional challenges.

- The 1977 law limited evidence in aggravation to "evidence relevant to those aggravating circumstances specified in the [death] ... notice" (Laws of 1977, 1st Ex. Sess., ch. 206, §2(4)) and the aggravating circumstances were fewer and more objectively defined. Notably (for Gentry and others), concealment of the commission of a crime or the identity of a person committing the crime, which had been an aggravator under the 1975 Initiative, was removed as an aggravator in the 1977 amendments. *Id.* at §4.

- The 1977 law identified mitigating circumstances the jury could consider sufficient to merit leniency. The

1981 amendments turned these into "whether or not" considerations.

- The 1977 law provided for sentence review by the Washington Supreme Court, including a determination of whether the evidence supports "the jury's findings" (without limitation) and whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Laws of 1977, 1st Ex. Sess., ch. 206, §7(2)(b). The statute did not limit the pool of cases to be compared to those in which aggravated murder was charged, and it required the Court to include a reference to the similar cases it took into consideration in making that decision (*Id.*, § 7(5)). The Court was given the option to affirm, reverse or "set the sentence aside and remand the case for resentencing by the trial court based on the record and argument of counsel" and consider "the records of those similar cases referred to by the Supreme Court." (*Id.*, §7(5)(b)). The 1981 statute gives this Court no such intermediate power.

The 1981 death penalty statute was further modified by subsequent legislation and other decisions that broadened it and further relaxed the protections against arbitrariness and discrimination, by:

- allowing victim impact testimony (In *State v. Gentry*, 125 Wn.2d 570, 682, 888 P.2d 1105 (1995), Justices Johnson, Madsen & Utter predicted that "allowing the jury in a special sentencing proceeding to consider [victim impact evidence] ... invites emotional and arbitrary sentencing decisions...."). The Beckett Report confirms this prediction. Indeed, only one African American defendant (Ben Harris) was sentenced to death before victim impact testimony was permitted. At least 6 African American defendants (Gentry, Luvene, Gregory, Woods, Thomas, and Davis) were sentenced to death in the 15 years after victim impact testimony was allowed.

- adding and broadening aggravating circumstances (See RCW 10.95.020(6) ("group" related murder) and RCW 10.95.020(7) ("drive by" shooting), added 1995; RCW 10.95.020(13) (violation of protective order) and RCW 10.95.020(13) (domestic violence), added 1998; see also *State v. Broadaway*, 133 Wash. 2d 118, 123, 942 P.2d 363, 367 (1997) (describing the 1995 expansion of RCW 10.95.020(8), (9), and (11)(c)); *State v. Monschke*, 133 Wash. App. 313, 329–30, 135 P.3d 966 (2006) ("The range of groups falling within RCW 10.95.020(6) is nearly infinite"); *State v. Heath*, 143 Wash. App. 1004 (2008) (broadly interpreting RCW 10.95.020(7) to include shootings in the "immediate area" of a vehicle); *State v. Allen*, 159 Wash. 2d 1, 9, 147 P.3d 581 (2006) (broadly interpreting RCW 10.95.020(11)(a), the robbery murder aggravator; see id. at 11-12 [dissenting opinions]); *State v. Brinkley*, 100 Wash. App. 1012 (2000) (broadly interpreting RCW 10.95.020(2) ("serving a term of imprisonment"); *State v. Harris*, 106 Wash.2d 784, 725 P.2d 975 (1986) and *State v. Manthie*, 39 Wash. App. 815, 696 P.2d 33 (1985) (broadly interpreting RCW 10.95.020(4) and (5), solicitation of murder for pecuniary gain); *State v. Pirtle,* 127 Wash. 2d 628, 662, 904 P.2d 245, 264 (1995) (broadly interpreting RCW 10.95.020(9) and (10), "concealment" and "common scheme or plan"); *State v. Kincaid*, 103 Wash.2d 304, 692 P.2d 823 (1985) (broadly interpreting a "single act under RCW 10.95.020(10)).

- creating and allowing arbitrary financial incentives for county prosecutors to seek the death penalty as a way of obtaining state "reimbursement" funds that would solve county budgetary shortfall problems and enable prosecutors to avoid cutting their own staff by eliminating personnel. *See* RCW 43.330.190 (providing state money to counties for "extraordinary criminal justice costs" in aggravated murder cases); Affidavit of Kendra Schafer (Exh. 17 to *Defendant's Motion to Strike Death Penalty* in *State v. Nicolas Vasquez*, Franklin County Cause No. 99-1-50411-8 (copy of statute and of

an unsigned copy of the *Schafer Affidavit*[11] attached as Appendices B and C); and "Defense wants prosecutor kicked off slaying case," *Seattle Times*, July 11, 2001 (http://community.seattletimes.nwsource.com/archive/?datee=20010711&slug=vasquez11m, last visited 1/20/18).

- interpreting RCW 10.95.130 to make proportionality review an "empty ritual," see also *State v. Davis*, 175 Wash. 2d 287, 388, 290 P.3d 43(2012) (dissenting opinion of Justices Fairhurst and Stephens) (quoting *State v. Benn*, 120 Wash. 2d 631, 711, 845 P.2d 289 (1993) (dissenting opinion of Justices Utter, Johnson and Smith). *See also State v. Elledge*, 144 Wn.2d 62, 90, 26 P.2d 271 (2001); *Harris v. Blodgett*, 853 F. Supp. 1239, 1291 (W.D. Wash. 1994), aff'd sub nom. *Harris v. Wood,* 62 F.3d 1432 (9th Cir. 1995) ("Here, on careful consideration of the entire sentence review in *Harris, supra,* it is clear that the Washington Supreme Court did not fulfill the essential function of ensuring the 'evenhanded, rational, and consistent imposition of death sentences' under Washington law.").

The evisceration of meaningful proportionality review has led directly to the inability to prevent arbitrariness and race discrimination as dissenting members of this Court have noted:

> ***These cases exemplify the arbitrariness with which the penalty of death is exacted. They are symptoms of a system where statutory comparability defies rational explanation. The death penalty is like lightening, randomly striking some defendants and not others.*** Where the death penalty is not imposed on Gary Ridgway, Ben Ng, and Kwan Fai Mak, who represent the worst mass murders in Washington's history, on what basis do we determine on whom it is

[11] The Schafer affidavit was filed 17 years ago in Franklin County Superior Court. Amicus obtained this unsigned copy from Vasquez's trial counsel Michael Iaria who explained that he no longer has a signed copy of the affidavit. Mr. Iaria has furnished amicus' counsel with what he believes is the final Word Perfect version of the affidavit that he filed in the Vasquez case. Amicus will endeavor to obtain a signed copy of the affidavit from the Franklin County Superior Court.

> imposed? No rational explanation exists to explain why some individuals escape the penalty of death and others do not.

State v. Cross, 156 Wn.2d 580, 132 P.3d 80 (2006) (dissenting opinion of Justices Johnson, Sanders, Owen and Madsen) (emphasis added).

The Beckett Report underscores the failure of appellate sentence review—the one purported protection against discrimination and arbitrariness in the 1981 statute. For it shows that death sentences have been sought arbitrarily and imposed discriminatorily against African American defendants—and yet sentence review under RCW 10.95.130 has not resulted in corrective action by this Court *in a single case* after nearly forty years.

For all these reasons, "the death sentences now before [the Court] are the product of a legal system" that violates the constitution. *Furman*, 408 U.S. at 309 (concurring opinion of Justice Stewart).

> [I]t is clear that these sentences are 'cruel' in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary.... In the second place, it is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder ... [and] [t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."

Id. In *Furman*, Justice Stewart found the death sentences so imposed to be unconstitutional for these reasons, though he believed "racial discrimination ha[d] not been proved." *Id.* In Washington, it now has.

Given the post-1977 amendments, Washington's current death penalty statutes and laws fall far short of taking all possible steps to

eliminate arbitrariness and discrimination. Because of that, even those who, like Justice Stewart, believe that discrimination and arbitrariness can be eliminated by "a carefully drafted statute" (*Gregg*, 428 U.S. at 195) should not be surprised that Washington's death penalty statutes have failed to do so.

III. CONCLUSION

Deferring ruling on the central constitutional issues of arbitrariness and racial discrimination will disserve the interest of justice. Defendants are being held in solitary confinement. Victims are being deprived of any final resolution. Prosecutors, trial courts and juries are facing agonizing decisions they may not need to make. Decades of experience with the current statute show that racial discrimination and arbitrary imposition of death sentences continues unabated. The Court should declare the current death penalty statutes violate art. 1, §14 and it should do so now.

Respectfully submitted this 22nd day of January, 2018.

CARNEY BADLEY SPELLMAN, P.S.

By _____
James E. Lobsenz, WSBA No. 8787
Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ ESERVICE to the following:

Kathleen Proctor, DPA
John Neeb, DPA
PCpatcecf@co.pierce.wa.us
Pierce County Prosecutor's Office

Neil Fox
nf@neilfoxlaw.com
Law Office of Neil Fox, PLLC

James Lobsenz
lobsenz@carneylaw.com
Carney Badley Spellman, P.S.

Nancy Talner
talner@aclu-wa.org
Cassandra Stubbs
cstubbs@aclu.org
Jeffery Robinson
robinson@sgb-law.com
ACLU

Lila J. Silverstein
lila@washapp.org
Washington Appellate Project

Mark Shapiro
mrshapiro@orrick.com
Aravind Swaminathan
aravind@orrick.com
John Wolfe
John.wolfe@orrick.com
Orrick Herrington & Sutcliffe LLP

Nicholas Brown
Nicholas.brown@pacificalawgroup.com
Pacifica Law Group

Robert Chang
changro@seattleu.edu
Jessica Levin
levinje@seattleu.edu
Seattle University School of Law

Allen Gregory
795777
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362
(VIA US MAIL)

SIGNED at Seattle, Washington this 22th day of January, 2018.

Deborah A. Groth, Legal Assistant

APPENDIX A

CHAPTER 206

[Substitute House Bill No. 615]

DEATH PENALTY

AN ACT Relating to the death penalty; amending section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. and RCW 9A.32.040; amending section 1, chapter 9, Laws of 1975–'76 2nd ex. sess. (Initiative Measure No. 316, section 1) and RCW 9A.32.045; amending section 2, chapter 9, Laws of 1975–'76 2nd ex. sess. (Initiative Measure No. 316, section 2) and RCW 9A.32.046; amending section 3, chapter 9, Laws of 1975–'76 2nd ex. sess. (Initiative Measure No. 316, section 3) and RCW 9A.32.047; adding a new chapter to Title 10 RCW; adding a new section to chapter 9.01 RCW; prescribing penalties; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. When a defendant is charged with the crime of murder in the first degree as defined in RCW 9A.32.030(1)(a), the prosecuting attorney or the prosecuting attorney's designee shall file a written notice of intention to request a proceeding to determine whether or not the death penalty should be imposed when the prosecution has reason to believe that one or more aggravating circumstances, as set forth in RCW 9A.32.045 as now or hereafter amended, was present and the prosecution intends to prove the presence of such circumstance or circumstances in a special sentencing proceeding under section 2 of this 1977 amendatory act.

The notice of intention to request the death penalty must be served on the defendant or the defendant's attorney and filed with the court within thirty days of the defendant's arraignment in superior court on the charge of murder in the first degree under RCW 9A.32.030(1)(a). The notice shall specify the aggravating circumstance or circumstances upon which the prosecuting attorney bases the request for the death penalty. The court may, within the thirty day period upon good cause being shown, extend the period for the service and filing of notice.

If the prosecution does not serve and file written notice of intent to request the death penalty within the specified time the prosecuting attorney may not request the death penalty.

NEW SECTION. Sec. 2. (1) If notice of intention to request the death penalty has been served and filed by the prosecution in accordance with section 1 of this 1977 amendatory act, then a special sentencing proceeding shall be held in the event the defendant is found guilty of murder in the first degree under RCW 9A.32.030(1)(a).

(2) If the prosecution has filed a request for the death penalty in accordance with section 1 of this 1977 amendatory act, and the trial jury returns a verdict of murder in the first degree under RCW 9A.32.030(1)(a), then, at such time as the verdict is returned, the trial judge shall reconvene the same trial jury to determine in a separate special sentencing proceeding whether there are one or more aggravating circumstances and whether there are mitigating circumstances sufficient to merit leniency, as provided in RCW 9A.32.045 as now or hereafter amended, and to answer special questions pursuant to subsection (10) of this section. The special sentencing proceeding shall be held as soon as possible following the return of the jury verdict.

(3) At the commencement of the special sentencing proceeding the judge shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its findings as provided in RCW 9A.32.040 as now or hereafter amended.

(4) In the special sentencing proceeding, evidence may be presented relating to the presence of any aggravating or mitigating circumstances as enumerated in RCW 9A.32.045 as now or hereafter amended. Evidence of aggravating circumstances shall be limited to evidence relevant to those aggravating circumstances specified in the notice required by section 1 of this 1977 amendatory act.

(5) Any relevant evidence which the court deems to have probative value may be received regardless of its admissibility under usual rules of evidence: PROVIDED, That the defendant is accorded a fair opportunity to rebut any hearsay statements: PROVIDED FURTHER, That evidence secured in violation of the Constitutions of the United States or the state of Washington shall not be admissible.

(6) Upon the conclusion of the evidence, the judge shall give the jury appropriate instructions and the prosecution and the defendant or defendant's counsel shall be permitted to present argument. The prosecution shall open and conclude the argument to the jury.

(7) The jury shall then retire to deliberate. Upon reaching a decision, the jury shall specify each aggravating circumstance that it unanimously determines to have been established beyond a reasonable doubt. In the event the jury finds no aggravating circumstances the defendant shall be sentenced pursuant to RCW 9A.32.040(3) as now or hereafter amended.

(8) If the jury finds there are one or more aggravating circumstances it must then decide whether it is also unanimously convinced beyond a reasonable doubt there are not sufficient mitigating circumstances to merit leniency. If the jury makes such a finding, it shall proceed to answer the special questions submitted pursuant to subsection (10) of this section.

(9) If the jury finds there are one or more aggravating circumstances but fails to be convinced beyond a reasonable doubt there are not sufficient mitigating circumstances to merit leniency the defendant shall be sentenced pursuant to RCW 9A.32.040(2) as now or hereafter amended.

(10) If the jury finds that there are one or more aggravating circumstances and is unanimously convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency, the jury shall answer the following questions:

(a) Did the evidence presented at trial establish the guilt of the defendant with clear certainty?

(b) Are you convinced beyond a reasonable doubt that there is a probability that the defendant would commit additional criminal acts of violence that would constitute a continuing threat to society?

The state shall have the burden of proving each question and the court shall instruct the jury that it may not answer either question in the affirmative unless it agrees unanimously.

If the jury answers both questions in the affirmative, the defendant shall be sentenced pursuant to RCW 9A.32.040(1) as now or hereafter amended.

If the jury answers either question in the negative the defendant shall be sentenced pursuant to RCW 9A.32.040(2) as now or hereafter amended.

Sec. 3. Section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. and RCW 9A.32.040 are each amended to read as follows:

Notwithstanding RCW 9A.32.030(2), any person convicted of the crime of murder in the first degree shall be sentenced ((~~to life imprisonment~~)) as follows:

(1) If, pursuant to a special sentencing proceeding held under section 2 of this 1977 amendatory act, the jury finds that there are one or more aggravating circumstances and that there are not sufficient mitigating circumstances to merit leniency, and makes an affirmative finding on both of the special questions submitted to the jury pursuant to section 2(10) of this 1977 amendatory act, the sentence shall be death;

(2) If, pursuant to a special sentencing proceeding held under section 2 of this 1977 amendatory act, the jury finds that there are one or more aggravating circumstances but fails to find that there are not sufficient mitigating circumstances to merit leniency, or the jury answers in the negative either of the special questions submitted pursuant to section 2(10) of this 1977 amendatory act, the sentence shall be life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this subsection shall not have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner nor reduce the period of confinement. The convicted person shall not be released as a result of any type of good time calculation nor shall the department of social and health services permit the convicted person to participate in any temporary release or furlough program; and

(3) In all other convictions for first degree murder, the sentence shall be life imprisonment.

Sec. 4. Section 1, chapter 9, Laws of 1975–'76 2nd ex. sess. (Initiative Measure No. 316, section 1) and RCW 9A.32.045 are each amended to read as follows:

((~~A person is guilty of aggravated murder in the first degree when he commits murder in the first degree as defined in RCW 9A.32.030 under or accompanied by any of~~)) (1) In a special sentencing proceeding under section 2 of this 1977 amendatory act, the following shall constitute aggravating circumstances:

(((~~1~~))) (a) The victim was a law enforcement officer or fire fighter and was performing his or her official duties at the time of the killing and the victim was known or reasonably should have been known to be such at the time of the killing.

(((~~2~~))) (b) At the time of the act resulting in the death, the defendant was serving a term of imprisonment in a state correctional institution or had escaped or was on authorized or unauthorized leave from a state correctional institution, or was in custody in a local jail and subject to commitment to a state correctional institution.

(((~~3~~))) (c) The defendant committed the murder pursuant to an agreement that ((~~he~~)) the defendant receive money or other thing of value for committing the murder.

(((~~4~~))) (d) The defendant had solicited another to commit the murder and had paid or agreed to pay such person money or other thing of value for committing the murder.

(((~~(5) The defendant committed the murder with intent to conceal the commission of a crime, or to protect or conceal the identity of any person committing the same, or with intent to delay, hinder or obstruct the administration of justice by preventing any person from being a witness or producing evidence in any investigation or proceeding authorized by law or by influencing any person's official action as a juror~~)) (e) The murder was of a judge, juror, witness, prosecuting attorney, a deputy prosecuting attorney, or defense attorney because of the exercise of his or her official duty in relation to the defendant.

(((~~(6)~~))) (f) There was more than one victim and the said murders were part of a common scheme or plan, or the result of a single act of the defendant.

(((~~(7)~~))) (g) The defendant committed the murder in the course of ((~~or~~)), in furtherance of ((~~the crime of rape or kidnaping or in immediate flight therefrom.~~)), or in immediate flight from the crimes of either (i) robbery in the first or second degree, (ii) rape in the first or second degree, (iii) burglary in the first degree, (iv) arson in the first degree, or (v) kidnaping in which the defendant intentionally abducted another person with intent to hold the person for ransom or reward, or as a shield or hostage, and the killing was committed with the reasonable expectation that the death of the deceased or another would result.

(h) The murder was committed to obstruct or hinder the investigative, research, or reporting activities of anyone regularly employed as a newsreporter, including anyone self-employed in such capacity.

(2) In deciding whether there are mitigating circumstances sufficient to merit leniency, the jury may consider any relevant factors, including, but not limited to, the following:

(a) The defendant has no significant history of prior criminal activity;

(b) The murder was committed while the defendant was under the influence of extreme mental disturbance;

(c) The victim consented to the homicidal act;

(d) The defendant was an accomplice in a murder committed by another person and the defendant's participation in the homicidal act was relatively minor;

(e) The defendant acted under duress or under the domination of another person;

(f) At the time of the murder, the capacity of the defendant to appreciate the criminality (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; and

(g) The age of the defendant at the time of the crime calls for leniency.

Sec. 5. Section 2, chapter 9, Laws of 1975-'76 2nd ex. sess. (Initiative Measure No. 316, section 2) and RCW 9A.32.046 are each amended to read as follows:

((~~A person found guilty of aggravated murder in the first degree as defined in RCW 9A.32.045, shall be punished by the mandatory sentence of death.~~)) Once a person is found guilty of ((~~aggravated~~)) murder in the first degree((~~, as defined in RCW 9A.32.045~~)) under RCW 9A.32.030(1)(a) with one or more aggravating circumstances and without sufficient mitigating circumstances to merit leniency and the jury has made affirmative findings on both of the special questions submitted pursuant to section 2(10) of this 1977 amendatory act, neither the court nor the jury shall have the discretion to suspend or defer the imposition or execution of the

sentence of death. ((~~Such sentence shall be automatic upon any conviction of aggravated first degree murder. The death sentence shall take place at the state penitentiary under the direction of and pursuant to arrangements made by the superintendent thereof: PROVIDED, That~~)) The time of such execution shall be set by the trial judge at the time of imposing sentence and as a part thereof.

Sec. 6. Section 3, chapter 9, Laws of 1975–'76 2nd ex. sess. (Initiative Measure No. 316, section 3) and RCW 9A.32.047 are each amended to read as follows:

In the event that the governor commutes a death sentence or in the event that the death penalty is held to be unconstitutional by the United States supreme court or the supreme court of the state of Washington ((~~in any of the circumstances specified in RCW 9A.32.045,~~)) the penalty under RCW 9A.32.046 ((~~for aggravated murder in the first degree in those circumstances~~)) shall be imprisonment in the state penitentiary for life without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner ((~~or~~)) nor reduce the period of confinement ((~~nor release the~~)). The convicted person shall not be released as a result of any ((~~automatic~~)) type of good time calculation nor shall the department of social and health services permit the convicted person to participate in any ((~~work~~)) temporary release or furlough program.

NEW SECTION. Sec. 7. (1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Washington. The clerk of the trial court within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court of Washington together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of the defendant's attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington.

(2) The supreme court of Washington shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the evidence supports the jury's findings; and

(b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the supreme court of Washington in its decision and the extracts prepared therefor shall be provided to the resentencing judge for the judge's consideration.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

NEW SECTION. Sec. 8. There is added to chapter 9.01 RCW a new section to read as follows:

No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself, his family, or his real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of aggravated assault, armed robbery, holdup, rape, murder, or any other heinous crime.

When a substantial question of self defense in such a case shall exist which needs legal investigation or court action for the full determination of the facts, and the defendant's actions are subsequently found justified under the intent of this section, the state of Washington shall indemnify or reimburse such defendant for all loss of time, legal fees, or other expenses involved in his defense.

NEW SECTION. Sec. 9. Sections 1, 2, and 7 of this 1977 amendatory act shall constitute a new chapter in Title 10 RCW.

NEW SECTION. Sec. 10. If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 11. This 1977 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House June 3, 1977.
Passed the Senate June 2, 1977.
Approved by the Governor June 10, 1977.
Filed in Office of Secretary of State June 10, 1977.

CHAPTER 207

[Substitute House Bill No. 625]

CENTRAL CREDIT UNIONS

AN ACT Relating to central credit unions; creating new sections; and adding a new chapter to Title 31 RCW.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. A central credit union may be organized and operated under this chapter. The central credit union shall have all the rights and powers granted in and be subject to all provisions of chapter 31.12 RCW which are not inconsistent with this chapter. Such credit union shall use the term "central" in its official name. Any central credit union in existence on the effective date of this act in the state of Washington shall operate under the provisions of this chapter.

NEW SECTION. Sec. 2. Notwithstanding any other provision of law, the central credit union may adopt bylaws enabling it to exercise any of the powers, as

APPENDIX B

West's RCWA 43.330.190

43.330.190. Reimbursement of extraordinary criminal justice costs

Currentness

Counties may submit a petition for relief to the office of public defense for reimbursement of extraordinary criminal justice costs. Extraordinary criminal justice costs are defined as those associated with investigation, prosecution, indigent defense, jury impanelment, expert witnesses, interpreters, incarceration, and other adjudication costs of aggravated murder cases.

(1) The office of public defense, in consultation with the Washington association of prosecuting attorneys and the Washington association of sheriffs and police chiefs, shall develop procedures for processing the petitions, for auditing the veracity of the petitions, and for prioritizing the petitions. Prioritization of the petitions shall be based on, but not limited to, such factors as disproportionate fiscal impact relative to the county budget, efficient use of resources, and whether the costs are extraordinary and could not be reasonably accommodated and anticipated in the normal budget process.

(2) Before January 1st of each year, the office of public defense, in consultation with the Washington association of prosecuting attorneys and the Washington association of sheriffs and police chiefs, shall develop and submit to the appropriate fiscal committees of the senate and house of representatives a prioritized list of submitted petitions that are recommended for funding by the legislature.

Credits

[1999 c 303 § 1.]

APPENDIX C

AFFIDAVIT

I, Kenda J. Schafer, state that I am a Certified Public Accountant in the State of Washington as well as a Certified Fraud Examiner. I hold a Bachelor of Science in Accounting, a Master's in Business Administration, and a Master of Professional Accounting in Tax. I was previously employed as a Special Agent in the Criminal Investigation Division of the Internal Revenue Service for eight years. Currently I am an associate of Draughon & Draughon, Ltd., employed as a forensic accountant. I have held this position for the last nine years.

Pursuant to a request from defense counsel in the case State v. Vasquez, I have reviewed documents relevant to the Franklin County budget process, assorted e-mails, and documents produced in the process of petitioning the State of Washington for reimbursement for extraordinary criminal justice costs. Following is my review of those documents and the conclusions I reached after that review.

FRANKLIN COUNTY BUDGET IN LIGHT OF I-695

In 1999, Washington voters were considering an initiative that would severely reduce the motor vehicle excise tax. The Board of Commissioners for Franklin County was concerned about the loss of money the county would receive from the state should the initiative pass. The Commissioners were told that their county would lose $513,000 in criminal justice funding from the state. [Exhibit A, page 5]

The criminal justice funding of $513,000 was already a reduction from the previously budgeted $630,000. As Prosecutor Steve Lowe explained to the Commissioners, " . . . unfortunately, as the crime rate goes down, so does that funding formula." [Exhibit B, page 2]

Mr. Lowe was informed that approximately $440,000 of criminal justice funding represented 12 positions. Mr. Lowe described these positions, "There's four positions in my office, four in the sheriff's, two in each of the courts." [Exhibit B, page 6]

In response to a request for two budgets (one with state funding and one without state funding), Mr. Lowe stated, " . . . you want two budgets, . . . it's going to be the same . . . my need is not any different with or without I-695." [Exhibit B, page 5]

He further said, "There's two things county does. The county puts people in jail, the county builds roads." [Exhibit B, page 7]

In response to the Board's questions about Initiative 695, Mr. Lowe made reference to the two sections of the proposed law: The first one, reducing the motor vehicle excise tax to a flat $30 and the second one, putting any tax increase to a public vote. He said, "I am not as worried about that section as a lawyer, as I am the first section as a manager." [Exhibit B, page 14]

Mr. Lowe encouraged the Board to educate the voters as to the impact on criminal justice. When employees of the county expressed confusion as to what they could or could not do under public disclosure laws, Mr. Lowe stated, "Well, I've got a handout that tells you what you can and can't do." [Exhibit B, page 30]

He told the Board he could use his Administrative Assistant to prepare an impact statement. [Exhibit B, page 32]

STATE OF WASHINGTON REIMBURSEMENT FOR AGGRAVATED MURDER CASES

On 12 October 1999, the information charging Mr. Vasquez with aggravated murder was filed.

On 13 October 1999, the Superior Court Administrator told the Board of Commissioners of a new state law that could provide funding for counties with aggravated first-degree murder cases. The Administrator recommended getting information from Okanogan County where a similar type of case was filed. [Exhibit C]

On 20 October 1999, Prosecutor Lowe's Administrative Assistant received an e-mail from an individual with Okanogan County. Attached to that e-mail was a copy of a Memorandum of Agreement between the state and Okanogan County relative to reimbursement for expenses of trying an aggravated murder case. The memorandum agreement detailed an 80% reimbursement rate and specifically excludes employees' regular salaries and benefits. [Exhibit D] The e-mail also specifically mentioned an 80% reimbursement rate and reiterates that "The state will not reimburse you for regular on-going expenses like the Prosecutor's or Sheriff's salary . . . [Exhibit E]

FRANKLIN COUNTY BUDGET FOR VASQUEZ TRIAL

On 25 October 1999, Commissioner Frank Brock and Accounting Assistant Tiffany Coffland discussed an incomplete estimate of costs for the Vasquez case of $193,000. Mr. Brock stated that he [presumably Mr. Lowe] told him that Okanogan County had spent $330,000 to date and had not yet gone to trial. [Exhibit F, page 24]

This $330,000 amount can be derived from the 80% or $263,190.17 received by Okanogan County as reimbursement as mentioned in the 20 October 1999 e-mail from that county. [Exhibit E]

The estimate sheet provided to the Franklin County Board of Commissioners from Mr. Lowe's office has as the first line "Assumes filing of death penalty notice" [Exhibit G]

Commissioner Brock referred to the case as "the death penalty" twice, and there was speculation as to how quickly the state's reimbursement of expenses would come in. [Exhibit H, page 32-33]

On 9 November 1999, in a preliminary budget, the Franklin County Board of Commissioners set aside $350,000 from their contingency reserve fund for the Vasquez trial. They also cut $434,763 in criminal justice salaries and benefits. [Exhibit I, page 3]

On 10 November 1999, in response to a question about the certainty about the state's reimbursement for trial costs, Mr. Lowe said, "If that is an issue right now on whether 12 people get laid off. I will go—I will make an appointment with the governor tomorrow. And I'll go over, talk to him right now, and fly over there and see what I could do, if that's the problem." He also stated, " . . . that affects how I handle that case . . . " to which Commissioner Frank Brock responded, "It shouldn't make any difference." Then Mr. Lowe asked, "Losing four people, losing a third of my staff shouldn't affect the way I handle a case?" Commissioner Sue Miller then suggested it was a matter of priorities, to which Mr. Lowe responded, "Okay, then I don't do anything else, that's fine. I mean that's fine. You're exactly right, Sue. You're exactly right. I have to make priorities." Mr. Lowe went on further to say, ". . . to make—my office, and I get the biggest hit of anybody. Absolutely, percentage wise, number wise, policies and decision wise, you're hamstringing me on what I've been doing for the last five years." [Exhibit J, pages 4-5]

FRANKLIN COUNTY BUDGET REVENUE SOURCE

Later, that same day, Mr. Lowe presented a letter to the Board of Commissioners recommending that they add $220,000 as a revenue,

representing the state's reimbursement for expenses in the "potential death penalty case." Mr. Lowe noted that addition would allow the county to fund a half-year of the criminal justice positions. [Exhibit K]

In the Board meeting that followed the submission of that letter, several details were discussed. Mr. Lowe noted that $350,000 was budgeted for the Vasquez case. He also said if he did not file a death penalty notice, "about $180,000 of that goes away." [Exhibit I, pages 12-13]

Mr. Lowe stated, "So what I was going to suggest is to be conservative is to take half that, or $220,000, which is the six month as a revenue from the state, to reimburse you against the $350,000 that you're expending." [Exhibit I, page 13]

He further explains, "And I'm saying $220,000 in my letter because that gives us the six-month cushion." [Exhibit I, page 15] An unidentified male spoke up, " . . . if eighty percent it'd be $280,000, though." To which Mr. Lowe responded, " . . . I put $220,000 down to get through six months. Cause we'll know in six months; one whether we have a death penalty case; two, when that's going to be; three, what the legislature, if anything, is going to do on that. And we'll have an answer whether we're going to have revenue to support those criminal

justice positions." [Exhibit I, pages 20-21] When asked about the estimate of $350,000 for the Vasquez case, Mr. Lowe said the figure was based on the Okanogan County case. When asked if $350,000 was a realistic figure for the year 2000, he answered, "Yes." [Exhibit I, page 26]

FRANKLIN COUNTY BUDGET FOR 2000

On 13 December 1999, the Board of Commissioners approved their budget in Resolution Number 99-491 [Exhibit L]. The budget contained $220,000 in non-departmental revenue classified as "STATE GRANTS—MURDER TRIAL REIMBURSE" [Exhibit M] In the non-departmental expenditure section, there are two contingency reserves, one classified as "SALARIES" and one classified as "MURDER TRIAL." [Exhibit N] In the Board of Commissioners' meeting, it is confirmed that the criminal justice positions are funded for six months. [Exhibit O, pages 29-30]

1999 FRANKLIN COUNTY PETITION FOR REIMBURSEMENT

On 22 December 1999, the Court Administrator for the county submitted a petition for reimbursement of extraordinary criminal

justice costs for the year 1999 in the amount of $67,842.23. [Exhibit P] Attached to this document is a letter with supporting documentation requesting $40,129.86 in reimbursement of amounts by the City of Pasco Police Department. Also enclosed are two questionnaires, one completed by the County Administrator [Exhibit Q] and one completed by the Superior Court Administrator [Exhibit R]. Both state that there are no limits placed on the amount the Prosecutor may send. The Court Administrator does point out that the defense is limited by court order as to the maximum amounts that may be paid for any expenditure. [Exhibit R]

On 29 December 1999, the Director of the Washington Association of Prosecuting Attorneys sent an e-mail directing all prosecutors to include actual salary and benefits costs of their staff in the handling of aggravated murder cases. Below the e-mail are handwritten figures that appear to calculate three individuals' hourly rates with benefits. [Exhibit S] On 7 January 2000, the Court Administrator sent a revised petition requesting $79,429.20. The increased amount is attributable to $462.00 in security costs and $11,124.97 in prosecution salaries. The only documentation included for the salaries figure is a fax from the prosecutor's office multiplying by the applicable hourly rate. [Exhibit T] Taking out the prosecutors' salaries and the amount

spent by the City of Pasco Police Department, the amount expended on the Vasquez case by Franklin County for 1999 is $28,174.37.

1999 State of Washington Reimbursement

The Office of Public Defense generated a summary of the county petition process and a prioritization of those petitions for 1999. It was recommended that Franklin County apply for the entire cost incurred after their case had been adjudicated. [Exhibit U]

On 31 January 2000, the Director of the Washington Association of Prosecuting Attorneys sent an e-mail to Prosecutor Steve Lowe asserting that a claim for total costs in the year of trial was the preferred method, although the county could petition the legislature for partial costs. [Exhibit V] The Director informed the legislature that Franklin County had indicated it might directly apply to the legislature for immediate reimbursement. [Exhibit W] In a 13 March 2000 e-mail, the Director notified the counties requesting reimbursement that the legislature had set aside monies and informed Mr. Lowe, "I am not worried about Franklin getting reimbursed. Loveland and the Governor's Office have both expressed a commitment to help out. Next year may make more sense when you're costs really hit."

[Exhibit X] On 15 March 2000, Mr. Lowe responded to the Director in an e-mail. Mr. Lowe stated, ". . . we balanced our budget with an expectation that some of the money would be available in 2000. With the late decision to go with only those that 'conclude' being eligible it has left us in a huge bind combined with 695 loss of revenue. I also realize this debate only fuels the anti death penalty forces as illustrated in Justice Guy's report. I also realized that Sen Loveland does not like the bill as it puts money in the pockets of county's that can afford it. Nevertheless, we are out about $120,000 in just our out of pocket expenses. Is there any way we can get some of this money or is it just hopeless? Let me know what I could do; I am deciding by 3/22 the death penalty notice . . . " [Exhibit Y]

Ultimately, Washington State Office of Financial Management allocated Franklin County $18,155 as partial reimbursement for the county's expenditure of $79,429. [Exhibit Z] On 22 November 2000, a State of Washington check in that amount was made payable to Franklin County. [Exhibit AA] It is unknown, at this point, whether the City of Pasco received any funds from the county.

2000 Franklin County Petition for Reimbursement

For the year 2000, Franklin County claimed $392,554 in extraordinary criminal justice costs. [Exhibit AB] In addition, the county petitioned the state for $61,274 in 1999 costs previously submitted but not reimbursed. [Exhibit AC] In the Office of Public Defense report to the legislature, dated 26 January 2001, Franklin County's estimated fee arrangement with defense attorneys, in lieu of hourly fee arrangement, was cited as an efficient management of resources. [Exhibit AD] In the county's petition for reimbursement, the prosecutors' salaries are based on their certification of hours worked on the case. [Exhibit AE] Presumably these hours are then multiplied by those individuals' hourly rates with benefits to arrive at the dollar figure included in the Prosecution Attorney Cost column in the county's petition for reimbursement. [Exhibit AC] In the county's detailed cost summary, prosecution salaries total $43,187. [Exhibit AF] In 1999, there is a handwritten notation that "SML" would have an hourly rate with benefits of $45.67 after 1/1/00. [Exhibit S] Steve M. Lowe certified he had 303.5 hours on the Vasquez case for the year 2000. [Exhibit AE] Dividing his salary cost of $13,861 [Exhibit AF] by his 303.5 hours, his hourly rate can be derived to be $45.67. Discrepancies appear, however, between the 1999 and 2000 hourly rates for the Chief Criminal Deputy Paige L. Sully and the Lead Felony Secretary Jennifer Peterson. The handwritten calculation of the hourly rate for "PLS" in 1999 is $35.80. [Exhibit S]

Dividing Paige L. Sully's salary cost of $27,311 [Exhibit AF] by her certified hours of 363.5 [Exhibit AE] results in an hourly rate of $75.13 or a rate that is more than double the $35.80 rate for 1999. The handwritten calculation of the hourly rate for "JP" in 1999 is $18.16. [Exhibit S] Dividing Jennifer Peterson's salary cost of $2,015 [Exhibit AF] by her certified hours of 81 [Exhibit AG] results in an hourly rate of $24.88, that is more than a third higher than the $18.16 rate for 1999. Additional information would be needed to complete analysis on this issue.

EQUIPMENT PURCHASES

In November of 1998, in a series of e-mails between Hazel Hanson, the prosecutor's administrative assistant, and Kevin Scott of Information Services, the acquisition of a laptop computer was discussed. Ms. Hanson expressed the need for a laptop for a trial coming up in December of 1998. Mr. Scott agreed to lend the prosecutor's office his department's new laptop. Ms. Hanson informed Mr. Scott, ". . . we still would like to have you pursue purchasing one for our office. In addition to using the laptop for trials, we would like to have one available for Steve and the deputies to take home when necessary. We are also considering

having our support staff use the laptop during docket days in court." [Exhibit AH]

On 20 October 1999, Ms. Hanson e-mailed Mr. Scott informing him of her office's definite need for its own laptop computer. Should Information Services not have money in its budget, Ms. Hanson requested, " . . . we need to have exact cost of a laptop so we can include it in the supplemental budget information that Steve will be presenting to the Commissioners on Monday, October 25." [Exhibit AI] On 25 October 1999, Mr. Lowe submitted a rough estimate of costs for the Vasquez case that included $15,000 in evidence/equipment costs. [Exhibit G] On 22 May 2000, the Board of Commissioners passed Resolution 2000-209 approving the purchase of a laptop computer in the amount of $2,916 to be paid from extraordinary criminal justice trial expense budget. [Exhibit AJ] That computer was purchased. [Exhibit AK]

On 28 August 2000, Mr. Lowe, through the Information Services employee, requested an additional laptop computer. Per Commissioners' record 41 [Exhibit AL], "Mr. Scott said the prosecutor's office has requested an additional laptop computer for use during the Vasquez murder trial. After the trial, he would like it to be shared by other departments. The cost is $1800. Mrs. Corkrum asked if we have this in the capital outlay

budget for 2000. Mr. Scott said it is coming out of the extraordinary criminal justice budget because it is reimbursable." That same date the purchase was approved to be paid from extraordinary criminal justice trial expense budget. [Exhibit AM] On 15 September 2000, the laptop computer was claimed on a current expense voucher for $1,900. [Exhibit AN]

On 30 August 2000, Mr. Lowe informed the Board he would be buying a projector for $5,200 that had already been budgeted. Per Commissioners' record 41 "If it would be better to wait until next year, Mr. Lowe can wait. He would like to be able to use the equipment before the trial. Mr. Brock asked Mr. Lowe to wait to purchase the door projector until 2001." [Exhibit AO]

CONCLUSIONS

Prosecutor Lowe is a vigorous proponent for his department's budget and the retention of criminal justice employees. Prior to the passage of I-695, Mr. Lowe noted his state funding fell as the crime rate dropped. He knew precisely what positions in what departments would be unfunded if the county lost monies from the state. He maintained that his department's function was one of the most important for the county and was more concerned as a manager than as a lawyer as to the impact of the passage of I-

695. Mr. Lowe advocated the county educate voters as to the impact on his funding should the initiative pass.

During 1999, a new state law provided funding for smaller counties with aggravated murder cases. Lacking information about the mechanics of the reimbursement process, Mr. Lowe used information from Okanogan County since that county had an earlier reimbursement agreement with the state on a similar case. Prosecutor Lowe relied on the Okanogan County information to estimate the costs of such a case and to determine that the state would possibly reimburse 80% of the cost of the case under the new law. Prior to guidance from the state, Mr. Lowe only had the Okanogan County agreement to go by, which expressly did not fund employees' regular salaries and benefits. Yet, when faced with a $440,000 cut in his funding, Mr. Lowe persuaded the Franklin County Board of Commissioners to add $220,000 in anticipated in-flows as reimbursements for costs of the Vasquez case. This allowed the county to fund 12 criminal justice positions for half of the year. The county had previously budgeted $350,000 in estimated costs for the case. An 80% reimbursement rate for those costs would have been $280,000. Prosecutor Lowe was not using the estimate of costs for the Vasquez case; he was using the dollar amount he needed to retain 12 employees for six months. As Mr. Lowe noted, if the case was not a death-penalty case, the cost estimate to try the case would be reduced by about

$180,000. This would result in a supposed reimbursement from the state of 80% of $170,000 ($350,000 minus $180,000) or $136,000. As a result, Mr. Lowe and the County could not hope to obtain the budgeted $220,000 of revenue from the Vasquez case unless he sought the death penalty.

Prosecutor Lowe had other economic incentives to charge Mr. Vasquez with the death penalty as well. Eight days after the filing of the information, his assistant was obtaining information on computer costs to include in his estimate of case costs. Using the extraordinary criminal justice trial budget (which the county presumed was going to be reimbursed), Mr. Lowe was able to obtain one laptop which his assistant had requested a year before the Vasquez information was filed. He was able to get a second one approved when the Information Service employee assured the Board the cost would be reimbursed and the equipment would be available for use by other departments after the trial. The State reimbursement process was designed to reimburse counties for case expenses, not for office equipment to be used by multiple county departments for tasks unrelated to the pending aggravated murder case. Mr. Lowe and the County have exploited the reimbursement statute to obtain portable computers that are to be shared with other county departments.

Finally, the state reimbursement procedure, as currently applied, encourages case costs to be as large as possible since those costs are only reimbursed at an 80% rate. As an example, the hourly rate with benefits for the prosecutor's staff may have increased drastically between the 1999 petition for reimbursement and the 2000 petition for reimbursement.

The State of Washington prioritizes cases based on how disproportionate the cost of a particular case is vis-à-vis the county's entire budget and its criminal justice budget. The higher the cost in relation to the county's budget, the higher the proportion of the state's reimbursement. Accordingly, any prosecutor who is considering a murder charge in Washington State has a financial incentive to file an aggravated murder charge to qualify for State reimbursement funds and to seek a death verdict because that is likely to substantially increase the costs of the case.

Based on these facts, I conclude that:

1. Mr. Lowe had a substantial financial incentive to pursue this case as an aggravated murder case rather than as a lesser charge and to pursue a death penalty verdict.

2. Mr. Lowe himself was instrumental in creating this financial incentive because he is the person who persuaded the County Commissioners to add $220,000 of "revenue" from the Vasquez case to the County budget.

3. Mr. Lowe and the County have, in fact, benefited from the addition of budgeted "revenue" to the 2000 County budget because this accounting allowed the County to retain 12 employees who would otherwise have been laid off.

4. Mr. Lowe's office has similarly benefited from the expense reimbursement process for this case because, for example, his office was permitted to purchase two portable computers and to bill the expense as a Vasquez case expense for reimbursement from state funds. The office was also allowed to retain four employees who would have otherwise been laid off.

5. Mr. Lowe has personally benefited from the Vasquez case reimbursement process. He is an elected official who can be presumed to benefit when his office is fully staffed and equipped. Indeed, he had informed the Board of Commissioners that their budget cuts would be "hamstringing" him. The County budget's anticipated "revenue" for this case allowed Mr. Lowe to retain a full staff and the office

computer costs billed to Vasquez case allowed him to purchase computers he had sought for some time. As a result, the reimbursement process for this case benefited Mr. Lowe's personal interests.

Kenda J. Schafer _____ Date

CARNEY BADLEY SPELLMAN

January 22, 2018 - 1:02 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	88086-7
Appellate Court Case Title:	State of Washington v. Allen Eugene Gregory
Superior Court Case Number:	98-1-04967-9

The following documents have been uploaded:

- 880867_Briefs_20180122130008SC876089_1612.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Supplemental Brief of Amicus Curiae Washington Coalition to Abolish the Death Penalty.PDF

A copy of the uploaded files will be sent to:

- Nicholas.brown@pacificalawgroup.com
- aravind@orrick.com
- changro@seattleu.edu
- cstubbs@aclu.org
- dawn.taylor@pacificalawgroup.com
- jessica.levin@gmail.com
- jneeb@co.pierce.wa.us
- john.wolfe@orrick.com
- kprocto@co.pierce.wa.us
- levinje@seattleu.edu
- lila@washapp.org
- mrshapiro@orrick.com
- nf@neilfoxlaw.com
- paul.lawrence@pacificalawgroup.com
- robinson@sgb-law.com
- sea_wa_appellatefilings@orrick.com
- talner@aclu-wa.org
- tricia.okonek@pacificalawgroup.com
- wapofficemail@washapp.org

Comments:

SUPPLEMENTAL Brief of Amicus Curiae Washington Coalition to Abolish the Death Penalty

---

Sender Name: Deborah Groth - Email: groth@carneylaw.com
Filing on Behalf of: James Elliot Lobsenz - Email: lobsenz@carneylaw.com (Alternate Email:)

Address:
701 5th Ave, Suite 3600
Seattle, WA, 98104
Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20180122130008SC876089