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SUPREME COURT STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

ALLEN EUGENE GREGORY,

Appellant

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

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Federal Cases

Other Jurisdictions

Constitutional Provisions

Page(s)

Treatises & Law Review Articles

Other Authorities

I. INTRODUCTION

Since June 20, 1963, when Joseph Chester Self was executed, over the last 52 years, Washington has executed only five people.[1] Those five men and the dates of their executions are:

Westley Allan Dodd	January 5, 1993
Charles Campbell	May 27, 1994
Jeremy Sagastegui	October 13, 1998
James Elledge	August 28, 2001
Cal Brown	September 10, 2010

Thus, in the last half century, on average Washington has executed roughly one person every ten years.

A clear historical trend shows how exceptionally rare Washington executions have become over time. Looking at the total number of executions in successive decades shows this trend:

Time Period	**Number of Executions in Washington[2]**
1902-1913	16 executions
1914-1920	[The death penalty was abolished in 1914 reinstated in 1919]
1921-1931	16 executions
1932-1941	23 executions
1942-1952	13 executions

[1] Three of the five men were "volunteers" who made no attempt to invalidate their death sentences. Thus, in the last fifty years Washington has only executed two people who opposed their own execution.

[2] See the Washington Department of Corrections list of executed persons, at http://www.doc.wa.gov/offenderinfo/capitalpunishment/executedlist.asp and the list compiled by Wikipedia. https://en.wikipedia.org/wiki/Capital_punishment_in_Washington_state#List_of_executions. The Wikipedia list begins in 1902 with the execution of Lum You on January 31, 1902; the Washington DOC list begins in 1904 and thus does not include the Lum You execution.

1953-1963	6 executions
1964-1973	none
1974-1983	none
1984-1993	1
1994-2003	3
2004-2013	1
2014-present	none

Since Parliament included a prohibition against "cruel and unusual punishments" in the English Declaration of Rights in 1688,[3] it has been a fundamental tenet of American law that if the imposition of a punishment is "unusual" then it constitutionally prohibited. When the frequency of a punishment decreases to the point that only a tiny handful of transgressors receive it, it reaches the point of intolerable cruelty precisely because there is no fair way to justify why the punishment should be carried out against so few. The death penalty has reached that point in this State.

Justice Breyer has recently suggested that perhaps the death penalty has become so unusual throughout the entire nation that it has reached the point of being unconstitutional in all the States. This case does not present that issue; this brief does not make that claim; and there is no need for this Court to opine on that much broader argument. There are several States where death sentences are still being carried out in significant numbers. In *those* States executions may not have reached the point of such infrequency that the death penalty has crossed the 8th Amendment border of unconstitutionality. That is a question that *only* the

[3] "The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta." *Trop v. Dulles,* 356 U.S. 86, 100 (1958).

U.S. Supreme Court and the state supreme courts in those States can answer. But under Wash. Const., art. 1, §14, it is this Court's inescapable duty to decide whether it has become unconstitutional in *this* State.[4]

In 1972 Justice Stewart described Georgia's death penalty record as constitutionally arbitrary by using death by lightning as a comparison:

> ***These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.*** For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among ***a capriciously selected random handful*** upon whom the sentence of death has in fact been imposed.

Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring). In Justice Stewart's view, the Eighth Amendment did not tolerate "the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 310.

We have now reached the point where the number of executions in Washington is basically on par with the number of deaths caused by lightning strikes. Five people were killed by lightning in Washington State during the time period of 1959 to 2014. That is *same* number of people that Washington has executed during roughly the same time period (1963 to 2016).[5] Or to put it another way: over the past 60 years (since

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[4] Similarly, in *Trop v. Dulles,* 356 U.S. 86, 104 (1958), the U.S. Supreme Court acknowledged its responsibility to strike down legislation that transgresses the limits of the Eighth Amendment: "we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. . . . We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked."

[5] http://www.lightningsafety.noaa.gov/stats/59-14_State_Ltg_Fatalities.pdf

1946) Washington State has executed 19 people, whereas in the first 9 months of 2015, 26 people in this country died from lightning strikes.[6]

Appellant Gregory, one of the capriciously selected handful of men currently on death row in this State, has raised the question: "Why me? Out of all the others who have committed heinous murders, why should this lightning be permitted to strike me?"[7] *Amicus* submits that the death penalty in Washington State has become as rare, and as arbitrary, as death by lightning. *Amicus* urges this Court to rule that Washington has crossed the threshold of prohibited unusualness, and that consequently in this State the death penalty violates art. I, § 14 of the Washington Constitution.

II. LEGAL DISCUSSION

A. AS JUSTICE DOUGLAS NOTED IN *FURMAN,* THE ORIGINAL ENGLISH PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENTS WAS ADOPTED AS A REACTION TO THE UNUSUALLY HARSH PUNISHMENT OF CRITICS OF THE CROWN. A PUNISHMENT NOT "USUALLY" IMPOSED WAS BANNED PRECISELY BECAUSE ITS SELECTIVE IMPOSITION UPON A FEW WAS DEEMED ARBITRARY, AND THUS "CRUEL."

The words of the Eighth Amendment Cruel and Unusual Punishment Clause are taken from the English Declaration of Rights.

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[6] Looking at the *national* lightning death figures one finds that for the last decade (2006 to 2015), at least 313 people in this country died from being struck by lightning. But only one person was executed in Washington during that same decade. See http://www.lightningsafety. noaa.gov/fatalities.shtml.

[7] As Appellant Gregory points out, only two people have been involuntarily executed in this state in the last half century, "even though well over 335 people have been convicted of aggravated murder since 1981." *Brief of Appellant,* at 109. The normal goals of retribution and deterrence are "not served by killing one out of every 100 aggravated murderers." *Id.* at 108-09.

Trop v. Dulles, 356 U.S. 86, 100 (1958). It is generally understood that Parliament was impelled to include those words because of a general sense that in cases such as the perjury trial of Titus Oates, English judges had gone too far and had imposed punishments that were not consistent with the customary usage of English courts.[8]

As Justice Douglas recognized, the English Declaration of Rights, "from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature." *Furman*, 408 U.S. at 242 (Douglas, J., concurring). Douglas recognized that Georgia's application of its death penalty was similarly "selective and irregular," and thus he joined the other justices who found Georgia's death penalty statute unconstitutional because of the way in which it was actually being applied:

> The generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions.

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[8] Titus Oates was an Anglican priest who accused dozens of people of conspiring to assassinate King Charles II. On the strength of his testimony, at least 15 innocent men were executed. But over time the Lord Chief Justice became increasingly skeptical and eventually in 1685 Oates was prosecuted and convicted of perjury. The sentence then imposed upon him was an exceptionally unusual sentence for the offence of perjury. He was stripped of his position as an Anglican priest, imprisoned for the rest of his life, ordered to pay a fine of 1,000 marks, pilloried and repeatedly whipped, and it was further ordered that he was to be whipped again, one day each year, for the rest of his life. *The case against Titus Oates*, 16 How. St. Tr. 1079, 1316 (K.B. 1685). In 1689, after King James II was dethroned and William of Orange had become King of England, Oates was pardoned and released. *See* I. Brant, The Bill of Rights: Its Origin and Meaning 132-52 (1965).

Id. at 242. "When read in light of the English proscription against selective and irregular use of penalties," the words "cruel and unusual" prohibited application of the death penalty to a select few whom society was willing to see suffer, even "though it would not countenance general application of the same penalty across the board." *Id.* at 245.

B. LEGAL HISTORIANS HAVE CONFIRMED JUSTICE DOUGLAS' ASSESSMENT THAT THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE WAS MEANT TO PROHIBIT PUNISHMENTS THAT DEVIATED FROM THE CUSTOM OF THE COMMUNITY BY IMPOSING A MORE SEVERE PENALTY UPON A SELECT FEW.

Douglas recognized that the focus on prohibiting the infrequent imposition of a harsh punishment upon an arbitrarily selected subset of society was driven by a concern for an equality of punishment:

> There is increasing recognition of the fact that ***the basic theme of equal protection is implicit in "cruel and unusual" punishments.*** "A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily." The same authors add that "***[t]he extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness."***

Furman, 408 U.S. at 249 (Douglas J., concurring) (emphasis added).

Legal historians agree with Justice Douglas. "The principle that lies behind the Eighth Amendment is nondiscrimination. The Eighth Amendment is a founding era expression of equal protection." L. Claus, *The Antidiscrimination Eighth Amendment*, 28 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 119, 121 (2004). Behind the Eighth Amendment lies the English Parliament's condemnation of punishments that deviate from

the custom of community:

> In adopting the 1689 Bill of Rights, the English Parliament sought to condemn punishments that were illegal because they were contrary to the common law. Punishments that departed from the common law, that is ***punishments that departed from the historic custom of the community,*** could be described as ***"illegal" or as "unusual."*** In the England of 1689, ***those two terms were used interchangeably.***

Claus, *supra* at 121 (emphasis added).

> ***To call a punishment "unusual" was to call it immorally discriminatory.*** To call a punishment "cruel and unusual" was to call it immorally discriminatory in the direction of greater severity. Understanding the Cruel and Unusual Punishments Clause as a prohibition of discrimination most faithfully translates the historic text into a modern context.

Claus, *supra* at 122 (emphasis added).

C. WHEN IMPOSITION OF A PUNISHMENT BECOMES SUCH A RARITY THAT IT AFFECTS ONLY A HANDFUL OF OFFENDERS, THEN IT BECOMES UNCONSTITUTIONAL. IN WASHINGTON STATE, EXECUTIONS *HAVE* BECOME AN INCREDIBLE RARITY, AND THEREFORE THE DEATH PENALTY *HAS* BECOME UNCONSTITUTIONAL IN THIS STATE.

It is a truism that the meaning of the phrase "cruel and unusual punishment" changes over time. *Weems v. United States*, 217 U.S. 349, 378 (1910).[9] "[T]he words of the Amendment are not precise, and . . . their scope is not static." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The phrase "evolving standards of decency" first appeared in *Trop*.

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[9] The meaning of the Cruel and Unusual Punishments Clause "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Accord Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Because the scope of the constitutional phrase changes over time, what was once constitutionally acceptable can become unconstitutional. "Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today." *Furman*, 408 U.S. at 329 (Marshall, J., concurring). And in fact, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court explicitly recognized that a punishment practice that *had* been constitutional in *Penry v. Lynaugh*, 492 U.S. 302 (1989), had become unconstitutional during the 13 year period leading up to the decision in *Atkins*: "Much has changed since [*Penry*]." *Id.* at 314. Not only had several States enacted bans on the execution of the "retarded,"[10] but

> even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, ***only five have executed offenders*** possessing a known IQ less than 70 ***since we decided Penry. The practice***, therefore, ***has become truly unusual,*** and it is fair to say that a national consensus has developed against it.

Atkins, 536 U.S. at 316 (emphasis added).[11]

But while societal concepts of what constitutes an unacceptable punishment change over time, it is not easy for a court to ascertain what those existing societal standards of decency are, or when they have changed. A punishment that strikes one judge as barbaric may strike

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[10] While it is more respectful to use the term "intellectually disabled," the *Atkins* court used the word "retarded" and that is why that word is used here.

[11] Amicus submits that the same is true of the death penalty in Washington. "Much has changed since" 1983 when this Court narrowly held that Washington's death penalty statute was not unconstitutional. *State v. Campbell*, 103 Wn.2d 1, 25, 691 P.2d 929 (1984). To paraphrase *Atkins*, even though Washington has not prohibited the death penalty, it has executed "only five . . . offenders since [this court] decided [*Campbell*]" in 1984.

another as well-justified and perfectly acceptable. Rather than rely upon personal subjective views of what level of punishment exceeds society's threshold for decency, courts have always depended in large part on an *objective* analysis of simply ascertaining whether the punishment is frequently imposed, or whether it has fallen out of usage. Thus, in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) the Court pointed to the fact that over a four year period in the 1980s, 82,094 people were arrested for homicide, and 1,393 of those were sentenced to death; but only five of these people were younger than 16 years old at the time of their offense.

Recognizing that five people over a four year period of time made the imposition of a death sentence exceptionally unusual for these youthful offenders, the Court embraced Justice Stewart's working definition of an unconstitutional punishment and held that these statistics "do suggest that these five young offenders have received sentences that are "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 833, quoting from Justice Stewart's opinion in *Furman.*

As Justice Scalia acknowledged in a later case, the two critical opinions in *Furman* "***focused on the infrequency*** and seeming randomness with which, under the discretionary state systems, the death penalty was imposed." *Walton v. Arizona*, 497 U.S. 639, 658 (1990) (Scalia, J., concurring in the judgment). Like Justice Stewart, Justice White opined that the extremely low frequency with which death sentences were being imposed in Georgia led to the conclusion that no Georgia death sentence could be upheld. He recognized that "*when*

imposition of the penalty reaches a certain degree of infrequency" neither society's general need for retribution, nor its need for deterrence can justify the continued practice of capital punishment. *Furman*, 408 U.S. at 311-12 (White, J., concurring). A death sentence cannot be justified "for so few, when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient . . . ." *Id.* at 312. "The penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." *Id.* at 313.

The historical record in Washington State is clear. Executions for the crime of aggravated murder have become not merely infrequent, they have become an incredible rarity, occurring on average only once every ten years for the past half century. If five cases of juvenile death sentences in a four year period was deemed unusual enough to make those death sentences unconstitutional in *Thompson*, then five executions in Washington over a 52 year period is even more clearly unconstitutional.

D. ALTHOUGH ARTICLE 1, § 14 DOES NOT INCLUDE THE WORD "UNUSUAL" WITHIN ITS TEXT, HISTORY DEMONSTRATES THAT THE FRAMERS OF STATE CONSTITUTIONS ATTACHED NO SIGNIFICANCE TO THIS FACT, BECAUSE CRUEL PUNISHMENTS WERE DEFINED AS UNUSUALLY IMPOSED PUNISHMENTS.

While the Eighth Amendment specifically refers to "unusual" punishments, Article 1, Section 14 does not. It reads instead: "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." But the absence of the word "unusual" was not intended to give

the state constitutional provision a narrower scope than the Eighth Amendment. On the contrary, this Court has repeatedly held that article 1, §14 has a *broader* scope and provides *more* protection that its federal counterpart. *See State v. Roberts*, 142 Wn.2d 471, 506 n.11, 14 P.3d 713 (2000); *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996); *State v. Thorne*, 129 Wn.2d 736, 772, 921 P.2d 514 (1996).

There is a unanimous consensus among legal historians that around the time of the adoption of the federal constitution, "the cruel and unusual punishments clause was considered constitutional boilerplate." A. Granucci, "*Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIFORNIA LAW REVIEW 389, 840 (1969). It was the shorthand way of referring to the principle of protecting offenders from selective discriminatory practices in the imposition of punishment.

Although the conjunction "and" linked the two words "cruel" and "unusual," that did not mean that a punishment had to fit within two separate categories in order to fall within the scope of the constitutional prohibition. In fact, the idea expressed by this phrase was that a punishment was "cruel" – and therefore illegal – precisely *because* it was "unusual." A single concept was expressed by these two words:

> As evidenced by the state constitutions they wrote, the Founders used the phrases "cruel and unusual," "cruel or unusual," and "cruel" interchangeably as referring to a unitary concept. An inflexible textual requirement that an unconstitutional punishment be both cruel and unusual would make little sense as a matter of either interpretation or principle.

T. Stacy, *Cleaning Up the Eighth Amendment Mess,* 14 WILLIAM & MARY BILL OF RIGHTS JOURNAL 475, 475 (2005).

> The state constitutions enacted while ratification of the Eighth Amendment was pending simply prohibited "cruel punishments." Tellingly, there is no evidence that this formulation was thought to carry a meaning different from that of the Eighth Amendment or from the phrase "cruel or unusual" found in many state constitutions enacted during the Revolutionary Period. These various formulations evidently were understood as referring to a unitary concept. It makes sense to organize this concept around cruelty, which is the term common to all three formulations.

Stacy, *supra*, at 479.

The Eighth Amendment went into effect when the federal constitution was ratified on June 21, 1788, when New Hampshire became the ninth state to ratify it. Before this date, a number of state constitutions already had provisions prohibiting certain punishments. Four states had constitutional provisions that prohibited "cruel or unusual" punishments. Stacy, *supra* at 503 n.145.[12] Pennsylvania[13] and South Carolina[14] both enacted constitutions in 1790, and both of these constitutions simply banned "cruel punishments" without making any mention of "unusual" punishments. In 1792 both Delaware[15] and Kentucky[16] adopted new

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[12] See Del. Decl. of Rights, §16 (1776); N.C. Decl. of Rights,¶X (1776); Mass. Decl. of Rights, ¶XXVI (1780); and N.H. Bill of Rights, ¶XXXIII (1783).

[13] Const. Commonwealth of Pennsylvania, art. IX, §13 (1790) ("WE DECLARE . . . That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted."

[14] S.C. Const., art. IX, §4 (1790) ("nor cruel punishments inflicted").

[15] Del. Declaration of Rights, art. I, §11 (1792). The 1792 constitution changed the language of the previous Delaware Constitution by taking out the reference to "unusual" punishments, viewing it as simply unnecessary.

constitutions which made no mention of "unusual" punishments and simply decreed that there could be no "cruel punishments inflicted." In later years several other states followed by adopting constitutional provisions that mentioned only "cruel punishments."[17] But "[t]here is no evidence" that the no "cruel punishments inflicted" language was understood to mean anything different from either the Eighth Amendment's proscription of "cruel and unusual punishments," or the ban of the many state constitutions enacted during the Revolutionary and post-Revolutionary periods against "cruel or unusual" punishments." Stacy, *supra* at 505. All these phrases were understood as referring to a single concept of forbidden punishment. *Id.*

Other scholars agree: "The framers of the Bill of Rights understood the word 'unusual' to mean 'contrary to long usage.'" J. Stinneford, *The Original Meaning of "Unusual,"* 102 NORTHWESTERN UNIVERSITY LAW REVIEW 1739, 1825 (2008).

> [T]he words "cruel" and "unusual" acted as synonyms when employed in the context of punishment. The word "cruel" stated the abstract moral principle, and the word "unusual" provided a concrete reference point for determining whether that principle had been violated. Thus, it makes sense that some states outlawed "cruel punishments," some outlawed "cruel and unusual punishments," and some outlawed "cruel or unusual punishments." Each formulation is simply a different way of saying the same thing.

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[16] Kentucky Constitution, art. X, §15 (1792).

[17] *See, e.g.*, Ala. Constitution, art. 1, §16 (1819); Miss. Constitution, art. I, §16 (1817); R.I. Constitution, art. I, §8 (1843).

Stinneford, *supra, at 1799*

This Court has not previously had any occasion to consider the nondiscrimination principle that animates the "cruel punishments" provision of art. I, § 14. Prior decisions have considered the principle of proportionality that also animates the clause. In cases like *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980), this Court has recognized that when the magnitude of a punishment grossly outweighs the magnitude of the harm caused by commission of the offense in question, the punishment violates art. I, §14 because it is constitutionally excessive.[18] Thus a punishment of ten years imprisonment would not be constitutionally excessive for a crime like robbery, but it surely would be for shoplifting.[19]

But another, older, and even more central nondiscrimination principle also animates the clause. If a punishment is imposed only upon a tiny handful of convicted criminals, and is not imposed upon others who have committed equally heinous offenses, then the punishment of the few is unconstitutional even if the punishment is not disproportionate to the crime. As Justice Douglas said in *Furman,* the Cruel and Unusual Punishment provision of the English Declaration of Rights, from which article 1, Section 14 originates, "was concerned primarily with ***selective or***

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[18] In *Fain* this Court noted that each of the defendant's crimes were minor offenses involving "the use of fraud to obtain small sums of money . . . adding up to a total of less than $470." *Id.* at 397-98. And yet he had received a sentence of life imprisonment. "Under these circumstances, we believe Fain's sentence to be entirely disproportionate to the seriousness of his crimes. Accordingly, we hold it is cruel punishment in violation of Const. art I, Section 14." *Id.* at 402.

[19] *See Fain*, 98 Wn.2d at 396 ("A punishment clearly permissible for some crimes may be unconstitutionally disproportionate for others.")

irregular application of harsh penalties and that its aim was ***to forbid arbitrary and discriminatory penalties*** of a severe nature." *Furman*, 408 U.S. at 242 (Douglas, J., concurring) (emphasis added).

Sometime long before today, in Washington State the death penalty passed the boundaries of constitutionally acceptable punishment. To paraphrase Justice Douglas' words, over the past half-century the execution of a capital sentence, the harshest penalty known to the law, has become both "selective" and "irregular." Accordingly, it has become both "arbitrary and discriminatory" in the same way that being struck by lightning is arbitrary. Therefore, under article I, Section 14, the death penalty has become unconstitutional in this State.

E. WHETHER WE HAVE REACHED THE POINT WHERE THE DEATH PENALTY IS UNCONSTITUTIONAL IN ALL FIFTY STATES IS NOT AN ISSUE IN THIS CASE.

Appellant Gregory has pointed the Court to Justice Breyer's dissent in *Glossip v. Gross,* 135 S.Ct. 2726 (2015). In that opinion, taking a *national* view of the death penalty, Justice Breyer notes that the incidence of the death penalty is steadily declining:

> The Eighth Amendment forbids punishments that are cruel and *unusual*. Last year, only seven States carried out an execution. Perhaps more importantly, in the last two decades, the imposition and implementation of the death penalty have increasingly become unusual.

Glossip, 135 S.Ct. at 2772 (Breyer, J., dissenting) (italics in the original).

Looking at data from all 50 states, Justice Breyer notes that "30 states have either formally abolished the death penalty or have not

conducted an execution in more than eight years. Of the 20 States that have conducted an execution in the past eight years, 9 have conducted fewer than five in that time, making an execution in those States a fairly rare event." *Id.* at 2773.[20] "That leaves 11 States in which it is fair to say that capital punishment is not 'unusual.'" *Id.* at 2777.

Justice Breyer specifically suggested that the U.S. Supreme Court "should call for full briefing on the basic question" of whether the death penalty is now unconstitutional everywhere in this country. *Id.* at 2777. He left no doubt that he personally believed that the Eighth Amendment required its invalidation in every State where it currently exists: "It seems fair to say that it is now unusual to find capital punishment in the United States; at least when we consider the Nation as a whole." *Id.* at 2774.

But *that* question is *not* before this Court. Indeed, whether this Court has the power to make such a *national* assessment is an open question. But this Court unquestionably has both the power and the *duty* to decide whether the death penalty has become so exceptionally unusual within the borders of this State so as to violate article I, §14. Amicus urges this Court to hold that it has, and that it does.

F. THE RECENT DECISION IN *JOHNSON v. UNITED STATES* PROVIDES A BASIS FOR THIS COURT TO RECONSIDER ITS DECISION IN *CAMPBELL*, AND TO CONCLUDE THAT OUR DEATH PENALTY STATUTE IS UNCONSTITUTIONALLY VAGUE.

[20] Justice Breyer noted that Washington is one of those nine States that had conducted fewer than five executions in the past five years. More specifically, Washington has only conducted *one* execution within that time period.

In *State v. Campbell,* 103 Wn.2d 1, 26, 691 P.2d 929 (1984) this Court narrowly rejected the claim that Washington's death penalty statute was void for vagueness. The majority acknowledged that the vagueness doctrine rests in part upon the requirement that a statute provide ascertainable standards "so that police, judges, and juries are not free to decide" for themselves what the statute means. *Id.* Yet the majority concluded that the statute did provide sufficient guidance as to when to seek and impose the death penalty. *Id.*

Four dissenters disagreed, concluding that Washington's statute "is applied arbitrarily, without pattern or meaningful standards," and therefore was "void for vagueness and violates article 1, section 14 . . . ." *Id.* at 42 (Utter, J., dissenting). The dissent noted that a death sentence turns upon proof of the absence of "sufficient" mitigating circumstances to merit leniency. *Id.* citing RCW 10.95.060(4). Among several problems with the statute, the dissent pointed out "There is no definition for the word 'sufficient,' which leaves the prosecutor and juror free to follow their own personal feelings." *Id.* at 44. "For one juror or prosecutor, youth may be a sufficient factor; for another, a mental illness; for another, no prior record; for another, a low mental capacity." *Id.*

When *Campbell* was decided, there were only five people who had received death sentences under the "new" statute (Campbell, Rupe, Bartholomew, Mak and Jeffries). Thus, the data did not yet exist to discern whether the statute would lead to arbitrary and irrational patterns of discrimination, although the dissenters noted that there was "substantial"

evidence nationally of such discrimination. *Id.* at 50. Citing "[t]he potential for discriminatory imposition of the death penalty," the dissenters concluded that our statute was fatally flawed because it allowed for the "imposition of the death penalty in a standardless manner." *Id.*

Recently, in the summer of 2015, thirty-one years after the *Campbell* decision, the U.S. Supreme Court explicitly held *that a sentencing statute which provided for enhanced punishment* was unconstitutionally vague. Moreover, the Court specifically held that the inability to fashion a rule that would guide sentencing judges and achieve some degree of regularity in sentencing compelled it to declare the residual clause in the Armed Career Criminal Act unconstitutional. *Johnson v. United States*, 192 L.Ed.2d 569, 578 (2015) (the statute "invites arbitrary enforcement by judges" and therefore "[i]ncreasing a defendant's sentence under the clause violates due process of law.").

To paraphrase *Atkins,* "Much has changed since" *Campbell* was decided 32 years ago. First, this Court now has the data that was lacking in 1984, and it shows that over the past half-century Washington's death penalty statute has resulted in clear patterns of arbitrariness and racial discrimination. *See Reply Brief of Appellant*, at 54-73.

Second, just six months ago the *Johnson* Court held that the following statutory phrase was unconstitutionally vague: "involves conduct that presents a serious potential risk of physical injury to another." One key problem was that this language "leaves uncertainty about how much risk it takes for a crime" to qualify for the enhanced punishment.

192 L.Ed.2d at 579. After analyzing its prior attempts to solve the vagueness defect, the Court concluded that the vagueness problem remained unsolved: "Nine years' experience trying to derive meaning from [the statute] convinces us that we have embarked upon a failed enterprise." *Id.* at 581. "[T]he failure of persistent efforts . . . to establish a standard can provide evidence of vagueness." *Id.* at 579. *Amicus* similarly suggests that despite this Court's efforts over the past half-century, Washington's death penalty statute remains hopelessly vague, and continues to produce arbitrary and discriminatory results.

In light of the *Johnson* decision, and our State's capital punishment experience of the past half-century, *amicus* suggests that this Court should reconsider the *Campbell* decision.

III. CONCLUSION

In 1976 two Justices of the U.S. Supreme Court believed that the death penalty had become so unusual a punishment as to have become unconstitutional in all fifty states. Justice Brennan wrote then:

> ***The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it.*** The evidence is conclusive that death is not the ordinary punishment for any crime.

Furman, 408 U.S. at 291 (Brennan, J., concurring) (emphasis added).

Today, in the year 2016, when only five people have been executed in Washington in the past half-century, the death penalty has become, in Justice White's words, "a penalty so rarely invoked" that it is no longer constitutionally tolerable. *Furman*, 408 U.S. at 312. Similarly,

as Justice Brennan noted in his concurring opinion:

> [W]hen a severe punishment is inflicted 'in the great majority of cases' in which it is legally available, there is little likelihood that the State is inflicting it arbitrarily. If, however, the infliction of a severe punishment is "something different from that which is generally done" in such cases [citation], 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.

Furman, at 275-76, quoting from *Wilkerson v. Utah*, 99 U.S. 130, 134 (1879) and *Trop v. Dulles*, 356 U.S. at 101 n.32.

Today, in Washington State, the execution of persons convicted of aggravated murder is *not* "that which is generally done in such cases." On the contrary, it is something that is almost *never* done. It is *exceptionally unusual*, and therefore it is unconstitutionally cruel in the same way that being struck by lighting is highly unusual. *Furman,* 408 U.S. at 309-10 (Stewart, J., concurring). Amicus urges this Court to declare unconstitutional appellant Gregory's death sentence, and all other currently existing death sentences imposed by Washington state courts, because they violate Wash. Const. art. I, § 14.

Respectfully submitted this 4th day of January, 2016.

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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:

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DATED this 4th day of January, 2016.

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