

FILED  
SEP 14 2017  
WASHINGTON STATE  
SUPREME COURT

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON ,  
Respondent,  
v.  
ALLEN EUGENE GREGORY,  
Appellant.

NO. 88086-7  
COMMISSIONER'S SUPPLEMENTAL  
INTERROGATORIES

The appellant Allen Eugene Gregory has proffered an updated version of a report in support of his contentions, titled *The Role of Race in Washington State Capital Sentencing, 1981 - 2014 (Updated Report)*, authored by Katherine Beckett, Professor, Law, Societies and Justice Program of the Department of Sociology at the University of Washington, and Heather Evans, M.A., Ph.D. Candidate, Department of Sociology, University of Washington. At oral argument, the State requested an opportunity to challenge the *Updated Report*. A majority of the court granted the State's request and ordered that a hearing should be held before me. The parties were directed to file memoranda addressing the conduct of the hearing, the manner of submitting testimony or other evidence, and whether the court should appoint an expert pursuant to ER 706 or alternatively, the appropriateness of appointment of a technical advisor to assist the court in understanding the evidence. Each party filed a memorandum that included suggested procedures for the State to obtain information relating to the *Updated Report's* method of analysis and conclusions, submission of

additional information and evidence, and the State's presentation of the bases for its challenge to the *Updated Report* and Mr. Gregory's response. Upon consideration of these memoranda, this court issued an order that included a provision directing the parties' attorneys to confer and determine whether agreement may be reached on the steps and timing of procedures for the following: (a) the State to obtain information relating to the *Updated Report's* method of analysis and conclusions; (b) the submission of additional information and evidence; and (c) the State's presentation of the bases for its challenge to the *Updated Report* and Mr. Gregory's responses. The parties were directed to report to me any areas where they agreed and any areas where they disagreed as to the steps and timing of such procedures.

The parties jointly submitted an agreed proposal consisting of steps in which Mr. Gregory provided the coding manual and data file for the study on the role of race in capital sentencing in Washington, the State submitted its expert report stating its conclusions about the methodology used and the reliability of the study's conclusions, and Mr. Gregory provided the response of Professor Beckett.<sup>1</sup> I accepted the parties' agreed proposal and noted that I would issue a ruling detailing whether and how a technical advisor would be appointed and used.

Mr. Gregory provided the coding manual and data file to the State. The State filed the report of its expert, Nicholas Scurich, Ph.D., entitled *Evaluation of "The Role of Race in Washington State Capital Sentencing, 1981-2014"* (*Evaluation of the Updated Report*). Mr. Gregory then submitted the response by Professor Beckett entitled *Response to Evaluation of 'The Role of Race in Washington State Capital Sentencing, 1981-2014' by Nicholas Scurich (Response to Evaluation)*.

I reviewed these documents to determine if the assistance of a neutral technical advisor with specialized skills would be beneficial. After close study of the information and explanations contained in these reports, supplemented by the Federal

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<sup>1</sup> For readability, I refer to Professor Beckett and Ms. Evans, collectively, as "Professor Beckett."

Judicial Center's *Reference Manual on Scientific Evidence*, (3d ed. 2011),<sup>2</sup> I concluded that the information available allows for the understanding of the concepts necessary to give full consideration to the experts' respective positions. However, mindful that the potential exists for a judicial officer to be confused about the technical concepts and the relationships of the technical concepts to legal principles, I stated that it would be useful to appoint a neutral technical advisor to review my proposed report to the court for the limited purpose of identifying any misunderstanding of the multiple regression methodology or interpretation of the results, and to address issues relating to Dr. Scurich's reports of his inability to replicate certain results. However, on further reflection and study, I concluded these issues may best be addressed by specific interrogatories to the parties' experts. Accordingly, I set forth 33 specific questions in interrogatory form, with background as necessary to illumine the bases of the questions. The parties' experts have filed responses to the *Commissioner's Interrogatories to Parties' Experts*.

Professor Beckett's response to interrogatory number 8 raises additional questions regarding the inclusion or exclusion of certain cases in the regression analyses reported in Table D of the *Response to Evaluation*. Accordingly, below are additional specific questions in interrogatory form, with background to illumine the bases of the questions.

**Background:** Professor Beckett indicated that after certain corrections she identified 82 cases in which death notices were filed and special sentencing proceedings occurred. *Response to Evaluation* at 19, n.39. She noted that one trial report lists the race of the defendant as "unknown." *Id.* at 16. However, only 77 cases were included in the regression analysis for which results are reported in Table D, titled "Impact of Case Characteristics and Defendant Race on Capital Sentencing Outcomes in Cases with Special Sentencing Proceedings, December 1981 - May 2014." *Response to Evaluation* at 25. A note to Table D indicates that "[i]n this

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<sup>2</sup> See <https://www.fjc.gov/sites/default/files/materials/2017/SciMan3D01.pdf>

model, five cases (6.1%) were missing data and were therefore dropped from the analysis.” *Id.* As noted, in one case (Trial Report 210) the trial judge listed the defendant’s race as “unknown,” and this case was evidently excluded from the analysis. The four other cases that were excluded are not identified. In background to my interrogatory numbers 7 and 8, I indicated that my preliminary review suggested the possibility that Trial Reports 92, 167, 182, and 224 were not included in the regression analysis, as each one is a report of a case in which the defendant and the prosecutor reached an agreement and the special sentencing proceeding was conducted before a judge.<sup>3</sup> I asked Professor Beckett in interrogatory number 8 whether cases that are the subject of Trial Reports 92, 167, 182, and 224 were or were not included in the regression analyses relating to special sentencing proceedings in which juries imposed a death sentence. Professor Beckett responded, “TRs 92, 167, 182 and 224 *were* included in all of the regression analyses as well as in the descriptive analyses.” (Emphasis in original). Professor Beckett’s *Response to Commissioner’s Interrogatories to Parties’ Experts* at 5. Professor Beckett maintains that it is appropriate to include these cases because “the death notices do not appear to have been withdrawn, special sentencing proceedings actually took place, and the judge, exercising independent judgment based upon the facts of the crime, could still have imposed a death sentence.” *Id.*

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<sup>3</sup> By way of background to interrogatory number 8, I noted that Trial Report 92 indicates “the proceeding was conducted before a judge” and that “the defendant & prosecutor stipulate that there was mitigating circumstances.” Trial Report 167 indicates “the defendant pled guilty” and “with the consent of the State, he then waived jury for the special sentencing proceeding,” and further that “the defendant and the State stipulated that the State could not prove beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency.” Trial Report 182 indicates, “[t]he jury for special sentencing was waived by the parties and the court accepted the waiver” and further indicates, “[t]he court accepted the parties’ stipulation that mitigation was sufficient for leniency.” Trial Report 224 indicates that “[t]he defendant pled guilty and waived his right to a jury trial for the special sentencing proceeding,” and that “[i]n lieu of evidence at the special sentencing proceeding, the state and the defendant submitted a stipulation, accepted by the court, ‘that the State of Washington is not able to prove beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency.’”

In *State v. Davis*, 175 Wn.2d 287, 290 P.3d 43 (2012), the court observed that in the cases reported in Trial Reports 92, 167 and 182 three white defendants received a life sentence after the prosecution stipulated that mitigating circumstances merited leniency, *Davis* at 366, and noted that Trial Report 224 reported similar circumstances in a case involving a Mexican defendant. *Id.* at 366 n.49. As to these cases, the court concluded: “The life sentences imposed in these cases obviously had nothing to do with the judge’s or jurors’ attitudes about race. Indeed, by stipulating that mitigating evidence merited leniency, the prosecution gave the fact finders no alternative.” *Id.* at 366. Accordingly, it may be debatable whether these cases are properly included or excluded from the analyses. In order to set forth information that allows each Justice to independently decide the matter, information is needed regarding the calculation of p-values and odds ratios under different assumptions as to whether these cases are properly included or excluded from the analyses.

Additionally, Professor Beckett’s response that Trial Reports 92, 167, 182, and 224 were included in the analyses raises the question of which cases were excluded. It appears the cases excluded were those that are missing values in the data file for one of the variables used in the particular regression analysis. For the model reported in Table D, “the dataset analyzed includes 77 special sentencing proceedings with no missing values.” Professor Beckett’s *Response to “Commissioner’s Interrogatories to Parties’ Experts”* at 44. Apparently, if information is missing for a variable that is included in an analysis, the software program automatically excludes the case from the analysis. *Cf. Response to Evaluation* at 4 n.9 (explaining this feature of the software in a different context).

As noted above, in one case the trial judge listed the defendant’s race as “unknown.” Data file column “X” with the heading “D\_Race” is where codes are entered for the “[d]efendant’s race as recorded in trial report.” *Washington State Capital Sentencing Judicial Trial Report Data, 1981-2014 Codebook (Codebook)* at 15. Code 999 means the information is “[m]issing.” *Id.* at 16. The data file column

“X” under the heading “D\_Race” contains a “999” only for Trial Report 210. This case is evidently one of the five cases missing information referenced in the note to Table D.

While the other four cases that were excluded from the regression analysis of sentencing decisions reported in Table D are not specifically identified, Professor Beckett indicated in answers to various interrogatories that two cases involving special sentencing proceedings are missing information on the number of prior convictions, one case is missing information on the number of defenses, and one case is missing information on whether the victim was held hostage. *See Professor Beckett's Response to Interrog.* at 7, 32, and 28 n.15. Since each of these variables was used in the analysis reported in Table D of the *Response to Evaluation*, I reviewed the data file for the cases coded as having special sentencing proceedings to determine which cases had missing data for one of these variables. First, I looked to see which trial reports had missing data on the number of prior convictions. The variable index lists “D\_Priors” as “[d]efendant's number of priors” and describes the variable as “defendant's number of prior criminal convictions.” *Codebook* at 6, 20. The data file column “AR” with the heading “D\_Priors” where information on the number of prior convictions is entered is blank only for Trial Report 8 (Charles Bingham) and Trial Report 15 (Patrick Jeffries). Second, I looked to see which trial report had missing data on the number of defenses. The variable index uses “Defenses\_Num,” for “[n]umber of defenses” and describes the variable as the “[n]umber of defenses for which evidence was entered.” *Codebook* at 8, 43. The data file column “EP” under the heading “Defenses\_Num” is blank only for Trial Report 313 (Byron Scherf). Third, I looked to see which trial report had missing data on whether a victim was held hostage. The variable index uses “Vics\_AnyHostage,” for “[a]ny victim held hostage,” which is also the description of the variable. *Codebook* at 8, 38. The data file column “DT” under the heading “Vics\_AnyHostage” is blank only for Trial Report 197 (Joseph Revay).

However, review of Trial Reports 8, 15, and 313 suggests that the information purportedly missing was actually included in the trial report, and that coding errors may have caused the value to be left blank for a variable in each of these three cases. As noted, the data file column for information on the number of prior convictions is blank for Trial Reports 8 and 15. But each one of these trial reports states that the prior convictions are listed on an attachment. The form instructs at question 1(i), "If the defendant has a record of prior convictions, please list." Immediately under this form instruction, Trial Report 8 states, "See excerpt from Bill of Particulars filed in this cause by the Prosecuting Attorney, which lists the entire record of the Defendant's prior convictions, attached hereto." The attached bill of particulars details 8 prior convictions. Similarly, in Trial Report 15 the trial judge wrote immediately under this form instruction, "See copy of Canadian record of convictions attached hereto as Exhibit A." The attached exhibit lists 15 prior convictions. There is no evident basis for the coders to leave this column blank for these trial reports. As to Trial Report 313, where the value for the number of defenses was left blank in the data file, the trial report form question 2(c) instructs, "Please indicate if there was evidence introduced or instructions given as to any defense(s) to the crime of aggravated first degree murder" followed by a list of specific defenses and aligned boxes that can be checked to indicate "Evidence" and "Instruction(s)." The trial report form also provides blank lines for "[o]ther specific defenses" to be written in by the judge, with accompanying boxes for checking. The *Codebook* instructs coders to "[e]nter 0 for no" and "[e]nter 1 for yes" as to whether evidence was given regarding a specific defense or "other specific defense" and to enter the total number of defenses for which evidence was entered. *Codebook* at 61. The values for total number of defenses range from 0 to 4. *See Codebook* at 43. All trial reports for cases with special sentencing proceedings have a value of "0" to "4" entered in the data file column "EP" under the heading "Defenses\_Num" except Trial Report 313. In Trial Report 313 the trial judge wrote "general denial" on one of the blank lines under

the form subheading “Other specific defenses,” but did not check any box. I note that in Trial Report 7 “denial” is written on a blank line below “Other specific defenses” with the aligned “Evidence” box checked, and this was coded as “1” in column EP of the data file. It is evident that the trial judge would have written “general denial” only if evidence of such was introduced in the case. *Cf.* Professor Beckett’s *Response to Commissioner’s Interrogatories to Parties’ Experts* at 2 (as to mitigating circumstances, coding protocol includes the following: “If nothing is checked but the judge has described one or more mitigating circumstances, count them and enter the appropriate number.”) Accordingly, there is no apparent basis to conclude that Trial Report 313 was missing the relevant information.<sup>4</sup>

The following supplemental interrogatories, with numbering continued from the first set of interrogatories, are directed to Professor Beckett. Dr. Scurich may offer answers and calculations in response to interrogatory numbers 37, 38 and 39 if he chooses to do so.

**Interrogatory No. 34:** Were the following five cases the cases that “were missing data and were therefore dropped from the analysis” reported in Table D of the *Response to Evaluation* at 25: Trial Report 210 (Cheyenne Brown), Trial Report 8 (Charles Bingham), Trial Report 15 (Patrick Jeffries), Trial Report 313 (Byron Scherf), and Trial Report 197 (Joseph Revay)? If not, please identify the five cases that were missing data and were therefore dropped from the analysis by trial report and defendant name and explain the reason each was dropped from the analysis.

**Interrogatory No. 35:** Do you maintain that the data file was correctly left blank as to the number of prior criminal convictions for Trial Report 8 and Trial Report 15? If yes, please explain.

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<sup>4</sup> As to Trial Report 197, the blank in the data file under the column indicating whether any victim was held hostage accurately reflects the trial judge’s answer. The trial judge answered “not known” to question 4(g), “[w]as the victim held hostage during the crime.”



**Interrogatory No. 36:** Do you maintain that the data file was correctly left blank as to number of defenses for Trial Report 313? If yes, please explain.

**Interrogatory No. 37:** Please indicate whether any of the cases that were dropped from the analysis reported in Table D should have been included in the analysis, identify such cases by trial report number and defendant name, and indicate the proper coding for the case variable(s) that were previously identified as missing information.

**Interrogatory No. 38:** Please report the results if the original model used in Table D and the two variants of Table D requested in interrogatory numbers 19 and 20 are re-run with proper coding for the cases that were previously identified as missing information.

**Interrogatory No. 39:** Please report the results if the original model used in Table D and the two variants of Table D requested in interrogatory numbers 19 and 20 are re-run with proper coding for the cases that were previously identified as missing information, and with Trial Reports 92, 167, 182, and 224 removed from the analyses.

Answers to these supplemental interrogatories should be received by the court and counsel of record for the parties by September 29, 2017. Upon consideration of answers to interrogatories, a final report will be submitted to the court for such weight as each Justice determines to accord it in deciding the matter. As previously noted, nothing in my rulings in this matter precludes a motion for the filing of additional briefs under RAP 10.1(h).



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ACTING DEPUTY COMMISSIONER

September 14, 2017