

STATE OF WASHINGTON
SUPERIOR COURT
PIERCE COUNTY
CASE NO. 11-2-00177
FILED
MAR 11 2014

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 SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

OPENING BRIEF OF APPELLANT

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u **Filed**
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A. INTRODUCTION

Allen Gregory is by no stretch of the imagination one of Washington's worst offenders. He was sentenced to death for killing a single victim when he was 24 years old and has committed no other violent felonies. Hundreds of other people who committed particularly brutal aggravated murders, including scores who killed multiple victims, are serving life sentences. Mr. Gregory's death sentence is random and arbitrary, and, to the extent it is not, it is a result of his race and the county of conviction.

The prosecutor told the jury otherwise. He described Mr. Gregory as one of the state's "worst offenders," and said his crime was "as bad as it gets." Mr. Gregory objected, moved for a mistrial, and moved in the alternative for leave to present the overwhelming evidence of worse cases to the jury. The trial court denied the motions, and also overruled Mr. Gregory's numerous objections to other instances of prosecutorial misconduct that included repeated burden-shifting and political arguments regarding the propriety of capital punishment generally. This Court should not tolerate a death sentence obtained under such circumstances.

If this Court does not reverse the sentence due to prosecutorial misconduct and disproportionality, the sentence should be reversed on a variety of other grounds, including: (1) the unconstitutional discretion that

prosecutors have to seek death in a second sentencing hearing after this Court vacates a death sentence; (2) multiple constitutional infirmities with RCW 10.95.060; (3) the failure of the State to file and serve a notice of intent to seek the death penalty related to the Fourth Amended Information; (4) an improperly denied challenge for cause; (5) insufficient evidence; and (6) the sentence being the result of passion and prejudice.

This Court should also reverse the underlying murder conviction because of a defective charging document. Moreover, the conviction should be reversed because key evidence against Mr. Gregory – DNA evidence and a knife – was illegally obtained, in part based on statements made by a complainant in another case who has since admitted she lied.

B. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived Mr. Gregory of his rights to remain silent and a fair trial guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 3, 9, 14 and 22 of the Washington Constitution. In this regard, Mr. Gregory assigns error to the trial court's Order Denying Motion to Compare Other Murder Cases and Motion for Mistrial (Closing Argument). CP 1195-96.

2. Mr. Gregory's death sentence is excessive and disproportionate to the penalty imposed in similar cases.

3. The imposition of the death penalty upon Mr. Gregory is random and arbitrary.

4. To the extent Mr. Gregory's death sentence is not random and arbitrary, it is a result of his race and the county of conviction rather than any valid variable.

5. Mr. Gregory's death sentence violates article I, section 14 of the Washington Constitution.

6. RCW 10.95 unconstitutionally assigns to judges the task of finding facts necessary to elevate the crime of aggravated murder to capital murder without a reasonable doubt standard.

7. The Fourth Amended Information is fatally defective and fails to charge the elements of capital murder. CP 6120-21. (App. B).

8. Because the State failed to file and serve a notice of intent to seek the death penalty related to the Fourth Amended Information, there was no lawful authority for the State to seek, or for the trial court to impose, the death penalty.

9. The trial court erred when, in 2011 and 2012, it did not grant a new trial and suppress biological evidence seized from Mr. Gregory and physical evidence seized from his car.

10. Mr. Gregory assigns error to the entry of the trial court's *Order Denying Defendant's Motion to Dismiss Death Penalty, Grant New*

Trial, Have Franks Hearing, CP 617-19, and its Order Denying Motion to Reconsider Earlier Rulings (Franks, Suppression) and Denying Deposition, CP 1193-94, in their entirety.

11. The trial court erred in ordering on September 8, 1998, that Mr. Gregory's blood be drawn for DNA testing. CP 410-11 (App. D).

12. The trial court erred in ordering on January 12, 2000, that Mr. Gregory's blood be drawn a second time. CP 443-44 (App. F).

13. The trial court, in 2001, erred in denying Mr. Gregory's motions to suppress evidence obtained from the September 8, 1998, and January 12, 2000, blood draws. Specifically, Mr. Gregory assigns error to the trial court's Findings of Fact ("FF") 3, 7-13, 19-22, 24-31, and Conclusions of Law ("CL") 1-5, 8-13, entered on March 23, 2001, CP 473-85 (App. G), and FF 2, 13, 21, 22, 23, and CL 1-5, 8-10, entered on April 2, 2001. CP 6115-19 (App. H).

14. The trial court violated Mr. Gregory's right to a fair and impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution by denying his motion to dismiss a biased juror for cause.

15. The death sentence should be reversed because it was obtained by passion or prejudice.

16. The death sentence violates Mr. Gregory's right to due process under the Fourteenth Amendment and article I, section 3, because the State presented insufficient evidence to prove beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency.

17. RCW 10.95 is unconstitutional on its face and as it has been applied because it gives the prosecutor unfettered discretion to seek the death penalty upon remand after this Court has vacated a death sentence.

18. There is no statutory authority to support reimposition of the death penalty in a second sentencing proceeding once this Court vacates a death sentence.

19. RCW 10.95.060(3) violates the Eighth and Fourteenth Amendments and article I, sections 3 and 14, because it does not sufficiently define the "facts and circumstances" of the crime that may be introduced to the jury in a second penalty proceeding. Mr. Gregory therefore assigns error to CP 620-21.

20. The trial court erred when it placed no limits on the admission of evidence at the second sentencing proceeding and admitted, as "facts and circumstances," evidence of non-statutory aggravating factors such as the lack of residual doubt, Mr. Gregory's possession of dangerous knife, and gruesome photographic and physical evidence. Mr. Gregory therefore assigns error to CP 738-39.

21. Mr. Gregory's rights to due process, equal protection of the laws and the right to appeal under the Fourteenth Amendment and article I, sections 3, 12 and 22 were violated by providing him a sentencing hearing that afforded him fewer rights than that given to someone who did not win an appeal.

22. RCW 10.95.020 fails to meaningfully narrow the class of defendants eligible for capital punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 14 of the Washington Constitution, and the trial court erred when denying Mr. Gregory's motion to dismiss the death penalty on this basis. CP 622-23.

23. Mr. Gregory re-asserts the assignments of error from his first appeal related to this murder case, specifically, Assignments of Error (murder case) 1-8, 14-19, 23, 25-26.

24. Mr. Gregory assigns error to Sections 4(g), 6(a)-(d), and 6(k) of the Report of the Trial Judge. CP 1261-75.

25. Mr. Gregory assigns error to entry of the verdicts of guilt and aggravating circumstances and of death, CP 1156, 6122-23, the entry of the judgment and sentence and warrant of commitment. CP 1179-88.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor commits misconduct when he shifts the burden of proof, misstates the jury's role, or invokes alleged facts not in evidence to make political arguments or inflame the jury's passions. Here, over Mr. Gregory's numerous objections, the prosecutor shifted the burden of proof by telling the jury it should vote for death because Mr. Gregory had not produced enough mitigation evidence. The prosecutor misstated the jury's role by telling jurors they should "speak the truth" that Mr. Gregory "deserved" the death penalty, and that their job was to "balance" Mr. Gregory's rights with those of the decedent. He spoke at length regarding his personal opinions about the death penalty and alleged "facts" regarding the politics of the capital punishment. And he told the jury that Mr. Gregory's crime was "as bad as it gets," even though no such evidence had been presented and Mr. Gregory was denied the opportunity to rebut this claim by presenting evidence of the dozens of worse crimes for which defendants received life sentences. Did prosecutorial misconduct deprive Mr. Gregory of a fair trial, requiring reversal and remand for a new proceeding?

2. A death sentence which is disproportionate to the penalty imposed in other aggravated murder cases must be reversed and remanded for imposition of a sentence of life without the possibility of parole.

Dozens of defendants in Washington are serving life sentences for committing brutal aggravated murders against multiple victims. Apart from Allen Gregory, the people who are on death row for the aggravated murder of a single victim are defendants with violent criminal histories. Allen Gregory is on death row for killing a single victim when he was only 24 years old and he has committed no other violent felonies. Must the death sentence be vacated and the case remanded for imposition of a sentence of life without the possibility of parole?

3. Article I, section 14 of the Washington Constitution provides stronger protection against cruel punishment than the Eighth Amendment, and in determining whether a sentence violates this provision this Court considers: (a) the nature of the offense, (b) the legislative purpose behind the statute, and whether that purpose can be equally well served by a less severe punishment, (c) the punishment the defendant would have received in other jurisdictions for the same offense, and (d) the punishment meted out for other offenses in the same jurisdiction. Does Mr. Gregory's death violate the state constitution because, although he was convicted of aggravated murder, hundreds of people convicted of gruesome aggravated murders in Washington and scores of people convicted of multiple murders are serving life sentences, Mr. Gregory would not be executed in

most jurisdictions, and the legislative goals of retribution and deterrence would be equally well-served by a sentence of life without parole?

4. Does RCW 10.95 unconstitutionally deny defendants a jury trial and proof beyond a reasonable doubt because the statutory scheme assigns the task of determining proportionality to judges, rather than to juries?

5. Where the Fourth Amended Information fails to include essential elements in the charging language – the "absence of sufficient mitigating circumstances to warrant leniency" and proportionality of the sentence – should this Court reverse the conviction and dismiss the information?

6. Where the prosecutor failed to file and serve a new notice of intent to seek the death penalty within 30 days of Mr. Gregory's arraignment on the Fourth Amended Information, was there any authority for the trial court to sentence Mr. Gregory to death?

7. Should the trial court have granted Mr. Gregory's motions to suppress evidence and to grant a new murder trial?

8. Should the trial court have granted Mr. Gregory's motions for a hearing to determine if the State and its agents knowingly or recklessly failed to disclose material evidence in the search warrant affidavit and the blood draw requests?

9. Was the September 8, 1998, order for a blood draw valid?

10. Did the January 12, 2000, order authorizing the drawing of Mr. Gregory's blood, and authorizing a release of a sample to Mr. Gregory's attorney, authorize its release to the police for comparison with the genetic profiles of other unrelated alleged crimes?

11. Was the August 1998 search warrant valid where the supporting application was not signed under penalty of perjury?

12. The Sixth and Fourteenth Amendments and article I, sections 21 and 22 guarantee the right to an impartial jury. To protect this right in a capital case, the trial court must grant a motion to excuse a juror for cause if the juror will not properly consider mitigating circumstances or otherwise follow the law and the court's instructions. Did the trial court violate Mr. Gregory's constitutional right to an impartial jury by denying his motion to excuse Juror 132 for cause, where that juror said life without parole was not a severe enough sentence for premeditated murder, stated at least four times that he would place the burden of proof on the defense despite knowing the law required otherwise, and said that he did not consider any information about Mr. Gregory's life to be relevant?

13. Was the death sentence obtained by passion or prejudice?

14. Due process prohibits the imposition of a death sentence unless the State presents sufficient evidence to prove beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit

leniency. Here, although Mr. Gregory was convicted of a brutal murder, he was only 24 at the time of the crime, the State acknowledged that he had a history of only “minor” non-violent crimes, and, according to the prison expert who testified, the probability that Mr. Gregory will commit a violent act in the future is “miniscule.” Did the State fail to prove beyond a reasonable doubt that a death sentence is appropriate, requiring reversal and remand for imposition of life without the possibility of parole?

15. When this Court has reversed death sentences on appeal, it has issued conflicting decisions as to whether the prosecutor, upon remand, has the discretion to withdraw a death notice. *Compare State v. Bartholomew*, 104 Wn.2d 844, 850, 710 P.2d 196 (1985) (“*Bartholomew III*”), with *State v. Clark*, 143 Wn.2d 731, 783-84, 24 P.3d 1006 (2001). In light of these conflicting decisions, is RCW 10.95 unconstitutional either on its face or as applied?

16. Where this Court vacates a death sentence, but affirms the underlying conviction, what constitutional limits are there to the State’s introduction of “facts and circumstances” of the crime upon remand for a new sentencing hearing, and if there are no restrictions on what evidence the State can introduce, is RCW 10.95.060(3) unconstitutional?

17. Did the trial court in this case err when it allowed the State to introduce irrelevant and prejudicial facts, including evidence of the lack of

residual doubt, evidence of ownership of a dangerous weapon, and gruesome photographic and physical evidence, that far exceeded the permissible scope of evidence that should have been introduced at a capital sentencing hearing?

18. Were Mr. Gregory's rights to due process, to equal protection, and to an appeal violated when he had a sentencing hearing upon retrial that was less protective of his rights than a sentencing hearing afforded to someone who was being sentenced for the first time?

19. Should RCW 10.95 be construed to require imposition of a sentence of life without parole after this Court vacates a death sentence?

20. A capital punishment scheme violates the Eighth and Fourteenth Amendments and article I, section 14 if it fails to sufficiently narrow the class of eligible defendants to avoid arbitrary application of the death penalty. Washington's aggravated murder statute has been expanded significantly both in number and scope of aggravating factors, such that over 300 people have been found eligible for the death penalty. Yet, only five have been executed and only nine are on death row, and this group does not consist of the "worst of the worst" offenders. Is Washington's capital punishment scheme unconstitutional?

21. Should this Court reverse Mr. Gregory's conviction based upon legal errors he identified in his first appeal?

D. STATEMENT OF THE CASE

1. **Procedural facts.**

By information filed on November 19, 1998, in Pierce County Superior Court, the State charged Allen Gregory with one count of aggravated premeditated murder in the first degree in relation to the death of G.H. on July 27, 1996. CP 1-2. The State amended the information a number of times, and, ultimately, Mr. Gregory was tried on a Fourth Amended Information, which alleged that the murder occurred in the course or furtherance of, or in immediate flight from, the crimes of first or second degree rape and/or first degree robbery. CP 6120-21.

The State opted to seek the death penalty. CP 5744-46. On March 22, 2001, Mr. Gregory was found guilty of aggravated murder, and the jury returned a death sentence after a special sentencing proceeding. CP 6122-23.

Mr. Gregory's appeal of the murder conviction was consolidated with an appeal of three first-degree rape convictions from Pierce County Superior Court No. 98-1-03691-7. On November 30, 2006, this Court issued a decision (1) reversing the rape convictions, (2) affirming the aggravated murder conviction, but (3) vacating the death sentence. *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006). The Court reversed the death sentence because it was based on the reversed rape convictions,

Id. at 849, and because of prosecutorial misconduct in closing argument.

Id. at 867. Both cases were remanded to superior court for (1) a retrial of the rape cases, and (2) a possible new sentencing proceeding in the murder case.¹

On August 26, 2010, the trial court dismissed the rape charges with prejudice. CP 521-22. This action was based on the fact that the complainant in the rape case, Robin Sehmel, admitted that she lied at Mr. Gregory's rape trial, that she had been acting as a prostitute on the night in question, and now acknowledged that the first two of the three alleged sex acts had been consensual. CP 272, 276, 289, 518-20. Because the sentencing hearing in the murder case had been repeatedly continued because of the State's desire to have the rape case tried first, *see* RP (1/22/10) 192, the penalty hearing did not begin until March 5, 2012.

Even though the rape charges were dismissed with prejudice, leaving Mr. Gregory with no prior violent felonies, the State did not withdraw its notice of intent to seek the death penalty. On May 15, 2012, the jury found there were not sufficient mitigating circumstances to merit

¹ The Court stated that the State "*may* seek the death penalty at resentencing." 158 Wn.2d at 849 (emphasis added). This discretion as to whether or not to seek death a second time is the subject of an assignment of error.

leniency. CP 1156. The trial court again sentenced Mr. Gregory to death. CP 1181-88.

2. Substantive facts.²

Mr. Gregory was born in Sacramento, California, in 1972. His parents divorced when he was young, after his father abandoned the family. Mr. Gregory mostly grew up in Tacoma, near his grandmother, Mae Hudson. RP (5/8/12) 2671-74, 2779-80; RP (5/10/12) 2913-15, 2921-22. Mr. Gregory went to elementary and middle school in Tacoma, where he was in special education classes. RP (5/8/12) 2699-2708, 2781. In the mid-1980s, Mr. Gregory's mother sent him to live with his father in California, but his father beat him and he ended up back with his mother, this time living in a high crime area of Los Angeles. RP (5/8/12) 2784-85; RP (5/10/12) 2935-37.

Mr. Gregory dropped out of high school because he was pressured to join a gang. RP (5/8/12) 2785; RP (5/10/12) 2937-38. He joined the Job Corps in Utah for 11 months. RP (5/10/12) 2941. Then, when he was not even 18 years old, he returned to Los Angeles, working first as an electrician's apprentice and then for a drilling company. RP (5/10/12)

² Specific facts related to the assignments of error will be discussed in the sections of the briefs addressing those issues.

2941-42. Mr. Gregory became involved with a young woman and the couple had a baby when he was still a teenager. RP (5/10/12) 2944-45.

In 1996, Mr. Gregory moved back to Tacoma and moved in with his grandmother. RP (5/8/12) 2756, 2765. For the next two years, he did chores for Ms. Hudson, RP (5/8/12) 2683, 2756-57, 2773, 2788, worked sporadically, RP (5/8/12) 2690-97, 2756, and for a significant time served as primary parent to his daughter when the child's mother said she could not take care of her. RP (5/8/12) 2776; RP (5/10/12) 2953-54. He was, by all accounts, a loving and responsible father, who also treated his new girlfriend's daughter as his own. RP (5/8/12) 2682-83, 2713, 2764-66, 2773-74, 2787-89.

G.H. grew up in the same neighborhood as Mr. Gregory, although she was older than Mr. Gregory (she was born in 1953). G.H.'s mother, Leola Peden, lived next door to Mr. Gregory's grandmother, Ms. Hudson, for 30 years. RP (4/24/12) 2357-58; RP (5/10/12) 2965. G.H. was a military veteran who worked as a bartender at a Tacoma restaurant. RP (4/24/12) 2364; RP (5/7/12) 2656. In July 1996, she moved into a house next door to her mother. RP (4/24/12) 2360-61. On July 27, 1996, when G.H. did not show up for work, one of her co-workers came to her house and discovered her body. RP (4/25/12) 2417-23. G.H. had been raped and repeatedly stabbed with a knife. Her diamond earrings were missing

and her purse had been emptied. RP (4/24/12) 2374-76, 2475-76; RP (4/25/12) 2514; RP (4/26/12) 2553-2603.

Over the next two years, the police came to suspect Mr. Gregory had committed the crime, but they lacked evidence. RP (4/25/12) 2499. However, based upon the now-discredited allegations of rape by Robin Sehmel in August 1998, the police were able to obtain a blood sample from Mr. Gregory. The DNA profile extracted from the sample was compared against the DNA from the semen found at the G.H. crime scene. CP 473-78, 6157-67. The State's DNA experts concluded that there was an extremely high probability that Mr. Gregory was the donor of the semen, and, in lieu of live testimony, Mr. Gregory's attorneys stipulated to the admissibility of the DNA results at the 2012 sentencing hearing. CP 1030-40.

Mr. Gregory had minimal criminal history before he was incarcerated at age 26 in 1998 (he was 24 years old at the time of the murder). Mr. Gregory had a few misdemeanor convictions, and a first degree theft disposition from juvenile court involving a stolen skateboard from 1986. CP 1022-29; RP (5/7/12) 2663-64; Ex. 7 (admitted 5/7/12). After he was incarcerated, in 1999, Mr. Gregory was found guilty of a drug possession charge from an incident that took place before he was arrested. RP (5/7/12) 2663; CP 1212. In 2001, Mr. Gregory was

convicted of the gross misdemeanors of attempted escape in the second degree and malicious mischief, for a 2000 incident in the jail, when he removed some screws from a window in his jail cell. RP (5/10/12) 2833-34, 2884-85.

Between 2001 and 2007, the State imprisoned Mr. Gregory in Walla Walla, and he was allowed out of his cell, at most, a few hours at a time, with minimal interactions with other inmates. RP (5/10/12) 2865-2868. During this time, Mr. Gregory obtained his GED, RP (5/10/12) 2958-59, and had no disciplinary incidents. RP (5/10/12) 2897. When he came back to Pierce County in 2007, he was placed into general population, only being placed into segregation a few times. RP (5/10/12) 2853-56, 2895-96.

While in the Pierce County Jail, another inmate attacked Mr. Gregory, and Mr. Gregory required medical care. RP (5/10/12) 2833, 2856, 2896. Another time, in October 2011, Mr. Gregory got into a fight with another inmate, who this time was the one who required medical attention. RP (5/10/12) 2833, 2856-59. Both Mr. Gregory and the other inmate received disciplinary infractions, but no charges were ever filed. RP (5/10/12) 2833, 2886, 2898-99, 2905-08.³ The incident was minor

³ The record is silent as to whether the inmate who attacked Mr. Gregory was prosecuted.

enough that when the parties were discussing whether Mr. Gregory should be restrained during the sentencing proceeding, the prosecutor stated that the corrections staff had told him that “there aren’t any discipline issues that happened in the jail since he’s been back.” RP (3/19/12) 173-74. Finally, in the middle of the 2012 trial, Mr. Gregory received an infraction because he was told to move cells, and, instead of simply moving, he tried to explain to the guard why he did not want to move. RP (5/10/12) 2886, 2901-05.

Between 1998 and 2012, Mr. Gregory had continued contact with his family members, although, because of their busy lives, many of his relatives either did not actually visit him in person or did not do so frequently. RP (5/8/12) 2684-86, 2716, 2757-61, 2766-68, 2776-77, 2790-92; RP (5/10/12) 2955-57, 2960. Ms. Hudson died in 2006, and Mr. Gregory was obviously unable to attend her funeral. RP (5/8/12) 2684, 2790. Mr. Gregory’s daughter had her own child, so at this point Mr. Gregory was a grandfather. RP (5/10/12) 2963-64.

At the 2012 sentencing hearing, a former prison warden, James Aiken,⁴ testified that, after reviewing Mr. Gregory’s records, it was unlikely that Mr. Gregory would be a risk to others in the correctional

⁴ Not an opponent of the death penalty, Mr. Aiken had personally executed two prisoners. RP (5/10/12) 2814.

system. Because of his age, the lack of any violence directed toward corrections' staff, and his lack of gang affiliation, Mr. Gregory instead would be completely dependent on correctional staff to insure his safety. RP (5/10/12) 2828-33. According to Mr. Aiken, the "level of probability to inflict random or systemic violence on somebody else is minuscule, at best." RP (5/10/12) 2831. Mr. Aiken concluded that Mr. Gregory "can be adequately managed within the correctional environment for the remainder of his life without causing an undue risk of harm to staff, inmates or the general community." RP (5/10/12) 2835.

E. ARGUMENT

1. Prosecutorial misconduct permeated the proceedings, depriving Mr. Gregory of his right to a fair trial under the Sixth and Fourteenth Amendments and article I, section 22.

a. Introduction.

"The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution." *In re Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012); U.S. Const. amends. VI, XIV; Const. art. I, § 22. Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *Glasmann*, 175 Wn.2d at 703-04.

A new trial should be granted where a prosecutor's conduct was both improper and prejudicial. *Id.* at 704. Non-constitutional misconduct is prejudicial if there is a substantial likelihood that the misconduct affected the verdict. *Id.* Misconduct that violates a constitutional right is presumed prejudicial and reversal is required unless the State can prove, beyond a reasonable doubt, that the misconduct did not contribute to the verdict. *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011).

Even where a defendant does not object to improper argument, this Court will reverse if the misconduct was flagrant and ill-intentioned and incurable by an instruction. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). Furthermore, procedural rules regarding arguments raised for the first time on appeal are construed more liberally in the sentencing phase of a death penalty case. *State v. Gregory*, 158 Wn.2d 759, 859, 147 P.3d 1201, 1253 (2006). This is based on the Eighth Amendment's requirement of heightened reliability in capital proceedings. *See Zant v. Stephens*, 462 U.S. 862, 884-85, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

Multiple instances of misconduct may result in an unfair trial requiring reversal even if each improper comment in isolation would not. "There comes a time ... when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of

instructions can erase it and cure the error.” *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); *see also State v. Perez-Mejia*, 134 Wn. App. 907, 917, 143 P.3d 838 (2006) (reversing murder conviction because cumulative misconduct denied defendant a fair trial).

In this case, prosecutorial misconduct permeated the proceedings, depriving Mr. Gregory of a fair trial and requiring reversal. The prosecutor improperly told the jury its job was to “declare to truth” and to “balance” the rights of Mr. Gregory and the decedent, repeatedly shifted the burden of proof to the defense, and invoked “facts” not in evidence to make political arguments not relevant to the jury’s decision and to inflame the passions and prejudices of the jury. Although he did not object to every instance of misconduct, Mr. Gregory objected numerous times, and most of his objections were improperly overruled. Defense counsel ultimately moved for a mistrial based on the State’s inappropriate closing argument, but the trial court incorrectly denied that motion as well. This Court should hold that the prosecutor’s persistent misconduct violated Mr. Gregory’s rights, and should reverse and remand for a new trial.

- b. The prosecutor told the jury its job was to “declare the truth” that Mr. Gregory “deserved” the death penalty, even though multiple appellate court decisions had held such argument is improper.

The prosecutor told the jury:

The word “verdict” in our system comes from the Latin word *veredictum*, which means to declare the truth. I would suggest to you that in this case there’s only one truth that you can declare, and that is that this defendant deserves and should get the ultimate penalty for his crime, and that is death.

RP (5/14/12) 3013. His accompanying PowerPoint slide similarly said, “You declare the truth ...”. “Exhibit Number 1 at Sentencing” (State’s PowerPoint), filed 6/13/12, Slide 18.⁵ He repeated the argument at the end of rebuttal, as his final message to the jury:

I would ask that you declare the truth. Allen Gregory deserves the death penalty. And on behalf of the State of Washington and all of its law abiding citizens, I would ask that you sentence him to the appropriate sentence, and that is sentence Allen Gregory to his death.

RP (5/14/12) 3055. The prosecutor’s final PowerPoint slide stated in large red letters overlaying an image of G.H.: “DECLARE THE TRUTH[:]
ALLEN GREGORY *DESERVES* THE DEATH PENALTY.” Ex. 1
(6/13/12) Slide 102.

These admonitions constitute flagrant and ill-intentioned misconduct because the Court of Appeals had already held in multiple cases that the argument is improper. *E.g.*, *State v. Evans*, 163 Wn. App. 635, 644-45, 260 P.3d 934 (2011); *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). Indeed, because those cases arose out of

⁵ See RP (6/13/12) 3129.

Pierce County, there is no question but that the prosecutor was on notice of the impropriety of his remarks.

In *Anderson*, the prosecutor had similarly told the jury:

The word “verdict” comes from the Latin word “veredictum,” which means to declare the truth. So, by your verdict in this case, you will declare the truth about what happened on August the 21st of 2007 at the Save A Lot....

Anderson, 153 Wn. App. at 424. Division Two held the prosecutor’s request that the jury “declare the truth” was improper. *Id.* at 429. “A jury’s job is not to ‘solve’ a case.” Rather, it is “to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt.” *Id.*

In *Evans*, the court reaffirmed *Anderson* and reversed convictions where the prosecutor mischaracterized the jury’s role and the burden of proof. *Evans*, 163 Wn. App. at 648. The prosecutor had told the jury, “You decide who’s telling the truth, who’s being less than truthful.” *Id.* at 641. He later reiterated, “I want you to peel back different layers of the onion to get to the truth, what you would swear you would do, all right?” *Id.* The Court of Appeals held it was misconduct to “suggest[] to the jury that it had an obligation to determine the truth.” *Id.* at 645. “Here, as in *Anderson*, the prosecutor miscast the jurors’ role as one of determining what happened and not whether the State had met its burden of proof.” *Id.*

Thus, by 2011, the law clearly prohibited the “truth” argument Pierce County had employed, yet the prosecutor brazenly disregarded these holdings and proceeded to invoke the forbidden tactic in Mr. Gregory’s case in order to obtain a death sentence.

This Court ultimately endorsed Division Two’s holdings in *Emery*, 174 Wn.2d at 760. “The jury’s job is not to determine the truth of what happened; a jury therefore does not ‘speak the truth’ or ‘declare the truth.’” *Id.* (citing *Anderson*, 153 Wn. App. at 429). Rather, the jury’s role is to determine whether the State proved its case beyond a reasonable doubt. *Id.*

Here, instead of proving the absence of mitigating circumstances beyond a reasonable doubt, the prosecutor insisted that the jury declare the “truth” that Mr. Gregory “deserved” the death penalty. This Court should not tolerate such misconduct, especially in combination with the numerous other improprieties that peppered the prosecutor’s closing arguments.⁶

⁶ The use of red capital letters overlaying these PowerPoint slides and others also impermissibly injects “inflammatory extrinsic considerations” into the argument. *State v. Hecht*, ___ Wn. App. ___, ___ P.3d ___ (No. 71059-1-I, 2/18/14), Slip op. at 6.

- c. Over Mr. Gregory's objections, the prosecutor repeatedly mischaracterized the standard of proof and shifted the burden to the defense to prove mitigating circumstances warranted a life sentence.

In a capital sentencing proceeding, the State bears the burden of proving beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency. RCW 10.95.060(4); *State v. Rupe*, 101 Wn.2d 664, 700-01, 683 P.2d 571 (1984). However, in closing argument the prosecutor repeatedly shifted the burden to Mr. Gregory and mischaracterized the applicable standard.

- i. *The prosecutor's statements to the jury and Mr. Gregory's objections.*

After quoting Justice Cardozo for the proposition that justice is due to both the accused and the accuser, the prosecutor told the jury, "you are balancing the defendant's rights with society's rights and [G.H.]'s rights and her family." RP (5/14/12) 3019. This is an incorrect statement of the factfinder's role. The jury is not to "balance" the evidence of the accuser and the accused; it is to determine whether the accuser has proved its case beyond a reasonable doubt.

The prosecutor later said – after mocking defense expert James Aiken – that "the question then becomes is life without parole really severe enough." RP (5/14/12) 3024. That is not the question. The

question is whether the State has proved beyond a reasonable doubt that a death sentence is appropriate.

Shortly thereafter, the prosecutor launched into a sustained assault on the applicable standard, ignoring defense objections and supplementing his misstatements with equally erroneous visual aids. RP (5/14/12) 3029-48; Ex. 1 (6/13/12) Slides 61, 66, 82, 88. He said, “The defendant chose to put on mitigation. And what that means is that the mitigation that was presented was the best that could be said.” RP (5/14/12) 3029. He went on:

[T]here’s a list of things that you can consider if you decide that they are relevant. One of those is that the defendant acted under extreme mental disturbance. ... I guess what I would tell you is this: You should pay very, very close attention to the defense closing argument to hear what they tell you is the evidence that you –.

RP (5/14/12) 3030-31. Mr. Gregory objected, but the trial court overruled the objection. RP (5/14/12) 3031.

Accordingly, the prosecutor continued the theme: “I suppose it’s possible that I fell asleep during this hearing and missed the psychological testimony about Allen Gregory.” RP (5/14/12) 3032. Mr. Gregory again objected, stating:

Objection, Your Honor. He’s requiring us to provide evidence – mitigation evidence, and we have no responsibility. He’s shifting the burden of proof and it’s inappropriate to argue that.

RP (5/14/12) 3032. This time, the court sustained the objection. *Id.*

But the prosecutor was undeterred. He persisted in faulting the defense for failing to produce certain evidence, even though the defense had no burden to present evidence or prove a life sentence was warranted. The prosecutor said, there was “[n]o evidence of drug use. No evidence of alcohol use. No evidence of psychological impairment.” RP (5/14/12) 3032-33. He continued:

[Y]ou judge the mitigation the same way as any evidence. Is there in this proceeding any incentive to hold back anything? I would suggest to you the answer is no. So that means that what you heard was the best that there is to say about Allen Gregory.

RP (5/14/12) 3034; *see also* Ex. 1 (6/13/12) Slide 61. Mr. Gregory again objected, and explained to the court that the prosecutor was making the same improper argument as he had before. RP (5/14/12) 3034-35.

However, the court overruled the objection. RP (5/14/12) 3035. Mr. Gregory noted that the State’s PowerPoint slide similarly shifted the burden of proof and asked the court to tell the jury to disregard it, but that objection was overruled as well. RP (5/14/12) 3036-38. Thus, the prosecutor continued to argue that the jury should sentence Mr. Gregory to death because Mr. Gregory presented insufficient evidence of mitigation:

You heard from a total of seven people in his life. ... that’s it. That’s the sum and substance of what mitigates Allen

Gregory's conduct. That's the sum and substance of the facts about the defendant that were presented to you.

RP (5/14/12) 3039; Ex. 1 (6/13/12) Slides 64-65, 82.

Finally, the prosecutor read the definition of reasonable doubt to the jury and then mischaracterized its meaning. He said, "What it says is a doubt for which a reason exists. That means you can actually explain what is missing." RP (5/14/12) 3046; Ex. 1 (6/13/12) Slide 88. He went on, "when you're talking about the concept of mercy, you should think about whether or not your explanation for the reason about mercy, whether you grant it, whether you don't, ... it has to be explainable." RP (5/14/12) 3048. Mr. Gregory objected, stating, "That's not the way the instruction reads. It can be given for any reason or no reason at all. He's misquoting the law." *Id.* The court overruled the objection. RP (5/14/12) 3048.

- ii. *The prosecutor's arguments constitute flagrant misconduct because it is well settled that such burden-shifting is improper.*

As shown above, the prosecutor engaged in an extraordinary amount of burden-shifting during closing argument. It is well-settled that the arguments he made are improper. *See Glasmann*, 175 Wn.2d at 713 ("Shifting the burden of proof is improper argument, and ignoring this prohibition amounts to flagrant and ill-intentioned misconduct"); *State v.*

Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007) (“it is flagrant misconduct to shift the burden of proof to the defendant”).

Indeed, the same cases that should have alerted the prosecutor to the impropriety of the “speak the truth” argument squarely held that it is misconduct to tell a jury it has to be able to explain a reason for doubting the State’s case. *Evans*, 163 Wn. App. at 645-46; *Anderson*, 153 Wn. App. at 431; *see also State v. Johnson*, 158 Wn. App. 677, 684, 243 P.3d 936 (2010); *State v. Venegas*, 155 Wn. App. 507, 524, 228 P.3d 813 (2010); *accord Emery*, 174 Wn.2d at 759-60. As this Court explained in affirming Division Two’s holdings in the numerous cases addressing Pierce County’s stock closing argument, the argument “improperly implies that the jury must be able to articulate its reasonable doubt.” *Emery*, 174 Wn.2d at 760. “This suggestion is inappropriate because the State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden.” *Id.*

The prosecutor’s repeated implications that Mr. Gregory bore the burden of producing mitigation evidence were also clearly improper and shifted the burden to the defense. *See, e.g., State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996). In *Fleming*, the prosecutor told the jury:

[T]here is absolutely no evidence ... that [the victim] has fabricated any of this or that in any way she’s confused about the fundamental acts that occurred upon her back in

that bedroom. *And because there is no evidence to reasonably support either of those theories, the defendants are guilty as charged of rape in the second degree.*

...
[I]t's true that the burden is on the State. *But you would expect and hope that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence in this [matter].* And several things, they never explained.

Id. at 214 (emphases in original). The prosecutor went on to argue that the defendants had not explained various pieces of evidence, “implying that the defendants had a duty to explain this evidence, and that because they did not, the defendants were guilty.” *Id.* at 215.

The Court of Appeals reversed, noting, “[a] defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt.” *Id.* The court cited with approval another case in which a conviction was reversed because the prosecutor questioned the defendant’s failure “to provide innocent explanations for the State’s evidence.” *Id.* (citing *State v. Traweck*, 43 Wn. App. 99, 106, 715 P.2d 1148 (1986)). “The State must convict on the merits, and not by way of misstating the nature of reasonable doubt, misstating the role of the jury, infringing on the right to remain silent, and improperly shifting the burden of proof to the defense.” *Id.* at 216.

Another case in which the prosecutor committed similar misconduct is *State v. Fiallo-Lopez*, 78 Wn. App. 717, 899 P.2d 1294

(1995). There, the prosecutor stated in closing argument that “there was ‘absolutely’ no evidence to explain” why the defendant was present at the crime scene and “there was no attempt by the defendant to rebut the prosecution’s evidence regarding his involvement in the drug deal.” *Id.* at 729. The Court of Appeals held, “[b]ecause the argument improperly commented on the defendant’s constitutional right not to testify and impermissibly shifted the burden of proof to the defendant, it was misconduct.” *Id.*; *see also State v. Cleveland*, 58 Wn. App. 634, 648, 794 P.2d 547 (1990) (holding prosecutor committed misconduct by stating defense attorney “would not have overlooked any opportunity to present admissible, helpful evidence”).

The same is true here. The prosecutor repeatedly shifted the burden of proof over Mr. Gregory’s persistent objections, and despite clear caselaw holding such arguments are improper. A death sentence that results from such misconduct cannot be sustained.

d. The prosecutor commented Mr. Gregory’s exercise of constitutional rights and set up a false dichotomy between his rights and those of G.H. and society.

As noted above, one of the many ways in which the prosecutor mischaracterized the standard and burden of proof was by claiming the jury’s job was to “balanc[e] the defendant’s rights with society’s rights

and [G.H.]’s rights and her family.” RP (5/14/12) 3019. The prosecutor implied that he was responsible for protecting the latter’s rights, and those of all “law-abiding” citizens. RP (5/14/12) 3055.

The prosecutor also improperly commented on Mr. Gregory’s exercise of his constitutional rights. For instance, the prosecutor said, “Allen Gregory had all of his rights,” RP (5/14/12) 3021-22, while showing the jurors a PowerPoint slide with G.H.’s image superimposed on the list of rights. Ex. 1 (6/13/12) Slide 30. He then said, “And now he wants you to give him a break.” RP (5/14/12) 3046.

Mr. Gregory’s exercise of his right to a jury trial is not a request for “a break,” and the prosecutor’s denigration of Mr. Gregory’s exercise of his rights was improper.⁷ “It is well-settled that an accused may not be subjected to more severe punishment simply because he exercised his right to stand trial.” *United States v. Medina-Cervantes*, 690 F.3d 715, 716 (9th Cir. 1982). The State may not seek to execute a defendant simply because he or she seeks to have a trial and put the State to its burden of proof. *See State v. Frampton*, 95 Wn.2d 469, 479, 627 P.2d 922 (1981) (former

⁷ The statement that Mr. Gregory wanted “a break” was yet another instance of burden-shifting. It implied that a death sentence was the default, and that to deviate from that presumption would constitute a “break”. But of course, the presumption is supposed to be a *life* sentence, and the State must prove beyond a reasonable doubt that a death sentence is appropriate. RCW 10.95.060(4).

Washington capital statute unconstitutional because it chilled the right to plead not guilty and demand a jury trial). A prosecutor commits misconduct by commenting on a defendant's exercise of his constitutional rights. *State v. Moreno*, 132 Wn. App. 663, 672-73, 132 P.3d 1137 (2006) (prosecutor committed misconduct by commenting in closing argument about the defendant's exercise of his Sixth Amendment right to self-representation); *State v. Nemitz*, 105 Wn. App. 205, 19 P.3d 480 (2001) (reversal where police testified about defendant's possession of attorney's card); *Fleming*, 83 Wn. App. at 214 (misconduct to urge jury to draw adverse inference from the defendant's exercise of his Fifth Amendment rights); *State v. Gauthier*, 174 Wn. App. 257, 267, 298 P.3d 126, 132 (2013) (same for Fourth Amendment); *State v. Martin*, 171 Wn.2d 521, 252 P.3d 872 (2011) (same for article I, section 22).⁸

Furthermore, it is improper for the prosecutor to claim he was advocating on behalf of the rights of society or G.H. A prosecutor is "a quasi-judicial officer." *Monday*, 171 Wn.2d at 676. "Defendants are among the people the prosecutor represents. The prosecutor owes a duty

⁸ Commenting on Mr. Gregory's exercise of his rights also violated the court's order "prohibit[ing] the State from referring to the defendant's failure to testify at the guilt or penalty phase, or the exercise of any privilege." CP 819. See *State v. Easter*, 130 Wn.2d 228, 242 n.11, 922 P.2d 1285 (1996) (criticizing "cavalier violation" of pretrial rulings disallowing mention of defendant's silence).

to defendants to see that their rights to a constitutionally fair trial are not violated.” *Id.*

The prosecutor further misstated the law in urging the jury to engage in a balancing of rights. As previously discussed, the statement undermines the prosecution’s burden to prove its case beyond a reasonable doubt, but it also violates other canons of prosecutorial conduct, as explained in *State v. Rizzo*, 266 Conn. 171, 833 A.2d 363 (2003). There, the prosecutors asked the jury to “set up a metaphorical scale with the life of the defendant on one side and the life of the victim on the other.” *Id.* at 258. He said, “Weigh [the defendant] against the slides Balance [the defendant] against what he did, his life against [the victim’s]. That’s the balancing test.” *Id.* The Court held the argument was improper:

Taken in this context, we conclude that it is more likely that the jurors heard this entire final passage as an appeal to weigh one life against another – the life of the defendant, who had committed a horrendous murder, against the life of an innocent, thirteen-year-old victim. This was an improper appeal to the jurors’ emotions of anger and revenge – to persuade the jury to avenge the defendant’s taking of the life of the innocent victim by mandating the death of the guilty defendant.

This improper appeal to emotion was exacerbated by the fact that it was a blatant misstatement of the statutory weighing test. That test required the jury to weigh the aggravating factor proven against any mitigating factor or factors proven. It did not permit the jury to weigh the life of the defendant against the life of the victim.

Id. Similarly here, the exhortation to the jury to weigh Mr. Gregory’s rights against G.H.’s rights misstated the law, appealed to the jury’s passions, and shifted the burden of proof.⁹

- e. The prosecutor cited numerous alleged “facts” not in evidence to make improper political arguments, to inflame the jury’s passions, and to convince the jurors of the false proposition that Mr. Gregory’s crime was “as bad as it gets.”

“A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.” *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). Thus, “[a]lthough prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record.” *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). A closing argument “calculated to appeal to the jury’s passion and prejudice and encourage it to render a verdict on facts

⁹ Not only did the prosecutor improperly comment directly on Mr. Gregory’s exercise of his constitutional rights as described above, he also did so indirectly when he insinuated that Mr. Gregory was hiding behind his lawyers: “That person sitting there, Allen Gregory, sitting behind his attorneys so you’re not seeing him right now, is the man who did all these horrific things to [G.H.]” RP (5/14/12) 3012. Mr. Gregory had a right to counsel and a right to silence, protected by the Fifth and Sixth Amendments and article I, sections 9 and 22. It was therefore improper for the prosecutor to imply that Mr. Gregory somehow was hiding behind his lawyers – this was an indirect comment on the assertion of his constitutional rights (to be represented by counsel and to remain silent with only his lawyers speaking for him), and thus was improper.

not in evidence are improper.” *State v. Stith*, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); *accord Hecht*, Slip Op. at 6.

In this case, the prosecutor cited numerous alleged “facts” not in evidence to make improper political arguments, to inflame the jury’s passions, and to convince the jurors of the false proposition that Mr. Gregory’s crime was “as bad as it gets.” The trial court erred in overruling Mr. Gregory’s objections and in denying his alternative motions for a mistrial or to present contrary evidence. CP 1195-96.

- i. *Based on “facts” not in evidence, the prosecutor made improper political arguments designed to minimize the jury’s responsibility.*

Shortly after improperly exhorting the jury to declare the “truth” that Mr. Gregory “deserves” the death penalty, the prosecutor opined, “[i]f we don’t give people who deserve the death penalty the death penalty, then there isn’t any point in having it.” RP (5/14/12) 3015. He went on to assure the jury that “we are not the only state that has the death penalty,” and that “an overwhelming majority” of the country has capital punishment statutes. RP (5/14/12) 3015; Ex. 1 (6/13/12) Slide 23. Despite the fact that 18 states in the country do *not* have capital punishment, the prosecutor put up a PowerPoint slide titled “Normal,” that stated:

39 counties

49 other states
Every day in every state, juries are being asked to do the
same thing

Ex. 1 (6/13/12) Slide 22.

He cited arguments he said are commonly made against the death penalty and attempted to rebut them. RP (5/14/12) 3020-22; Ex. 1 (6/13/12) Slides 32-50. For example, he suggested some people have described the death penalty as “uncivilized punishment,” but his view is that “a civilized society is one that will not ignore the monstrous acts that people who live among them commit.” RP (5/14/12) 3020-21; Ex. 1 (6/13/12) Slides 33-34.

Although no evidence on the question had been presented, the prosecutor claimed, “[d]eath penalty opponents in our society are the vast minority, but they are the loudest minority.” RP (5/14/12) 3022. He asserted, “People who oppose the death penalty don’t care anything about the reasons, they care only about the result.” RP (5/14/12) 3022. He went on:

[N]othing that you do in this case is going to stop people from opposing the death penalty. If you were to return a death, they would shout as loud as they are or continue to shout as loud as they do. If you return a verdict of life, they would celebrate it and then shout about how bad the death penalty is, in general, and move on to the next inmate who deserves the death penalty and doesn’t get it. So really there isn’t any message that you can send to people who disagree with the death penalty that will –

RP (5/14/12) 3027; *see also* Ex. 1 (6/13/12) Slide 50. Mr. Gregory's attorney said, "I'm going to object to this argument. They are not here to send a message to anyone." RP (5/14/12) 3027. The objection was overruled. RP (5/14/12) 3028.

The prosecutor continued to discuss "facts" outside the record: "The fact of the matter is, a great majority of our states have the death penalty and an overwhelming majority of the people in the country support the death penalty. Those numbers are the same for Washington state." RP (5/14/12) 3028; *see also* Ex. 1 (6/13/12) Slides 23, 50. The prosecutor also relied on foreign authority (New York and England) to help convince the jurors to impose a death sentence. RP (5/14/12) 3019, 3026-27; Ex. 1 (6/13/12) Slides 29, 49.

The prosecutor additionally tried to rebut hypothetical arguments about the death penalty's failure to deter crime by referring to his own personal experiences and those of unnamed police officers who never testified:

[T]he last time I checked no one had run up to one of the police officers that I work with and say, "Hey, I was thinking about raping and robbing and killing somebody but we have a death penalty here in Washington so I passed. Good for me." People just don't do that. So we can't quantify how many people have stopped and thought, do I really want to take this next step.

RP (5/14/12) 3026. The prosecutor also improperly presented several PowerPoint slides stating his opinion – often in large red letters – that the jury “should” impose the death penalty because Mr. Gregory “deserves” it. Ex. 1 (6/13/12) Slides 21, 27, 40, 53, 75. *Cf. Hecht*, Slip Op. at 3, 7 (misconduct to present slide telling jury “you shouldn’t” believe defendant).¹⁰

The State’s assertions, based on “evidence” outside the record, were misleading. In actuality, juries around the country are imposing death sentences less and less, and the number of new death sentences imposed in 2012 and 2013 was near its lowest level since capital punishment was reinstated in the United States in the 1970’s. *See* P. Yost, “Report: Use of Death Penalty Shows Decline in the United States,” *Washington Post*, Dec. 22, 2013.¹¹ Furthermore, contrary to the prosecutor’s suggestions that juries across the state and nation impose the death penalty, the fact is that only a tiny fraction of counties accounts for the majority of death sentences. *See* Death Penalty Information Center,

¹⁰ Slide 75 read, “If he can’t behave now, what possible reason do you have for thinking he would behave *after* you sentence him to life ?? None. No reason at all.” Ex. 1 (6/13/12) Slide 75. This is similar to the slide condemned in *Hecht* which read, “If [the defendant’s] not truthful about the little things, why should you believe him when he denies the big things? You shouldn’t.” *Hecht*, Slip Op. at 3.

¹¹ Available at http://www.washingtonpost.com/politics/report-use-of-death-penalty-shows-decline-in-united-states/2013/12/22/261cdf12-68d8-11e3-a0b9-249bbb34602c_story.html (last viewed 12/26/13).

The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases At Enormous Costs to All, Oct. 2013. Moreover, while the prosecutor invoked legal authority from New York and England in urging the jury to impose a death sentence, he failed to inform the jurors that in fact the death penalty had been abolished in both jurisdictions.¹² Finally, it is simply not the case that an “overwhelming majority” of Americans support the death penalty. In fact, in 2012 when the prosecutor made this argument to the jury, a public opinion poll found that “Americans are now evenly divided on whether the death penalty or life without parole is the appropriate punishment for murder.”¹³

The problem is not just that the extra-record “facts” the prosecutor relayed to the jury were false or misleading. The problem is that using facts not in evidence to make political arguments is improper. For instance, the Court of Appeals reversed a first-degree murder conviction in a case in which the prosecutor similarly made political arguments and urged the jury to “send a message” through its verdict. *Perez-Mejia*, 134

¹² See <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last viewed 1/23/14); <http://hub.coe.int/what-we-do/human-rights/death-penalty> (last viewed 1/23/14)

¹³ *The Death Penalty in 2012: Year End Report* (Death Penalty Information Center), Dec. 2012, at 6-7. Available at: <http://deathpenaltyinfo.org/documents/2012YearEnd.pdf> (last viewed 1/24/14).

Wn. App. at 915. The State's theory in that case was that the killing was a result of gang violence. The prosecutor in summation said:

[W]hat you can do as ladies and gentleman of the jury is send a message. ... Send a message to Scorpion, to other members of his gang, and to all the other people who choose to dwell in the underworld of gangs. That message is we had enough. We will not tolerate it any longer. That we as citizens of the State of Washington and the United States of America, we have the right to life, liberty, and the pursuit of happiness and we will no longer allow those who choose to dwell in the underworld of gangs to stifle our rights. And that message begins now.

Id. at 917. As in Mr. Gregory's case, a defense objection was improperly overruled. *Id.* at 917-18.

The Court of Appeals held it was misconduct to "urg[e] jurors to base a guilty verdict on a goal of sending a message to gangs or taking part in a mission to end violence, rather than returning a verdict based upon a consideration of the evidence properly admitted in the case." *Id.* at 915. Other cases are in accord. *See, e.g., United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991) (reversing based on prosecutor's call to send a message to drug dealers, notwithstanding curative instruction given by trial court); *State v. Echevarria*, 71 Wn. App. 595, 860 P.2d 420 (1993) (reversing conviction for delivery of cocaine where prosecutor discussed the "war on drugs"); *see also Case*, 49 Wn.2d at 69 (reversing where prosecutor discussed alleged facts about sex offenders in general).

The jury's role was not to "send a message," or to weigh political arguments about the death penalty based on alleged facts not in evidence. Its job was to determine whether the State proved beyond a reasonable doubt that there were not sufficient mitigating circumstances in Mr. Gregory's case to merit leniency. RCW 10.95.060(4). By shifting the focus to the political debate about capital punishment generally, and by invoking "facts" outside the record to urge jurors to send a message to death-penalty opponents, the prosecutor committed flagrant misconduct.

The argument also violated Mr. Gregory's rights under the Eighth Amendment (and article I, section 14) by diminishing the jury's sense of responsibility. *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). In *Caldwell*, the Court held that the prosecutor violated the Eighth Amendment when he argued:

that the jury's decision as to life or death was not final, that it would automatically be reviewed by the State Supreme Court, and that the jury should not be made to feel that the entire burden of the defendant's life was on them. This Court held that such comments "presen[t] an intolerable danger that the jury will in fact choose to minimize the importance of its role," a view that would be fundamentally incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case.

Darden v. Wainwright, 477 U.S. 168, 183 n. 15, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting *Caldwell*, 472 U.S. at 333); *see also Dugger*

v. Adams, 489 U.S. 401, 407, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989) (*Caldwell* violation occurs where prosecutor’s remarks “improperly described the role assigned to the jury by local law”); *Romano v. Oklahoma*, 512 U.S. 1, 10, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994) (narrowing *Caldwell* to cases in which the prosecutor’s argument “affirmatively misled the jury regarding its role in the sentencing process so as to diminish its sense of responsibility”).¹⁴ By falsely assuring the jury that “an overwhelming majority” of Americans favor the death penalty and that “all the time, jurors just like you folks, are deciding life and death decisions,” the prosecutor diminished the jurors’ sense of responsibility and violated Mr. Gregory’s constitutional rights. RP (5/14/12) 3015, 3028.

In many respects, the State’s reliance on public policy arguments as reasons why the jurors should return a death verdict is as inappropriate as it was for the defense in *Pirtle* to introduce evidence that the victim had opposed the death penalty. See *State v. Pirtle*, 127 Wn.2d 628, 671-72, 904 P.2d 245 (1995). This Court had little trouble determining that such

¹⁴ In keeping with these cases, the trial court entered an order, without objection by the State, excluding “any arguments diminishing the jury’s responsibility for imposing the sentence.” CP 819. The prosecutor’s political arguments and false assurances that “an overwhelming majority” of Americans support the death penalty violated this order in addition to violating Mr. Gregory’s constitutional rights.

evidence was not relevant to the issues before the jury – the facts and circumstances of the murder, victim impact evidence, or extenuating circumstances that bore on the defendant’s moral culpability. *Id.*

Similarly, the Sixth Circuit recently held that it was appropriate to exclude evidence and argument at a federal capital trial of the fact that, had the murder taken place 227 feet away on non-federal land, the death penalty would not have been an option under Michigan state law. *United States v. Gabrion*, 719 F.3d 511, 520-24 (6th Cir. 2013) (en banc). The court held that such evidence was irrelevant to the defendant’s personal responsibility, moral culpability, and the crime:

That Michigan lacks a death penalty has nothing to do with these things. It has nothing to do with Gabrion's background or character. It has nothing to do with the reasons why he chose to kill Rachel Timmerman. It has nothing to do with the utter depravity of the manner in which he killed her. And above all it has nothing to do with his culpability for that offense or with any other consideration the Supreme Court has ever flagged as mitigating. Gabrion does not even argue the contrary.

Id. at 522. See also *United States v. Johnson*, 223 F.3d 665, 675 (7th Cir. 2000) (“A mitigating factor is a factor arguing against sentencing *this* defendant to death; it is not an argument against the death penalty in general. ... [T]he list of mitigating factors in the federal death-penalty statute does not include the harshness or ugliness or (some would say) the immorality of the death penalty, but only factors specific to the

defendant.”); *Campbell v. Kinchleloe*, 829 F.3d 1453, 1460-61 (9th Cir. 1987) (State’s argument that jurors should not “debate the death penalty” was proper).

In light of this authority, it is clear that the *defense* would not have been allowed to argue that the jury should return a verdict of life because (1) several states had recently abolished the death penalty,¹⁵ (2) the Supreme Court of Canada had ruled that the application of capital punishment in the United States was too fraught with the risk of error to allow capital defendants to be extradited to the U.S.,¹⁶ or (3) most democracies in the world prohibit the death penalty.¹⁷ Such policy arguments have no place in a jury trial and it was misconduct for the prosecutor here to argue that the jury should sentence Mr. Gregory to

¹⁵ Since 2007, New Jersey, New York, New Mexico, Illinois, Connecticut, and Maryland have all abolished the death penalty. See <http://deathpenaltyinfo.org/documents/YearEnd2013.pdf> (last viewed 1/23/14).

¹⁶ See *United States v. Burns* [2001] 1 S.C.R. 283, 2001 SCC 7.

¹⁷ See “*Statement by the Spokesperson of EU High Representative Catherine Ashton on the new sentence to death penalty in Belarus*,” European Union External Action, Brussels, 19 December 2013, 131219/03 (“The European Union opposes capital punishment under all circumstances. ...The High Representative urges Belarus, the only country in Europe still applying capital punishment, to join a global moratorium on the death penalty as a first step towards its universal abolition.”). Available at http://eeas.europa.eu/statements/docs/2013/131219_03_en.pdf (last viewed 12/24/13).

death because capital punishment is a good thing in general. The trial court erred in overruling Mr. Gregory's objection.

- ii. *The prosecutor made an improper emotional appeal based upon a made-up narrative of G.H.'s last moments that was not supported by the record.*

In addition to invoking "facts" not in evidence to make political arguments to the jury, the prosecutor repeatedly urged the jury to imagine what G.H. was thinking, seeing, and saying, and to sentence Mr. Gregory based on these speculations. He said:

We don't know – we probably never will know – what was going through her mind at the time. But as she was being dragged to her bedroom, she could not have been thinking it was going to get better. ... he cut off her shorts and he cut off her panties. And what must [G.H.] have been thinking then? ... And as it continued to get worse and continued to get worse, what must [G.H.] have been thinking then?

RP (5/14/12) 3049-50. Shortly thereafter, he asked the jury, "Do we know whether she was screaming, begging, pleading? We don't." RP (5/14/12) 3049-50.

The prosecutor then averred, "you know that she resisted him. And you know that she shook her head and jerked her head and that she moved her head every way she could." RP (5/14/12) 3051. Mr. Gregory objected, saying "no facts in evidence," but the objection was overruled. RP (5/14/12) 3051. He objected for the same reason when the prosecutor

claimed Mr. Gregory pulled G.H.'s head back so hard he broke a bone in her neck, but the trial judge overruled that objection also. RP (5/14/12) 3052. In fact, at the 2012 sentencing hearing, there was no testimony at all by Dr. Ramoso that would support any claim that G.H.'s head was pulled back so hard that a bone in her neck was broken. RP (4/26/12) 2553-2603.¹⁸

Emboldened, the prosecutor said, "And the indignity of all, the indignity of it all, is when he pulled her head back, she was looking at the window that faced her mom's house in her brand new house." RP (5/14/12) 3052. Mr. Gregory objected again, saying, "There's no facts in evidence. This is totally inappropriate argument." RP (5/14/12) 3052. The court overruled the objection, so the prosecutor said it again: "[G.H.] died after taking one last look out the window or toward the window, toward her mother's house" RP (5/14/12) 3053.

This argument improperly appealed to the prejudice and passions of the jury and assumed facts not in evidence. Unlike the 2001 trial, at which Dr. Ramoso testified (over defense objection) that G.H. may have been conscious for a few minutes after being stabbed, RP (2/27/01) 5305-10, the State chose not to introduce such testimony at this trial. Although

¹⁸ There was such testimony at the original murder trial in 2001, RP (2/27/01) 5300-04, but the State elected not to reintroduce that testimony at the second sentencing proceeding.

Dr. Ramoso testified that G.H. was likely still breathing after the initial stab, there was no evidence that she was conscious, let alone looking at her mother's home and thinking about it. RP (4/26/12) 2577-80, 2594-99.¹⁹

The Court of Appeals reversed two murder convictions under similar circumstances in *State v. Pierce*, 169 Wn. App. 533, 537, 280 P.3d 1158 (2012). There, the prosecutor during closing argument “fabricat[ed] an emotionally charged story of how the victims might have struggled with [the defendant] and pleaded for mercy.” *Id.* The prosecutor said, “It was just another day,” and “[n]ever in their wildest dreams” would the victims have thought that 15 hours later “they would be forced to [lie] facedown in their own kitchen in their own home to be robbed by somebody that knew them....” *Id.* at 541. The prosecutor speculated that the male victim probably did not want to do anything to put his wife in greater danger, and that the two probably looked into each other's eyes while lying on the floor just before being shot. *Id.* at 543. The trial court overruled a defense objection, but the appellate court reversed.

¹⁹ Indeed, the jury instructions and verdict form at the guilt-phase trial allowed the jury to find the aggravating circumstance of rape based on the “physically helpless” (i.e. unconscious) prong. CP 6126-63 (Instruction No. 14); *see* RCW 9A.44.010(5) (“Physically helpless” means “a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.”)

The court held, “the prosecutor committed misconduct by arguing facts not in evidence and by appealing to the passion and prejudice of the jury.” *Id.* at 551. The “embellishments to the evidence were nothing more than an improper appeal to the jury’s sympathy that encouraged the jury to decide the case based on the prosecutor’s heart-wrenching, though essentially fabricated, tale of how the murders occurred.” *Id.* at 555. Furthermore, “the argument invited the jury to imagine themselves in the [victims’] shoes, increasing the prejudice.” *Id.*

The same is true here. The prosecutor invited the jurors to imagine themselves in G.H.’s shoes and speculate about what she must have been thinking, and he embellished the story by claiming the victim was looking out the window at her mother’s house when she died, even though no such evidence had been introduced. This tactic violated the prosecutor’s duty “to ensure a verdict free of prejudice and based on reason.” *State v. Claflin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984) (reversing rape and assault convictions where prosecutor had read a poem by a rape victim during closing argument).

iii. Based on “facts” not in evidence, the prosecutor wrongly claimed Mr. Gregory’s crime was “as bad as it gets,” and the trial court improperly denied Mr. Gregory’s alternative motions for a mistrial or for leave to present contrary evidence.

Perhaps the most egregious alleged “fact” not in evidence that the prosecutor put before the jury was the claim that Mr. Gregory’s crime was “as bad as it gets.” RP (5/14/12) 3030, 3056. No such evidence had been presented, for two reasons. First, the claim is false. Although there is no question this was a brutal murder, dozens of horrific murders have been committed in this state by more culpable defendants who killed many more victims – yet were not sentenced to death. *See* Section E(2).

Second, this Court has squarely held that it is not the jury’s job to compare aggravated murders in determining the appropriate sentence.

“Washington’s death penalty scheme clearly assigns the task of proportionality review to this court, not the jury in a penalty phase. RCW 10.95.130(2)(b).” *Gregory*, 158 Wn.2d at 858. By claiming this crime is “as bad as it gets,” the prosecutor used highly inflammatory “facts” not in evidence to convince the jury that a death sentence was appropriate

because Mr. Gregory deserved it more than other defendants – a claim which is not true and which is not for the jury to determine in any event.²⁰

Defense counsel properly objected on the basis that the statement “compares it to other cases.” RP (5/14/12) 3057. Counsel requested a mistrial or in the alternative permission to present evidence of all the cases that are worse. RP (5/14/12) 3057.

And it’s unfair to allow statements like that that essentially say this is the worst case, this is as bad as it gets, with no reference, no other evidence to support that allegation. What are we supposed to say about it? If the Court will authorize us to provide examples in lieu of a mistrial. I believe it should be a mistrial but if the Court doesn’t then the Court should allow us to get into other cases that we feel [are worse].

RP (5/14/12) 3057.

The prosecutor claimed he made statements only about Mr. Gregory’s case. RP (5/14/12) 3058-59. The court reporter then read back the argument, verifying that the prosecutor said “this is as bad as it gets,” which is an inherently comparative statement. RP (5/14/12) 3059.²¹ Mr.

²⁰ Mr. Gregory has separately argued that this is a question that should be put to the jury under the Sixth, Eighth and Fourteenth Amendments and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). See Section E(4). If it is put to the jury, both sides must of course be permitted to present evidence of other cases. One side may not be permitted to claim a crime is “as bad as it gets” while the other side is gagged.

²¹ In his PowerPoint presentation, the prosecutor had also argued that the death penalty was appropriate for Mr. Gregory because it was the

Gregory's attorney again said, "I believe I should be entitled, in general, to compare this to other crimes that have occurred in this State where they rival the circumstance of this case." RP (5/14/12) 3060. The court pointed out that it had ruled such evidence inadmissible because it is "not relevant to these proceedings." Mr. Gregory's counsel agreed, and explained that because the State violated that rule, the defense had to have an opportunity to rebut the State's claim. Otherwise, the jury was left with one side's assertion, based on facts not in evidence, that "it doesn't get any worse than this." RP (5/14/12) 3060.

Defense counsel again explained:

When I read and hear "as bad as it gets," that is a personal opinion comparing it to other crimes. I don't know how else you determine that this particular crime is as bad as it gets without comparing it to something else. That's exactly what was done. That's exactly what he intended to do. Now he's telling me that we're stuck with it and we can't say anything about it.

RP (5/14/12) 3062. The court nevertheless denied the motion for a mistrial and prohibited the defense from rebutting the assertion with contrary evidence. RP (5/14/12) 3063; CP 1195-96. The trial court erred because the prosecutor invoked alleged facts not in evidence to urge the

appropriate punishment for "the worst offenders." Ex. 1 (6/13/12) at Slide 23.

jury to impose a death sentence for a reason this Court has held is not relevant to its decision. *Gregory*, 158 Wn.2d 759 at 858.

Moreover, the misconduct in the comparing of Mr. Gregory's case to other cases that were not before the jury was compounded by the prosecutor's political argument, discussed above, that normalized the imposition of death in this case because of what other juries supposedly have done across Washington and the United States. RP (5/14/12) 3015; Ex. 1 (6/13/12) at Slide 23. This invitation to look at sentencing practices in other jurisdictions or in other counties in Washington was a backdoor way of bringing proportionality review into the sentencing proceeding.

Once the State brought up the issue of the "worst offenders," it was manifestly unfair to prevent Mr. Gregory from introducing evidence to rebut the prosecutor's claim and to prohibit him from showing to the jury, in contrast to the prosecutor's political rhetoric, that "many times each year, juries just like you do *not* impose the ultimate penalty on the worst offenders." *See State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) (unfair to allow one party to bring up a subject but then bar other party from addressing it). Accordingly, it was error to deny the mistrial motion, and, alternatively, it was error to deny the defense the opportunity to rebut the prosecutor's argument by showing that Mr. Gregory was *not* one of the "worst" offenders.

- f. The prosecutor repeatedly commented on Mr. Gregory's supposed demeanor in court during closing argument.

Prior to the second sentencing hearing, Mr. Gregory's attorneys moved in limine to bar references to Mr. Gregory's demeanor during the trial. CP 700-01. The prosecutor agreed to this motion, with the only caveat being that if Mr. Gregory allocuted the prosecutor might re-raise the issue prior to closing arguments. RP (3/5/12) 75.²² Accordingly, the trial court entered an order granting "the defendant's motion to exclude any reference to 'the defendant's demeanor or conduct during the trial.'" CP 818.

Yet, during closing argument, the State violated this order. First, the prosecutor insinuated that Mr. Gregory was hiding behind his lawyers: "That person sitting there, Allen Gregory, sitting behind his attorneys so you're not seeing him right now, is the man who did all these horrific things to [G.H.]" RP (5/14/12) 3012.²³ There was no objection to this comment.

Later in the argument, when the prosecutor was referring to the failure of the defense to produce psychological evidence, the prosecutor

²² Mr. Gregory did not allocute; he exercised his right not to testify.

²³ As an in-custody prisoner, Mr. Gregory would have had limited options as to where in the courtroom he could sit. There is no indication that he purposefully was sitting in a manner so that jurors could not see him.

stated: “The fact is, if you look at the crime itself, he did it because he got off on it. He did it because he enjoyed it. And he can smirk over there all he wants to at my argument, but that's what the evidence shows.” RP (5/14/12) 3033. Mr. Gregory’s counsel promptly objected, stating that the record should reflect that Mr. Gregory was “not smirking and that's an improper argument about the defendant.” *Id.* The trial court sustained the objection without comment. *Id.*²⁴

The fact that all of these misleading comments were made in clear violation of pre-trial orders – orders that the prosecutor did not even object to – shows that they were so ill-intentioned and flagrant that they should result in reversal. *See Gregory*, 158 Wn.2d at 866 (“The fact that the State made the motion in limine and then blatantly violated the resulting order strongly suggests that the argument was flagrant and ill intentioned.”).

Furthermore, the prosecutor’s observations of who was in the courtroom and who was not (Ms. Peden v. Mr. Gregory’s family), who was sitting where (Mr. Gregory behind his lawyers) and whether Mr. Gregory was “smirking,” were all alleged facts not admitted at trial. There

²⁴ The prosecutor also commented on the absence of Mr. Gregory’s family during closing argument, contrasting their absence with the presence of the decedent’s mother: “[Y]ou know that Ms. Peden is in the courtroom and she’s been here the entire time for this case, for her daughter. Today, as we sit here, there are no members of the defendant’s family.” RP (5/14/12) 3017.

was simply no testimony before the jury to support any of these assertions, and thus the jury was left with the prosecutor's personal observations as to these claims. *See State v. Barry*, ___ Wn. App. ___, ___ P.3d ___ (No. 43438-5-II, filed 1/29/14) (defendant's alleged demeanor is not evidence that jury may consider).

While Mr. Gregory's attorney did dispute that Mr. Gregory was "smirking," essentially the jury was left with a credibility contest between the two lawyers (without the benefit of cross-examination) as to whether it was true or not. The prosecutor's allegation that Mr. Gregory was smirking, of course, was devastating because if true it would tend to show the jury that he had no remorse and did not take the proceedings seriously. As between Mr. Gregory's attorney's claim that Mr. Gregory was not smirking and the prosecutor's assertion that he was, the jurors would likely believe the prosecutor, who claimed to be the advocate for the "law-abiding citizens" of Washington. RP (5/14/12) 3055.

It is precisely to avoid such credibility contests that courts have held it to be misconduct for a prosecutor to comment on a defendant's demeanor in trial. For instance, in *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85 (1993), the Court of Appeals held that it was improper for a prosecutor to comment on a defendant's alleged action of making eye contact with a witness during her testimony. *Id.* at 811-12. *See also State*

v. Klok, 99 Wn. App. 81, 83-86, 992 P.2d 1039 (2000) (improper to comment on demeanor in court, but not reversible where there was no objection); *United States v. Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973) (“A defendant has no right to disregard the dignity, order and decorum of judicial proceedings. . . . But this does not mean that his courtroom behavior off the witness stand is in any sense legally relevant to the question of his guilt or innocence of the crime charged.”); *United States v. Schuler*, 813 F.2d 978, 981 (9th Cir. 1987) (“We also conclude that, in the absence of a curative instruction from the court, a prosecutor's comment on a defendant's off-the-stand behavior constitutes a violation of the due process clause of the fifth amendment.”).

g. Reversal is required because the pervasive misconduct deprived Mr. Gregory of a fair trial.

This Court should reverse for the egregious misconduct that pervaded the State’s closing argument. The prosecutor told the jury this case “is as bad as it gets” even though no evidence was before the jury about other cases and the defense was not allowed to rebut the assertion with contrary evidence. The prosecutor inflamed the jurors’ passions by urging them to imagine what the victim might have been thinking and seeing during the crime. He discussed political arguments outside the record, and encouraged the jury to sentence Mr. Gregory to death in order

to send a message to death-penalty opponents. He repeatedly shifted the burden to the defense to prove mitigating circumstances merited leniency, and denigrated Mr. Gregory's exercise of his constitutional rights. He improperly told the jury its duty was to "declare the truth" that Mr. Gregory "deserved" the death penalty.

Mr. Gregory objected to much of this misconduct but almost all of the objections were improperly overruled. In light of the weakness of the State's case (see sections E(2) and (10) below) and the extraordinary number of improper arguments, the misconduct cannot be deemed harmless. The cumulative effect of this repeated, flagrant misconduct could not have been cured by an instruction and deprived Mr. Gregory of his constitutional rights to a fair trial and to remain silent under the Fifth, Sixth, and Fourteenth Amendments, and article I, sections 3, 9, and 22. Given the heightened standards of reliability in a capital case, this misconduct also violated the Eighth Amendment and article I, section 14. This Court should reverse.

2. Mr. Gregory's death sentence is excessive and disproportionate to the penalty imposed in similar cases.

a. Introduction.

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.

Governor Inslee's remarks announcing a capital punishment moratorium, Feb. 11, 2014 (attached as App. J).

The death penalty is supposed to be reserved for the "worst of the worst." Contrary to the prosecutor's improper argument to the jury, Mr. Gregory is by no stretch of the imagination one of the worst offenders. Indeed, Washington's worst are serving life sentences. Meanwhile, Allen Gregory is on death row for killing a single victim when he was only 24 years old and he has committed no other violent felonies. His sentence is disproportionate to the penalty imposed in similar cases. It is random and arbitrary and more readily explained by his race and county of conviction than by any valid variable. This Court should reverse and remand for imposition of a life sentence.

b. Purpose and methodology of proportionality review.

For each capital case, the Legislature has conferred upon this Court the duty of determining whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." RCW 10.95.130(2)(b). "Similar cases" means all cases resulting in one or more convictions for aggravated murder, regardless of whether a death sentence was sought or imposed. *Id.*; *State v. Davis*, 175 Wn.2d 287, 348, 290 P.3d 43 (2012). Trial judges

are required to file reports in all aggravated murder cases, citing the relevant details of the crime and the defendant, in order to facilitate this Court's proportionality review in capital cases. RCW 10.95.120.

"This review does not question whether the sentence is proportionate to the crime itself, but instead asks whether a particular sentence is disproportionate to the punishment imposed on others convicted of the same crime." *Pirtle*, 127 Wn.2d at 685; *see also State v. Rupe*, 108 Wn.2d 734, 779, 743 P.2d 210 (1987) (Pearson, C.J., dissenting). As Justice Fairhurst recently explained:

We must avoid the temptation to confuse the question actually posed by RCW 10.95.130(2)(b) with the question of whether [the defendant's] death sentence is proportionate to his crime. The statute does not ask us to evaluate [the defendant] and his crime in a vacuum. Such an interpretation not only ignores the statute's plain language, it reduces proportionality to a tautology: aggravated murders are by definition the worst possible crimes, so they will always be proportionate to the worst possible punishment. Instead the statute asks us to compare the defendant's sentence to the sentence imposed in all other aggravated murder cases, including life sentences and the results of plea bargains.

Davis, 175 Wn.2d at 376 (Fairhurst, J., dissenting); *accord Pirtle*, 127 Wn.2d at 685. "The goal is to ensure that the sentence, in a particular case, is proportional to sentences given in similar cases, is not freakish, wanton or random, and is not based on race or other suspect classifications." *State v. Cross*, 156 Wn.2d 580, 630, 132 P.3d 80 (2006).

In performing the analysis, this Court compares the following characteristics of the current case and the other aggravated murder cases: (1) the nature of the crime, (2) the aggravating circumstances, (3) criminal history, and (4) personal history. *Id.* at 630-31. An excessive or disproportionate death sentence must be vacated and remanded for imposition of a sentence of life without the possibility of parole. RCW 10.95.140(1)(b); RCW 10.95.090; RCW 10.95.030(1).

Mr. Gregory's sentence is disproportionate as demonstrated below. Only nine defendants, including Mr. Gregory, are on death row in Washington.²⁵ Five others have been executed since the death penalty was reinstated in 1981.²⁶ Meanwhile, since 1981, almost 300 adults convicted of aggravated murder were sentenced to life in prison, and most of them committed crimes that were as bad as or worse than Mr. Gregory's. Furthermore, there is nothing about Mr. Gregory himself that justifies his place among the nine death-row defendants. To the contrary, he was

²⁵As of 12/24/13. These are: Davya Cross, Cecil Davis, Clark Elmore, Jonathan Gentry, Conner Schierman, Byron Scherf, Dwayne Woods, Robert Yates, and Mr. Gregory.

²⁶Westley Dodd, Charles Campbell, Jeremy Sagastegui, James Elledge, Cal Brown. Three of these – Elledge, Sagastegui, and Dodd – were “volunteers” who asked to be put to death. *See State v. Elledge*, 144 Wn.2d 62, 81-82, 26 P.3d 271 (2001); *State v. Sagastegui*, 135 Wn.2d 67, 954 P.2d 1311 (1998); *State v. Dodd*, 120 Wn.2d 1, 838 P.2d 86 (1992). One defendant, Clark Hazen, who received a death sentence for killing two victims, committed suicide before this Court could review his case. TR 39.

young when the crime occurred and had committed no prior violent felonies. His death sentence is excessive and disproportionate to the penalty imposed in other aggravated murder cases.

In evaluating the issue, Mr. Gregory has not taken into account the trial judge reports for any defendant who was under 18 at the time of the crime, even though this Court has endorsed inclusion of juveniles convicted before 1993, and even though including them would only bolster Mr. Gregory's argument. *See State v. Furman*, 122 Wn.2d 440, 456, 858 P.2d 1092 (1993) (invalidating capital punishment for juveniles in Washington).²⁷ Mr. Gregory has also not considered the handful of trial judge reports for people whose aggravated murder convictions were reversed and who were not convicted of aggravated murder on remand, even though their inclusion would also only be helpful to Mr. Gregory.²⁸ Mr. Gregory has disregarded Michael Hightower (TR 100), even though his inclusion would be helpful, because his rape-murder took place at a time when there was not a valid capital punishment scheme in

²⁷ The 28 juveniles excluded from the analysis are trial judge reports 50, 61, 67, 70, 73, 110, 111, 122, 134, 139, 145, 149, 161, 170, 171, 189, 195, 196, 205, 206, 208, 209, 222, 223, 226, 246, 267, and 270.

²⁸ These are: TR 8 (Charles Bingham), TR 48 (Christopher St. Pierre), TR 217 (Timothy Cronin), TR 225 (Morris Goldberg), and TR 253 (Nicholas Hacheney). TR 292 (John Vickers) was also excluded because his conviction was for the lesser offense of first-degree premeditated murder.

Washington. *See Davis*, 175 Wn.2d at 358 n. 34 & 363 n. 41 (excluding Hightower for this reason).²⁹ Finally, Mr. Gregory excluded defendants whose IQ is 70 or below, rendering them ineligible for capital punishment.³⁰ *See RCW 10.95.030(c); Davis*, 175 Wn.2d at 356 n.29. The point is that even using the most conservative approach possible, the disproportionality of Mr. Gregory's death sentence is undeniable.³¹

- c. Nature of the crime: Mr. Gregory is on death row for the murder of a single victim, while dozens of brutal mass murderers and serial killers are serving life sentences, and scores of other single-victim murderers committed equally heinous crimes but were sentenced to life in prison.

As noted above, the first factor this Court evaluates is the nature of the offense. *Cross*, 156 Wn.2d at 630-31. The death penalty is appropriate only for "the most serious crimes." *Atkins v. Virginia*, 536

²⁹ Hightower also had prior convictions for rape and escape. TR 100.

³⁰ TR 1 (Mario Ortiz), TR 19 (Michael Cornethan), TR 106 (James Cushing), TR 224 (Nicolas Vasquez).

³¹ Mr. Gregory *has* included aggravated murders for which trial judge reports should have been filed, but were not. In November 2013, Mr. Gregory filed a *Motion to Complete the Process of Compiling a Full Set of Aggravated Murder Reports*, with a list of aggravated murders missing from the database and accompanying exhibits showing the facts of these crimes. The exhibits include judgments, informations, probable cause statements, and appellate opinions, where available. This Court denied Mr. Gregory's motion to appoint a special master to oversee the completion of the reports, but of course the cases must be considered in the proportionality analysis. *See Davis*, 175 Wn.2d at 348. Until trial judge reports are filed for these cases, Mr. Gregory will cite them by exhibit number, where the exhibit number pertains to the exhibits filed with the *Motion to Complete*.

U.S. 304, 319, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). It “must be reserved for those crimes that are ‘so grievous an affront to humanity that the only adequate response may be the penalty of death.’” *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (quoting *Gregg v. Georgia*, 428 U.S. 153, 184, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)).

Mr. Gregory does not dispute that the rape and murder of G.H. was serious and rendered him *eligible* for the death penalty. But the sentence is disproportionate because dozens of other defendants committed more serious offenses and are serving life sentences. Mr. Gregory is on death row for killing a single victim. Meanwhile, at least 93 adults who committed aggravated murder against multiple victims were ultimately sentenced to life in prison.³² Of these, 19 committed aggravated murder

³² These are: TR 265 (Ridgeway), TR 14 (Ng), TR 143 (Mendez-Reyna), TR 247 (Chea), TR 309 (Carneh), TR 99 (Runion), TR 101 (Macas), TR 157 (Sherrill), TR 174 (Blackwell), TR 218 (Neal, Jr.), TR 219 (Neal, Sr.), TR 234 (Ford), TR 275 (Prather), TR 278 (Johnson), TR 280 (Handy), TR 285 (Rafay), TR 286 (Burns), TR 4 (Ramil), TR 5 (Guloy), TR 10 (Carey), TR 12 (Gregory Brown), TR 20 (Martin), TR 22 (Dictado), TR 32 (Defrates), TR 37 (Strandy), TR 42 (Petersen), TR 53 (Thompson), TR 59 (Baja), TR 68 (Hutchinson), TR 69 (Sullens), TR 81 (Sanders), TR 84 (Reite), TR 86 (Peerson), TR 96 (Fish), TR 105 (McKinley), TR 107 (Simmons), TR 108 (Dailey), TR 116 (Pawlyk), TR 120 (Russell), TR 128 (Metcalf), TR 130 (Camara), TR 146 (Bulich), TR 148 (Oakes), TR 152 (McCord), TR 153 (Benson), TR 162 (Sammons), TR 168 (Pierce), TR 172 (Thomas), TR 182 (Ellis), TR 185 (Parker), TR 187 (Jones), TR 190 (Jones), TR 198 (Schuler), TR 199 (Krueger), TR

against three or more people, yet they are not on death row.³³ Three were convicted of aggravated murder against 13 or more people, but avoided execution.³⁴

If these 93 multiple-victim murderers had killed their victims in a relatively painless fashion, their exemption from the death penalty might not render Mr. Gregory's sentence disproportionate even in light of the fact that he had just one victim. But these other defendants did not simply

203 (Francisco), TR 210 (Cheyenne Brown), TR 211 (Anfinson), TR 213 (Morgan), TR 232 (Leuluaialii), TR 256 (Cruz), TR 262 (Pirtle), TR 263 (Benn), TR 264 (Robert Anderson), TR 272 (Riggins), TR 273 (Phadnis), TR 275 (Prather), TR 276 (Amell), TR 279 (Martin), TR 282 (Morimoto), TR 284 (Williams), TR 287 (Matsen), TR 291 (Kim), TR 296 (Jackson), TR 297 (Smith), TR 299 (Phai), TR 300 (Saray), TR 302 (Nettlebeck), TR 311 (Hicks), TR 315 (Stenson), Ex. 5 - Spokane 08-1-01075-0 (Crenshaw), Ex. 7 - Snohomish 94-1-01113-2 (Finch), Ex. 15 - *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997) (Jeffries), Ex. 21 - King 85-1-01004-0 (Rice), Ex. 23 - Franklin 87-1-50286-3 (Ruiz), Ex. 24 - Thurston 81-1-00316-1 (Rupe), Ex. 26 - Yakima 05-1-00459-8 (Sanchez), Ex. 30 - Pierce 07-1-05865-8 (Tavares), Ex. 32 - Skagit 08-1-00704-8 (Zamora), Ex. 34 - Grant 91-1-00083-5 (Ballard), Ex. 35 - Snohomish 97-1-02153-1 (Walton), Ex. 39 - Snohomish 11-1-02284-1 (Pedersen), *State v. Hilton*, 164 Wn. App. 81, 261 P.3d 683 (2011) (Hilton). Mr. Finch killed himself after the jury returned a life sentence, but before it could be imposed. The Court may or may not wish to include this life verdict for a multiple-victim aggravated murder in its analysis.

³³ TR 265 (Ridgeway), TR 14 (Ng), TR 143 (Mendez-Reyna), TR 247 (Chea), TR 309 (Carneh), TR 99 (Runion), TR 101 (Macas), TR 157 (Sherrill), TR 174 (Blackwell), TR 234 (Ford), TR 275 (Prather), TR 278 (Johnson), TR 280 (Handy), TR 285 (Rafay), TR 286 (Burns), Ex. 21 (Rice), Ex. 32 (Zamora), Ex. 23 (Ruiz), Ex. 18 (Mak).

³⁴ TR 265 (Ridgeway), TR 14 (Ng), Ex. 18 (Mak).

kill more people; they did so in a brutal fashion, causing extreme suffering, often to particularly vulnerable victims.³⁵

For example, Martin Sanders raped two 14-year-olds, then strangled one of them to death and killed the other by hitting her with a tire jack. (TR 81). Steven Carey burned his wife and infant son to death. (TR 10). His wife suffered third-degree burns over 100% of her body and lived for approximately 18 hours before succumbing. *Id.* Cherno Camara hacked his two children to death with a hatchet. (TR 130). He also attacked his wife, causing a severe laceration, but she escaped and survived. *Id.* None of these defendants was sentenced to death.

Scott Pierce and Anthony Sammons beat, choked, and drowned two young Hispanic victims in a racially motivated attack. (TR 162, 168). David Rice repeatedly stabbed a husband, wife, and their two preteen children and then bludgeoned them with a steam iron. (TR 43; Ex. 21).³⁶

³⁵ In *Davis*, this Court affirmed a death sentence for a single-victim aggravated murder where the crime involved “substantial conscious suffering of the victim” – the defendant “broke down the door of a 65-year-old woman’s home, raped her to the point where her vagina ripped, strangled her, and left her to asphyxiate with chemical-soaked rags around her head in a bathtub filled with blood and feces.” *Davis*, 175 Wn.2d at 349-350. Not only was Davis’s crime more brutal than Mr. Gregory’s, he was convicted of more aggravating factors, and, perhaps most importantly, Davis had a history of violent felonies – including another *murder* – prior to the crime at issue. *See id.* at 351-53.

³⁶ Rice was originally sentenced to death but following reversal he received a life sentence for these four brutal killings. Ex. 21.

Lawrence Sullens killed two people, one of whom he had to shoot three times over a 10-minute period. (TR 69). He then beat and shot the couple's 11-year-old daughter. The daughter survived despite being left to die in the house the defendant subsequently burned down. *Id.* All of these men are serving life sentences.

Billy Neal, Sr. and his son, Billy Neal, Jr., killed their victims by stabbing them a total of 140 times. (TR 218, 219).³⁷ Stanley Runion held three victims hostage before murdering them. (TR 99). One of the victims was a child. *Id.* Kenneth Ford killed one victim by strangling, beating, and stabbing her in the throat repeatedly, then shot two others to death with a high-powered semi-automatic pistol. (TR 234).

Robert Parker stripped two victims, gagged them with their own undergarments, sexually assaulted them, and stabbed them multiple times in the abdomen until they died. (TR 185). The two killings occurred a month apart, demonstrating clear planning and premeditation of this horrific type of rape-murder. *Id.* Rick Peerson tied one of his two victims up and held him hostage for two to three hours; he stuck sharp objects into his ears and beat him severely. (TR 86). The victim was "bound with ropes and cords in a way that ensured his slow death by strangulation."

³⁷ The total number of stab wounds apparently includes those on all three victims, including the one for which the Neals were convicted of first-degree murder.

State v. Peerson, 62 Wn. App. 755, 761, 816 P.2d 43 (1991).³⁸ Minviluz Macas set fire to her house and burned her nine-year-old son, 11-year-old son, and husband to death because she wanted to be with another man. (TR 101). None of these brutal multiple-victim murderers is on death row.

Tommy Metcalf responded to a retired couple's advertisement regarding a motor home for sale. (TR 128). He tied both of them up and suffocated them to death by duct-taping plastic bags over their heads. *Id.* James Thomas strangled a mother and daughter to death after raping the daughter. (TR 172). Richard Prather stabbed his wife and two young children to death, and his wife survived for some time after the stabbing before expiring. (TR 275). George Russell was convicted of two counts of aggravated murder and one count of first-degree murder after he raped and sexually assaulted three women, strangled, bludgeoned, or stabbed them to death, and left their bodies posed in gruesome sexual positions. *State v. Russell*, 125 Wn.2d 24, 30-36, 882 P.2d 747 (1994); (TR 120). These defendants all received life sentences.

Justin Crenshaw stabbed a man and a woman repeatedly with a small knife, then drove a broadsword through the man's chest and a samurai sword through the woman's neck. (Ex. 5). Jose Sanchez held a

³⁸ Upon apprehension in North Dakota, Mr. Peerson also shot two police officers. *Peerson*, 62 Wn. App. at 763 n. 7.

woman and her two young daughters hostage at gunpoint, ordered the children's father to retrieve money and drugs for him, then shot the father and the three-year-old child to death and severely wounded the woman and the 18-month-old child. (Ex. 26; *State v. Sanchez*, 171 Wn. App. 518, 288 P.3d 351 (2012)). Billy Ballard bound the hands and feet of his two victims, then slashed their throats. (Ex. 34). Chad Walton stabbed a father and his son to death on Christmas Eve. (Ex. 35). Two separate weapons were used to inflict the injuries on the son. *Id.* Walton had planned the murders for some time and styled himself after "Scarface." *Id.* David Pedersen, who had a prior conviction for threatening to kill a federal judge, killed his parents in Snohomish County before embarking on a multi-state murder spree, targeting people he believed to be black or Jewish. (Ex. 39). None of these men was sentenced to death.

Darrell Jackson and Tyreek Smith held one victim hostage for thirty minutes, bound his hands and feet with duct tape, gagged him, and robbed him. (TR 296, 297). They then stabbed him at least 15 times in the torso and neck, and struck him on the head with the butt of a pistol. *Id.* They stabbed a second victim in the back several times, and severely slashed his throat. *Id.* Charles Nettlebeck murdered his wife and step-daughter with an axe. (TR 302). The step-daughter lay dying for two to

three hours, and the defendant did not call the police during this time. *Id.* All of these defendants were sentenced to life in prison.

The above list, although lengthy, is merely illustrative. The Trial Reports are rife with further examples of horrific multiple-victim murders whose perpetrators escaped death. *See, e.g.*, TR 4, 5, 22, & 112 (defendants convicted for shooting two victims; one died instantly but other suffered for 13 hours before dying);³⁹ TR 116 (two victims, each stabbed over 100 times); TR 182 (defendant bludgeoned mother and two-year-old daughter to death with a bread board, though “death came quickly”); TR 198 (“rage killing” against estranged wife and 10-year-old son, who was trying to protect his mother when his father stabbed them both to death); TR 211 (two victims killed with knife and metal skillet); TR 213 (defendant killed his own children, ages six and seven); TR 262 (both victims slashed with knife and beaten with blunt instrument); TR 265 (defendant pled guilty to 48 counts of aggravated murder; his method was strangling, some of the struggles were “protracted,” and many of his

³⁹ These four cases, reported at *State v. Dictado*, 102 Wn.2d 277, 687 P.2d 172 (1984); *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985); and *State v. Baruso*, 72 Wn. App. 603, 865 P.2d 512 (1993), were particularly egregious because they were likely the result of a political hit directed by a foreign dictator. *See Estate of Domingo v. Republic of Philippines*, 694 F. Supp. 782 (W.D. Wash. 1988) (setting out history). This would place the cases in a special category of murder in the trial reports, yet all four defendants are serving life sentences.

victims were teenagers); TR 272 (defendant killed two children with a hammer and a knife); TR 275 (defendant stabbed to death his wife and two children, who were ages four and seven; wife lived for a period of time after stabbing); TR 278 (three victims included a six-year-old child); TR 282 (both victims stabbed multiple times).

Additionally, there are numerous defendants serving life sentences who were technically convicted of only one count of aggravated murder, but who killed multiple victims in a single event and were convicted of non-aggravated murder for the additional victims. The nature of these defendants' crimes, like those above, is worse than that of Mr. Gregory. For example, Jack Spillman killed, eviscerated, and sexually mutilated a woman and her teenaged daughter, the latter of whom was discovered with a baseball bat shoved up her vagina. (TR 167). He pled guilty to aggravated murder for the mother and felony murder for the daughter. *Id.* Spillman had also pled guilty to an unrelated murder in another county. *Id.*

Gerald Davis was convicted of aggravated murder for tying up, raping, beating and stabbing a 77-year-old woman, and second-degree murder for tying up, bludgeoning, and suffocating a 91-year old. (TR 186). Michael Thornton's aggravated murder conviction was based on his shooting his victim in the head, fracturing his skull with a rock, and

stabbing him in the neck, but he was also convicted of second degree murder for shooting and killing another victim. (TR 238). Although Jeffrey Fox was convicted of only one count of aggravated murder, he actually killed four people, including two children. (TR 138).⁴⁰

Like the 93 multiple-victim murderers described above, most single-victim defendants are also serving life sentences, even though many of them committed crimes that are as bad as or worse than Mr. Gregory's. Terapon Adhahn, for example, was convicted of aggravated murder for kidnapping, raping, and killing a 12-year-old child, yet he is not on death row. (Ex. 1). Arnold Brown also raped and killed a child – his seven-year-old niece – yet was not sentenced to death. (TR 2). Kenneth Hovland held his 16-year-old victim hostage for 20 minutes, raped and sodomized her brutally, stabbed her in the back, neck, and head, and then suffocated her by forcing her face into mud. (TR 6). He received a life sentence.

⁴⁰ See also TR 131 and *State v. Brown*, 64 Wn. App. 606, 825 P.2d 250 (1992) (one count of aggravated murder and one count of second-degree murder for shooting two women in adjoining duplexes); TR 16 and *State v. Kincaid*, 103 Wn.2d 304, 692 P.2d 823 (1985) (one count of aggravated murder and one count of second-degree murder for killing wife and wife's sister); TR 95 (defendant convicted of first-degree murder for stabbing his wife to death, and aggravated murder for killing the responding police officer).

Brian Kester raped and beat a woman before killing her by shooting her three times. (TR 18). Grady Mitchell bound his 68-year-old victim's hands and feet with telephone cord and strapping tape, gagged him with a washcloth, tore open his belt and pulled his slacks down, beat him badly, strangled him, and shot him. (TR 24). He committed this heinous crime "for the sole purpose of obtaining money or property," and "there was no indication of mitigating factors." *Id.* These men were sentenced to life in prison.

John Wesley Anderson raped his victim and tortured her using a table leg, a screwdriver, and a wooden dowel. (TR 27). He broke all of her facial bones, fractured her skull, knocked out all of her teeth, "pulpified" her right eye, punctured her neck, and perforated her vagina. *Id.* Robert Lindamood caused "19 distinct injuries" to his victim's head, including a broken jaw, broken nose, and "smashed" eye sockets. (TR 30). Ten of the victim's ribs were broken and his aorta was severed. *Id.* Bruce Bushey raped and beat his victim, then strangled her to death. (TR 36). None of these men received the death penalty.

John Schoenhals held a 14-year-old hostage for two hours, then killed him by stabbing him multiple times in the throat and abdomen. (TR 40). Arthur Longworth stabbed his victim in the back, and she slowly bled to death over a period of 30 minutes to two hours. (TR 41). James

Dykgraaf tied the victim to her bed, forced her to beg him to have sex with her, sexually assaulted her, strangled her for 3-5 minutes, then shot her in the neck. (TR 45). Brian Lord raped a 16-year-old girl, stabbed her repeatedly in the head and face, and smashed her to death with a hammer. (TR 47, 259). All of these men were sentenced to life in prison.⁴¹

Michael Ihde held his 67-year-old victim hostage for half an hour and raped her orally, anally, and vaginally before strangling her to death. (TR 49). Russell Stenger kidnapped a 23-year-old jogger at gunpoint, stole her wedding ring, held her hostage for three hours, repeatedly raped her “in all orifices,” drove her somewhere else, raped her again, tied her to a tree, and shot her in the temple. (TR 55).⁴² Daniel Yates abducted three teenagers, held them hostage for an hour or more, bound them, raped them, and shot them. (TR 56); *State v. Yates*, 64 Wn. App. 345, 346-47, 824 P.2d 519 (1992). One of them died, and the other two survived with

⁴¹ Lord was initially sentenced to death (TR 47), but was sentenced to life following vacation of the conviction in federal court and retrial. (TR 259).

⁴² The prosecutor initially sought the death penalty against Stenger but his office was disqualified due to a conflict of interest. *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988). A special prosecutor was appointed and withdrew the death notice. In *Davis*, 175 Wn.2d at 359 n.35, this Court implied that Stenger’s case should not be included in the analysis because of this procedural history. However, whether a life sentence makes sense for an individual case viewed in isolation is not the question when performing proportionality review. See *Davis*, 175 Wn.2d at 376 (Fairhurst, J., dissenting); *Pirtle*, 127 Wn.2d at 685. Thus, Stenger must be included.

severe injuries. *Id.* Life sentences were imposed on these brutal rapist-murderers.

David Dayton kidnapped a three-year-old child, then murdered him by stabbing him four times in the chest and hitting him numerous times over the head with a rock hammer. (TR 78). Sherwood Knight – a month after being released from prison for robbery and burglary – broke into a neighbor’s apartment, raped her, hit her in the head, and strangled her to death. (TR 79). Ronald Thomas hog-tied the victim to her bed, held her hostage for hours, raped her, and murdered her. (TR 83). Louis Maryland bound and beat a 75-year-old woman, injected her with toxic substances, strangled her, and suffocated her. (TR 85, 85A). This brutal act was apparently committed simply because the victim refused to loan the defendant money. *Id.* None of these aggravated murderers was sentenced to death.

James Fountain stabbed, punched, strangled, and burned his disabled girlfriend to death. (TR 97). In a murder-for-hire case, James Hutcheson caused “gruesome injuries” to his victim by ambushing him in his apartment and beating him with a lug wrench at least 15 times. (TR 98). Harold Eirich held a 69-year-old woman hostage for several hours, then bludgeoned her to death with a heavy frying pan. (TR 104). These men were given life sentences.

Gregory Scott raped a 23-year-old woman, strangled and suffocated her, and bludgeoned her with an iron. (TR 109). Michael Green kidnapped and raped a 12-year-old, then stabbed her to death. (TR 136). Charles Bolton held a 75-year-old woman hostage for several hours, raped her (“possibly with scissors”), then threw her into a river while she was still alive. (TR 137). The nature of these crimes is at least as horrific as Mr. Gregory’s, yet none of these men is on death row.

Keith Dyer raped a 13-year-old girl, then stabbed her 21 times in the neck and skull, severing her spinal cord. (TR 142). Michael Lauderdale bound and anally raped a 22-year-old young man, then hit him five times with a baseball bat until he died of a skull fracture. (TR 150). Alan Rocek handcuffed his victim and gagged him with duct tape. (TR 155). He tortured him for over an hour by stabbing him, hitting him on the head with a claw hammer, strangling him, and slitting his throat. *Id.* All of these defendants avoided the death penalty.

Roderick Selwyn committed a particularly cruel crime against a vulnerable victim. He beat and choked a 13-year-old boy for approximately 20 minutes, then stuffed a paper bag down his throat. (TR 158). During the ordeal, the victim was crying and at one point said he felt like he was dying and was having trouble breathing. The defendant

continued beating the victim after that statement, and the victim eventually died. *Id.* The defendant was sentenced to life in prison.

Jason Wickenhagen is yet another of dozens of defendants who brutally murdered a child yet avoided a death sentence. (TR (159). He choked his nine-year-old niece, then placed her in a garbage can. When her eyes opened, he “deliberated upon whether to kill her or take her to the hospital, then decided to finish her off, struck her twice in the head with a hammer, killing her by the blows.” *Id.*

Randy Henderson severely beat his victim with a 2x4 with protruding nails. (TR 163). The victim “suffered fifteen distinct wounds to the face and head, resulting in fatal brain injuries, in addition to other wounds over various parts of his body.” *Id.* Steven Eggers and an accomplice hog-tied and gagged their victim, repeatedly hit and kicked him, then threw him in the trunk of a car. (TR 169). They drove him to a river, beat him some more, then threw him in the water alive. *Id.* The victim died by drowning. *Id.* Guy Rasmussen kidnapped a nine-year-old girl, burned her with cigarettes, sexually assaulted her, beat her in the head, and stuffed her panties in the back of her throat. (TR 184). None of these defendants was sentenced to death.

David Lewis raped his neighbor’s 12-year-old child and stabbed her 15 times. (TR 193). Donnie Ivy stabbed a 63-year-old woman in the

neck, shoulder, and chest. (TR 207). The victim also suffered a cervical fracture of the spine, was strangled, and appeared to have been sexually assaulted. *Id.* Angel Fernandez tied his victim to a post, stabbed him repeatedly, then buried him alive. (TR 230). All of these defendants were given life sentences.

James Kinney held a 20-year-old woman hostage for an hour and used pruning shears to cause “extensive blunt trauma” and “sexual instrumentation” in killing her. (TR 245). Joseph Kennedy stabbed an 18-year-old girl over 100 times. (TR 250). Richard Clark raped a seven-year-old girl violently, then murdered her with a knife. (TR 277).⁴³ John Phillip Anderson and John Whitaker kidnapped Anderson’s ex-girlfriend, beat her, tied her up, and placed her in a duffel bag. (TR 289, 290). They took her to a remote location, removed her from the bag, forced her to remove her clothing and jewelry, and ordered her to kneel in a hole in the ground. *Id.* They then shot her to death. *Id.* These heinous crimes resulted in life sentences.⁴⁴

⁴³ Like Brian Lord, Clark was originally sentenced to death, TR 175, but was sentenced to life after reversal and remand. TR 277.

⁴⁴ The Court of Appeals recently granted a new trial for Whitaker based on a public trial violation. COA No. 61980–2–I. The State’s motion for discretionary review is pending in this Court. *See* Supreme Court No. 89148-6.

Isaiah Kalebu broke into the victim's home, repeatedly raped her over a period of 90 minutes, sliced her neck multiple times with a knife, then stabbed her in the heart. (TR 307). Lacey Kae Hirst-Pavek hired Tansy Mathis to kill a woman and her unborn child. (Exs. 14, 20). Mathis and another accomplice kidnapped the victim, beat her and choked her, then stabbed her repeatedly in the abdomen with an ice pick. *Id.* Phiengchai Sisouvanh bound the hands and feet of a woman who was eight-and-a-half months pregnant, stabbed her in the chest, and cut her baby out of her. (Ex. 27; *State v. Sisouvanh*, 175 Wn.2d 607, 290 P.3d 942 (2012)).⁴⁵ Clayton Stafford ambushed a young woman in a park, raped her, strangled her, beat her on the head, then dumped her in a river while she was still alive. (Ex. 28). The nature of all of these crimes is horrific, yet none of these defendants was sentenced to death.

Other aggravated murderers who received life sentences also brutally killed their victims. *See, e.g.*, TR 33 (defendant tied victim up and bludgeoned him to death with a pipe wrench); TR 34 (three assailants held victim hostage for one-two hours, beat him with a toilet seat, and ultimately stabbed him to death); TR 46 (stabbed 79-year-old to death);

⁴⁵ The State did not seek death, in part, because it believed Ms. Sisouvanh suffered from mental illness. However, the State's expert later determined that Sisouvanh was malingering. *Sisouvanh*, 175 Wn.2d at 612-13.

TR 58 (sexual assault and multiple stab wounds); TR 60 (victim killed with steel crow bar and knife; ribs and jaw broken and chest and throat cut); TR 62 (repeated stab wounds); TR 63 (multiple stab wounds to neck and base of skull); TR 64 & 65 (defendants kidnapped an 89-year-old woman, put her in the trunk of a car in her nightgown without her glasses, and shot her multiple times in the legs prior to delivering fatal shot to the head) TR 74 (multiple stab wounds); TR 80 (16-19 knife wounds); TR 87 (87-year-old victim stabbed with a knife then suffocated with pillow); TR 89 (victim beaten with tire iron numerous times); TR 90 & 91 (defendants stabbed, kicked, and punched victim to death); TR 102 & 103 (rape, black eye, bruises, abrasions to both legs, bite on left breast, internal and external evidence of strangulation); TR 117 (defendant killed victim with knife and bat; 14 lacerations on head, 2 stab wounds on back); TR 124 (defendant raped and used pocketknife to kill a 17-year-old); TR 156 (victim beaten and strangled); TR 164 (“numerous wounds inflicted with a knife”); TR 221 (defendant bound victim’s feet, and delivered at least seven blows to the head with a blunt object); TR 231 (multiple blows to victim’s head with hammer and knife); TR 236 (defendant stabbed 65-year-old victim, then raped her as she lay dying); TR 237 (defendant stabbed victim repeatedly with a paring knife, then shot her); TR 239 (“extensive blunt trauma to face, head, and body; forcible rape; ligature

strangulation”); TR 249 (defendant raped, stabbed, and smothered an 87-year-old woman); TR 258 (victim stabbed repeatedly with large kitchen knife and struck repeatedly with metal baseball bat); TR 260 (defendant raped the victim, then pummeled her, beat her about the face at least nine times, broke her jaw and ribs, and strangled her); TR 304 (14-year-old killed with a knife); TR 310 (victim was “beaten, raped, and run over by a car two or three times”); Ex. 4, *State v. Brewczynski*, 173 Wn. App. 541, 294 P.3d 825 (2013) (80-year-old victim severely beaten, then shot); Ex. 16, *State v. Kosewicz*, 174 Wn.2d 683, 278 P.3d 184 (2012) (victim was held hostage and repeatedly beaten for two days before being shot to death).

In sum, the Governor’s acknowledgment that “our death penalty is not always applied to the most heinous offenders” is an understatement in light of the cases discussed above. App. J at 4. When comparing the nature of the crime in this case to the nature of the crimes committed by the hundreds of aggravated murderers serving life sentences, it is clear that Mr. Gregory’s sentence is outrageously disproportionate.

This is also evident when comparing this crime to those of the handful of other defendants on death row. Of the 13 other people who were ultimately sentenced to death, seven committed aggravated murder

against multiple victims.⁴⁶ There are only six other men who are either on death row or have been executed for single-victim aggravated murders.⁴⁷ These six not only committed brutal crimes, but are far worse than Mr. Gregory with respect to the other categories relevant to proportionality analysis, as discussed below.

- d. Aggravating circumstances: Mr. Gregory committed murder in the course or furtherance of two felonies – a crime for which a life sentence is generally imposed.

In light of the above analysis regarding the nature of the crime, one might think that because Mr. Gregory is on death row while hundreds of people who committed horrific aggravated murders are serving life sentences, Mr. Gregory must be far worse than everyone else in terms of aggravating circumstances, personal characteristics, and/or criminal history. *See* RP (6/13/12) 3130 (prosecutor tells trial court, “I don’t believe there’s another person – certainly not in this state, or anywhere else – who is as richly deserving of the sentence you’re going to give him as Allen Gregory is.”). Nothing could be further from the truth.

The second characteristic to be compared is aggravating circumstances. *Cross*, 156 Wn.2d at 630-31. This Court reviews both the

⁴⁶ TR 9 (Campbell), TR 76 (Dodd), TR 160 (Sagastegui), TR 177 (Woods), TR 220 (Cross), TR 251 (Yates), TR 303 (Schierman).

⁴⁷ TR 119 (Gentry), TR 140 (Brown), TR 165 (Elmore), TR 180, 281 (Davis), TR 183 (Elledge), TR 313 (Scherf).

number and nature of the aggravators in comparing the current case to other death-eligible cases. *Davis*, 175 Wn.2d at 351.

Mr. Gregory was convicted of committing murder in the course or furtherance of rape and robbery. In terms of the number of aggravating factors, the vast majority of defendants convicted of two or more aggravators was sentenced to life in prison. Indeed, 126 defendants committed murder with an equal or greater number of aggravators than Mr. Gregory, but are serving life sentences.⁴⁸ Forty of them had more aggravating circumstances than Mr. Gregory, yet are not on death row.⁴⁹ It is also worth noting that both Cecil Davis and Cal Brown, who were

⁴⁸ TR Nos. 215, 227, 045, 056, 064, 065, 082, 141, 231, 259, 296, 297, 018, 031, 035, 043 (Ex. 21), 052, 053, 055, 063, 081, 097, 107, 108, 113, 115, 128, 164, 176 (Ex. 22), 191, 192, 194 (Ex. 31), 200, 239, 255, 277, 280, 283, 309, 006, 013 (Ex. 18), 014, 015 (Ex. 15), 017, 021, 026, 030, 032, 044, 049, 058, 062, 066, 068, 069, 079, 080, 085, 086, 092, 096, 101, 102, 103, 104, 118, 123, 124, 131, 136, 142, 146, 155, 156, 157, 158, 166, 167, 169, 172, 174, 178, 179, 182, 193, 199, 201, 203, 218, 219, 221, 232, 233, 234, 235, 237, 241, 243, 244, 249, 250, 252, 254, 260, 262, 264, 266, 275, 278, 282, 285, 286, 289, 290, 291, 294, 299, 300, 304, 310, 316; Exs. 1, 25, 26, 35, 36. The Trial Judge Report for 304, Jesus Perales, wrongly lists “victim vulnerability” as an aggravating factor. The Court of Appeals opinion, 168 Wash.App. 1043 (2012), says the jury found three aggravating circumstances, but a close reading shows the jury likely found two. TR 13, 15, 43, 176, and 194 show death sentences but all of these became life sentences following reversal and remand. Exs. 15, 18, 21, 22, 31.

⁴⁹ TR Nos. 215, 227, 045, 056, 064, 065, 082, 141, 231, 259, 296, 297, 018, 031, 035, 043, 052, 053, 055, 063, 081, 097A, 107, 108, 113, 115, 128, 164, 176, 191, 192, 194, 200, 239, 255, 277, 280, 283, 309; Ex. 26.

sentenced to death for single-victim aggravated murders, were convicted of more aggravating factors than Mr. Gregory. (TR 140, 180, 281).

As to the nature of the aggravating circumstances, there is no question that rape is one of the more heinous aggravating factors in terms of victim suffering.⁵⁰ However, as explained in great detail in the preceding section, dozens of murderers who brutally sexually assaulted their victims before killing them received life sentences. *See* Section E(2)(c) *supra*, and TR Nos. 2, 6, 18, 27, 36, 45, 49, 55, 56, 58, 79, 81, 83, 109, 124, 137, 142, 150, 167, 172, 184, 185, 186, 193, 207, 236, 239, 245, 249, 259, 260, 265, 277, 307, 310; Exs. 1, 28. Mr. Gregory's death sentence therefore cannot be justified by the aggravating circumstances.

- e. Criminal history: In contrast to all other single-victim murderers on death row, Mr. Gregory has no violent felonies in his criminal history.

In *Davis*, a majority of this Court held that the defendant's death sentence was proportionate over the objections of three dissenters, notwithstanding that the defendant had a single victim. *Davis*, 175 Wn.2d

⁵⁰ The other aggravating factor, robbery, was based on the fact that a pair of earrings and tips from G.H.'s purse were missing. Although Mr. Gregory was found guilty of this aggravating factor, the theft appears to have been an afterthought. RP (4/24/12) 2375-76; RP (4/25/12) 2408-10, 2476. *Compare* TR 13 (Ex. 18), TR 14 (Mak and Ng are serving life sentences after executing 13 victims for the purpose of robbing them); *Davis*, 175 Wn.2d at 300-01 (Before his crime Davis announced, "I need to rob somebody," and "I need to kill me a motherfucker").

at 347-73. In so doing, this Court not only noted that the crime was extremely brutal and that the defendant had been convicted of three aggravating factors, but found it particularly important that the defendant had a serious, violent criminal history that included another *homicide*. *Id.* at 352-53. This Court noted that only thirteen of the approximately 300 aggravated murderers in the trial judge reports had prior convictions for murder or manslaughter. *Id.* Because Davis was in “a special category of repeat murderers,” and also had at least two other serious violent offenses in his criminal history, the sentence of death was proportionate. *Id.*

The same was true of both Jonathan Gentry and James Elledge. Both received death sentences despite committing aggravated murder against a single victim. In finding the sentences proportionate, this Court emphasized that the defendants had killed additional victims in the past and had committed other violent felonies. *See State v. Elledge*, 144 Wn.2d 62, 81-82, 26 P.3d 271 (2001) (defendant was on parole for prior first-degree murder when he committed aggravated murder); *State v. Gentry*, 125 Wn.2d 570, 657, 888 P.2d 1105 (1995) (“The Defendant’s prior criminal record showed a history of violent behavior. He had killed before and had raped a 17-year-old girl at knife point not long before this

murder.”).⁵¹ See also TR 251 (although Yates was convicted of “only” two counts of aggravated murder, he was a serial killer who had prior convictions for 13 counts of first-degree murder).

In stark contrast to this “special category” of men whose death sentences are proportionate because of prior homicides, Mr. Gregory has *no* violent felonies in his criminal history – let alone another killing. CP 1182. His criminal history consists of only misdemeanors and two non-violent class C felonies: one count of drug possession and one count of theft. CP 1182. The theft was a juvenile offense for stealing a skateboard at age 13. Ex. 7 (admitted 5/7/12).⁵² The prosecutor's admission that “these are not the crimes of the century” is an understatement. RP (5/14/12) 2040-41.⁵³

⁵¹ It is also worth noting that the victim of Gentry's aggravated murder was a 12-year-old child. *Gentry*, 125 Wn.2d at 657. Gentry sexually assaulted the child and bludgeoned her to death with a rock. *Id.*

⁵² CP 1182 wrongly lists the skateboard theft as an adult crime. There is no dispute that the incident occurred when Mr. Gregory was 13 years old.

⁵³ Two of Mr. Gregory's misdemeanors were the result of an incident in jail in 2000. He pled guilty to third-degree malicious mischief and second-degree attempted escape after he removed some screws from a window in a cell. “He didn't get anywhere,” and he may have simply been attempting to obtain contraband. RP (5/10/12) 2834. In any event, obviously these misdemeanors cannot justify killing Mr. Gregory. Numerous people convicted of aggravated murder had prior convictions for attempted or actual escape, yet were sentenced to life in prison. TR 23 (prior escape *and murder*); TR 35 (aggravated murder occurred while defendant was on escape status); TR 102 (prior escape and multiple

The three other single-victim aggravated murderers on death row may not have prior homicides like Davis, Elledge, and Gentry, but they all committed violent felonies prior to their aggravated murder convictions. Clark Elmore had a prior burglary. *State v. Elmore*, 139 Wn.2d 250, 309, 985 P.2d 289, 323 (1999).⁵⁴ Cal Brown's prior convictions included assault with a deadly weapon, attempted assault in the first degree, assault in the second degree, attempted murder in the first degree, torture, and robbery in the first degree. *State v. Brown*, 132 Wn.2d 529, 558, 940 P.2d 546 (1997). The prior attempted murder conviction arose from the following conduct:

Appellant straddled her while she lay face down on the bed. Suddenly he violently jerked her arms back and told her not to scream. When she did, he slit her throat. As she continued to scream, Appellant restrained her with handcuffs and brought the knife around to her chest and threatened her with it. She saw the knife. He told her he just wanted her money. Appellant repositioned Ms. Schnell on the bed and tied her to it, using her pantyhose. He shaved her pubic hair and, raped her vaginally and orally. He then ordered her to write him a check for \$4,000.00, which she

rapes); TR 115 (convicted of conspiracy to escape at same time as aggravated murder); TR 120; TR 133; TR 148; TR 167; TR 200 (see attachment to TR 125: *five* counts of escape or attempted escape); TR 214; TR 221; TR 227 (failure to return to work release); TR 230; TR 238 (*three* counts of escape); TR 247; TR 255; TR 256; TR 260; TR 284 (escape from community custody); Ex. 34 (two counts of escape).

⁵⁴ Also, the nature of the aggravated murder Elmore committed was particularly brutal: his victim was only 14 years old, and he raped her, strangled her, hit her over the head with a sledge hammer, then inserted a pin in her ear and drove it all the way through her head. (TR 165).

had difficulty completing to his satisfaction until her third attempt.

Appellant became concerned about Ms. Schnell's bleeding and told her he was going out for medical supplies. He tried to gag her with a sock and restrain her arms above her head, but abandoned the effort when she began coughing up blood. Her feet, however, remained handcuffed to the bed. While he was gone, she was somehow able to reach the telephone and call the desk clerk.

Id. at 547.⁵⁵

At the time Byron Scherf committed aggravated murder, he had such a serious criminal history that he was already serving a sentence of life without the possibility of parole under the “three strikes” law. (TR 313). His prior crimes included two counts of first-degree rape, first-degree kidnapping, and first- and second-degree assault. *Id.*

Other brutal aggravated murderers who committed prior homicides did not even receive the death penalty. For example, Brian Lord had a prior conviction for second-degree murder when he committed aggravated murder by raping and bludgeoning to death a 16-year-old girl. *State v. Lord*, 117 Wn.2d 829, 907, 822 P.2d 177 (1991). Yet, in contrast to Mr. Gregory, on remand after Lord’s death sentence was reversed, Lord was

⁵⁵ The aggravated murder for which Cal Brown was sentenced to death was also “particularly brutal” because it involved prolonged suffering by the victim. *Brown*, 132 Wn.2d at 556. Brown kidnapped the victim and robbed, raped, and repeatedly tortured her for *two days* before killing her. *Id.*

sentenced to life in prison. (TR 259). Other aggravated-murder defendants with prior killings were similarly sentenced to life in prison. *E.g.* TR 23 (Hughes); TR 44 (Williams); TR 191 (Smith); Ex. 30 (Tavares).⁵⁶

Contrary to these cases, as noted, Mr. Gregory's criminal history consists of a handful of misdemeanors, one count of theft of a skateboard, and one count of drug possession. CP 1182; Ex. 7 (admitted 5/7/12). The prosecutor acknowledged that "[t]hese are not the crimes of the century," and that Mr. Gregory had "only [been] convicted of minor crimes in his criminal history." RP (5/14/12) 2040-41. This is dispositive in light of the preceding analysis regarding the nature of the crime and the aggravating factors. Because scores of people are serving life sentences for committing crimes that were just as bad or worse than Mr. Gregory's, the only possible way Mr. Gregory's death sentence would be proportionate is if he had an extensive, violent criminal history. But the opposite is true. The criminal history factor, like the others, shows that

⁵⁶ The same is true of brutal killers with other prior violent felonies. *E.g.* TR 36 (prior rape); TR 49 (prior rape and prior assault with intent to murder); TR 79 (prior robbery and burglary); TR 81 (prior rape and kidnapping convictions, and possibly a prior murder – the trial judge report indicates he "cleared up" a prior unresolved homicide); TR 102 (multiple prior rapes); TR 104 (prior sex offense).

Mr. Gregory's death sentence is disproportionate to the sentences imposed in other aggravated murder cases.

- f. Personal history: Mr. Gregory was a loving and responsible father, brother, son, and cousin despite having been beaten and abandoned by his father, and his young age at the time of the crime further diminishes his culpability relative to other aggravated murderers.

As demonstrated in the preceding sections, Mr. Gregory's death sentence is unquestionably excessive in light of the sentences imposed in similar cases. Nothing about Mr. Gregory's personal history undercuts this conclusion. To the contrary, Mr. Gregory was a responsible and loving family member despite having been abused and abandoned by his father, and his young age at the time of the crime renders him less culpable than the mature adults who committed brutal aggravated murders.

Mr. Gregory's father left the family when Allen was only three, so Allen, as the only male, was very protective of his younger sister and his developmentally disabled cousin. RP (5/8/12) 2673, 2678, 2775; RP (5/10/12) 2921. He also looked out for his grandmother, mowing her lawn and doing "anything she asked him to do." RP (5/8/12) 2683, 2757, 2788. With the money he made mowing other people's lawns, Mr. Gregory regularly bought his mother gifts from garage sales. RP (5/10/12) 2944.

Mr. Gregory became a father at a young age, and served as primary parent to daughter Elisha for a significant time when the child's mother said she could not take care of her. RP (5/10/12) 2953-54. Mr. Gregory was a good father despite the fact that his own father had brutally beaten him. RP (5/10/12) 2936. By all accounts, Mr. Gregory was very loving and responsible with Elisha, and also treated his girlfriend's daughter as his own. RP (5/8/12) 2683-83, 2765-66, 2773-74, 2787-89.

Mr. Gregory was only 24 years old when the murder took place. This is an important mitigating factor that renders Mr. Gregory less culpable than others who committed similar crimes. It is well-settled that the part of the brain which performs "executive functions" is not completely developed before the mid-20's. *Brain Maturity Extends Well Beyond Teen Years*, National Public Radio, October 10, 2011.⁵⁷ As scientists from the National Institutes of Health have explained, "the frontal cortex area – which governs judgment, decision-making and impulse control – doesn't fully mature until around age 25." *Teen Brains: Still Under Construction*, NIH News in Health, September, 2005, at 3. Two Harvard neurologists similarly acknowledged the striking findings

⁵⁷ Available at: <http://www.npr.org/templates/story/story.php?storyId=141164708> (last viewed 11/4/2013).

enabled by functional magnetic resonance imaging over the last 10-15 years:

The last section [of the brain] to connect is the frontal lobe, responsible for cognitive processes such as reasoning, planning, and judgment. Normally this mental merger is not completed until somewhere between ages 25 and 30 – much later than these two neurologists were taught in medical school.

Debra Bradley Ruder, *The Teen Brain*, Harvard Magazine, September / October 2008, at 8.

It is because of this phenomenon that those who committed their crimes when under age 18 can *never* be subject to the death penalty – no matter how heinous the crime or how many victims were killed. *Roper v. Simmons*, 543 U.S. 551, 578, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The U.S. Supreme Court had previously barred capital punishment only for those under 16 at the time of the crime. *Id.* at 561 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988)). But in *Roper*, it recognized the growing body of research demonstrating that the brain continues to develop in important ways beyond childhood. *Id.* at 570-71. Juvenile offenders, whose brains are still developing, “cannot with reliability be classified among the worst offenders.” *Id.* at 569.

[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These

qualities often result in impetuous and ill-considered actions and decisions.

Id.

Although the absolute bar on capital punishment applies only to those who were under 18 at the time of the crime, the Court also recognized that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.” *Id.* at 574. Indeed, the Court has held that youth must be available as a mitigating factor, for young adults over 18, as a matter of federal constitutional law. *Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993). “The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” *Id.* at 368. Since the brains of young people are not fully developed, they are both less culpable for their crimes and more amenable to rehabilitation, and are therefore less appropriate candidates for capital punishment. *Roper*, 543 U.S. at 569-71.

All other defendants who have been executed or who are on death row were older than Mr. Gregory when they committed their crimes. (TR 9, 76, 119, 140, 160, 165, 177, 180, 183, 220, 251, 303, 313). And of these defendants, the only ones who were even close to being as young as

Mr. Gregory are those who brutally murdered *multiple* victims. (TR 160, 177, 303). Two of these three – Sagastegui and Woods – *requested* the death penalty. (TR 160, 177). The third slashed four people to death with a knife, including two young children. (TR 303, Schierman).

All other single-victim aggravated murderers who are on death row or have been executed were mature adults at the time they committed their crimes. James Elledge was 55 years old. (TR 183). Byron Scherf was 52. (TR 313). Clark Elmore was 43. (TR 165). Cecil Davis and Cal Brown were both 37 years old when they committed aggravated murder. (TR 180, 281, 140). Jonathan Gentry was 31 years old. (TR 119); *see also Gentry*, 125 Wn.2d at 657 (“Gentry was not youthful as in some cases where the death penalty was not imposed”).

In contrast to the above defendants, Mr. Gregory had just turned 24 at the time of the crime. He had not committed any other violent felonies in his life. He was convicted of a brutal aggravated murder, but he had only one victim. Hundreds of defendants who committed equally heinous or far worse crimes were sentenced to life in prison. There can be no doubt that the penalty imposed upon Mr. Gregory is disproportionate to the crime imposed in other aggravated murder cases. This Court should reverse and remand for imposition of a sentence of life without the possibility of parole. The Court need not reach the argument below.

- g. Mr. Gregory's death sentence is random and arbitrary, and, to the extent it is not, it is impermissibly based on his race and the county of conviction.

As shown above, Mr. Gregory is by no stretch of the imagination the “worst of the worst,” and the imposition of the death penalty upon him, when so many brutal aggravated murderers received life sentences, is random and arbitrary. This Court need say no more in reversing the death sentence.

However, it is worth noting that to the extent Mr. Gregory's sentence is not arbitrary, it is likely based on factors that have nothing to do with culpability: the defendant's race, and the county of conviction. In *Davis*, several justices urged this Court to investigate whether there is a significant relationship between these irrelevant variables and the imposition of capital punishment. *See Davis*, 175 Wn.2d at 387-88 (Fairhurst, J., dissenting) (urging Court in the future to “carefully watch” whether “the county in which a crime is committed, rather than the crime or the defendant, may determine who receives the death penalty”); *id.* at 389 (Wiggins, J., dissenting) (recognizing that “African American defendants are more likely to receive the death penalty than Caucasian defendants,” and urging a study of “whether the disparity is statistically significant”).

In light of *Davis*, Mr. Gregory commissioned a study by University of Washington Professor Katherine Beckett on the effect of race and county on the imposition of the death penalty in Washington. *See* Katherine Beckett & Heather Evans, *The Role of Race in Washington State Capital Sentencing, 1981-2012*, January 27, 2014 (Attached as Appendix A) (hereinafter “Beckett Report”). The data evaluated in the study consisted of all trial judge reports filed through Mr. Gregory’s (number 312), but with all 28 juveniles removed. *Id.* at 3-4. Professor Beckett and her research assistant evaluated the impact of the race of the defendant and the race of the victim on both the prosecutor’s decision to seek death and the factfinder’s decision to impose it. *Id.* at 2, 9-10, 12-13, 15, 17.

The findings are pleasantly surprising in some ways. The researchers concluded that, unlike in some jurisdictions, the race of the victim does not seem to play a role in either the prosecutor’s decision to file a death notice or the jury’s decision to impose a death sentence. Beckett Report at 2, 12-13. Nor does the race of the defendant play a significant role in the prosecutor’s decision to seek death. *Id.*

However, the race of the defendant matters a great deal at the special sentencing proceeding. Indeed, “the results of regression analyses indicate that juries were three times more likely to impose a sentence of

death when the defendant was black than in cases involving similarly situated white defendants.” *Id.* at 2. The analysis controlled for case characteristics and concluded that “defendants who are black are more likely to be sentenced to death *after taking all other variables in the model, including number of priors, aggravators, and victims, into account.*” *Id.* at 11 (emphasis in original); *see also id.* at 15 (“black defendants are more than three times more likely than similarly situated white defendants to be sentenced to death, after controlling for all other variables in the model”). The statistician’s conclusion validates that of the *Davis* dissent: “The trial reports are evidence that once the prosecution seeks the death penalty against African-American defendants, those defendants are much more likely to be sentenced to death than their Caucasian counterparts.” *Davis*, 175 Wn.2d at 392 (Wiggins, J., dissenting).

The fact that black defendants are three times more likely to be sentenced to death after controlling for valid variables violates the principles of fairness guaranteed by RCW 10.95.130(2)(b). *See Cross*, 156 Wn.2d at 630. Although the U.S. Supreme Court has held that such disparities do not offend the federal Constitution, Washington law demands more. *See Davis*, 175 Wn.2d at 398 (Wiggins, J. dissenting) (citing *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262

(1987)).⁵⁸ Under RCW 10.95.230(2)(b), a death sentence that is arbitrary, random, or based on race must be reversed. *Cross*, 156 Wn.2d at 630. Sections 2(c) through 1(f) above show that Mr. Gregory's sentence is arbitrary. Professor Beckett's report shows that to the extent it is not arbitrary, it is impermissibly based on race.

The report also sets forth the disparate sentencing outcomes across counties in Washington.⁵⁹ Beckett Report at 7-8. There is substantial variation across counties, and "it does not appear that these differences are a function of the number of aggravating circumstances or the number of victims involved in the relevant cases." *Id.* at 7.⁶⁰ In announcing a

⁵⁸ It is also worth noting that Justice Powell, the author of the 5-4 majority opinion in *McCleskey*, soon regretted his decision. After he retired, a biographer asked him if there were any votes he would change. He said, "yes, *McCleskey v. Kemp*." American Law Institute, *Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty*, April 15, 2009, at 14. President Jimmy Carter, who as governor of Georgia signed into law the statute at issue in *McCleskey* (and on which Washington's is modeled) has also expressed his regret. He recently called for a nationwide moratorium on the death penalty because of its arbitrary and discriminatory application. He said, "The only consistency today is that the people who are executed are almost always poor, from a racial minority or mentally deficient." *Jimmy Carter calls for fresh moratorium on death penalty*, *The Guardian*, Nov. 11, 2013.

⁵⁹ Unlike the section addressing race, no regression analysis was performed regarding the impact of county of conviction upon the imposition of the death penalty. These are instead "descriptive statistics." Beckett Report at 7.

⁶⁰ Washington is not the only state with this problem. Indeed, a recent study found that across the United States, "[d]eath sentences depend more

moratorium on capital punishment in Washington, Governor Inslee similarly observed, “The use of the death penalty in this state is unequally applied, sometimes dependent on the budget of the county where the crime occurred.” App. J at 1.

Pierce County, from which Mr. Gregory’s case arose, is one of the counties in which prosecutors seek the death penalty in a relatively high percentage of aggravated murder cases (47%). Beckett Report at 8. Meanwhile, counties like Okanogan and Yakima, which are the sites of several brutal aggravated murders described above, have *never* had a capital sentencing proceeding since the death penalty was reinstated in 1981. *Id.* Like the race of the defendant, the location of the crime is irrelevant to culpability, and should have no bearing on whether the death penalty is sought or imposed.⁶¹

on the location of the county line than on the severity of the crime.” Death Penalty Information Center, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases At Enormous Costs to All*, Oct. 2013 at 2.

⁶¹In *Bush v. Gore*, 531 U.S. 98, 109, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000), the Supreme Court disapproved of election practices that varied from county to county, and concluded that the lack of consistent procedures across Florida violating equal protection and due process. This Court has twice refused to extend *Bush v. Gore*, *supra*, to Washington’s capital context. *State v. Cross*, 156 Wn.2d at 624-25; *State v. Yates*, 161 Wn.2d 714, 791-92, 168 P.3d 359 (2007). In light of Professor Beckett’s report, however, this Court should now reassess its prior unwillingness to find local variations in the administration of the death penalty to be violative of the Fourteenth Amendment.

In sum, because Mr. Gregory's death sentence is more likely the result of his race and county of conviction than any valid characteristic, this Court should reverse and remand for imposition of a sentence of life without the possibility of parole.

- h. Governor Inslee's recent announcement of a moratorium on executions in Washington confirms Mr. Gregory's analysis.

As noted above, on February 11, 2014, Governor Jay Inslee announced a moratorium on executions in Washington. App. J. Governor Inslee's announcement was not based on an act of mercy for Mr. Gregory – quite the contrary. See App. J. at 2 (“Let me say clearly that this policy decision is not about the nine men currently on death row in Walla Walla. I don't question their guilt or the gravity of their crimes. They get no mercy from me.”). Rather, Governor Inslee based his moratorium, in part, on his conclusion that the capital system in Washington had “too many flaws,” and that:

[O]ur death penalty is not always applied to the most heinous offenders. That is a system that falls short of equal justice under the law and makes it difficult for the State to justify the use of the death penalty. In 2006, state Supreme Court Justice Charles Johnson wrote that in our state, “the death penalty is like lightning, randomly striking some defendants and not others.” I believe that's too much uncertainty.

App. J. at 2, 4.

Governor Inslee's conclusions are not those of a private citizen who happens to be the governor of this state. Rather, Governor Inslee's conclusions were made in the context of carrying out his official functions as the "supreme executive power of this state." Const. art. III, § 2. This official function includes the power to issue reprieves of executions. Const. art. III, § 9; RCW 10.01.120. The moratorium was also issued pursuant to article III, section 5, which provides in part that the Governor "shall see that the laws are faithfully executed."

Gov. Inslee's conclusions have two separate, but interrelated, legal effects on this case. First, his conclusions are persuasive legal authority and expressions of public policy that should lead this Court to accept Mr. Gregory's proportionality analysis. While statutes and case law are the primary sources of authority, an executive order from the Governor is certainly another valid source of this State's public policy. *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 216-17, 193 P.3d 128 (2008) (plurality). Therefore, Governor Inslee's public finding that the capital punishment system in Washington is disproportionately applied (and that he will not allow Mr. Gregory to be executed because of this disproportionality) should be considered by this Court as persuasive authority supporting Mr. Gregory's arguments in this case.

Second, Governor Inslee's conclusions should be viewed almost as a concession of error by the State. The Washington Constitution differs from the constitutions of many other states in terms of the power given to the Governor in article III, section two:

While in many of the constitutions of the various states the governor is but a part of the executive department, in the state of Washington, as is indicated by the above quoted portions of our constitution, the governor is the supreme executive power. *Black's Law Dictionary* (7th ed.), defines supreme power as: "The highest authority in the state, all other powers in it being inferior thereto." Which, of course, when applied to the instant case, means that the governor, under our constitution, is the *highest executive authority*.

State ex rel. Hartley v. Clausen, 146 Wash. 588, 592, 264 P. 403 (1928) (emphasis in original). *See also Seattle v. McKenna*, 172 Wn.2d 551, 563-64, 259 P.3d 1087 (2011) (recognizing, but not deciding, *Hartley's* effect on lawsuit involving Governor's opposition to Attorney General's participation in lawsuit against federal healthcare statute).

To be sure, the Pierce County Prosecuting Attorney has the authority to represent the State of Washington in this proceeding. RCW 36.27.005 & .020. This statutory authority derives from a separate constitutional provision, article XI, section 5, which directs the Legislature to provide for the election of prosecuting attorneys at the county level. Const. art. XI, § 5. But even recognizing this division of power, the

Governor's announcement that the death penalty in Washington is arbitrarily meted out and is disproportionate is the official pronouncement of the highest executive authority of Washington State and should be seen as an admission by the State of Washington. The Pierce County Prosecuting Attorney's Office, which is an inferior office, without the same constitutional power that the Governor has, should not be able to advance a position that is inconsistent with what the supreme executive power of the State of Washington has announced.

Accordingly, the Court should hold that, in light of Governor Inslee's declaration that the capital punishment scheme in Washington is disproportionate, Mr. Gregory's sentence should be reduced to life in prison without parole.

3. Mr. Gregory's death sentence violates article I, section 14 of the Washington Constitution.

- a. Article I, section 14 is more protective than the Eighth Amendment.

Mr. Gregory's death sentence is disproportionate not only under the statute, but also under the constitution. Article I, section 14 of the Washington Constitution provides, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Const. art. I, § 14. The framers considered and rejected the language of the Eighth Amendment to the United States Constitution, which only prohibits

punishment that is both “cruel” and “unusual.” U.S. Const. amend. VIII; *State v. Fain*, 94 Wn.2d 387, 393, 617 P.2d 720 (1980) (citing *The Journal of the Washington State Constitutional Convention: 1889* 501-02 (B. Rosenow ed. 1962)).

Because of the differences in text and history, this Court has long held that article I, section 14 provides greater protection than its federal counterpart. *State v. Thorne*, 129 Wn.2d 736, 772, 921 P.2d 514 (1996); *Fain*, 94 Wn.2d at 393.⁶² Accordingly, a *Gunwall*⁶³ analysis is not necessary. *State v. Roberts*, 142 Wn.2d 471, 506 n.11, 14 P.3d 713 (2000). Rather, this Court will “apply established principles of state constitutional jurisprudence.” *Id.*

⁶² The only exception is where a capital defendant wishes to waive general appellate review. *Dodd*, 120 Wn.2d at 21. Article I, section 14 does not bar such a waiver any more than the Eighth Amendment does. *Id.* But in all other contexts, article I, section 14 provides stronger protection against cruel punishment than the federal constitution. *Thorne*, 129 Wn.2d at 772 and n.10.

Below, the State argued that this Court, in *State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007), had rejected the proposition that article I, section 14, was more protective than the Eighth Amendment. CP 566. However, the Court in *Yates* simply cited *Dodd* for the proposition that “[t]he *Gunwall* [footnote omitted] factors do not demand that we interpret Const. art. 1, § 14 more broadly than the Eighth Amendment.” 161 Wn.2d at 792, quoting *Dodd*, 120 Wn.2d at 22. That conclusion was correct in the context of *Dodd*, but this language did not purport to overrule other cases where this Court has held, in other contexts, that article I, section 14, is in fact more protective than the Eighth Amendment.

⁶³ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

In order to pass state constitutional muster, a sentence must be both inherently and comparatively proportional. *See Fain*, 94 Wn.2d at 397. This Court evaluates four factors in determining whether a sentence violates article I, section 14: (1) the nature of the offense, (2) the legislative purpose behind the statute, and whether that purpose can be equally well served by a less severe punishment, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in the same jurisdiction. *Id.* at 397 and 401 n.7; *see Harris v. Kastama*, 98 Wn.2d 765, 770, 657 P.2d 1388 (1983) (“The calculation of the constitutional proportionality of penalties must be based upon a consideration of all the factors enumerated in *Fain*”).

A sentence may be considered proportional under the Eighth Amendment yet violate article I, section 14. *See Fain*, 94 Wn.2d at 391, 402 (acknowledging that defendant’s sentence would not violate the federal constitution but reversing it as cruel punishment under the state constitution). Further, a sentencing statute may be facially constitutional but violate the cruel punishment clause as applied to a particular defendant’s conduct. *Thorne*, 129 Wn.2d at 773 n.11.

- b. An analysis of the *Fain* factors demonstrates that Mr. Gregory's sentence violates article I, section 14.

A review of the *Fain* factors shows that the imposition of a death sentence upon Mr. Gregory constitutes cruel punishment in violation of the state constitution. Accordingly, his sentence should be vacated and his case remanded for entry of a sentence of life without parole.

The first and fourth elements of the *Fain* analysis are similar to the first two factors this Court considers in conducting proportionality review under the statute. Under either framework, this Court considers the nature of the defendant's crime and compares his crime and sentence to those of similarly situated defendants in Washington. *See Fain*, 94 Wn.2d at 397; *Pirtle*, 127 Wn.2d at 685; RCW 10.95.130(2)(b).

Mr. Gregory was convicted of one count of murder in the course or furtherance of rape and robbery, thus rendering him eligible for the death penalty. But as explained extensively in section E(2)(c) above, dozens of brutal mass murderers and serial killers are serving life sentences, and scores of other single-victim murderers committed equally heinous crimes but were sentenced to life in prison. And as explained in section E(2)(d), most defendants who committed murder with two or more aggravating factors received life sentences. Thus, an application of the first and fourth

Fain factors to Mr. Gregory's case weighs against a finding of constitutionality.

The second *Fain* factor is the legislative purpose behind the sentencing statute, and whether that purpose can be equally well served by a less severe punishment. *Fain*, 94 Wn.2d at 401 n.7. This standard should be employed with caution to respect the separation of powers. *Id.* But the factor may not be overlooked entirely, because it is ultimately the Court's duty to determine the constitutionality of a sentence. *Id.* at 402; see *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 62, 65 P.3d 1203 (2003) ("The ultimate power to interpret, construe, and enforce the constitution of this state belongs to the judiciary").

The purposes of capital punishment are retribution and deterrence. *Gregg v. Georgia*, 428 U.S. 153, 183, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976). Unless the imposition of the death penalty on a particular type of defendant measurably contributes to one or both of these goals, it is "nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *Atkins*, 536 U.S. at 319.

Killing Allen Gregory would not further these legislative goals. First, the retributive goal is not served by killing one out of every 100

aggravated murderers.⁶⁴ Furthermore, executing a single-victim defendant with no violent criminal history while sentencing notorious mass murderers to life in prison makes a mockery of the notion that capital punishment is reserved for “the worst of the worst.” *See Cross*, 156 Wn.2d at 652 (C. Johnson, J., dissenting) (“Where the death penalty is not imposed on Gary Ridgeway, Ben Ng, and Kwan Fai Mak, who represent the worst mass murderers in Washington’s history, on what basis do we determine on whom it is imposed?”); *Atkins*, 536 U.S. at 319 (retributive goal not served by executing those with “lesser culpability”). And retribution “most often can contradict the law’s own ends,” particularly in capital cases. *Kennedy*, 128 S.Ct. at 2650. “When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.” *Id.*

As for deterrence, hard data demonstrate that this goal is equally served by life sentences. Indeed, an 18-year study of the issue concluded that for every year between 1990 and 2007, the murder rate in death-

⁶⁴ Information from reported cases and trial judge reports submitted pursuant to RCW 10.95.120 shows that only Cal Brown and Charles Campbell have been involuntarily executed in this state in the last 45 years. No one else has been involuntarily executed even though well over 335 people have been convicted of aggravated murder since 1981.

penalty states was *higher* than that in states without the death penalty.⁶⁵ Even more significantly, the difference in the murder rate between the two groups is now 10 times greater than it was in 1990. *Id.* States that impose capital punishment suffer from a murder rate that is over 40% higher than states without a death penalty. *Id.* And although the annual number of death sentences has declined by 60% nationally since the 1990's, the murder rate has remained close to constant.⁶⁶ A national poll released in 2009 revealed that the nation's police chiefs do not believe the death penalty acts as a deterrent to murder.⁶⁷ Finally, as an expression of the public policy of the State of Washington, Gov. Inslee has officially declared that "there is no credible evidence that the death penalty is a deterrent to murder. That's according to work done by the National Academy of Sciences, among other groups." App. J. at 4.

In sum, the purposes behind the death penalty would be equally well-served by sentencing Allen Gregory to life in prison without the

⁶⁵ <http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates> (last viewed 1/20/14).

⁶⁶ *The Death Penalty in 2008: Year End Report* (Death Penalty Information Center), Dec. 2008 (hereinafter "2008 Report") at 1, 3. Available at <http://www.deathpenaltyinfo.org/2008YearEnd.pdf>.

⁶⁷ *The Death Penalty in 2009: Year End Report* (Death Penalty Information Center), Dec. 2009 (hereinafter "2009 Report") at 3. Available at <http://www.deathpenaltyinfo.org/documents/2009YearEndReport.pdf>.

possibility of parole. The second *Fain* factor, like the first and fourth, thus counsels against Mr. Gregory's execution.

Finally, the third *Fain* factor – other jurisdictions – also cuts in favor of overturning Mr. Gregory's death sentence. In evaluating this factor, this Court looks not to the static state of affairs, but to trends which signal “evolving standards of decency.” *Fain*, 94 Wn.2d at 397. The method of analysis tracks that of the Eighth Amendment, but our state constitution requires a more cutting-edge response to the latest trends, in order to enforce the stronger protection against cruel punishment required in Washington. *See id.* at 399-400 (reviewing same national trends as United States Supreme Court reviewed in *Rummel v. Estelle*⁶⁸, but reaching different result which was more protective of defendant's rights).

In most jurisdictions, Allen Gregory would not be executed. Although a majority of states in this country retain capital punishment statutes, a minority have executed single-victim defendants in the last 10 years.⁶⁹ *See Kennedy*, 128 S.Ct. at 2657 (statistics about number of executions evaluated rather than looking only at legislation); *Roper*, 543 U.S. at 561 (considering it significant that “even in the 20 states without a formal prohibition on executing juveniles, the practice is infrequent);

⁶⁸ 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980).

⁶⁹<http://www.deathpenaltyinfo.org/executions> (last viewed 1/20/14).

Atkins, 536 U.S. at 316 (similarly finding it significant that “even in those States that allow the execution of mentally retarded offenders, the practice is uncommon”). The annual number of new death sentences has plummeted over the last 20 years, from 315 in 1994 to 80 last year.⁷⁰ In 2013, Maryland became the sixth state in six years to abolish the death penalty.⁷¹ See *Roper*, 543 U.S. at 574 (constitutional proportionality analysis must include states that have abandoned the death penalty altogether, not just those that have abandoned it for the defendant’s class of offenders). Eighteen states now prohibit capital punishment.⁷² Other trends also show that Mr. Gregory’s death sentence does not pass state constitutional muster. In 1999, 98 executions occurred nationwide.⁷³ But by 2013, that number had dropped by 60%, to 39. *Id.* Only nine states administered death sentences that year. *Id.*

Consistent with the decrease in both death sentences and executions, public support for the death penalty has declined sharply. See *Atkins*, 536 U.S. at 316 n.21 (polling data considered in cruel punishment analysis). In 1994, a Gallup Poll found that 80% of the American public

⁷⁰*The Death Penalty in 2013: Year End Report* (Death Penalty Information Center), Dec. 2013(hereinafter “2013 Report”) at 1. Available at <http://deathpenaltyinfo.org/documents/YearEnd2013.pdf> (last viewed 1/20/14).

⁷¹ 2013 Report at 1, 5.

⁷² 2013 Report at 3.

⁷³ 2013 Report at 1.

approved of the death penalty.⁷⁴ But by 2010, a poll of 1,500 Americans conducted by Lake Research Partners revealed that 61% of Americans now *oppose* capital punishment and prefer a term of incarceration for murder.⁷⁵ By 2013, public support for the death penalty had reached its lowest level in 40 years.⁷⁶

Opposition to the death penalty among esteemed jurists and criminal justice professionals has also grown. *See Roper*, 543 at 561 (considering views of “respected professional organizations”); *Atkins*, 536 U.S. at 316 n.21 (citing opinions of professionals “with germane expertise”). Shortly before he retired, Justice Stevens concluded that “the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose.” *Baze v. Rees*, 553 U.S. 35, 170 L.Ed.2d 420, 128 S.Ct. 1520, 1551 (2008) (Stevens, J., concurring). And as mentioned above, President Jimmy Carter, who as governor of Georgia signed into law the death penalty statute on which Washington’s is modeled, recently called for a nationwide moratorium on capital punishment because of its arbitrary and discriminatory application. *Jimmy Carter calls for fresh moratorium on death penalty*, *The Guardian*, Nov. 11, 2013.

⁷⁴ 2008 Report at 2.

⁷⁵ <http://www.deathpenaltyinfo.org/pollresults> (last viewed 1/20/14).

⁷⁶ 2013 Report at 1, 3.

On October 23, 2009, the members of the American Law Institute voted “overwhelmingly” to withdraw Section 210.6 of the Model Penal Code, on which Washington’s capital punishment statute is based.⁷⁷ Section 210.6 was drafted in 1962, but after “decades of experience with death-penalty systems modeled on it,” the Institute concluded, “on the whole the section has not withstood the tests of time and experience.”⁷⁸ Indeed, “no state has successfully confined the death penalty to a narrow band of the most aggravated cases.” *Id.* at 30. The Institute removed its provision for capital punishment because “real-world constraints make it impossible for the death penalty to be administered in ways that satisfy norms of fairness and process.” *Id.* at 4.

Finally, an international consensus has developed against the death penalty. *See Roper*, 543 U.S. at 575-76 (looking to views of other nations); *Atkins*, 536 U.S. at 316 n.21 (considering practices within “the world community”). Since 1990, an average of three countries each year have abolished the death penalty, and today over two-thirds of the world’s nations have ended capital punishment in law or practice.⁷⁹ This

⁷⁷ http://www.ali.org/_news/10232009.htm (last viewed 1/20/14).

⁷⁸ American Law Institute, *Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty* (2009) at 4 (hereinafter “ALI Report”).

⁷⁹ <http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty> (last viewed 1/20/14).

overwhelming international trend indicates that executing Mr. Gregory would not comport with the evolving standards of decency that mark the progress of a maturing society. While practices in other countries around the world are not binding on the State of Washington, our constitutional jurisprudence would surely be deficient if it did not take into account the growing international consensus that capital punishment violates accepted norms of human rights. *See also United States v. Burns* [2001] 1 S.C.R. 283, 2001 SCC 7 (banning extradition of suspects to United States where they would face the death penalty); *Soering v United Kingdom* (1989) 11 Eur. Ct. H. R 439 (same).

Ultimately, regardless of the total number of states, countries, judges, doctors, or citizens who have abandoned their support for the death penalty since Mr. Gregory was convicted, it is “the consistency of the *direction* of change” that mandates reversal. *Atkins*, 536 U.S. at 315; *accord Roper*, 543 U.S. at 565-66 (holding juvenile death penalty unconstitutional despite small number of states recently abolishing it). As demonstrated above, the overwhelming trend both nationally and internationally is away from capital punishment. Thus, the third *Fain* factors, like the others, shows that Mr. Gregory’s death sentence violates article I, section 14 of the Washington Constitution. This Court should

reverse and remand for imposition of a sentence of life without the possibility of parole.

4. RCW 10.95 unconstitutionally assigns judges the task of finding the facts necessary to execute someone.

a. Introduction.

In Mr. Gregory's first appeal, he argued that the trial court incorrectly barred him from introducing evidence of or referencing various high profile murder cases "as illustrations of the class of severe cases for which the death penalty should be reserved." *Gregory*, 158 Wn.2d at 855. This Court rejected Mr. Gregory's argument, holding that such evidence was properly excluded because it neither related to the defendant nor the specific crime, and that RCW 10.95 assigns the task of proportionality review to "this court, not the jury." 158 Wn.2d at 858.

In his second trial, Mr. Gregory again moved to introduce evidence of comparable cases to rebut the prosecutor's contention to the jury that the offense in this case "is as bad as it gets," RP (5/14/12) 3030, and that the death penalty was appropriate for the "worst offenders," Ex. 1 (6/13/12) at Slide 23, but the trial court denied the motion, referring to its earlier rulings, and finding that the State's arguments were limited to the evidence in this case. RP (5/14/12) 3056-63; CP 1195-96.

In fact, RCW 10.95.130(2) does assign to this Court, in the first instance, rather than to the jury, the task of determining proportionality. Yet, the statutory assignment of this task to this Court (and to trial courts to make the predicate findings for the information used by this Court), rather than to a jury with a beyond a reasonable doubt standard, violates the Sixth, Eighth, and Fourteenth Amendments and article I, sections 3, 14, 21 and 22.

- b. RCW 10.95 assigns this Court and trial courts the task of finding key operative facts which are necessary for the State to execute someone.

Washington's capital punishment scheme provides for a jury to "decide the matters presented in the special sentencing proceeding," RCW 10.95.050 (2), and for mandatory review by this Court. RCW 10.95.100. The scope of the mandatory review is set out in RCW 10.95.130, which includes review of sufficiency of the evidence, proportionality, whether the sentence was brought about by passion or prejudice, and whether the defendant had an intellectual disability. RCW 10.95.140 then directs that the death sentence be either affirmed or invalidated depending on the "determination" that this Court makes regarding the questions in RCW 10.95.130.

While some of the tasks set out in RCW 10.95.130 and RCW 10.95.140 are typically appellate in nature, such as determining the

sufficiency of evidence, or determining whether the sentence was based on passion or prejudice, RCW 10.95.130(2)(a) & (c), the other tasks do not necessarily involve review of legal errors committed below.⁸⁰ Rather, the tasks entail this Court obtaining evidence (either from its own fact-finding or from the fact-finding of superior court judges), and then making conclusions based upon that evidence.

RCW 10.95.120 requires trial judges from all aggravated murder conviction cases to make a series of factual determinations about the cases and to transmit that information to this Court. RCW 10.95.120. The information in the trial reports may or may not have been offered before the jury, and the parties may have different perspectives on what actually occurred. When the facts that are supposed to go into the trial reports are disputed, the trial judge in practice resolves the disputes. It is not clear from the statute that a party can assign error to the trial reports and it is unclear what role this Court has in reviewing the accuracy of the reports.

⁸⁰ RCW 10.95.130(2)(d) also requires this Court to determine whether the defendant had an intellectual disability. RCW 10.95.030(2) places the burden of proof on this issue on the defense, but then assigns the task of determining whether the defense has met its burden, not to the jury, but to the judge. This process would appear to violate the Sixth Amendment, but since the defense in this case did not attempt to prove Mr. Gregory suffered from an intellectual disability, the issue does not present itself here.

In Mr. Gregory's case itself, when the trial judge was determining what facts to include in the trial report, the State argued that the information need not have been presented to the jury, and could come from any source. RP (11/9/12) 3212 (“[I]t's not that the Court includes information in this report that just was elicited in the penalty phase. It's information that's known about the defendant, the victim and the case itself that should be included.”). Similarly, the State urged the trial court to include information in the trial report that was admitted only in the first set of proceedings of Mr. Gregory's case. RP (11/9/12) 3211-12, 3215-16. Thus, the trial court made a series of factual findings about Mr. Gregory's IQ, about his education, and about news coverage and publicity that were neither brought out before the second sentencing jury nor even, in some instances (such as publicity) contained in the record. TR 312 (CP 1261-75) at 2, 3, 13.

While the defense did not object to the inclusion of such information, the defense did object to the State's proposal that G.H. had been held “hostage in her own home” before she was killed. RP (11/9/12) 3217. The trial judge included this finding (without stating a standard of proof), “based on the original trial,” RP (11/9/12) 3217; TR 312 at 9, although there is no evidence in the trial record to support G.H. being “held hostage.” In fact, the State eliminated an allegation of kidnapping in

the final information. Compare CP 5747-5748 with 6120-21. Thus, the trial court made a factual finding about an uncharged aggravating circumstance, without a jury verdict, which presumably will be utilized by this Court in this case and other future cases, during proportionality review.

The trial court also made factual findings about the demographic make-up of Pierce County, adopting the State's proposed figures, rather than Mr. Gregory's very different statistics. RP (11/9/12) 3219-20; CP 1220, 1272. The trial court's findings about race also ignore the defense challenge to the racial challenge to the venire raised during the first trial. CP 6097-6114.

Similarly, the defense argued that race was in fact a factor in this case, noting that "[y]ou had a black defendant and everybody else was Caucasian." RP (11/9/12) 3219. The trial court, however, found that race was not an "apparent factor as far as being an issue at trial." RP (11/9/12) 3219. *See also* CP 1274 ("There was no evidence presented during this penalty phase that raised issues of race, ethnic origin, or sexual preference.").

The trial court made a factual finding that there was no “*Batson*-based issue raised by either side during the process of seating the jury.”⁸¹ CP 1273. This is incorrect because the defense challenged the State’s disparate treatment of Jurors No. 19 and 20 based upon, what the defense believed, was the race of the juror. RP (4/3/12) 707-08. Although technically not a “*Batson*” issue, it was a challenge to the prosecutor’s jury selection practices based on race and should have been included in the report.

When the parties addressed Section 6(k) of the trial report, the defense urged the court to make findings about proportionality, comparing Mr. Gregory’s case to other murder cases tried by the judge where the State had not sought death. *See* CP 1221; RP (11/9/12) 3222. The State objected, and the trial judge stated that she thought that making such findings would violate the constitutional prohibition on making comments on the evidence. RP (11/9/12) 3223. Despite this fear, the trial judge then adopted the same finding that she made after the 2001 trial, that the jury’s verdict and punishment were appropriate in light of the evidence. TR 216 at10; CP 1274; RP (11/9/12) 3223.

⁸¹ *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Thus, it is apparent that the trial report in this case, as well as others in the statutory pool,⁸² rest upon judicially determined facts, which this Court then uses to conduct its required tasks under RCW 10.95.130 and 10.95.140. Notably, the trial judge never articulated any standard of proof for her findings, nor is such a standard of proof contained within RCW 10.95.120.

This Court uses the trial reports to make its own findings of fact about which cases are similar or dissimilar to the case at bar, again, without articulating a standard of proof. The analysis requires extensive discussions of the facts of dozens of prior cases, cataloguing various salient features, such as IQ, race, youth, the number of aggravating factors, criminal history, and the relative cruelty of the murders. *See, e.g., Davis*, 175 Wn.2d at 347-73.

Ultimately, the Court makes factual findings on key disputed issues. For instance, regarding race, in *Davis*, this Court made factual findings about the likelihood that a white defendant would receive the death penalty as compared to a black defendant, engaging in its own statistical analysis. 175 Wn.2d at 362-64. The Court also makes factual

⁸² Because the trial reports do not require recording the source of the information given or whether the information was contested by the parties, one can only assume that there would have been disputes about the information contained within the other trial reports.

findings about the comparative brutality of the crime,⁸³ and about a particular defendant's criminal history as compared to that of others.⁸⁴

Thus, overall, the tasks that this Court must engage in to answer the questions of RCW 10.95.130 and 10.95.140 involve this Court (or trial courts) finding facts. These facts might be found in the record of the trial court, but it is not always clear where the facts come from, how they were arrived at, and what standard of proof was used. As a federal judge once held, when determining that Washington's proportionality statute was unconstitutionally applied:

[N]o procedure is established for fact finding as part of the sentence review. Some of the majority's statements [in *State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986)] amounts to findings of fact. Findings of fact are not contained within the trial record. Generally, an appellate court is prohibited from engaging in factfinding where the trial court has not done so. [Citation omitted] It is anyone's guess whether the Report of the Trial Judge under RCW 10.95.120 is intended to be findings of fact.

Harris ex rel. Ramseyer v. Blodgett, 853 F. Supp. 1239, 1290 (W.D. Wash. 1994), *aff'd*, 64 F.3d 1432 (9th Cir. 1995).

⁸³ See, e.g., *Elmore*, 139 Wn.2d at 308 ("Elmore brutally raped and tortured his stepdaughter. Comparing the facts of this case with 'similar cases' reveals that Elmore's crime is at least as vicious as other cases in which the death penalty was imposed.") (citing to facts of six cases),

⁸⁴ See, e.g., *Brown*, 132 Wn.2d at 559 ("His criminal history is comparatively more extensive than that of other appellants who received the death penalty.").

- c. Assigning the task of determining the factors required for statutory review to judges violates the Sixth Amendment.

Beginning with *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the Supreme Court has held that the jury trial right protected by the Sixth Amendment and the Fourteenth Amendment's Due Process Clause require a determination by a jury, with a reasonable doubt standard, of facts that increase a sentence over the statutory maximum. In *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Court held that statutory aggravating factors which increase the maximum sentence for murder to death could not be determined by a judge without a jury. Justice Breyer concurred in *Ring*, concluding that in a capital case, jury determination of key facts was required under the Eighth Amendment. 536 U.S. at 614-19 (Breyer, J., concurring).

Under *Apprendi* and *Ring*, it is now apparent that any fact that must be proven by the State to increase the maximum punishment over what is available based on conviction of a statutorily defined charge is an element of a greater crime. If a fact is by law the basis for imposing or increasing punishment - for establishing or increasing the prosecution's entitlement - it is an element. *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring). The U.S. Supreme Court unambiguously adopted this

position in *Alleyne v. United States*, 570 U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), where it held that facts necessary to imposing a statutory minimum must be found by a jury. Such facts must be considered an element of the crime to be proved beyond a reasonable doubt to a jury:

[T]he core crime and the fact triggering the mandatory minimum sentence together *constitute a new, aggravated crime*, each element of which must be submitted to the jury.

Alleyne, 133 S. Ct. at 2161 (emphasis added).⁸⁵

Under *Apprendi*, *Ring*, and *Alleyne*, it is indisputable that the determination of any facts necessary to impose a death sentence must be found by a jury, with a reasonable doubt standard, and that judicial fact-finding violates the right to a jury and due process guaranteed by the Sixth and Fourteenth Amendments (and the Eighth Amendment, according to Justice Breyer). This principle leads to the conclusion that RCW 10.95 is unconstitutional because it removes essential fact-finding from the jury and gives that task solely to judges, who are not required to use a reasonable doubt standard in making their findings.

Under *Alleyne*, RCW 10.95 therefore defines two separate crimes: aggravated murder (punishable by life without the possibility of parole)

⁸⁵ Prior decisions of this Court to the contrary, such as *State v. Thomas*, 150 Wn.2d 821, 848, 83 P.3d 970 (2004), need to be re-assessed under *Alleyne*. See *infra* at Section E(5)(c).

and capital murder (punishable by execution). For a person to be convicted of the higher crime (capital murder) certain facts must be determined to exist, including the determinations that the death sentence is not disproportionate to the sentences imposed in other similar cases. This determination is no different in effect from the determinations that RCW 10.95 assigns to the jury – i.e. that certain aggravating factors have been proven beyond a reasonable doubt and that “there are not sufficient mitigating circumstances to merit leniency.” RCW 10.95.030.

RCW 10.95 assigns the task of determining proportionality to this Court, rather than to the jury. The determination of proportionality is based upon a series of findings of fact drawn, not from what was presented to the jury, but on evidence presented either to this Court or to judges who are tasked with writing the trial reports. Moreover, this fact-finding process is not explicitly based on a reasonable doubt standard of proof.

This Court’s review is not traditional appellate review. The task at hand does not involve reviewing a fixed record for error and determining sufficiency of the evidence. Rather, the statute assigns to judicial officers the role of making factual determinations, a role, under *Apprendi*, *Ring*, and *Alleyne*, that properly belongs to the jury with a reasonable doubt standard.

To be sure, a state need not have any proportionality review in its statute. *Pulley v. Harris*, 465 U.S. 37, 48-50, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). But once a state adopts a statutory scheme establishing proportionality review as an essential step in the process of executing a person, it is the jury that must determine, in the first instance, whether or not a sentence is proportionate. While judges can still have a role to insure that the jury's verdict is supported by the evidence and can still have appellate jurisdiction over capital cases, the Sixth, Eighth and Fourteenth Amendments prohibit judges from making the essential factual determinations, in the first instance, that are necessary to elevate the crime to capital murder.

In light of the constitutional prohibition on judicial fact-finding of essential elements of a crime, the remedy is to give back to the jury what this Court has claimed previously as exclusively being in the domain of the judiciary – giving the jury the role, in the first instance, of determining proportionality, with a reasonable doubt standard.

In voir dire in this case, various jurors consistently expressed a desire to reserve the death penalty for “the worst of the worst,” such as serial murderers and mass murderers. *See, e.g.*, RP (4/16/12) 1878. If jurors knew that mass murderers like Vincente Ruiz (Ex. 23; *State v. Ruiz*, 176 Wn. App. 623, 309 P.3d 700 (2013)), or serial killers like George

Russell (TR 120; *State v. Russell*, 125 Wn.2d 24, 30-36, 882 P.2d 747 (1994)), received life sentences, many jurors would likely not vote to execute a person, with no record of violence, for the murder of a single victim.

Understandably, the State would not want the jurors to know of the complete arbitrariness of the capital punishment regimen in the United States. However, if proportionality needs to be determined before the State executes a person, the jury must have the opportunity to decide this issue first, with a reasonable doubt standard, with this Court having appellate review powers. Accordingly, this Court should find the entire death penalty statute unconstitutional under the Sixth, Eighth and Fourteenth Amendments and article I, sections 3, 14, 21 and 22. The Court should vacate the death sentence and remand for imposition of a life without parole sentence.

5. The Fourth Amended Information lacks essential elements of the crime of capital first degree aggravated murder.

In the Fourth Amended Information, the State failed to allege key elements of capital murder – the absence of sufficient mitigating circumstances to merit leniency and the proportionality of a death sentence. CP 6120-21. Yet, these elements are necessary to raise the maximum sentence from life without parole to death. Because of

established case law in Washington that an information can be challenged for the first time on appeal, the remedy is to vacate the sentence and conviction and remand for dismissal without prejudice to the State's ability to re-file a murder charge.⁸⁶

a. Relevant Facts.

By a Fourth Amended Information, filed on February 12, 2001, the State charged Mr. Gregory with the crime of “murder in the first degree with aggravating circumstances (also known as aggravated murder in the first degree).” CP 6120-21; App. B. The information charged that Mr. Gregory killed G.H. with premeditated intent and that he was armed with a deadly weapon, thereby subjecting him to an increased sentence under RCW 9.94A.310 and .370. *Id.* The information further alleged an aggravating circumstance, that the murder was committed in the course of a rape and/or a robbery. *Id.* The deadly weapon allegation was the only mention of increased penalty in the charging document.

⁸⁶ This Court has long held that defective charging documents can be challenged for the first time on appeal. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). While this issue was not raised in the first appeal, the issue is properly raised now because what is on appeal is the 2012 conviction for capital murder. *State v. Recuenco*, 163 Wn.2d 428, 436, 180 P.3d 1276 (2008) (“*Recuenco III*”) (error occurred not when information filed, but at point when defendant was sentenced for firearm enhancement that was not charged.).

- b. All essential elements of a crime must be contained within the charging document.

Both the Washington and United States Constitutions guarantee a defendant "the right . . . to demand the nature and cause of the accusation against him," Const. art. I, § 22, or to "be informed of the nature and the cause of the accusation." U.S. Const. amend. VI. Due process of law also requires notice of the charge. U.S. Const. amend. XIV; Const. art. I, § 3. These requirements take on additional importance in a capital case because of the Eighth Amendment's requirements of heightened reliability in the selection of death cases. *See Lankford v. Idaho*, 500 U.S. 110, 124-27, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991). Because of this constitutional right to notice of the charge, the charging document must contain all essential elements of the charge, both statutory and non-statutory. *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010); *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). "[E]ssential elements include only those facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime." *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (internal quotations omitted). Additionally, alleging the essential elements of the charge requires more than just citing to the statute involved, but, instead, requires

listing the particular facts supporting the elements. *Zillyette*, 178 Wn.2d at 162.

Failure to allege each element means that the charging document “is insufficient to charge a crime and so must be dismissed.” *Nonog*, 169 Wn.2d at 226. Where a charging document is challenged for the first time on appeal or after verdict, the “document is liberally construed in favor of validity.” *State v. Simon*, 120 Wn.2d 196, 198, 840 P.2d 172 (1992). In such cases, a two-prong test is used: (1) does the charging document contain the crime's essential elements; and (2) if so, was there nevertheless actual prejudice caused by lack of notice. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). The second element, prejudice, is not reached if the face of the charging document itself lacks an essential element. *Auburn v. Brooke*, 119 Wn.2d 623, 636, 836 P.2d 212 (1992).

- c. After *Alleyne*, it is apparent that capital murder is a separate crime from life-without-parole aggravated murder.

This Court has previously held that RCW 10.95 does not create a crime separate from premeditated first degree murder, RCW 9A.32.030, but merely provides for a different sentence. See *State v. Thomas*, 150 Wn.2d 821, 848, 83 P.3d 970 (2004); *State v. Kincaid*, 103 Wn.2d 304, 312, 692 P.2d 823 (1985). Following these cases, in *State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007), the Court rejected an argument that an

information alleging aggravated murder was defective because it excluded the absence of mitigating circumstances. *Id.* at 759.⁸⁷

These cases require reconsideration after the United States Supreme Court decision in *Alleyne*. In that case, the Supreme Court overruled its earlier decision in *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), which had upheld judicial fact-finding that increases the mandatory minimum sentence for a crime. In *Harris*, the Court had made the distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. In *Alleyne*, the Court held that *Harris* was inconsistent with the Sixth Amendment principles announced in *Apprendi*, and held that any facts necessary to imposing a statutory minimum must be found by a jury. *Alleyne*, 133 S. Ct. at 2161-64.

The *Alleyne* holding was predicated on the conclusion that if a sentencing scheme mandated a particular sentence based upon proof of certain facts, the statutory scheme at issue actually created “a new,

⁸⁷ See also *State v. Siers*, 174 Wn.2d 269, 274 P.3d 358 (2012), (aggravating circumstances that permit an exceptional sentence above the standard range but not beyond the statutory maximum are not essential elements that need to be pled in the information).

aggravated crime,” the elements of which needed to be proved beyond a reasonable doubt to a jury. *Alleyne*, 133 S. Ct. at 2161.⁸⁸

Applying *Alleyne*'s holding to Washington's murder statutes, it is apparent that Washington has at least four types of murder:

Murder in the second degree, RCW 9A.32.050, which includes intentional murder, with a penalty of 123 months to life, depending on the defendant's criminal history.

Murder in the first degree, RCW 9A.32.030, which includes premeditated intentional murder, with a penalty of 240 months to life, depending on the criminal history of the defendant.

Aggravated murder in the first degree, RCW 10.95.020, which is first degree premeditated murder, with the presence of one of 14 aggravating circumstances, with a penalty of life without possibility of release (RCW 10.95.030(1)).

Capital murder, RCW 10.95.060(4), which is aggravated murder in the first degree and the State proves beyond a reasonable doubt that "there are not sufficient mitigating circumstances to merit leniency" and the Supreme Court finds the sentence not to be excessive or disproportionate. RCW 10.95.130(2)(b). The sentence for capital murder is death. RCW 10.95.030(2).

⁸⁸ See also *Alleyne*, 133 S. Ct. at 2160 ("any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime.") (internal quotations omitted); *Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or *Mary Jane* - must be found by the jury beyond a reasonable doubt.").

Insufficiency of mitigating circumstances and proportionality are facts which raise both the minimum and maximum sentence for aggravated murder from life without release to death. Insufficiency of mitigating circumstances is *the* factor that the prosecutor must determine before filing a death notice, RCW 10.95.040(1),⁸⁹ and it is the only question that the jury (or judge) must answer before imposing a death sentence. RCW 10.95.060(4). And, as noted in the prior argument section, the State can only execute someone if this Court finds that the sentence is not excessive or disproportionate. RCW 10.95.130(2)(b). Thus, but for findings of insufficient mitigation or proportionality, a defendant's sentence upon conviction of the statutory offense is life without parole. Therefore, under *Alleyne*, the core crime of aggravated murder and the facts triggering the mandatory minimum sentence, insufficiency of mitigating circumstances and proportionality, together constitute a new, aggravated crime, namely capital murder.

⁸⁹ In *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984), the Court rejected an equal protection challenge to RCW 10.95 by holding:

There is no equal protection violation here, because a sentence of death requires consideration of an additional factor beyond that for a sentence for life imprisonment -- namely, an absence of mitigating circumstances.

103 Wn.2d at 25.

- d. Because the absence of mitigating circumstances and proportionality are elements of capital murder, they must be charged in the information.

Once it is apparent that the crime of capital murder is a separate offense, with additional elements, then the conclusion is clear – if the State wishes to execute someone, it must include in the charging document the elements of the lack of mitigating circumstances and proportionality. Contrary language in *Yates*, *Kincaid*, and *Siers* cannot be reconciled with *Alleyne*'s mandate. Lack of mitigating circumstances or proportionality can no longer be relegated to the realm of mere sentence enhancers. Instead, lack of mitigating circumstance and proportionality are the key essential elements that distinguish aggravated murder (with life without parole as a mandatory sentence) and capital murder (with death as a mandatory sentence).

In *Alleyne*, the Supreme Court cited with approval historic precedent and treatises going back centuries which required the inclusion in the charging document of all facts that led to the enhancement of the punishment. 133 S. Ct. at 2158-61. This practice is in line with this Court's precedent as well. See *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) ("*Recuenco III*") ("Sentencing enhancements, such as a deadly weapon allegation, must be included in the information.").

Here, there is no question but that the charging document – the Fourth Amended Information – on its face does not contain any allegation to support a charge of capital murder. App. B. The charging document’s only reference to an increased penalty, as noted, involved a deadly weapon allegation. Even under the liberal standards of construction used for challenges to charging documents for the first time on appeal, the Fourth Amended Information is defective. There is no mention of the death penalty and certainly no mention of the lack of mitigating circumstances or proportionality contained within the Fourth Amended Information.

Under the Sixth, Eighth, and Fourteenth Amendments and article I, sections 3, 14 and 22, the information is defective. The remedy is to vacate the conviction and remand for dismissal without prejudice, not a remand for conviction to a lesser included offense. *Vangerpen*, 125 Wn.2d at 792-95.

- e. The notice of intent to seek death does not cure the defective information.

The State will likely argue that the notice of its intent to “request a special sentencing proceeding,” CP 5744-46 (App. C), could cure the defective information. However, it is apparent that its “notice” is only that

– it is a notice and nothing more. It does not purport to be a charging document.⁹⁰

This “notice” never alleged that a death sentence would not be excessive or disproportionate, nor did it allege that “there are not sufficient mitigating circumstances to merit leniency.” Rather, the notice simply stated that the prosecutor “had reason to believe” that there were not sufficient mitigating circumstances, which may be the procedural predicate for the prosecutor to file a death notice, but is not the same as the element of the offense in RCW 10.95.060(4) – that beyond a reasonable doubt there are not sufficient mitigating circumstances. That the notice simply implied the prosecutor’s position, rather than acting as a charging document, is apparent from the last line of the notice, which stated:

To the date of this notice, such mitigating circumstances as have been submitted to the prosecuting attorney have been deemed by him not sufficient to merit leniency.

CP 5745-46. The clear implication of this sentence is that the prosecutor was still open to considering such mitigating circumstances, not that Mr. Gregory had been charged with committing capital murder.

⁹⁰ In fact, the notice here, while listing the aggravating circumstances charged in April 1999, mistakenly stated that the prosecutor “intends to prove the presence of such circumstances in a special sentencing proceeding pursuant to statute.” CP 5745. Of course, in Washington’s system, aggravating circumstances are proven at the “guilt” phase of a capital case, not the penalty phase. *See Kincaid*, 103 Wn.2d at 310.

In any case, this Court has always made clear that a defective charging document, that fails to include essential elements of the crime, cannot be cured by reference to other documents in the file that may refer to those elements. Thus, jury instructions which set out the essential elements cannot cure the absence of those elements in the information. *Vangerpen*, 125 Wn.2d at 788. Here, the notice of intent to seek the death penalty does not cure the constitutional deficiencies of the Fourth Amended Information. The remedy is to reverse the conviction without prejudice.

6. Because the State never filed and served a notice of intent to seek the death penalty within 30 days of arraignment Mr. Gregory on the Fourth Amended Information, there was no authority to impose a death sentence.

a. Relevant facts.

The State originally charged Mr. Gregory with one count of aggravated murder, with the alleged aggravating circumstance being that the murder was committed during the course or furtherance of a rape. CP 5732-33. Mr. Gregory was arraigned on this charge on the same date. RP (11/19/98) 2-3. The trial court entered three agreed orders extending the time by which the State could file and serve a “Notice to Seek Death Penalty,” ultimately extending the time until April 23, 1999. CP 5738-41.

On April 22, 1999, the State filed a Notice of Special Sentencing Proceeding to Determine Imposition of Death Penalty. CP 5744-46 (App. C). The notice was personally signed by the elected prosecutor, John W. Ladenburg. The notice recited, *inter alia*, three specific aggravating circumstances: that the murder was committed in the course of, in furtherance of or in immediate flight from the crimes of rape in the first or second degree, robbery in the first or second degree and kidnapping in the first degree. *Id.* At the same time, the State filed an amended information, again alleging one count of aggravated first degree murder, but amending the alleged aggravating crimes to those mentioned in the death penalty notice (rape, robbery and kidnapping). CP 5747-48. The notice of intent was personally served on Mr. Gregory and his counsel on the same date that it was filed. CP 5749-50.

Mr. Gregory was arraigned on the amended information on May 20, 1999. RP (5/20/99) 50-52. The State explained that the amended information “added some aggravating factors,” RP (5/20/99) 50, then explained as “the robbery and the kidnapping.” RP (5/20/99) 51. Mr. Gregory entered a plea of not guilty to the amended charge, with the judge specifically noting the new aggravating circumstances. RP (5/20/99) 52.

In September 2000 and January 2001, the State filed a Second Amended Information and a corrected Second Amended Information,

which made some minor technical changes to the wording of the charges, changing the cause number, and changing the name of the elected prosecutor. CP 5931-32, 6095-96; RP (9/22/00) 328-30; RP (1/23/01) 2406-07; RP (1/29/01) 2847-49.

On February 12, 2001, the State again filed an amended information, filing what was first called the “Third Amended Information,” with “Third” crossed out in the heading (but not in the footer), and “4th” written in by hand. This new information deleted the allegation that the murder was committed in the course of or in furtherance of a kidnapping. CP 6120-21 (App. B). The State formally moved to amend in court and Mr. Gregory was arraigned on the amended information on February 12, 2001. RP (2/12/01) 4010-12.⁹¹

The State never filed and served a new notice of intent to seek the death penalty after Mr. Gregory’s arraignment on the Fourth Amended Information. The only allegation of an increased sentence contained within the Fourth Amended Information was an allegation that Mr. Gregory was armed with a deadly weapon at the time of the crime, “to wit: a knife, thereby invoking the provisions of RCW 9.94A.310 and adding

⁹¹ For purposes of clarity, the information filed on February 12, 2001, will be called the “Fourth Amended Information.”

additional time to the presumptive sentence as provided in RCW 9.94A.370.” App. B.

b. Argument.

RCW 10.95 unequivocally provides that the prosecutor cannot seek the death penalty unless certain conditions are satisfied. First, the prosecutor must file the charge of aggravated first degree murder under RCW 10.95.020. Second, the prosecutor must determine that there is reason to believe there are not sufficient mitigating circumstances to merit leniency under RCW 10.95.040(1). Third, the prosecutor must:

file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed

RCW 10.95.040(1) (emphasis added).

RCW 10.95.040(2) then requires that before the State can seek the death penalty, the State must file and serve a notice of intent to seek the death penalty within 30 days of arraignment:

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. . . .

RCW 10.95.040(2) (emphasis added).

The failure to file and serve the notice of a special sentencing proceeding bars the State from seeking the death penalty. RCW 10.95.040(3) explicitly provides:

If a notice of special sentencing proceeding *is not filed and served* as provided in this section, the prosecuting attorney may not request the death penalty.

(Emphasis added). *See also* RCW 10.95.050(1) (“a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by RCW 10.95.040.”).

Because of the differences between a death sentence and other sentences, this Court requires strict compliance with these statutory requirements. *See State v. Luvene*, 127 Wn.2d 690, 719 n. 8, 903 P.2d 960 (1995) (“The determination of whether a defendant will live or die must be made in a particularly careful and reliable manner and in accordance with the procedures established by the Legislature.”). This statute is quasi-judicial in nature. Without compliance, there is no authority for the State to seek a death sentence. “[F]iling and service of notice is mandatory – no notice, no death penalty.” *State v. Dearbone*, 125 Wn.2d 173, 177, 883 P.2d 303 (1994).

RCW 10.95.040 is more than just a “knowledge” statute. The statute does not require simply that the defendant “knows” that the State wishes to seek the death penalty. Rather, the statute requires filing and

service of a pleading. Thus, in *Dearbone*, the deputy prosecutor assigned to the case told defense counsel that the elected prosecutor was seeking the death penalty, even telling counsel of this fact on the way to the clerk's office to file the death notice. However, the deputy prosecutor, not being familiar with the service requirements of the statute, failed to give defense counsel a copy of the notice that he was about to file. 125 Wn.2d at 176. Not only was the prosecutor's ignorance of the statutory requirements not good cause to reopen the time for service, but this Court unanimously held that the defendant's actual notice of the intent to seek death could not excuse lack of compliance with the statute. *Id.* at 181-83.

The filing and service requirements of RCW 10.95.040 are mandatory and cannot be waived by the failure to raise an objection in the trial court. In *Luvenc*, the failure to file and serve the notice of intent within the required time was not only raised for the first time on appeal, but the Court vacated the death sentence even though defense counsel below signed off on an agreed order extending the time to file a death notice, which was then filed "nunc pro tunc" after the deadline had passed and where there were subsequent agreed orders purporting to extend the time to file the death notice. 127 Wn.2d at 713-15.

The issue could be raised for the first time on appeal because the filing and service requirement of RCW 10.95.040 is what gives the State

the very authority to seek death – it is a quasi-jurisdictional requirement, which can be raised under RAP 2.5(a)(1). Without filing and service within the required time, the imposition of the death sentence is illegal, and, like all sentencing errors, can be raised for the first time on appeal, *see State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) or even on collateral attack. *See In re Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

Cases subsequent to *Dearbone* and *Luvenc* have relaxed the method of service required under RCW 10.95.040. Thus, this Court has not required “in person” service in the manner used in some civil contexts, and has allowed the notice to be served through informal interoffice mail or by leaving a copy at the office of defense counsel. *See State v. Clark*, 129 Wn.2d 805, 920 P.2d 187 (1996); *State v. Cronin*, 130 Wn.2d 392, 923 P.2d 694 (1996). However, these subsequent cases have never eliminated the essential requirement for the State to seek to execute its opponent – filing and service of the notice within the required time period.

Here, the State did initially file and serve notice of intent to seek the death penalty in a timely fashion with regard to the Amended Information, filed on April 22, 1999. CP 5744-46 (App. C), 5749-50. The notice very specifically set out the crimes (rape in the first or second degree, robbery in the first or second degree and kidnapping in the first

degree) that formed the basis of the aggravated murder charge, adding two additional alleged types of crimes (robbery and kidnapping) that were not contained in the original information. The notice made it clear that the prosecutor's decision to seek death was based on the nature and scope of the charges against Mr. Gregory, which now included an allegation that he committed the murder in the course of a kidnapping in addition to rape and robbery.

However, subsequent to the filing of the amended information and death notice in April 1999, the State filed a series of amended informations, ultimately trying Mr. Gregory on a Fourth Amended Information, which removed the allegation that the murder was committed in the course of, furtherance of, or flight from the crime of kidnapping. CP 6120-21. Once the State filed this Fourth Amended Information, the State failed to file and serve a new notice of intent to seek death within 30 days of arraignment (i.e. within 30 days of February 12, 2001).⁹² Thus, when March 14, 2001, came and went without such a notice being filed and served, there was no authority, ever, to seek the death penalty against Mr. Gregory, either in 2001 or, more importantly, in 2012, when the current special sentencing proceeding took place.

⁹² As noted, the only allegation of an increased penalty contained in the Fourth Amended Information was that Mr. Gregory was armed with a deadly weapon. App. B.

It is an accepted rule of pleading that "[w]hen a party files an amended pleading that abandons a former cause of action the original pleading is considered abandoned and ceases to perform any function." *Fluke Capital & Management v. Richmond*, 106 Wn.2d 614, 619 n.4, 724 P.2d 356 (1986). The later complaint does not "relate back" to the original complaint "but, instead, rests the action upon the pleadings as amended." *Ennis v. Ring*, 49 Wn.2d 284, 288, 300 P.2d 773 (1956). The later complaint "supersedes" the earlier one, which has no legal effect, unless the later complaint reserves causes of action from the original one. *See High v. High*, 41 Wn.2d 811, 816-17, 252 P.2d 272 (1953); *Herr v. Herr*, 35 Wn.2d 164, 166-69, 211 P.2d 710 (1949).

This rule has added significance in a capital case because of constitutional concerns about notice under the Sixth, Eighth and Fourteenth Amendments and article I, sections 3, 14 and 22. *See* Section E(5)(b), *supra*. Accordingly, where amended criminal informations fail to include crimes contained in earlier charging documents, a defendant cannot be convicted of the earlier charged offenses, those offenses having been abandoned and superseded. *See State v. Kinard*, 21 Wn. App. 587, 589, 585 P.2d 836 (1978) ("We hold, and it has been uniformly held, that the filing of an amended information constitutes an abandonment of the first information."); *State v. Navone*, 180 Wash. 121, 123-24, 39 P.2d 384

(1934) ("The second information was filed in the same proceeding as the first, and manifestly superseded the same. If the state should attempt to bring appellant to trial upon the first information, an appropriate remedy would doubtless be available to him.").

Because of this basic principle that an amended information supersedes earlier charging documents, the State must file and serve a new death penalty notice once it files an amended information. In fact, the State has, in other cases, filed and served a new notice of intent to seek death along with the amended information. *See, e.g., State v. Brett*, 126 Wn.2d 136, 151, 892 P.2d 29 (1995) ("A second notice of intent to seek the death penalty was filed with the second amended information.").

To be sure, in a case where the amended information increased the number of aggravating circumstances, this Court once held that the failure of the State to file and serve a new notice of intent to seek death was not fatal to the State's efforts to execute the defendant. *State v. Woods*, 143 Wn.2d 561, 589, 23 P.3d 1046 (2001) ("Woods was on notice from that date forward that the State would seek imposition of the death penalty if it obtained a conviction for aggravated first degree murder. We do not believe that the filing of an amended information diminished or called into question that original decision.").

However, this holding was qualified by the fact that the “amended information *added an additional aggravating factor* of ‘multiple victims’ and incorporated an additional allegation that Woods eluded the police as part of the ‘total circumstances and offenses in this case.’” 143 Wn.2d at 589-90 (emphasis added). In contrast, the Court stated that its holding would not bar future challenges where the amended information *diminished* the aggravating circumstances:

We can imagine a case where the filing of an amended information might cast doubt on the prosecutor's original decision to seek the death penalty. For example, if an amended information eliminated an aggravating factor that was set forth in the original information, it may be reasonable to conclude that the prosecutor's original decision is in question and a new notice need be filed.

143 Wn.2d at 590 n. 9.

This is exactly the situation in this case. Here, the Fourth Amended Information did not add an aggravating circumstance, but eliminated the allegation in prior charging documents that the murder was in the course of, in furtherance of or in immediate flight from a kidnapping. This is a significant change in the nature of the allegations and calls into question the elected prosecutor’s original death notice – a notice that was explicitly based on the kidnapping allegation. App. C. Because the Fourth Amended Information superseded the prior versions, and “downgraded” the seriousness of the offense (by eliminating a key

allegation), if the State wanted to execute Mr. Gregory, the elected prosecutor needed to file and serve a new notice of intent to seek death within 30 days of the arraignment of Mr. Gregory on the new information.

The elected prosecutor's original decision to seek the death penalty was evidently based on his careful assessment of the facts of the case, and was based upon his conclusion, as noted in the 1999 amended information and the 1999 death notice, that Mr. Gregory had committed the murder, not just in the course of a rape or robbery, but also in the course of a kidnapping. While at a later time, the State came to the conclusion that a kidnapping had not taken place, the elected prosecutor's original decision was clearly based on his belief, in 1999, that there had been a kidnapping.

This Court has recognized that an elected prosecutor's decision to seek death is constitutional because of the requirement that there be individualized weighing of the "unique circumstances of every case." *State v. McEnroe*, 179 Wn.2d 32, 44, 309 P.3d 428 (2013). This careful weighing not only can take into account the strength of the evidence, *id.* at 43, but also the number and nature of the alleged aggravating circumstances. *See Davis*, 175 Wn.2d at 351-52 (death sentence appropriate where jury found three aggravating circumstances – that murder committed in course of robbery, rape and burglary).

Given this careful balancing, it is reasonable to assume that the elected prosecutor's initial decision to seek death was based on the careful conclusion that *three* aggravating factors were present – that, in his opinion, death was required because there was some additional harm, some additional moral culpability, because of the presence of more aggravating factors, including an alleged kidnapping.

Yet, despite the earlier charge of a kidnapping, the State abandoned this allegation as the case came to trial, and specifically and intentionally amended the information, eliminating this alleged aggravator. But, with this decision to downgrade the charge, and remove a significant aggravating factor, the statute requires that the decision to seek death be carefully re-evaluated, and for the elected prosecutor to determine anew if, in light of the less serious charges, execution was still appropriate.

Thus, if RCW 10.95.040 has withstood constitutional scrutiny and conforms with equal protection under the Fourteenth Amendment and article I, section 12, it is because the statute is based on the careful discretion that is part of the prosecutor's charging decision. Where the prosecutor changes the charge, and downgrades the allegation, RCW 10.95.040 requires that the elected prosecutor file and serve a new death notice within 30 days of arraignment on the new charge. It cannot be

assumed that, given fewer aggravating factors, the elected prosecutor's initial decision to seek death, based on an incorrect understanding of the nature of the crime (i.e. that it involved kidnapping), would still be viable. Without the filing and service of a new notice within 30 days of arraignment, geared to the Fourth Amended Information, there is no lawful authority for the State to seek death.

The issue is not whether Mr. Gregory knew that the State wanted to try to execute him. As in *Dearbone* and *Luvene* there was no dispute about this fact, as Mr. Gregory now has been forced to endure sitting through not just one, but two, proceedings addressing whether the State of Washington could either hang him or kill him through lethal injection. Rather, the issue is whether the State strictly complied with the procedural requirements in RCW 10.95.040 and RCW 10.95.050, and thus has satisfied the minimal procedural requirements for there to have been lawful authority for the trial court to impose, in 2012, a sentence of death.

Accordingly, because the State did not file and serve a new notice of intent to seek death within 30 days of Mr. Gregory's arraignment on the Fourth Amended Information – i.e. by March 14, 2001 – there was no authority to impose a death sentence on Mr. Gregory in 2012. As in *Luvene*, this issue can be raised for the first time on appeal, and, as in

Luvene, the remedy is to vacate the death sentence and remand for imposition of a life without parole sentence.

7. The trial court should have suppressed the blood samples, the DNA evidence, and the knife, and should have granted Mr. Gregory’s motion for a new trial.

a. Relevant facts.

In the two years after G.H. was killed, the Tacoma Police Department (“TPD”) treated Mr. Gregory as a “person of interest” in the homicide investigation. RP (4/25/12) 2499. The investigating detectives wanted to obtain a biological sample from him for DNA comparison purposes, but a deputy prosecutor (Lilah Amos) told them that there was not probable cause to support a warrant for a blood draw. RP (12/15/00) 621-24.

In August 1998, long-time police informant Robin Sehmel (CP 492-505) claimed that Mr. Gregory gave her a ride in his car, took her to a school parking lot, and, in the front seat of his car repeatedly raped her at knife point, ejaculating several times. *Gregory*, 158 Wn.2d at 778-80, 824. At the rape trial, Mr. Gregory testified that Ms. Sehmel was a prostitute and that the sex was consensual. *Id.* at 780. After this Court reversed the rape convictions, Ms. Sehmel admitted that she lied, that she had actually been acting as a prostitute on the night in question, and that

she perjured herself at the rape trial. The rape charges were ultimately dismissed with prejudice. CP 272, 276, 289, 518-20, 521-22.

On August 25, 1998, based upon Ms. Sehmel's lies, Tacoma Police Department ("TPD") Detective Chris Pollard obtained a warrant to search Mr. Gregory's car, and a knife (Ex. 27) was seized as a result. CP 486-88 (App. I); RP (3/13/01) 6376-77. Although Det. Pollard submitted the warrant to a judge for signature, he failed to sign the supporting application under penalty of perjury, and the application's signature line is blank. CP 487. The State introduced the knife, seized from Mr. Gregory's car pursuant to this warrant, into evidence at the murder trial. RP (3/13/01) 6376-77. At the second penalty trial, the State again introduced the knife as an exhibit (Ex. 27), RP (4/24/12) 2355, and had it displayed to the jury, RP (4/25/12) 2500, offering testimony that this knife was consistent with G.H.'s injuries. RP (4/26/12) 2582-83 .

On September 8, 1998, Mr. Gregory's first attorney in the rape case, Richard Whitehead, signed an order that compelled Mr. Gregory to give a blood sample. CP 410-11 (App. D). Mr. Whitehead's firm ("Department of Assigned Counsel") also represented Ms. Sehmel. CP 5884-87. The motion in support of the order was based on CrR 4.7(b)(2)(vi). The body of the motion did not contain any factual

recitations as a basis for the motion, simply referring in conclusory terms to the declaration of probable cause in the case. CP 410-11.

The final order, signed by the Hon. Thomas Larkin, required Mr. Gregory to “provide blood samples as requested, at the direction of Detective Chris Pollard, or his designee, by a person qualified to take such samples and at a medical facility if necessary.” CP 411. Mr. Whitehead signed the order under text that stated “Approved as to Form.” CP 411. Mr. Gregory later alleged that Mr. Whitehead did not discuss with him what was taking place, that he only met Mr. Whitehead for the first time in court on September 8, 1998, that they did not discuss the facts of the case, that Mr. Whitehead did not mention the discovery to him, that he did not know he could challenge the blood draw and that he did not know about the order until the detectives came to take him to the hospital. CP 6000-01.

Some of the initial DNA work was done by the subsequently disgraced WSP forensic scientist John Brown, who later resigned when he was about to be fired for his dishonesty and falsification of records in another case. RP (3/5/01) 5652-79; RP (3/6/01) 5730-5853. TPD Det. David DeVault, who was leading the investigation into the G.H. murder, became concerned about Mr. Brown’s work and discussed with DPA

Lilah Amos the need for another blood draw. CP6064-94 (DeVault interview at p. 23).⁹³

Around the same time that the police and prosecutors were concerned about Mr. Brown's credibility, in December 1999, Mr. Gregory's new attorney in the rape case filed a motion to suppress the DNA results flowing from the September 8, 1998, blood draw and to suppress any evidence discovered pursuant to the August 25, 1998, warrant. CP 412-35.⁹⁴ The motion was based on:

(1) Mr. Whitehead's ineffectiveness and lack of authority to agree to a blood draw without Mr. Gregory's waiver;

(2) The lack of information in the motion to support a blood draw and the failure of the declaration of probable cause to contain any reference to the presence of any semen or other biological evidence on Ms. Sehmel's body to justify testing;

(3) The misrepresentation of material facts in the declaration of probable cause, which included the failure to mention the lack of scratches on Mr. Gregory's back (as Ms. Sehmel claimed there would be), inconsistencies about Mr. Gregory's appearance, and the failure to include information that Mr. Gregory's alibi had been confirmed;⁹⁵

⁹³ Det. DeVault recounted the concerns about Mr. Brown's work in a taped defense interview which the trial court considered in lieu of live testimony. RP (3/26/01) 6872-73.

⁹⁴ Because of the perception of an overlap of issues, a series of documents from the rape case were filed in murder case.

⁹⁵ As this Court noted in 2006, Mr. Gregory's initially advanced an alibi to the rape charges, although he later changed his defense to consent.

(4) Insufficient information of Ms. Sehmel's veracity in the declaration.

CP 412-35. The motion also noted the same misrepresentations in the August 1998 search warrant application, and also pointed out that Det. Pollard had failed to sign the application itself under penalty of perjury. CP 412-35.

Because of the issues raised by Mr. Gregory in his suppression motion, and because of concerns about the scandals surrounding forensic scientist John Brown, RP (12/15/00) 634-37, the State applied for a new court order, in the rape case, under CrR 4.7, to draw Mr. Gregory's blood a second time. CP 436-42 (App. E). Purportedly, in this new application, the State decided only to reveal the "facts" that it claimed it possessed in September 1998. RP (12/15/00) 638-40. The State simply repeated Ms. Sehmel's allegations of rape. The State did not disclose to the judge the true reasons for the new application (i.e. claims that Mr. Whitehead was ineffective, concerns about John Brown's credibility, and the fact the State wanted to use the blood samples as evidence in a capital murder case). The State also failed to include in the application for the second blood

158 Wn.2d at 779. Ms. Sehmel ultimately agreed with much of Mr. Gregory's trial testimony.

draw the following information in its possession in September 1998 or in the possession of cooperating law enforcement agencies:

- Accurate information about Ms. Sehmel and her long and close working relationship with the TPD, other police agencies, and the Pierce County Prosecuting Attorney's Office.⁹⁶
- Ms. Sehmel's history of prostitution, theft, other crimes, and bizarre behavior.⁹⁷
- The fact that TPD suspected Mr. Gregory in an unrelated homicide and were attempting to obtain a sample of his DNA for that case.

On January 12, 2000, the judge overseeing the rape case, the Hon. Marywave Van Deren, entered an "Order to Take Samples from Defendant" in the rape case, stating simply:

IT IS HEREBY ORDERED that the defendant, ALLEN EUGENE GREGORY, shall be released from the Pierce County Jail to the custody of Chris Pollard, of the Tacoma Police Department, or another member of said department, for the purpose of transporting the defendant to the laboratory area of Tacoma General Hospital, for the purpose of collecting blood samples from the defendant. These samples are to be obtained by an appropriately licensed medical technician and defense counsel may be present and provided the samples if desired.

⁹⁶ A partial list of the cases where Ms. Sehmel worked as an informant for the TPD can be found at CP 492-94 (through 1998). Ms. Sehmel admitted working for another 12 law enforcement agencies in Western Washington. CP 448.

⁹⁷ CP 452-53, 5758-5883, 5888-5930.

IT IS FURTHER ORDERED that immediately following the taking of blood samples, the defendant shall be returned to the custody of the Pierce County Jail.

CP 443-44 (App. F). Thus, the order did not specifically allow for the release of the sample to the police or for any testing to be done on it.

As had been done with the September 1998 sample, Mr. Gregory's blood sample from January 2000, however, was seized by the police and turned over to a series of laboratories, which then conducted a series of new DNA comparison tests, not just with the semen obtained from Ms. Sehmel, but also with the semen samples located during the G.H. murder investigation. These comparisons became the centerpiece of the State's murder case against Mr. Gregory,⁹⁸ and also were used by the State in the second sentencing hearing as evidence of why the jurors should return a death verdict. *See, e.g.*, RP (4/25/12) 2499-2500; RP (5/7/12) 2628-42.

Prior to Mr. Gregory's first trial, he moved to suppress the fruits of the two blood draws and the DNA samples. CP 5933-72, 5973-81, 5990-99, 6002-46, 6064-94. After an evidentiary hearing, the trial court denied the motion. CP 473-85 (App. G), 6157-67 (App. H). Mr. Gregory then

⁹⁸ *See State v. Gregory*, 158 Wn. 2d at 812, 820-35; RP (2/21/01) 4699-4839; RP (3/1/01) 5414-5581; RP (3/5/01) 5596-5641, 5652-79; RP (3/6/01) 5730-5853; RP (3/7/01) 5874-5938; RP (3/12/01) 6116-6259; CP 473-85, 6157-67.

raised in the first appeal a series of issues related to the two blood draws. This Court never reached the issue of whether the September 1998 blood draw was valid. *Gregory*, 158 Wn.2d at 825. Instead, the Court upheld the January 2000 blood draw, finding that there was probable cause to support the issuance of the order, based on Ms. Sehmel's allegations of rape. 158 Wn. 2d at 824-25. Because the January 2000 blood draw was appropriate, the Court relied on the "inevitable discovery" exception to the exclusionary rule. 158 Wn.2d at 825 ("Thus, all DNA results would have been inevitably discovered, and no evaluation of the September 1998 blood draw is necessary."). The fact that the blood was drawn for one crime and then compared against a DNA sample in another crime was of no significance, the Court held. 158 Wn.2d at 826-29.

Upon remand, the trial court in the murder case ordered additional discovery of Robin Sehmel's background and work as an informant. CP 294-96. Although the State resisted disclosure, CP 288-92, ultimately, upon the trial court's order, the TPD released over a thousand pages of previously suppressed documents about Ms. Sehmel's work, between 1992 and 2010, for the TPD. *See* CP 492-509. Ms. Sehmel worked on numerous cases and apparently was well-paid for her services, receiving, according to the defense, "tens of thousands of unaccounted for dollars in cash without having to declare any monies to the IRS." CP 277-78.

Mr. Gregory filed a new motion to suppress evidence, to dismiss the death penalty, to obtain a *Franks*⁹⁹ hearing, and for a new trial. The motion related not just to the blood draws, but also to the August 25, 1998, search warrant. CP 393-509. In his discovery motion, Mr. Gregory pointed out that the prior motion to suppress was not based on Ms. Sehmel's full history as an informant. CP 274-280.

The trial court denied Mr. Gregory's motions, ruling that this Court had already upheld the validity of the blood draw orders, that the only new fact was that the rape case had been dismissed, that the State did not withhold any evidence that would have affected the issuance of an order for DNA, and that the trial court did not have authority to rule the blood draws were invalid if this Court had already upheld them. CP 617-19.

Mr. Gregory then filed a pro se motion to reconsider. CP 951-53.

In his motion, Mr. Gregory asked:

I don't see how evidence obtained from a search warrant with now know[n] perjured statement can still be held admissible.

CP 952. Although he knew the State would claim good faith, Mr. Gregory wanted a hearing so that he could have:

the opportunity to make a record and show that a trained Detective or a State Prosecutor should have seen the

⁹⁹ *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978).

problems with the victim statements and her inconsistency [sic] in the statement she gave when she had first contact with police. . . .

CP 952. Mr. Gregory asked the trial court to review the police reports, Ms. Sehmel's statements and the photographs of Mr. Gregory's body. He further asked for a deposition of Ms. Sehmel so that the court could "look into why Robin Sehmel lied to police and what she knew before I was arrested and after. And why she didn't tell the truth when she knew my life could be ended with the help of her lie." CP 953. He thought that Ms. Sehmel's "motives and knowledge may at some point in time from now be an issue on appeal or fact finding motion of some kind from the higher court to the lower." CP 953.

Mr. Gregory's lawyers argued the motion for him, arguing that the court should hold a *Franks* hearing so that the defense could explore how much the police knew about her background. Counsel also sought to take a preservation deposition of Ms. Sehmel because she apparently was ill. CP 965-69; RP (4/19/12) 2233-37. The trial court denied the motions because this Court had already upheld the blood draw. CP 1193-94; RP (4/19/12) 2237-38.

b. Introduction.

For two years after G.H.'s death, the Tacoma Police wanted to obtain a biological sample from Mr. Gregory. Yet, they lacked probable

cause, and Deputy Prosecuting Attorney Lilah Amos told them that they could not get a court order to obtain samples.

A few months later, Ms. Sehmel claimed that Mr. Gregory raped her. Sehmel was an emotionally unstable drug addict, with a long history of prostitution and theft-type charges. Yet, she was a professional police informant, who even by 1998, had worked for over a dozen police agencies, including the Tacoma Police Department. Her connection to the police was so close that when contacted by the police on August 4, 1998 (just 17 days before the rape allegation), upon reports she was trying to sell her baby at a bus stop, Sehmel identified her occupation to be "an operative for the police." CP 5888-5930 (TPD Inc. No. 982160548).

Despite her history, both Det. Chris Pollard's search warrant application, CP 486-87, and Ms. Amos's affidavit for the January 12, 2000 blood draw, CP 436-42, failed to include any information about Ms. Sehmel, her extensive criminal history, her emotional problems (known to the police), and her long-time employment as an informant. Ms. Amos also failed to include in her motion for a blood draw the true reasons why the State wanted the order.

In sum, Det. Pollard and Ms. Amos misrepresented material facts to the court, both to the court that issued the search warrant for Mr. Gregory's car (obtaining the knife) and to the court that issued the January

12, 2000 blood draw order (which resulted in DNA evidence against Mr. Gregory). Mr. Gregory asked for an evidentiary hearing (and a preservation deposition of Ms. Sehmel) to explore these topics, and the trial court should have granted his motions, and suppressed all evidence flowing from the August 1998 warrant and the January 2000 blood draw order (that is, the knife and DNA evidence).

Additionally, the January 12, 2000 order failed to include any language authorizing the police seizure of any blood drawn at the hospital and certainly did not allow the police to analyze it and compare it to any other samples, particularly the samples from the G.H. investigation. The order only authorized a hospital technician and Mr. Gregory's attorney to obtain the blood samples, and, thus, the seizure by the police of these samples, without a warrant, violated the Fourth Amendment and article I, section 7. Because the January 12, 2000, order was invalid or did not allow for the police seizure of Mr. Gregory's blood, the Court now must review the propriety of the September 8, 1998, blood draw order, which, as argued by Mr. Gregory in his original appeal, also failed to meet Fourth Amendment standards.

Finally, as pointed out in the original suppression motion filed in the rape case in 1998, Det. Pollard's application supporting the warrant that authorized the search of Mr. Gregory's car in August 1998 was not

properly sworn under penalty of perjury, and the knife should have been suppressed.

c. This Court's prior decision does not preclude review of these issues.

Below, the State argued, and the trial court ruled, that this Court had already decided all the suppression issues in the first appeal. CP 578-81, 617-19. In fact, this Court's decision is not binding on the issues raised herein.¹⁰⁰

To begin with, this Court never addressed issues in the first appeal about the withholding from the search warrant application or motions for blood draws of information about Ms. Sehmel's background (her emotional history, her occupation as an informant, and her extensive criminal history). Rather, the issues that the Court addressed solely related to whether (1) there was a legitimate reason for the rape case for the trial court to authorize a second blood draw in January 2000, (2) the

¹⁰⁰ Notably, in its original order denying Mr. Gregory's motion to suppress, the trial court ruled that Mr. Gregory was collaterally estopped because of the litigation of these issues in the rape case. FF 24-26, CP 480-81; *see also* FF 18, CP 6157-67. However, collateral estoppel is no longer a valid reason to deny Mr. Gregory's challenge. One of the main conditions of collateral estoppel is that there is a final judgment. *City of Aberdeen v. Regan*, 170 Wn.2d 103, 108, 239 P.3d 1102 (2010). Here, because of the reversal of the rape conviction and dismissal of those charges with prejudice, there is no final judgment upon which collateral estoppel can be based, and the underpinnings of the trial court's earlier order denying suppression no longer exist.

January 2000 order was supported by probable cause, and (3) whether it was proper to compare Mr. Gregory's blood drawn for the rape case against the samples found in the G.H. murder case. *Gregory*, 158 Wn.2d at 820-29. The Court never addressed issues related to Ms. Sehmel's reliability and whether there was sufficient information to allow for a *Franks* hearing.

Similarly, below, the State claimed that this Court had already admitted the knife, and that therefore the defense could not raise a challenge to the warrant. CP 580. Yet, the Court's discussion of the admissibility of the knife had nothing to do with the validity of the August 25, 1998, search warrant that led to its seizure. Rather, the Court only addressed issues of relevancy and prejudice and issues related to Mr. Gregory's right to bear arms under article I, section 24, of the Washington Constitution. *Gregory*, 158 Wn.2d at 835-36.

This Court also never addressed issues related to the failure of the January 12, 2000, blood draw order to authorize the seizure of blood by the police, nor did the Court address issues related to Det. Pollard's failure to sign the search warrant under penalty of perjury. These issues were not addressed previously by this Court.

RAP 2.5(c)(1) specifically provides:

If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

This provision allows for review of the suppression issues because Mr. Gregory specifically challenged the blood draws and warrant upon remand, raising new grounds. *See State v. Kilgore*, 167 Wn.2d 28, 38, 216 P.3d 393 (2009) (“We have interpreted RAP 2.5(c)(1) to allow trial courts, as well as appellate courts, discretion to revisit an issue on remand that was not the subject of the earlier appeal.”).

RAP 2.5(c)(2) sets out an alternative ground for this Court to review “the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.” Here, after Mr. Gregory’s first appeal was decided, this Court made clear that one of the underpinnings of the decision – the “inevitable discovery” exception – did not exist in Washington. *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009). This Court has also clarified the standards used to judge court orders for biological samples under CrR 4.7(b)(2)(vi). *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010). Finally, the United States Supreme Court’s decision in *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552, 185 L. Ed.2d 696 (2013),

requires a reevaluation of the holding of *State v. Gregory, supra*, that Mr. Gregory did not have a privacy interest in his genetic information being tested and compared to other cases without a specific warrant.

d. Mr. Gregory has raised a sufficient showing to have a hearing under *Franks*.

There is no question but that article I, section 7 and the Fourth Amendment both require judicial authorization before blood can be forcibly drawn or someone's car searched.¹⁰¹ Both the search warrant authorizing the search of Mr. Gregory's car and the applications for the blood draws needed to be supported by probable cause. *Gregory*, 158 Wn.2d at 822; Const. art. I, § 7; U.S. Const. amend. IV; CrR 4.7(b)(2)(vi).

When determining probable cause based upon information supplied by informants, pursuant to article I, section 7, Washington follows the two-prong *Aguilar-Spinelli*¹⁰² test: (1) whether the informant was credible or reliable and (2) what the basis for knowledge is for the information. *State v. Jackson*, 102 Wn.2d 432, 435-36, 688 P.2d 136

¹⁰¹ See *Missouri v. McNeely, supra*; *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009); *State v. Snapp*, 174 Wn.2d 177, 195, 275 P.3d 289 (2012) (warrant required for car search absent exigencies); *Garcia-Salgado*, 170 Wn.2d at 184-85 (warrant required before DNA sample may be obtained even from minimally intrusive cheek swab).

¹⁰² *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

(1984). The same test is utilized when a named citizen informant provides the information used to establish probable cause. *See State v. Chamberlin*, 161 Wn.2d 30, 41-42, 162 P.3d 389 (2007).

Under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978), a warrant is invalid if the affidavit upon which it is based contains a false statement deliberately or recklessly included (or omission of material facts) that was necessary to the magistrate's finding of probable cause. *See United States v. Stanert*, 762 F.2d 775, 780-81 (9th Cir. 1985). *See also State v. Chenoweth*, 160 Wn.2d 454, 462-78, 158 P.3d 595 (2007) (adopting federal *Franks* standard under article I, section 7). To obtain an evidentiary hearing, a party need only make a preliminary showing, and need not prove the charge of reckless omission by a preponderance of evidence – it is only at the later hearing that the party bears such a burden of proof. *State v. Thetford*, 109 Wn.2d 392, 402, 745 P.2d 496 (1987).

Mr. Gregory satisfied this preliminary standard and the trial court should have granted him an evidentiary hearing at which he could have proven the allegations by a preponderance standard.¹⁰³ To begin with,

¹⁰³ In 2001, the trial court made a series of findings that all facts known to the State in September 1998 were included in Ms. Amos' declaration in support of the January 2000 blood draw order and that there had been full disclosure to Mr. Whitehead. CP 473-85 (FF 8, 12, 19-22); CP 6157-67

both Det. Pollard's August 25, 1998, search warrant application and Ms. Amos's declaration in support of the January 12, 2000, blood draw order omitted key facts that would support a conclusion that Ms. Sehmel was not raped by Mr. Gregory. These facts include undisputed evidence that the police confirmed that there were no scratches on Mr. Gregory's back (as Ms. Sehmel claimed there would be). CP 413-14. This is a significant omission, one that would certainly support a consent defense (or even the alibi defense initially raised).

Moreover, at the time that the police and State obtained the warrant to search Mr. Gregory's car and orders to obtain biological samples from him, both the police and the prosecutors had information about Ms. Sehmel's character that would call into question her reliability. Yet, none of this information was disclosed to any of the magistrates who authorized the searches and seizures.

This Court has relaxed the necessity of showing reliability where the information comes from a "citizen informant" because of their presumptive reliability. *See State v. Ollivier*, 178 Wn.2d 813, 850, 312 P.3d 1 (2013). In such cases, the Court has not necessarily required detailed consideration of the criminal history or mental health records of

(FF 13). These findings are erroneous and are not supported by the evidence.

“citizen informants.” *Id.* at 851. As the Court of Appeals once noted, “courts should not treat information from ordinary citizens who have been the victim of or witness to criminal conduct the same as information from compensated informants from the criminal subculture.” *State v. Lee*, 147 Wn. App. 912, 919, 199 P.3d 445 (2008).

In this case, in both Det. Pollard’s search warrant application (App. I) and Deputy Prosecutor Amos’s application for a blood draw (App. E), Ms. Sehmel was treated as if she were a “citizen informant.” Her claims that Mr. Gregory attacked her were presented without question, as if she were just a normal person walking down the street when accosted by Mr. Gregory. Because Det. Pollard and Ms. Amos presented Ms. Sehmel as just a “normal” crime victim, neither of the judges who signed the search warrant or the blood draw order appeared to have required any additional information about her background to determine reliability.

But Ms. Sehmel was not an "ordinary citizen;" she was a "compensated informant[]" from the criminal subculture." *Lee*, 147 Wn. App. at 919. Indeed, she had a criminal history that was significantly longer than that of most people, including Mr. Gregory, which she apparently "worked off" by serving as a “snitch” in dozens of cases. CP

492-505. She also lied to the court.¹⁰⁴ In 2010, she admitted she was a prostitute who had consensual sex with Mr. Gregory, contrary to her testimony in 2000.¹⁰⁵

Furthermore, Ms. Sehmel did not just occasionally give tips here and there to the police. Rather, it is apparent that she was, in her own words to the officer who confronted her at the bus stop on August 4, 1998, where she was trying to sell her child, employed as an “operative for the police.” CP 5888-5930 (TPD Inc. No. 982160548). The number of police agencies she worked for (at least 13 in Western Washington) and the large number of cases she worked on changes her status.

In *State v. Thetford*, *supra*, this Court held that a professional informant can be so controlled and directed by the police that he or she becomes a *de facto* government agent. In such circumstances, if such a professional informant lies to police officer who then applies for a warrant based upon this false information, the police cannot insulate themselves from *Franks* by their claimed good faith ignorance of the agent’s misconduct. *Thetford*, 109 Wn.2d at 398-403.

¹⁰⁴ In 2001, the trial court made a series of factual findings that Ms. Sehmel was a “victim” of a sexual assault, and had been attacked and raped. CP 473-85 (FF 3, 4, 6); CP 6157-67 (FF 2). These findings are erroneous, the allegations supporting them having been shown to be false.

¹⁰⁵ She did maintain that the last of three acts of sex was non-consensual, CP 289, but Mr. Gregory disputed this claim and the trial judge dismissed all three counts with prejudice. RP (8/26/10) 207.

Here, there was certainly sufficient evidence that Ms. Sehmel was a *de facto* government agent. Her self-announced employment (other than prostitution) in August 1998 – “operative for the police” –, the more than a dozen agencies for whom she worked, the money she earned, and the number of cases she worked on removed her from the category of “citizen informant” and turned her into a government agent. And her 2010 admission that she lied and perjured herself should have been sufficient on its own to put the matter before a judge for a *Franks* hearing.

In this regard, what has never been brought out in testimony before a court is (1) who else knew that Ms. Sehmel lied, (2) when the State first learned of the lies and perjury, and (3) whether any police officer knew that she lied and when they found out about it. Given the coincidental timing of Ms. Sehmel’s allegations, coming in the months that the police were stymied while trying to obtain samples from Mr. Gregory, there is a legitimate question as to whether or not anyone else knew of her lies at the time.

Mr. Gregory’s pro se motion to reconsider asked the trial court to review the quality of Ms. Sehmel’s allegations and, what he considered to be, their inherent lack of credibility. CP 951-53. In light of subsequent developments, this was not an unreasonable request and should not have been disregarded.

But, even if Ms. Sehmel's lies were not shared with any police officers or prosecutors, even if it is true that her admissions of perjury in 2010 was the first time anyone had heard them, and even if Ms. Sehmel was not an agent of the police in August 1998 when she made her false allegations, still, there was sufficient information that the police and prosecutors knew or should have known of Ms. Sehmel's background.

The Tacoma Police Department – the same agency that investigated the rape allegations and the murder – possessed a wealth of information about Ms. Sehmel's background, including voluminous records of her job as a professional informant, her mental health history, and her prior convictions and arrests for prostitution and theft-related crimes. The TPD's knowledge in this case is directly chargeable to the Pierce County Prosecutors. *See Kyles v. Whitley*, 514 U.S. 419, 438, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995); *United States v. Price*, 566 F.3d 900, 908-11 (9th Cir. 2009).

By January 2000, though, when Ms. Amos filed her second application for a blood draw, and claimed she only included facts that were known in September 1998, the Pierce County prosecutors had actual knowledge about Ms. Sehmel's background. Indeed, the main deputy prosecutor in the murder case later stated in open court that he had an independent memory of Ms. Sehmel's work as an informant in the

mid-1990s, when he was in his office's drug unit. RP (4/16/10) 59. Mr. Gregory's attorney in the alleged rape case specifically asked the State, on January 12, 2000 (the same date that the blood draw order was entered, CP 443-44) for information about Ms. Sehmel's work as an informant, but the State declined to provide it. CP 523.¹⁰⁶

As for Ms. Sehmel's rather lengthy record, including crimes of dishonesty and prostitution, by the time that Ms. Amos sought the January 2000 blood draw order in the rape case, there had been extensive discussion and litigation in the murder case about Ms. Sehmel's history as it related to the joint representation of the Department of Assigned Counsel ("DAC") of Mr. Gregory and Ms. Sehmel, and Ms. Sehmel's history was by this time completely clear. CP 5751-5887. Ms. Amos's declaration to the court, CP 436-42, in which she revealed only the information that she claimed was "known" in September of 1998, was therefore misleading in that it did not list the information in the possession of the State at the time of the motion, and, instead, very clearly intentionally avoided mentioning Ms. Sehmel's troubled past.

Given Ms. Sehmel's concurrent work for TPD as an informant and her fairly remarkable criminal history (including multiple prostitution

¹⁰⁶ The letter contains a typographical error,, literally reading "January 12, 1999" rather than "2000." CP 523.

charges), a magistrate reviewing a warrant application would likely be interested in such facts, as well as the fact that Mr. Gregory was a “person of interest” in a homicide and that the same police agency that employed Ms. Sehmel was seeking a blood sample from Mr. Gregory and previously had been unable to obtain one. Such information would clearly have led to suspicion by a judge as to the reliability of Ms. Sehmel’s claims. While it is certainly true that prostitutes who work as informants can be raped, the timing of Ms. Sehmel’s allegations combined with some key factual contradictions would have led a neutral magistrate to question her reliability.

With regard to this issue, Mr. Gregory does not seek at this time outright reversal of his conviction. Rather, he seeks a remand from this Court, under RAP 9.11, for the *Franks* hearing that should have been held earlier, at which point the full facts about Ms. Sehmel, the search warrant and the blood draw orders can be revealed in court. If Mr. Gregory can prove by a preponderance of the evidence that there were in fact material misrepresentations or omissions from Det. Pollard’s search warrant application or from the blood draw motions, then this Court should suppress the DNA results and the knife, and reverse the conviction.¹⁰⁷

¹⁰⁷ Accordingly, the trial court’s orders in 2012 rejecting Mr. Gregory’s motions related to the search and seizure issues, CP 617-19, 1193-94, were

- e. This Court should reconsider its holding that the second blood draw allowed the State to compare Mr. Gregory's blood against the results from the G.H. case.

- i. Introduction.

In the first appeal, the Court rejected Mr. Gregory's arguments that the State should not have analyzed and compared the January 2000 blood sample, taken in the rape case, to the G.H. samples. This Court should reconsider that holding. The January 2000 order authorizing the drawing of Mr. Gregory's blood did not authorize any such comparison – in fact, the January 12, 2000, order did not authorize the State to seize Mr. Gregory's blood at all. Moreover, the U.S. Supreme Court's decision in *McNeely* requires reconsideration of this Court's earlier decision and supports Mr. Gregory's arguments that blood seized for one purpose cannot be used for another.

- ii. The January 2000 order did not authorize the State to seize and test Mr. Gregory's blood.

Read literally, the January 2000 order did not in any way allow the State or the police to seize Mr. Gregory's blood and submit it for forensic

erroneous, as were the 1998 and 2000 orders authorizing the blood draws, CP 410-11, 443-44, and as were the trial court's findings and conclusions in 2001. CP 473-85 (FF 8, 9,12,13,19-22,28; CL 4,12,13); CP 6157-67 (FF 13).

testing and comparison. CP 443-44, App. F.¹⁰⁸ Although it is apparent that the State wished Judge Van Deren to enter such an order, the order itself simply authorized the police to transport Mr. Gregory from the jail to the hospital for blood to be drawn, and then authorized the blood to “to be obtained by an appropriately licensed medical technician and defense counsel may be present and provided the samples if desired.” CP 444. Nothing in this order allowed the police or the prosecutors to seize the blood sample, and nothing allowed it to be tested, analyzed or compared with other samples. The only persons listed as being authorized to obtain the sample are the medical technician and defense counsel.¹⁰⁹

In *State v. Garcia-Salgado*, *supra*, this Court recently held that orders to obtain biological samples entered under CrR 4.7(b)(2)(vi) need to be analyzed under the same constitutional rubric as a search warrant and “must describe the place to be searched and items to be seized; and must

¹⁰⁸ This particular issue was not raised on remand. However, it is constitutional and can be raised for the first time on appeal under RAP 2.5(a)(3). The fact that Mr. Gregory has consistently challenged the constitutionality of the blood draws at every opportunity has allowed the record to be sufficiently complete to allow for consideration of this issue at this juncture. *See State v. Jones*, 163 Wn. App. 354, 359-60 & n. 9, 266 P.3d 886 (2011).

¹⁰⁹ The wording of this order would not be any different if it authorized the transportation of Mr. Gregory to the hospital for purposes of drawing his blood for his own health purposes.

be supported by probable cause based on oath or affirmation.” 170 Wn.2d at 186.

Key to a valid warrant, under the Fourth Amendment, is the “particularity” requirement. The Fourth Amendment prohibits seizures under the unbridled authority of a general warrant. *Stanford v. Texas*, 379 U.S. 476, 481, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965). A leading purpose of the prohibition against general warrants is to ensure that judicially authorized searches are as “limited in scope as the justification for them.” *United States v. Burch*, 432 F. Supp. 961, 964 (D. Del. 1977), *aff’d* 577 F.2d 729 (3rd Cir. 1978). “A particular warrant also assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.” *Groh v. Ramirez*, 540 U.S. 551, 561, 124 S. Ct. 1284, 157 L.Ed.2d 1068 (2004) (internal quotes omitted). *See also Marron v. United States*, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231 (1927) (“[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant.”).

Here, when one considers the court order authorizing the drawing of Mr. Gregory’s blood, it is apparent that it fails under Fourth Amendment standards. It clearly does not authorize the State or its agents to seize Mr. Gregory’s blood and submit it for forensic testing (in either

the rape or the murder case). Again, while the police were ordered to transport Mr. Gregory to the hospital for a blood draw, the only parties who were entitled to obtain the samples were the medical technician and Mr. Gregory's attorney – no one else was authorized, under this order, to obtain the samples.

While the failure of the prosecutor's proposed order to specify that the court was ordering that the blood be turned over to police for forensic testing was undoubtedly an oversight, given the importance of the particularity requirement to the Fourth Amendment, it was a fatal oversight. In *Groh v. Ramirez, supra*, the Supreme Court addressed a similar error, where even though the search warrant affidavit described in detail the items that the police wished to seize, the warrant itself mistakenly left out the items and only authorized the seizure of the house that was the subject of the search. 540 U.S. at 554. The Court held that the warrant "was plainly invalid," *id.* at 557, and that the listing of the items to be seized in the affidavit could not cure the defective warrant: "The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." *Id.* Because of this error, the Supreme Court held that the seizure of various items was essentially "warrantless." *Id.* at 558.

Similarly, in this case, despite the fact that the prosecutors, when drafting the order authorizing the blood draw, intended that the transportation order be construed as an order authorizing the police to seize Mr. Gregory's blood, the order does not authorize such action. App. F. Again, the order only authorizes a medical technician to draw the blood and to turn it over to Mr. Gregory's attorney – not the police officer who happened to be accompanying Mr. Gregory to the hospital for security reasons.

The police seizure of Mr. Gregory's blood pursuant to the January 2000 court order was therefore warrantless, and violated the Fourth Amendment (and was without authority of law under article I, section 7). The use of that blood for forensic testing and comparison in the G.H. murder case – and the use of those results both at the original trial and in the 2012 sentencing hearing – was unconstitutional. The blood and DNA evidence should be suppressed. Not only should the death verdict be set aside, but the guilty verdict should be set aside and the case remanded for a new trial, without the blood and DNA evidence obtained as a result of the January 2000 blood draw.

iii. *This Court should reconsider its ruling that a biological sample drawn for one case can be used in other cases.*

If Judge VanDeren's January 2000 order, entered in the alleged rape case, allowed for the police to seize a sample of Mr. Gregory's blood at all, the order not only did not allow the police to test the blood, but did not allow for the results of any forensic testing to be used for any and all purposes. In 2006, this Court rejected Mr. Gregory's arguments, following its earlier decision in *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003), a case where the police retrieved an inmate's shoes from the jail property room and conducted forensic tests on them for an unrelated offense. Following *Cheatam*, this Court held:

Gregory does not point to any court that has concluded that DNA evidence, lawfully in the possession of the State for the purposes of one criminal investigation, cannot be compared with evidence collected for the purposes of an unrelated criminal investigation. We conclude that once the suspect's DNA profile is lawfully in the State's possession, the State need not obtain an independent warrant to compare that profile with new crime scene evidence.

158 Wn.2d at 827.

With all due respect, the Court should reconsider this conclusion. To begin with, there are cases that have limited the police use of samples to the cases for which they were obtained. *See State v. Gerace*, 210 Ga. App. 874, 437 S.E.2d 862 (1993) (blood sample seized under implied

consent law in traffic case could not be used for DNA testing in unrelated sex case); *State v. Binner*, 131 Ore. App. 677, 886 P.2d 1056 (1994) (blood drawn for purpose of checking alcohol content could not then be retested later for THC content).

There is a huge difference between a comparison of someone's shoes and forensic analysis of someone's blood. Shoes are generally exposed to the world for all to see, while someone's blood contains a myriad of private information that is not normally exposed to the public. *See State v. Binner*, 131 Ore. App. at 682 ("We hold that the testing of the contents of human blood implicates a privacy interest under section 9. Such testing could reveal the most personal of the medical details of our private lives that would not be known to the public in general."). This private information includes not only the genetic make-up of an individual, but also information about diseases and risk factors for which there is a reasonable expectation of privacy, an expectation now protected by statute.¹¹⁰ In light of this recognition of the privacy of one's blood, it was appropriate for Mr. Gregory to cite in the first appeal to Washington

¹¹⁰ *See, e.g., Health Insurance Portability and Accountability Act of 1996* ("HIPAA"), Pub. L. 104-191, 110 Stat. 1936 & 45 C.F.R. Parts 160, 162 & 164; *Genetic Information Nondiscrimination Act of 2008* (Pub.L. 110-233, 122 Stat. 881; RCW 70.02 et seq (regarding access and disclosure of health care information).

statutes and administrative regulations requiring that DNA identification evidence obtained by the State Patrol not be used for other purposes.¹¹¹

The Supreme Court recently recognized the enhanced privacy interests that people have in their blood in *Missouri v. McNeely*, *supra*. In that case, the Court held that a motorist's privacy interest under the Fourth Amendment in his or her blood was strong enough that a warrant was required before it could be seized after a DUI arrest. *See McNeely*, 133 S. Ct. at 1558 (“a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation” constitutes “an invasion of bodily integrity [that] implicates an individual's most personal and deep-rooted expectations of privacy.”) (internal quotes omitted).

In light of the now heightened recognition of privacy, the Court should re-think its earlier ruling. There was simply no authority of law to take Mr. Gregory's blood in the rape case, drawn at the hospital in January

¹¹¹ RCW 43.43.759; WAC 446-75-030, -070 and -080. *See also Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001), *later appeal*, 308 F.3d 380 (4th Cir. 2002) (addressing violation of privacy when hospital sent urine samples of pregnant patients, voluntarily given, to police if samples contained traces of drugs); *Skinner v. Railway. Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (“physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested [person's] privacy interests.”).

2000, to test it, and then compare it to samples from an unrelated case. The use of the January 2000 sample therefore violated the Fourth Amendment and article I, section 7. Although this Court did not address this precise issue in the first appeal, the same analysis leads to the conclusion that the use of the September 1998 sample, also seized in the context of the rape case, to test for purpose of the murder case also violated the Fourth Amendment and article I, section 7. The trial court's findings and conclusions to the contrary were in error. CP 473-85 (FF 29, 30; CL 1, 2, 4, 5, 12, 13); CP 6157-59 (FF 21, 22; CL 1, 2, 4, 5, 8, 9, 10). The September 1998 and January 2000 samples and the fruits of those samples should be suppressed and the conviction and death sentence reversed.

iv. *The September 8, 1998 blood draw was improper.*

As noted, in the first appeal, this Court never addressed the propriety of the September 1998 blood draw order. The Court held that the “inevitable discovery” rule applied and because the January 2000 draw was proper, the Court did not have to address the September 1998 draw. 158 Wn.2d at 825.

However, under *State v. Winterstein, supra*, there is no “inevitable discovery” exception in Washington. Article I, section 7 clearly requires a

“nearly categorical exclusionary rule.” 167 Wn.2d at 636. Thus, if the September 8, 2000, blood draw was illegal, the results of that draw and the fruits of that draw should be suppressed, whether or not Mr. Gregory’s genetic information was obtained as a result of the January 2000 draw. Similarly, the fact that had Mr. Gregory personally objected to the September 1998 draw, the State would have supplemented its motion and provided sufficient information to Judge Larkin to justify the draw, FF 9, CP 476, no longer is a valid basis to reject suppression. Again, under *Winterstein*, there is no inevitable discovery rule in Washington and thus a finding that the State could have obtained a sample with a better motion is of no significance.

As argued in the first appeal, the September 8, 1998, blood draw order (App. D) was deficient and the judge signing the order erred. Apart from not specifying clearly that any blood taken from Mr. Gregory could be turned over to the police, *see supra*, Section E(7)(e)(ii), the motion and order do not comport with the Fourth Amendment’s and article I, section 7’s requirements, as explained in *State v. Garcia-Salgado, supra*. The motion is not supported by an affidavit, under penalty of perjury. *See Garcia-Salgado*, 170 Wn.2d at 188 (prosecutor’s unsworn assertions “cannot support the court’s determination of probable cause.”). The motion also lacks any factual explanation. As in *Garcia-Salgado*, the

motion was based solely on the prosecutor's bald assertion, without any factual basis. Even the reference to the declaration of probable cause is deficient because "the record does not establish that the trial judge ever read the certification." 170 Wn.2d at 188. But even if the certificate of probable cause was considered, there was no recitation in the certificate that any cellular material was found that could be tested for DNA. CP 427.¹¹² Thus, there is no basis for a court to conclude that Mr. Gregory's blood sample would lead to relevant evidence.¹¹³

The trial court found as fact that the September 1998 order was an "agreed" order, and that Mr. Gregory "waived his objection to the substance of the order [for a blood draw] and agreed to its presentation." FF 7, 11,12; CP 475-77. These findings are erroneous.

To begin with, Mr. Whitehead indicated only that the order was "Approved as to Form." CP 411. This language does not reflect agreement as to the substance of the order, as would, for example,

¹¹² The certificate of probable cause for the rape case is not in the murder case's court file – the reference above (CP 427) is to the description of the certificate in the suppression motion.

¹¹³ See, e.g., *State v. Acquin*, 177 Conn. 352, 416 A.2d 1209 (1979) (no probable cause for blood draw where prosecutor did not establish that "reddish" substance found at murder scene was blood); *Cole v. Parr*, 595 P.2d 1349 (Ok. Ct. Crim. App. 1979) (no probable cause to compel blood, saliva and hair samples from defendant where similar items had been obtained from rape scene and body of victim, but had not been shown to be testable and not from the victim's body).

"Approved for Entry," or "No Objection." Attorneys often agree to the form of an order without agreeing that it is a correct ruling. Mr. Whitehead signed no other document before or after September 8, 1998 that would indicate he agreed to anything more than the "form" of the order. There is no indication that the prosecutor, defense counsel, or Mr. Gregory made any statements whatsoever on the record on September 8, 1998. Thus, the only evidence in the record reflects that Mr. Whitehead never agreed to the substance of the order. *See Harter v. King County*, 11 Wn.2d 583, 589-90, 119 P.2d 919 (1941) (signature of attorney stating that the order was "approved" does not mean order became consent decree); *State v. Morris*, 74 Wn. App. 293, 873 P.2d 561 (1994) (attorney did not waive claim that trial was untimely under Interstate Agreement on Detainers by signing order setting trial date "approved as to form"), *affirmed*, 126 Wn.2d 306, 892 P.2d 734 (1995); *Bank of Gauley v. Osenton*, 92 W. Va. 1, 114 S.E. 435 (1922) ("Orders are often so endorsed by counsel for parties who at the time fully intend to prosecute a writ of error thereto or petition for appeal therefrom.").

It is also significant that Judge Larkin's order states that it was "[b]ased on the foregoing motion" rather than on the agreement of the parties. CP 411. Thus, Mr. Whitehead's signature did not relieve the State of its burden of proof. *See Harter*, 11 Wn.2d at 591 (decree rested on

evidence in case, not on consent of the parties). Judge Larkin based his ruling on the State's submissions rather than on a stipulation between the parties. The trial court therefore erred in finding that the State's motion for a blood draw was an agreed order.

In any event, an attorney cannot waive his client's Fourth Amendment rights without the client's consent, which is personal to the client. "In the context of a search, consent is a form of waiver. Ordinarily, only the person who possesses a constitutional right may waive that right." *State v. Morse*, 156 Wn.2d 1, 8, 123 P.3d 832 (2005). Thus, apart from issues about Mr. Whitehead's conflict of interest and about his failure to meet Mr. Gregory and explain to him what was happening, Mr. Whitehead's signature alone cannot give rise to a waiver. Only Mr. Gregory could provide such a waiver, personally.

An attorney is impliedly authorized to stipulate to, and waive, procedural matters in order to facilitate a hearing or trial; but, in his capacity as an attorney, he is without authority to waive any substantial right of his client *unless specifically authorized to do so*. *State v. Ford*, 125 Wn.2d 919, 922, 891 P.2d 712 (1995) (quoting *In re Coggins*, 13 Wn. App. 736, 739, 537 P.2d 287 (1975)). *See also State v. Luvane*, 127 Wn.2d at 717 (defense counsel could not stipulate to reopen time to seek death penalty); *In re Marriage of Ebbighausen*, 42 Wn. App. 99, 101-04, 708

P.2d 1220 (1985) (due process violated where attorney agreed to dissolution decree in chambers without client's participation or approval).

Here, Mr. Gregory submitted a sworn declaration confirming that he never authorized Richard Whitehead to agree to a blood draw. CP 6000-01. Their first meeting was at the September 8, 1998 pretrial conference. *Id.* They had no discussion of the facts of the case, whether Mr. Gregory could challenge the prosecutor's motion, or, even, that the prosecutor had requested one. *Id.* The trial court's findings to the contrary (CP 476-78, FF 10-13) were erroneous. The only evidence before the court concerning conversations between Whitehead and Gregory came from Mr. Gregory's declaration, which was unrebutted (i.e. the State chose not to call Mr. Whitehead as a witness). In fact, as the trial court later recognized, Mr. Whitehead had a conflict of interest with Mr. Gregory because his firm also represented Ms. Sehmel. CP 5884-87. Under such circumstances, Mr. Whitehead's "approval as to form" of an order cannot be construed as authorization for a blood draw, over his client's objections.

Accordingly, because the September 1998 order did not comport with the requirements of a warrant, and because Mr. Whitehead at most agreed to the form of the order, but not the substance, the order violated the Fourth Amendment and article I, section 7. All evidence obtained as a

result of this illegal order should have been suppressed, which includes not only the blood/DNA evidence obtained directly from this order, but also the blood and DNA obtained from the January 2000 order, a fruit of the first blood draw. The Court should vacate the death sentence and reverse the conviction.

f. The August warrant was not supported by a sworn affidavit.

When Det. Pollard asked a magistrate for a warrant to search Mr. Gregory's car, he filled out a declaration in support of that warrant, but never signed it. The signature portion of the "affidavit" is blank, although he did sign the bottom of the application next to the words "Presented by." CP 487.

The Fourth Amendment very explicitly requires that any search warrant be supported by "Oath or affirmation." *See also* CrR 2.3(c) ("There must be an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant."); *State v. Garcia-Salgado*, 170 Wn.2d at 188 (prosecutor's assertions could not support order for samples because they were not under oath). The "oath or affirmation" requirement of the Fourth Amendment was adopted because of the colonists' desire to eliminate from their government the disregard for their privacy rights

which were characteristic of unsworn Writs of Assistance and general warrants. *State v. Brown*, 840 N.E.2d 411, 417-18 (Ind. App. 2006); *State v. Tye*, 248 Wis.2d 530, 636 N.W.2d 473, 476 (2001). Thus, “[i]t is undeniable that a valid oath is a constitutional condition precedent to the use of evidence.” *Brown*, 840 N.E.2d at 419 (citations and internal quotes omitted).

Here, Detective Pollard’s statement purports to have been submitted “under oath.” However, in Washington, an “oath” must be administered by a third party – a judge, clerk of a court or notary public. RCW 5.28.010. Det. Pollard’s statement was never notarized and his lack of signature shows that it was not given under oath. While RCW 9A.72.085 allows for unsworn certifications, this statute sets out the requirement that such unsworn statements be made “under penalty of perjury” under the laws of the State of Washington. Det. Pollard’s statement does not comply with this requirement, there being no indication that the statement was made “under penalty of perjury.”

Accordingly, because there was no “oath or affirmation” to support the issuance of a search warrant, the warrant was not properly issued under the Fourth Amendment and article I, section 7. All evidence obtained as a result, particularly the knife that the State used at both the trial and penalty proceedings, was illegally obtained. The conviction and

death sentence should be reversed and all evidence obtained as a result suppressed. See *State v. Brown*, 840 N.E.2d at 423; *State v. Tye*, 636 N.W.2d at 477-80.

8. The trial court violated Mr. Gregory's right to an impartial jury under the Sixth and Fourteenth Amendments and article I, sections 21 and 22 by denying his motions to excuse a substantially impaired juror for cause.

“Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution.” *Witherspoon v. Illinois*, 391 U.S. 510, 523, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Thus, a trial court must grant a defendant's motion to excuse a juror who will automatically vote for a death sentence or who will not follow the law or consider mitigating circumstances.

Juror 132 stated multiple times that he believed the death penalty was the only appropriate punishment for premeditated murder, that Mr. Gregory's life both before and after the crime was irrelevant to the punishment, and that, notwithstanding the instructions to the contrary, he would place the burden on the defense to prove a life sentence was appropriate. The trial court violated Mr. Gregory's constitutional right to an impartial jury by denying his motion to excuse Juror 132 for cause, and this Court should reverse.

- a. A juror who will not follow instructions regarding mitigating circumstances is substantially impaired and must be excused for cause.

The Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution guarantee the right to an impartial jury. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; *Morgan v. Illinois*, 504 U.S. 719, 726-28, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); *Rupe*, 108 Wn.2d at 748. The U.S. Supreme Court has explained that this right is a critical component of the Due Process Clause itself, and not merely an application of the Sixth Amendment to the states:

In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as “indifferent as he stands unsworne.” ... This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in *1 Burr’s Trial* 416 (1807). “The theory of the law is that a juror who has formed an opinion cannot be impartial.”

Morgan, 504 U.S. at 727 (citing, inter alia, *Irvin v. Dowd*, 366 U.S. 717, 721-22, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)).

To protect this right, a trial court in a capital case must grant a defendant’s motion to excuse a juror for cause if the juror’s views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Morgan*, 504 U.S. at 728

(citing *Wainright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)). A juror should be dismissed if he will “fail in good faith to consider the evidence of ... mitigating circumstances as the instructions require him to do,” regardless of his general assurances that he will follow the law. *Id.* at 729, 735-36.

This standard “does not require that a juror’s bias be proved with ‘unmistakable clarity.’” *Witt*, 469 U.S. at 424. Rather, if a juror “will not give mitigating evidence the consideration that the statute contemplates,” he must be excused in order to ensure the defendant is tried by a fair and impartial jury. *Morgan*, 504 U.S. at 738.

- b. The trial court erred in denying Mr. Gregory’s motion to excuse Juror 132 for cause, because the juror repeatedly stated he would shift the burden of proof to the defense and indicated he would not consider mitigating circumstances.

Mr. Gregory moved to excuse Juror 132¹¹⁴ for cause under the above standard. The trial court erred in denying the motion.

¹¹⁴ This brief will use Juror 132’s number rather than his name to protect his privacy. Juror 132 eventually sat in seat number 1 and was thereafter called Juror 1, but his original number is used for clarity.

- i. Juror 132 stated multiple times that he would require the defense to prove a life sentence was warranted and that neither Mr. Gregory's life before the crime nor his behavior after the crime was relevant to the penalty.

Immediately after the venire was seated and sworn, the trial court gave an “advanced oral instruction,” explaining the posture of the case and the law to be applied. CP 896-901; RP (3/22/12) 275-89. The court told the potential jurors that Mr. Gregory had already been convicted of premeditated first degree murder with aggravating circumstances and that the jury would “determine whether or not the death penalty should be imposed.” CP 897. The judge explained that the parties would present evidence about the facts of the crime and mitigating circumstances, and that Mr. Gregory was presumed to merit a life sentence. CP 897-98. The court further instructed, “A mitigating circumstance may be any relevant fact about the defendant or the offense which, although not justifying or excusing the offense, suggests to you a reason for imposing a sentence other than death.” CP 898.

The court explained that the ultimate question the jury would answer is:

Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

CP 898. The court also instructed the venire that the State bears the burden of proof:

The State bears the burden of proving beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency. If you find that the State has proved the absence of sufficient mitigating circumstances beyond a reasonable doubt, the penalty will be death. On the other hand, if you find the State has not met its burden of proof, the punishment will be life in prison, without the possibility of release or parole.

CP 898.

After instructing the venire, the court distributed questionnaires for the potential jurors to complete. RP (3/22/12) 286-87. In his questionnaire, Juror 132 wrote that a sentence of life without the possibility of parole can never be a severe enough punishment for someone who commits premeditated murder, let alone premeditated murder with aggravating circumstances. CP 5326. He explained, “They planned it. They know what can happen if convicted.” CP 5326.

During voir dire, both parties followed up on these responses and attempted to clarify Juror 132’s views and ascertain his fitness to serve. RP (4/18/12) 2033-63. Juror 132 confirmed, “To me, if it’s premeditated and the other offenses are also committed, you should know right from wrong. I mean, that’s - - *I just can’t see it any other way.*” RP (4/18/12) 2038 (emphasis added).

Defense counsel explained again that Mr. Gregory had already been convicted of aggravated murder, and inquired, “do you believe that the death penalty is the only appropriate penalty for that type of an offense?” Juror 132 said, “I would say, yes.” RP (4/18/12) 2039.

Mr. Gregory’s attorney reminded Juror 132 that Mr. Gregory was presumed to merit a life sentence and that the State bore the burden of proving beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency. RP (4/18/12) 2039. Juror 132 said he “would be open” to hearing about things like “were drugs involved,” because that could alter the mental state during the crime. RP (4/18/12) 2040. Defense counsel explained that there was no issue of drugs or any other mental issue and that Mr. Gregory had already been convicted of acting with premeditated intent. RP (4/18/12) 2040-41. Defense counsel told Juror 132 that mitigation evidence would be presented regarding both Mr. Gregory’s upbringing before the crime occurred and his behavior post-conviction. Juror 132 responded that neither pre-crime information about Mr. Gregory nor post-crime information about Mr. Gregory would be relevant to him. He said, “It doesn’t matter how you’re brought up,” and “I don’t know what the [post-crime] behavior would have to do with it.” RP (4/18/12) 2041.

Mr. Gregory's attorney said, "All right. Let me ask you this then: Is there anything about Mr. Gregory that could overshadow just the crime itself?" RP (4/18/12) 2042. Juror 132 responded, "I can't think of anything." RP (4/18/12) 2042.

Defense counsel once again reminded the juror that the judge would instruct him "to presume that Mr. Gregory merits a life sentence." He asked Juror 132 whether he would nevertheless "require the defense to prove to you that he should receive a life sentence." Juror 132 said, "Yes." RP (4/18/12) 2042. Mr. Gregory's attorney asked yet another time whether, notwithstanding the instruction to the contrary, Juror 132 would place the burden on the defense. Juror 132 said, "Correct." RP (4/18/12) 2042.

The prosecutor attempted to rehabilitate Juror 132, but was able to obtain only general assurances which did not overcome the above repeated, express statements that he would not consider mitigation or hold the State to its burden of proof. *See Morgan*, 504 U.S. at 729, 735-36. In response to the prosecutor's questioning, Juror 132 did backtrack from his earlier statements that all aggravated murderers should be put to death, and said "there could be mitigating circumstances." RP (4/18/12) 2053. He also responded in the affirmative when the prosecutor asked, "If the law says you have to presume that he merits a life sentence and the State has to

prove to you that death is appropriate, can you do that?” RP (4/18/12) 2054. However, he then said “yes,” when the prosecutor said, “Would you assume that the defense would present to you mitigating circumstances to try and save his life?” RP (4/18/12) 2054. The prosecutor explained that behavior in prison is related to future dangerousness, and Juror 132 said “yes,” when asked “is it something that you would consider when it comes to whether or not it’s a mitigating circumstance or not?” RP (4/18/12) 2056. And he said, “that would be the correct ruling, yes,” when the prosecutor asked if he would “vote for life if the State doesn’t prove beyond a reasonable doubt that the death penalty is appropriate.” RP (4/18/12) 2057.

But immediately thereafter, when defense counsel asked “are we going to have to prove to you that there’s reasons why Mr. Gregory should live,” Juror 132 said, “Yes.” RP (4/18/12) 2058. Defense counsel confirmed: “That’s even with the presumption that he should live, we have to prove to you that he should live?” Juror 132 said, “Yes.” RP (4/18/12) 2058-59.

ii. The trial court denied Mr. Gregory’s motion to excuse Juror 132 for cause.

Mr. Gregory’s attorney challenged Juror 132 for cause:

MR. PURTZER: Your Honor, I would challenge Juror 132 for cause based on responses that he set forth in his

questionnaire, particularly answers to questions 32 and 33. But also with respect to his answers to both me and Mr. Neeb that we would have to prove to him reasons why Mr. Gregory should live, even though he's heard and told us he will follow the presumption of life. The presumption of life to him means that we as a defense need to prove reasons why Mr. Gregory should live based upon - - because of the nature and the gruesomeness of this particular offense, which is the specific type of offense that he says that the penalty of life in prison without the possibility of parole is not severe enough. So based upon his statements to us in court that he would shift the burden from the State to the defense, we respectfully challenge Juror 132 for cause.

RP (4/18/12) 2059. The prosecutor countered that Juror 132 promised to follow the law and hold the State to its burden, but the prosecutor also acknowledged that "the juror expects the defense to prove that life is the correct sentence." RP (4/18/12) 2061. Defense counsel agreed: "he's going to require us to present evidence in order for Mr. Gregory to live." RP (4/18/12) 2062.

The trial court nevertheless denied the challenge for cause. The judge did not reference the juror's demeanor or other nonverbal cues. She denied the motion on the basis that Juror 132 "was clear that he could consider life without parole and vote for that," even though "[t]he juror did answer 'yes' to the question by Mr. Purtzer, do we have to prove to you reasons that he should live." RP (4/18/12) 2062-63.

iii. The trial court's ruling violated Mr. Gregory's constitutional right to an impartial jury, because Juror 132's views prevented or substantially impaired the performance of his duties in accordance with the instructions and the law.

The trial court erred in denying Mr. Gregory's motion to excuse Juror 132 for cause because the entire context of voir dire makes clear that this juror could not follow the law. *See Morgan*, 504 U.S. at 729, 735-38. He stated multiple times that he would place the burden of proof upon the defense, and said so both before and after the prosecutor attempted to rehabilitate him. He also stated that no part of Mr. Gregory's life would be relevant to his decision, even though the law requires consideration of mitigating circumstances and places the burden on the State to prove beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency. *See RCW 10.95.060(4); Morgan*, 504 U.S. at 729.

The Kentucky Supreme Court reversed under similar circumstances in *Fugett v. Commonwealth*, 250 S.W.3d 604, 612-16 (Ky. 2008). There, the defense moved to excuse a juror who believed that punishment should be based only on what occurred on the day of the killing rather than on a person's past, thought that police officers are more credible than other witnesses, and said that he would only consider the

defendant's age if he committed the crime when he was 10-12 years old. *Id.* at 613-14. The trial court denied the challenge because the juror later contradicted these statements and said "I would consider it" when asked whether he would take into account mitigating circumstances like the defendant's age, IQ, home life as a child, or drug abuse by him or his parents. *Id.* at 614. In reversing, the Kentucky Supreme Court acknowledged the latter statement but emphasized the requirement of a totality-of-circumstances analysis:

[T]he totality of the juror's responses form[s] a reasonable basis to conclude that he could not consider all the mitigation evidence that the law demands. He believed that only a person's history of violence should be considered on the issue of punishment and he would consider age only if the person were 10, 11, or 12 years old. He said he could consider some factors such as the defendant's IQ or the kind of home in which he was raised, but they would not have much effect on his opinion. Nor did he believe that factors such as the use, or abuse, of alcohol should be considered. "Any juror to whom mitigating factors are ... irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis and the evidence developed at trial. *Morgan v. Illinois*, 504 U.S. [at] 739.

Fugett, 250 S.W.3d at 615. The court concluded that the failure to excuse the juror for cause was an abuse of discretion, and reversed and remanded for a new trial. *Id.* at 615-16.

Similarly here, although Juror 132 dutifully answered "yes" when the prosecutor asked him if he would consider evidence of future

dangerousness and presume a life sentence, the totality of the juror's responses overwhelmingly shows he could not hold the State to its burden and would not consider mitigation as the law demands. Even after being told repeatedly that the State bears the burden of proving beyond a reasonable doubt that a death sentence is appropriate, Juror 132 stated no fewer than four times that he would place the burden on the defense to prove a life sentence was warranted. RP (4/18/12) 2042, 2058-59. He also made clear that information about Mr. Gregory's life was irrelevant to him. RP (4/18/12) 2041-42. Juror 132 believed death was the only appropriate sentence for aggravated murder, and acknowledged, "I just can't see it any other way." RP (4/18/12) 2038; CP 5326. As in *Fugett*, the trial court erred in denying the challenge for cause.

The decisions of this Court and the U.S. Supreme Court in *Cal Coburn Brown's* case are also instructive. See *Uttecht v. Brown*, 551 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007); *State v. Brown*, 132 Wn.2d 529. This Court and the U.S. Supreme Court approved the trial court's grant of a *State's* challenge for cause of "Juror Z" for substantial impairment. The totality of the voir dire transcript revealed that this juror's views "could have prevented him from returning a death sentence under the facts of [the] case." *Uttecht*, 551 U.S. at 13. This was so even though Juror Z stated that he believed in the death penalty for severe

crimes, and for people who would be dangerous in the future, and “stated six times that he could consider the death penalty or follow the law.” *Id.* at 14-15. The U.S. Supreme Court held that because “these responses were interspersed with more equivocal statements,” excusal for cause was appropriate. *Id.* at 15. The opinion endorsed this Court’s view that:

[Juror Z] was properly excused. On voir dire he indicated he would impose the death penalty where the defendant “would reviolates if released,” which is not a correct statement of the law. He also misunderstood the State’s burden of proof ... although he was corrected later.

Id. at 17 (quoting *Brown*, 132 Wn.2d at 604). “Juror Z’s assurances that he would consider imposing the death penalty and would follow the law do not overcome the reasonable inference from his other statements that in fact he would be substantially impaired in this case because there was no possibility of release.” *Uttecht*, 551 U.S. at 18.

Similarly here, Juror 132’s assurances that he would consider mitigating circumstances and follow the law do not overcome the reasonable inference from his other statements – which greatly outnumbered these assurances – that in fact he would be substantially impaired because he would place the burden of proof on the defense and would not consider circumstances of Mr. Gregory’s life either before or after the crime. This Court should hold that the trial court violated Mr.

Gregory's rights under the Sixth and Fourteenth Amendments and article I, sections 21 and 22 in denying his motion to excuse Juror 132 for cause.

- c. Because Juror 132 sat on the jury Mr. Gregory was prejudiced and reversal is required.

If a defendant uses a peremptory challenge to strike a juror who should have been removed for cause, he may not appeal the erroneous denial of the for-cause challenge. *State v. Fire*, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001); accord *Ross v. Oklahoma*, 487 U.S. 81, 85, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). But where a defendant uses his peremptories to strike other jurors and the juror who should have been excused for cause sits on the jury, reversal is required. *Ross*, 487 U.S. at 85; *Fire*, 145 Wn.2d at 158. "If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Morgan*, 504 U.S. at 729.

Here, although Mr. Gregory used many peremptory challenges to remove other jurors for whom the trial court denied for-cause challenges, he was unable to use a peremptory challenge to excuse Juror 132 because he exhausted all of his challenges in order to strike other jurors. RP (4/24/12) 2305 (peremptories exhausted for first 12), 2313 (peremptories exhausted for alternates); CP 989-90. His for-cause challenges to both Juror 132 and Juror 139 had been denied, and he could only use a

peremptory challenge against one of them. RP (4/18/12) 2059-81, 2098-2100; RP (4/24/12) 2311-13.

Juror 132 was originally an alternate, but became a deliberating juror after Juror 1 was excused for work-related issues on the second day of trial. CP 1017-21. Mr. Gregory objected to Juror 1's excusal, and moved for a mistrial or in the alternative for an additional peremptory challenge to remove Juror 132, but the trial court denied the motion. CP 1013-16; 4/25/12 RP 2385-2404; RP (5/7/12) 2611-2618. The trial court essentially ruled that Mr. Gregory should have chosen to use one of his peremptory challenges on Juror 132 rather than exhausting them to remove other people. RP (5/7/12) 2617. Mr. Gregory then renewed his challenge for cause to Juror 132, but the trial court denied that motion as well. RP (5/7/12) 2615-17.

Thus, Juror 132 served on the jury, and the *Morgan* error was preserved. *Ross*, 487 U.S. at 85; *Fire*, 145 Wn.2d at 158. Because the trial court violated Mr. Gregory's rights under the Sixth and Fourteenth Amendments and article I, sections 21 and 22 by denying his motion to excuse Juror 132 for cause, reversal is required. *Morgan*, 504 U.S. at 729; *Ross*, 487 U.S. at 85; *Fire*, 145 Wn.2d at 158.

9. The death sentence in this case was brought about by passion or prejudice.

a. The statutory context.

RCW 10.95.130(2)(c) requires statutory review by this Court of “[w]hether the sentence of death was brought about through passion or prejudice.” This Court has never precisely explained what standards are applied, but clearly, subsection (2)(c) was intended to provide some protection against questionable death sentences, beyond those otherwise required by law. “Passion or prejudice” cannot mean simply that there were substantial legal errors. If that was the test, Mr. Gregory’s sentence would be overturned on those issues and this Court would never reach the passion or prejudice review. *See Martin*, 171 Wn.2d at 537 (“Washington courts exercise inherent supervisory authority precisely when there is no constitutional infirmity, since there would be no need to exercise inherent supervisory power if there was a constitutional violation.”).

In practice, this Court has reviewed the trial record for evidence that the jury’s verdict was “affected by passion or prejudice.” *State v. Sagastegui*, 135 Wn.2d 67, 94, 954 P.2d 1311 (1998). At times, the Court has focused on whether the prosecutor’s closing argument was sufficiently inflammatory to meet this standard. *See Yates*, 161 Wn.2d at 787; *Cross*, 156 Wn.2d at 634-35. Mr. Gregory has already extensively argued that

the closing argument in this case was extraordinarily improper. Section E(1), *supra*. The prosecutor's closing argument also demonstrates how the verdict here was obtained by passion or prejudice.

Prior decisions about "passion or prejudice" should now be viewed through the prism of the Court's current jurisprudence regarding racism and criminal cases. For instance, in *State v. Monday, supra*, this Court held that "appeals by a prosecutor to racial bias" are "so repugnant to the concept of an impartial trial" that they are subject to the most stringent constitutional harmless error review. 171 Wn.2d at 680. In *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013), this Court, in multiple opinions, expressed concerns about persistent racism in jury selection. In particular, the lead opinion recognized that it is no longer socially acceptable to be overtly racist, but that racism often exists under the surface in the subconscious. 178 Wn.2d at 46 (opinion of Wiggins, J.).

Applying the lessons of *Monday* and *Saintcalle* to the concept of "passion or prejudice," this Court should strike down the death sentence in this case under RCW 10.95.130(2)(c). This is particularly the case now that Professor Beckett's statistical analysis of the aggravated murder trial reports demonstrate that Washington juries "were three times more likely to impose a sentence of death when the defendant was black than in cases involving similarly situated white defendants." App. A; *see* Section

E(2)(g). This study demonstrates the lingering effect of racism in Washington State and should not be ignored.

b. The issue of race was ever-present in this case.

At the outset, the Court cannot ignore the fact that Mr. Gregory was charged with committing with the most racially inflammatory kind of crime: the rape-murder of a white woman by an African American man. "[T]here is a special risk of arbitrariness in cases that involve black defendants and white victims." *Walker v. Georgia*, 555 U.S. 979, 981, 129 S.Ct. 453, 172 L.Ed.2d 344 (2008) (Stevens, J., statement respecting denial of certiorari). *See also Turner v. Murray*, 476 U.S. 28, 33-37, 106 S. Ct. 1683, 90 L.Ed.2d 27 (1986) (discussing the heightened risks of prejudice that inhere in the prosecution of interracial capital offenses).

The trial judge and prosecutors lacked sensitivity to the racial dynamics inherent in such a case. Illustrating Justice Wiggins's statements in *Saintcalle* about subconscious racism, in the trial report prepared for this case, despite the defense position that race was a factor,¹¹⁵ the trial judge concluded: "There was no evidence presented during this penalty phase that raised issues of race, ethnic origin, or sexual preference." CP 1274.

¹¹⁵ Defense counsel stated: "You had a black defendant and everybody else in this was Caucasian." RP (11/9/12) 3219.

Similarly, during the first trial, one of the prosecutors opposed including in the jury questionnaire questions about race, stating, “I don’t think this case has anything to do with race.” RP (12/21/00) 760. Even in 2000, a capital defendant accused of an interracial crime was entitled to have jurors questioned on the issue of racial bias. *Turner v. Murray*, 476 U.S. at 36-37.

Yet, the issue of race permeated the two proceedings held in this case, beginning with the charging documents that specifically identified Mr. Gregory by race. CP 5732-33, 5747-48, 5931-32, 6095-96, 6120-21. *See also* RP (1/29/01) 2848-49 (defense objects to listing race on the information). Mr. Gregory was then tried twice by two all-white juries. TR 312 at 12; TR 216 at 9. In the first trial, Mr. Gregory was forced to wear a “stun belt,” in part, simply because of his size, age and physical condition, RP (11/18/99) 127, 161-62; RP (1/4/01) 967-93; CP 6155-19 (FF VI), findings that are racially suggestive.¹¹⁶

At the first trial, Mr. Gregory unsuccessfully raised a challenge to the racial composition of the venire. CP 6097-6114, 6154-56; RP (2/8/01)

¹¹⁶ Mr. Gregory was not restrained in front of the jury during the 2012 penalty proceedings, although he was restrained in court in non-jury matters. RP (3/19/12) 173-76. This issue is raised here solely with regard to “passion or prejudice” and is not being raised as an independent basis to reverse the conviction. That issue may be the basis of a PRP, in which more information can be developed about whether the jurors in the murder trial knew Mr. Gregory was restrained.

3865-3906. As counsel stated during argument on the motion, “The defendant is African-American. And in fact, he is the only African-American here in the courtroom.” RP (2/1/01) 3216.

In the course of the second sentencing proceeding, the defense alleged that the State’s treatment of “for cause” challenges was racially charged. The defense argued that the State quickly acceded to a defense challenge “for cause” to Juror No. 20 (who was African-American), while in contrast resuscitating and then successfully objecting to a defense challenge to Juror No. 19 (who was white), even though their answers were similar. RP (4/3/12) 672-94, 697-709. “[D]isparate questioning of minority jurors can provide evidence of discriminatory purpose because it can suggest that an attorney is ‘fishing’ for a race-neutral reason to exercise a strike.” *Saintcalle*, 178 Wn.2d at 57. While perhaps not an independent ground for reversal, the differing way that the State treated two similar potential jurors can be considered in this Court’s passion or prejudice review.

There was also evidence of passion or prejudice in the answers given by the potential jurors themselves. For instance, during jury selection in the second trial, one potential juror (No. 113) spoke of

wanting to lynch Mr. Gregory. RP (4/17/12) 1935.¹¹⁷ While this juror was excused for cause, RP (4/17/12) 1937, the fact that lynching – historically used as a tool of white domination in cases where African-American males have been accused of sexual improprieties with white women – was even being discussed in court as a possibility is significant.

Juror No. 113 was outspoken in his use of racist imagery. Other jurors might have shared many of his perceptions of race, but were not so blunt about it. For instance, of the seated jurors in the second sentencing hearing, four of them agreed¹¹⁸ with the statement on the jury questionnaire that “African Americans often use race as an excuse to justify wrongdoing.” CP 3636, No. 58 (“6”); CP 5224, No. 127 (“8”); CP 5293, No. 130 (“5”); CP 5339, No. 132 (“9”). These same jurors also believed that the “Practices of some racial or religious groups” was a problem in our country. CP 3635, No. 58 (“5”); CP 5223, No. 127 (“5”); CP 5292, No. 130 (“5”); CP 5338, No. 132 (“10”). Juror Nos. 79 (“5”), 80

¹¹⁷ When the prosecutor asked Juror No. 113 whether, once the jury found Mr. Gregory guilty, “should the guys just pull out their guns and shoot him in the head?” Juror No. 113 said, “Probably not. But I’m a country boy. Find a tall tree and a short piece of rope.” RP (4/17/12) 1935.

¹¹⁸ Marking this question with a “5,” “6,” “7,” “8,” “9,” or “10.” .

(“10”), and 85 (“5”), agreed to this statement as well. CP 4118, 4141, 4256.¹¹⁹

During testimony in the original trial, the prosecutors and their experts repeatedly used antiquated terms like “Negroid” and “Negro” with reference to the racial characteristics of the donor of a hair found on the decedent. RP (2/14/01) 4076; RP (2/26/01) 5089, 5098-5102, 5108-10, 5119, 5127-29, 5138-46; RP (2/27/01) 5198-99, 5203-04; RP (3/19/01) 6720-21. While in and of itself not proof of an improper racial animus, *see In re Gentry*, ___ Wn.2d ___, ___ P.3d ___, Slip Op. at 18-19, 21-26 (No. 86585-0, 1/23/14), some people find such language to be unscientific and highly offensive remnants of an earlier age. *See* C. Agyemang, R. Bhopal, M. Bruijnzeels, “Negro, Black, Black African, African Caribbean, African American or what? Labelling African origin populations in the health arena in the 21st century,” 59 *J Epidemiol Community Health* 1014, 1015 (2005) (terms “Negro” or “Negroid” should be abandoned in scientific writings as they are derogatory and associated with slavery, unrelated to ethnicity and used to describe heterogeneous populations).

The use of such terminology should then be seen in conjunction with the prosecutor’s use of the term “lily white” when he was arguing in

¹¹⁹ Juror No. 23 simply checked the box. CP 2824.

favor of admission of gruesome photographs.¹²⁰ This term has its origins in the “Lily White Movement,” an anti-civil rights movement within the Republican Party in the Reconstruction South.¹²¹ Whether consciously or unconsciously, the prosecutor’s use of historically charged terminology in this case cannot be simply ignored.

Added to the outdated terminology, the prosecution’s stated intent was to dehumanize Mr. Gregory in front of the jury. During the first trial’s jury selection, the State actually objected to defense counsel calling Mr. Gregory by his name and introducing him to the jury, which the State argued gave the defense an “unfair advantage” – “Why not have them come over and shake his hand if that’s what he is allowed to do? The idea is, we are not trying to make this personal.” RP (1/9/01) 1056-57. Then, during the discussion of jury instructions during the second sentencing

¹²⁰ The prosecutor argued to the court (not the jury):
[T]he defense is trying to minimize the impact of the pictures because they want a life sentence instead of death. Case law is replete with you can’t depict a violent crime in a lily-white manner.

RP (4/24/12) 2352.

¹²¹ See *United States v. Louisiana*, 225 F. Supp. 353, 368-70 (E.D. La 1963) (describing historical context) *aff’d*, *Louisiana v. United States*, 380 U.S. 145, 85 S. Ct. 817, 13 L. Ed. 2d 709 (1965); *Nevett v. Sides*, 571 F.2d 209, 234 (5th Cir. 1978) (Wisdom, J., concurring) (describing progression from “lily-white primary” to literacy tests); Wikipedia, "Lilium Candidum" http://en.wikipedia.org/wiki/Lilium_candidum (last viewed 2/3/14) (noting interaction between “White Lily” and slavery and lynchings).

hearing, the State objected to using Mr. Gregory's name in one instruction, rather than "the defendant." The State accused the defense of trying to "humanize" Mr. Gregory – "they want to emphasize Allen Gregory, human being, and ignore the offense." RP (5/8/12) 2740. *See also* RP (5/14/12) 2989 (defense excepts to failure of Instruction No. 2 to refer to Mr. Gregory's full name).¹²²

c. Differential treatment for trial misconduct.

The State's desire to dehumanize Mr. Gregory should be seen in the context of the differential treatment afforded various people connected to this case who engaged in irregular behavior during the course of the trials. On one hand, Mr. Gregory's relatives, who were African-American, were excluded from the courtroom during the murder trial or admonished for making facial expressions during testimony. *See Gregory*, 158 Wn.2d at 815-16; RP (3/7/01) 6012-13.

¹²² The prosecutor also continuously referred to Mr. Gregory, not by name, but as "this defendant." RP (1/23/09) 48; RP (2/15/09) 59, 62; RP (6/3/09) 122; RP (9/15/10) 236; RP (3/5/12) 69; RP (4/2/12) 574, 597; RP (4/3/12) 728, 739, 751, 753; RP (4/4/12) 919; RP (4/5/12) 1093; RP (4/9/12) 1291, 1294, 1297; RP (4/10/12) 1438; RP (4/11/12) 1499, 1547; RP (4/12/12) 1661, 1680, 1713; RP (4/18/12) 2108; RP (5/8/12) 2731; RP (5/10/12) 2842, 2901; RP (5/14/12) 3013, 3023, 3028, 3032, 3049, 3051, 3054, 3061, 3088, 3092. This list does not include the references in the first trial.

In contrast, there were a series of incidents during both trials involving contact between prosecutors and their witnesses with jurors that resulted in no admonishments or sanctions:

- During the 2001 trial, a white detective¹²³ chatted with a juror about the juror's son's law enforcement work. RP (2/20/01) 4688-91; RP (2/21/01) 4841. Another juror had brief conversations with the State's DNA experts about proficiency exams. RP (3/6/01) 5701-02. When another juror had a heart attack, one of the prosecutors took it upon himself to call up the juror's medical providers to find out information about his prognosis. RP (3/12/01) 6104-05.
- During the second sentencing hearing, the prosecutor was present in the parking garage the first day of jury selection and, because of the chaotic conditions, repeatedly opened a gate for the jurors and had verbal contacts with them. RP (3/22/12) 272.¹²⁴

While there were no mistrial motions based upon these contacts, the issue at this point is not whether the contacts should result in a new trial – some of the contacts may have been completely innocently intended (although it is not clear why, for instance, the prosecutor was greeting jurors in the parking lot on the first day of trial). Rather, the issue is the differential treatment meted out to Mr. Gregory's family members, who were African-American, who were admonished for their misconduct,

¹²³ This detective testified that none of the police at the crime scene (presumably including herself) were African-American. RP (2/21/01) 4853.

¹²⁴ See also RP (3/1/01) 5587-88 (juror approached prosecutor and commented on her suit); RP (5/7/12) 2648-49 (prosecutor's contact with juror at park's department).

compared to the treatment given to prosecutors and police (who were white), who were not admonished for allowing themselves to have improper contacts with jurors.

The differential treatment extended even to how the parties themselves dealt with stress during the trial. During the first trial, one defense counsel and one prosecutor each made rude personal comments to each other in open court. RP (2/6/01) 3627-28; RP (4/5/01) 7481-82. Neither appear to have been sanctioned, but it is common for lawyers in capital cases to experience high levels of anxiety. *See* M. Johnson & L. Hooper, *Resource Guide for Managing Capital Cases, Vol. I: Federal Death Penalty Trials*, Federal Judicial Center (2004) at 44 (noting high degree of acrimony between attorneys in capital cases).

Yet, in contrast, when Mr. Gregory merely told his jailers that he did not want to move cells during the sentencing trial itself, when his very life was at stake, RP (5/10/12) 2902-05, the State used Mr. Gregory's statements as a reason he should die. RP (5/14/12) 3043-44 ("You know what, if he can't behave himself now when it matters most, what possible reason would you have for thinking that he will behave after he gets a life sentence?"). There was no consideration of the stress that a capital trial

causes to everyone, including prosecutors who make crude remarks and defendants themselves.¹²⁵

d. Testimony and exhibits that engendered an emotional response.

The stress in this case was felt not just by the lawyers, witnesses and parties, but also by the jurors. At least two of the jurors in the first trial developed serious health problems, such as heart attacks and headaches during the trial, and had to be excused. RP (3/6/01) 5700-01; RP (3/8/01) 6062; RP (3/12/01) 6104.¹²⁶ Although the record does not contain testimony of the excused jurors, it is obvious that their health problems were likely related to the horrendous photos and videos that were shown to them throughout the trial. According to defense counsel, some jurors refused to look at the autopsy photos, and when the guilty verdict was announced, one juror became very emotional and cried. RP (4/3/01) 7166, 7168. There were press accounts that at least one juror stated that the jurors grew to hate Mr. Gregory because he forced them to

¹²⁵ See *United States v. Harper*, 729 F.2d 1216, 1223 (9th Cir. 1984) (“Enduring a trial that entails the possibility of a death penalty imposes a hardship 'different in kind' from enduring the discomfiture of any other trial. The emotional stress and strain of a trial in a capital case are extreme in character and *sui generis*.”).

¹²⁶ There was also a major earthquake during the trial and the building had to be evacuated, RP (2/28/01) 5403; RP (3/5/01) 5409. Further, in the second trial, one juror’s granddaughter had a medical emergency and was hospitalized. RP (5/9/12) 2798-2800.

look at graphic photographs. CP 677 (“By the time the trial was over, Fueston said he resented that Gregory had made jurors see such things.”).

Yet, the State introduced the same gruesome photos and video at Mr. Gregory’s second sentencing hearing even though the cause of death and identity of the murderer were no longer at issue. The photos and video were often repeatedly displayed to the witnesses and jurors at various parts of the hearing, often on a projection screen, RP (4/25/12) 2434, 2446, 2462-64, 2476-81, 2486-88; RP (4/26/12) 2541, 2543-46, 2549, 2568-76, 2583-95, with the prosecutor, over objection, leaving at least one gruesome photo of G.H.’s naked body up on an overhead projection screen even though it was no longer being used by the witness. RP (4/25/12) 2476-81. Then, during the State’s closing argument, the prosecutor used a PowerPoint presentation that repeatedly referred to the photos, juxtaposing G.H.’s in-life photo with graphic crime scene photos. Ex. 1 (6/13/12).¹²⁷

While the prosecutor facetiously stated, “The last time I checked, Judge, this was an aggravated murder case and the pictures were going to be gruesome,” RP (4/25/12) 2478, it is apparent that the State utilized this tactic because of its past experience at the first trial where jurors blamed

¹²⁷ See also RP (5/14/12) 3014 (in closing, prosecutor tells jurors he saw them react to the photos, but they will see them “again and again and again.”).

Mr. Gregory for forcing them to look at the photos. In this way, the State consciously promoted a verdict based upon revenge and passion.¹²⁸

As noted in the section on prosecutorial misconduct, (E)(1), the prosecutor used photos of G.H. to belittle Mr. Gregory's constitutional rights. Ex. 1 (6/13/12) at Slide 30. But, the comparison of G.H. with Mr. Gregory's assertion of constitutional rights was also heightened by the admission of testimony about G.H.'s character that included evidence that she had been an "pretty easy" child and a "pretty good little gal," that her ex-husband had "hurt her pretty bad" but she still was not "nasty" to him, that she loved animals, and that she was so sensitive that she did not like treating children as an x-ray technician in the military. RP (5/7/12) 2651-58. Other witnesses, not family members, described their pet nicknames for G.H., RP (4/25/12) 2407, and how the murder impacted them. *See* RP (4/25/12) 2424 (co-worker describes how after murder, it took her three years to sleep on her stomach).

In this way, the State juxtaposed a sympathetic version of G.H. to Mr. Gregory's life, with the jury being given competing narratives, complete with competing sets of family pictures – G.H.'s idyllic

¹²⁸ Similarly, even though the cause of death was no longer an issue, the State, over defense objection, unfurled and showed the jurors a bloody bedspread. RP (4/25/12) 2489-95. This action could have no purpose other than to inflame the jury.

upbringing versus Mr. Gregory's life. This false juxtaposition of the value of G.H.'s life against the value of Mr. Gregory's life can be considered when determining passion or prejudice.

While this Court has upheld the admission of victim impact testimony, *Gentry*, 125 Wn.2d at 617-33, the jury in this case was never told what testimony was "victim impact" and what testimony related to the facts and circumstances of the crime. While, over defense objection, the prosecutor split Ms. Peden's testimony into two sections, to try to separate out the facts from victim impact testimony, RP (4/24/12) 2269-71, 2356-77; RP (5/7/12) 2650-62, the jurors were never told of the differences between Ms. Peden's two trips to the witness stand. Thus, the jurors could only have weighed the testimony about G.H.'s character against the mitigating factors. Instruction No. 4, CP 1073. The Court can certainly compare this inappropriate balancing of Mr. Gregory's life against the good character of G.H. as having contributed to a verdict based on passion or prejudice.

e. Conclusion.

If this Court's "passion or prejudice" review means anything, it must apply in the instant case. While this Court has never reversed a death sentence under a "passion or prejudice" review, Mr. Gregory asks

this Court to do so now and remand the case for imposition of a life sentence.

10. The State presented insufficient evidence to prove beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency.

A conviction or sentence supported by insufficient evidence violates a defendant's constitutional right to due process of law. U.S. Const. amend. XIV; Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Hunley*, 175 Wn. 2d 901, 914, 287 P.3d 584 (2012). The right is especially important in capital cases, and therefore the legislature has mandated a review of all death sentences to determine whether there was "sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4)." RCW 10.95.130(2)(a). That question is, "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" RCW 10.95.060(4).

On appellate review, evidence is sufficient to support an affirmative finding only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found sufficient evidence to justify that conclusion beyond a reasonable doubt." *Yates*, 161 Wn.2d at 786; *see Jackson v. Virginia*, 443 U.S. 307, 318, 99

S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Review is *not* merely for “substantial evidence,” but is more exacting. “We have rejected a substantial evidence standard in determining the sufficiency of the evidence because it does not require *proof beyond a reasonable doubt*.” *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013) (emphasis added).

The State failed to meet its heavy burden here. Although the crime was brutal, it involved a single victim and the conviction represented an aberration in Mr. Gregory’s life. Mr. Gregory was and continues to be an especially thoughtful son, grandson, brother, father, uncle and cousin, despite having been beaten and abandoned by his own father. *See* Section (E)(2)(f)¹²⁹; RP (5/8/12) 2673, 2678, 2775; RP (5/10/12) 2921.

Additional significant mitigating circumstances include the absence of any violent felony history, Mr. Gregory’s youth at the time of the crime, and his good behavior in prison as he matured. *See* RCW 10.95.070 (“any relevant factors” may be considered in mitigation, including “history ... of prior criminal activity,” the “age of the defendant at the time of the

¹²⁹ Many of the facts and arguments relevant to the sufficiency of the evidence are already discussed in the proportionality section. Rather than repeat, Mr. Gregory will point the reader to the relevant sections of the proportionality argument.

crime,” and the “likelihood that the defendant will pose a danger to others in the future”).

Other than the crime at issue in this case, Mr. Gregory has not committed any violent felonies. *See* Section (E)(2)(e); CP 1182. This is significant, for, as this Court has recognized, limited criminal history is not only a mitigating factor in its own right, it is highly relevant to another mitigating factor: absence of future dangerousness. *Gentry*, 125 Wn.2d at 641. This Court affirmed the death sentence in *Gentry* in part because the defendant had not only been convicted of aggravated murder, but also had a violent criminal history including both another homicide and a rape. *See id.* A reasonable inference from that history was that “the defendant is a dangerous person who would continue to present a danger even while incarcerated.” *Id.* The same was true of Cecil Davis, Robert Yates, James Elledge, and Brian Lord – all of whom committed additional *homicides* beyond the aggravated murders for which death sentences were imposed. *See Davis*, 175 Wn.2d at 302 (“Davis had been convicted of second degree intentional murder for a killing that occurred the year before the [aggravated] murder of Couch”); *Yates*, 161 Wn.2d at 787 (sufficient evidence supported death sentence for defendant convicted of two counts of aggravated murder because he “killed 15 people and tried to kill a 16th”); *Elledge*, 144 Wn.2d at 76-79 (sufficient evidence supported death

sentence for aggravated murder because defendant had a violent criminal history, including a prior first-degree murder conviction); *Lord*, 117 Wn.2d at 907 (sufficient evidence supported death sentence for defendant with numerous prior violent crimes, including second-degree murder).¹³⁰ The State's evidence of criminal history in Mr. Gregory's case is minimal in comparison to these cases.

Furthermore, since the first time that Mr. Gregory's case was before this Court, the one serious violent offense he had on his record – the rape convictions involving Ms. Sehmel – were not only reversed, but the charges were dismissed with prejudice. This is in contrast to cases like *Davis* in which the defendant received an *additional* murder conviction during the period between his two capital appeals. The dismissal of the rape charges against Mr. Gregory leaves a criminal history that is insufficient to justify the death sentence.

This is especially so when viewed in combination with Mr. Gregory's behavior during incarceration. Just as his history prior to the crime in question was non-violent, so too his post-conviction conduct demonstrates his non-dangerous nature. During his sixteen years of incarceration, Mr. Gregory has never been involved in a gang. RP

¹³⁰ Notwithstanding his violent history, Lord was ultimately sentenced to life without the possibility of parole following retrial. *See State v. Lord*, 161 Wn. 2d 276, 281, 165 P.3d 1251 (2007).

(5/10/12) 2830. According to former prison warden James Aiken, this means Mr. Gregory's "level of probability to inflict random or systemic violence on somebody else is miniscule, at best." RP (5/10/12) 2831. Indeed, Mr. Gregory has never engaged in any type of violent behavior toward staff in either the state prison or the county jail. RP (5/10/12) 2833. In his sixteen years in custody, he hit another inmate only once, and he himself was the victim of one attack. RP (5/10/12) 2833, 2898, 2908. The State made much of the one time he hit another inmate, but the lack of seriousness of this incident can be seen by the State's own failure to file any criminal charges as a result and the fact that the incident resulted only in mild discipline in the Pierce County Jail.

Although Mr. Gregory pled guilty to attempted escape in 2000, this incident occurred early in his term of imprisonment, and it involved simply removing some screws; "He didn't get anywhere." RP (5/10/12) 2834. Thus, the prison expert concluded that Mr. Gregory "can be adequately managed within the correctional environment for the remainder of his life without causing an undue risk of harm to staff, inmates, or the general community." RP (5/10/12) 2835.

Part of the reason Mr. Gregory is not dangerous is that he has matured. He was only 24 years old when the murder occurred, and he is now over 40. The corrections expert explained that people experience a

“tremendous drop” in poor behavior from the late 20’s through early 30’s. RP (5/10/12) 2832. “[T]he younger inmate is more prone to be involved in predator and disruptive behavior. As they get older, that diminishes [T]hey become more mature.” RP (5/10/12) 2831. The State offered no evidence to contradict this testimony.

Not only does Mr. Gregory’s maturation demonstrate his lack of future dangerousness, but his young age at the time of the crime is itself an important mitigating factor which the State failed to overcome beyond a reasonable doubt. *See* RCW 10.95.070. It is well-settled that the part of the brain which performs “executive functions” is not completely developed before the mid-20’s. *See* Section (E)(2)(f). It is because of this phenomenon that those who committed their crimes when under age 18 can *never* be subject to the death penalty – no matter how heinous the crime or how many victims were killed. *Roper*, 543 U.S. at 578. Although the absolute bar on capital punishment applies only to those who were under 18 at the time of the crime, the Court also recognized that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.” *Id.* at 574. Indeed, the Court has held that youth must be available as a mitigating factor, for young adults over 18, as a matter of federal constitutional law. *Johnson v. Texas*, 509 U.S. at 367. “The relevance of youth as a mitigating factor derives from the fact that

the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” *Id.* at 368. Since the brains of young people are not fully developed, they are both less culpable for their crimes and more amenable to rehabilitation, and are therefore less appropriate candidates for capital punishment. *Roper*, 543 U.S. at 569-71. Because Mr. Gregory was only 24 at the time of the crime and has since matured and demonstrated he is not dangerous, the State failed to prove beyond a reasonable doubt that the death penalty was appropriate. This Court should reverse and remand for imposition of a life sentence.

11. RCW 10.95 is either unconstitutional on its face or as it has been applied insofar as it gives the prosecutor unfettered discretion whether to seek the death penalty upon remand for resentencing.

a. Introduction.

In 2006, when this Court reversed the death sentence, it “remand[ed] for resentencing in the murder case.” *Gregory*, 158 Wn.2d at 867. The Court did not explain whether the case should be remanded for resentencing to life without the possibility of parole or whether a new sentencing hearing should be held to determine whether the State could execute Mr. Gregory. The Court suggested that a new sentencing hearing was optional. 158 Wn.2d at 849 (“But since the State *may* seek the death

penalty at resentencing, the issues raised in this appeal *may* arise again.”) (emphasis added).

This silence over the precise remedy to be followed upon remand is emblematic of a deeper problem with Washington’s death penalty statute. This Court has issued conflicting decisions as to whether or not, upon appellate reversal of a death sentence, a second penalty proceeding must take place or whether the prosecutor retains discretion not to seek to execute the appellant a second time. *Compare State v. Bartholomew*, 104 Wn.2d 844, 850, 710 P.2d 196 (1985) (“*Bartholomew III*”) (prosecutor has no discretion not to seek death a second time) *with State v. Clark*, 143 Wn.2d 731, 783-84, 24 P.3d 1006 (2001) (remanding for new sentencing hearing if State “desires”).

Because of these conflicting decisions and because of the practice in Washington State of giving prosecutors the unfettered discretion to decide whether a second penalty jury should be convened after a death sentence is reversed, RCW 10.95 violates the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 3, 12 and 14 of the Washington State Constitution, both on its face and as applied. Mr. Gregory’s death sentence in this case should therefore be

vacated and the case remanded for imposition of a life without parole sentence.¹³¹

- b. *Bartholomew III* was based upon a fear of giving prosecutors unfettered discretion.

The death penalty in Washington exists only by virtue of statute, and the State has no inherent power to execute anyone. *See State v. Benn*, 120 Wn.2d 631, 671, 845 P.2d 289 (1993) (prosecutor's authority in death penalty cases is "inherently (and wisely) limited" by statutory requirements of RCW 10.95). The State can seek this ultimate sanction, but only if the requirements of RCW 10.95.040(1) are strictly followed.

In *Bartholomew III*, this Court explained:

The "discretion" the prosecutor possesses at the charging stage is narrowly focused. The prosecutor can only follow the statutory instructions.

104 Wn.2d at 849. This statutory channeling of discretion is what has led this Court repeatedly to uphold RCW 10.95 from equal protection challenges, most recently in *McEnroe*, 179 Wn.2d at 43-45.

On the other hand, once a death notice is filed and once there is a conviction for aggravated murder, there is no provision in the statute

¹³¹ This issue was not raised below, but because of its constitutional and jurisdictional nature, it is raised here for the first time on appeal under the standard that heightened scrutiny is required to review errors in capital sentencing cases. RAP 2.5(a)(1) & (3); *Lord*, 117 Wn.2d at 849.

allowing for the withdrawal of a death notice. RCW 10.95.050(1)

provides:

If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by RCW 10.95.040. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

Emphases added.

Similarly, RCW 10.95.050(4) provides in part:

[I]f a retrial of the special sentencing proceeding is necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary.

Emphases added.

This Court first construed this language nearly 30 years ago in *Bartholomew III*. After this Court vacated Mr. Bartholomew's death sentence because of the improper admission of evidence at the special sentencing proceeding,¹³² the State decided not to seek the death penalty a second time. When the trial court ruled that the prosecutor lacked

¹³² *State v. Bartholomew*, 98 Wn.2d 173, 654 P.2d 1170 (1982) (“*Bartholomew I*”), vacated and remanded *Washington v. Bartholomew*, 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983), affirmed upon remand in *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984) (“*Bartholomew II*”).

discretion to decide not to seek death, both the State and the defendant appealed. 104 Wn.2d at 845-47.

On appeal, this Court interpreted the language of RCW 10.95 as being unambiguous and divesting the prosecutor of discretion not to seek the death penalty once the notice of special sentencing proceeding was served and filed. 104 Wn.2d at 847-48. While the prosecutor has guided discretion as to whether to file a death notice in the first instance, when a case is remanded for error in the penalty stage, the Court noted that the statute contained no standards for the exercise of discretion:

No statute exists to give him any guidance whatsoever in administering such power. Consequently, the prosecution would have the power to refuse to take the case to the jury even though the defendant has already been convicted of aggravated first degree murder. Since no guidelines would control the prosecution's decision, it is possible under a factual situation that two defendants, who are convicted of aggravated first degree murder and who have their cases remanded on appeal due to error in the sentencing phase, can, on remand, be subject to different dispositions of their cases. The prosecutor, quite arbitrarily, can decide to take one case to a new sentencing jury while refusing to do the same with the other. Consequently, two defendants, in identical situations, may have their penalties decided differently because the prosecutor has unbridled discretion as to how each will be treated. This clearly violates the Fourteenth Amendment's equal protection clause.

104 Wn.2d at 849.

Moreover, prosecutorial discretion after a vacated death sentence would usurp the jury's role, key to the Eighth Amendment. *Id.* at 850

(“The community should decide whether death is the appropriate punishment for a defendant. The jury, and not the prosecutor, far better represents the community.”). The Court thereupon remanded Mr. Bartholomew’s case to the trial court for a penalty proceeding where the prosecutor could appear before the jury and “ask for mitigation and the sparing of defendant's life.” *Id.*¹³³ *Bartholomew III* has never been explicitly overruled and this Court continues to cite it as authority. *McEnroe*, 179 Wn.2d at 44.

c. *Bartholomew III* has been superseded in practice, with this Court’s explicit approval.

Despite the seemingly clear holding of *Bartholomew III*, the parties below believed that the Pierce County Prosecuting Attorney retained the discretion to decide whether to seek death against Mr. Gregory a second time, making repeated references between 2007 and 2010 to suggestions of negotiations. RP (6/3/09) 122; RP (8/28/09) 132-33; RP (8/26/10) 222-23. The record is silent about whether the precise nature of the negotiations and what actually transpired.

The parties’ belief in this case that the State had discretion not to seek death upon remand is explicitly supported by this Court’s 2001

¹³³ After the second penalty trial, Mr. Bartholomew received a life without parole sentence. See *Bartholomew v. Wood*, 34 F.3d 870, 873 (9th Cir. 1994) (describing history), *rev’d* 516 U.S. 1 (1995), *on remand*, 96 F.3d 1451 (9th Cir. 1996).

decision in *State v. Clark, supra*, a decision that directly contradicts *Bartholomew III*. *Clark* involved a conviction for aggravated murder where the defendant kidnapped, raped and stabbed to death a seven-year-old girl. 143 Wn.2d at 738-43. On direct appeal, this Court affirmed the conviction, but vacated the death sentence because of the improper admission of details about a prior conviction during the penalty trial. As for remedy, the Court held: “[W]e reverse his death sentence and remand to the trial court where, *if the State desires*, a new special sentencing proceeding *may* take place.” *Id.* at 783-84 (emphasis added).

Thus, in stark contrast to *Bartholomew III*, this Court explicitly gave the State the power to determine, based upon its “desires,” whether a new penalty proceeding “may” take place. The use of the word “may” in particular contradicts the holding of *Bartholomew III* where this Court held that the use of the word “shall” in RCW 10.95.050, as opposed to the word “may,” means that the Legislature intended the prosecutor to have no discretion. *Bartholomew III*, 104 Wn.2d at 848. However, in *Clark*, the Court gave to the prosecutor that which it took away in *Bartholomew III*.

Indeed, after Mr. Clark’s case was remanded to the trial court, the State “withdrew [the] notice of intent to seek a second death sentence.” TR No. 277 at 6. This was likely based on the fact that, shortly before the second sentencing hearing, “Mr. Clark admitted he was solely responsible

for the murder of Roxanne Doll.” *Id.* at 4. The trial report noted that “[t]he wishes of the victim’s family were a significant factor in the decision to withdraw the notice of special sentencing proceeding.” TR 277 at 13.¹³⁴ Thus, with the Court’s explicit permission, Mr. Clark received a benefit that Mr. Gregory did not receive – the withdrawal of a death notice after this Court reversed the original death sentence.

d. The holding and practice of *Clark* causes constitutional violations that the Court in *Bartholomew III* warned against.

The Court’s grant of discretion in *Clark* to prosecutors to pick and choose when, on remand, to seek death a second time is unconstitutional. As the *Bartholomew III* majority held, while the initial decision to seek death is guided by the statutory criteria, nothing in RCW 10.95 gives any guidance to prosecutors in a post-appeal situation. Prosecutors now have unfettered discretion to pick and choose who must face a second penalty jury and who does not. The Court’s use of the words “*if the State desires,*” *Clark*, 143 Wn.2d at 784 (emphasis added), is telling, and allows the State to decide based on any criteria – or no criteria – who lives and who risks facing the executioner.

¹³⁴ This Court subsequently recognized, without comment, the discretion exercised in *Clark*. See *Davis*, 175 Wn.2d at 363 n.40 (including *Clark* in category of cases “in which the State decided not to seek the death penalty in a second . . . sentencing proceeding” after a death sentence was overturned).

There are no limits and no guidelines to channel this discretion. Mr. Clark lives presumably because shortly before the second penalty proceeding he admitted guilt. TR No. 277 at 4. Yet, this Court struck down Washington's earlier death penalty scheme because it unconstitutionally penalized defendants for going to trial by providing the incentive of a life sentence to those who admitted their guilt and pled guilty. *See State v. Frampton*, 95 Wn.2d at 478-79.¹³⁵

Did the Pierce County Prosecuting Attorney in this case decide to seek death a second time because Mr. Gregory refused to admit he was guilty and did not agree to withdraw any possible post-conviction remedies as to his underlying conviction? Is there any guarantee that the prosecutor's decision to seek death a second time against Mr. Gregory was not based on improper grounds?¹³⁶ Without neutral criteria in the statute governing the exercise of prosecutorial discretion, it cannot said with any assurance how the decision was made in this case.

¹³⁵ *See also State v. Martin*, 94 Wn.2d 1, 21-25, 614 P.2d 164 (1980) (Horowitz, J., concurring); *United States v. Jackson*, 390 U.S. 570, 581-83,, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) (statute that reserved death penalty for those who went to trial was unconstitutional).

¹³⁶ *See Furman v. Georgia*, 408 U.S. 238, 242, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972)("It would seem to be uncontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or *if it is imposed under a procedure that gives room for the play of such prejudices.*") (emphasis added).

- e. RCW 10.95.050 is unconstitutional as written and as applied.

The unfettered discretion that this Court in *Clark* gave to the prosecutors to seek life or death on remand is unconstitutional. As explained in *Bartholomew III*, such discretion violates equal protection under the Fourteenth Amendment and article I, section 12. Here, in the absence of any criteria to seek life or death, the statute allows for arbitrary decision-making, based, not on narrow statutory criteria, but on impermissible facts.

Similarly, the absolute discretion given to the prosecutors to pick and choose, based upon their “desires,” who lives and who dies, violates the requirement under the Eighth Amendment and article I, section 14, that discretion in seeking death be narrowly channeled and that the jury, as the conscience of the community, retains the ultimate role of deciding who lives and who dies. *Bartholomew III*, 104 Wn.2d at 850. The prosecutor’s “desires” have impermissibly replaced the conscience of the community.

As noted, in the past this Court has upheld the discretion RCW 10.95 given to the elected prosecutor to seek death initially because of the narrow criteria set out in the statute. *State v. McEnroe, supra*; *State v. Campbell*, 103 Wn.2d at 25-27. The protections in RCW 10.95 against arbitrary decision making, however, do not exist with regard to the

unbridled and standardless discretion given to prosecutors to seek life or death upon remand, under *Clark*. Accordingly, RCW 10.95 is unconstitutional as written, and the death sentence imposed on Mr. Gregory should be vacated.

But, the statute is also unconstitutional as it has been applied. The United States Supreme Court has held:

[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor *and apply its law* in a manner that avoids the arbitrary and capricious infliction of the death penalty.

Godfrey v. Georgia, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980) (emphasis added).¹³⁷

Here, by announcing one rule in *Bartholomew III*, and another in *Clark*, the Court has set up a capital punishment scheme that, in practice, has been arbitrarily carried out. Because of this Court's decision in *Clark*, the man who kidnapped, raped and stabbed to death a seven-year-old girl was able to escape execution, while Mr. Gregory did not get that benefit. In application, RCW 10.95 is unconstitutional. The Court should vacate the death sentence.

¹³⁷ See also *Hicks v. Oklahoma*, 447 U.S. 343, 346-47, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980) (violation of state's own procedural rules violates due process under Fourteenth Amendment).

12. RCW 10.95.060 (3) is unconstitutionally vague and overbroad because it does not sufficiently define what “facts and circumstances” may be admitted during a second penalty hearing.

Apart from the lack of discretion given to prosecutors when deciding whether to seek death a second time after a death sentence is reversed, there is another constitutional problem with retrials of capital cases. RCW 10.95.060(3) is so vaguely worded that it fails to delineate exactly what type of evidence about the “facts and circumstances” of the crime may be put before the second sentencing jury.

In the trial court, Mr. Gregory objected to this procedure and asked the judge to find RCW 10.95.060(3) unconstitutional. CP 524-42. The trial court denied the motion. CP 620-21. However, rather than addressing the issues raised by Mr. Gregory, the trial court wrongly concluded that this Court had already decided the issue in *State v. Bartholomew*, 98 Wn.2d 173, 654 P.2d 1170 (1982) (“*Bartholomew I*”) and *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984) (“*Bartholomew II*”). RP (6/24/11) 307-08; CP 620-21. Contrary to the trial court’s conclusion, this Court has never decided the precise issue raised here. This Court should now hold that RCW 10.95.060(3) is vague and overbroad in violation of the Eighth and Fourteenth Amendments and article I, sections 3 and 14, and hold that the admission of various

categories of evidence at the sentencing proceeding under the guise of “facts and circumstances,” including gruesome photographs, evidence of the lack of residual doubt and a dangerous knife, violated Mr. Gregory’s constitutional rights.

- a. To be constitutional, a death penalty statute must set forth clear standards which sufficiently narrow the discretion of the jury.

To survive scrutiny under the Eighth and Fourteenth Amendments, a state’s capital sentencing scheme must not permit death sentences to be imposed in an arbitrary and capricious manner. “[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” *Gregg v. Georgia*, 428 U.S. at 189 (opinion of Stewart, Powell and Stevens, JJ.). Sentencing procedures must set forth “clear and objective standards” that provide “specific and detailed guidance” to the sentencer. *Godfrey*, 446 U.S. at 428. Essential to the Eighth Amendment’s channeling process is the bifurcation of capital proceedings, by which the murder trial is separated from the sentencing phase, with the jury’s discretion at sentencing being carefully guided by instructions. *Gregg v. Georgia*, 428 U.S. at 190-95 (opinion of Stewart, Powell, and Stevens, JJ.).

Like the other U.S. jurisdictions that have not abandoned capital punishment, Washington has adopted a bifurcated procedure. However, RCW 10.95 differs from many capital schemes “in that it requires the aggravating circumstances to be proved at the guilt phase of the proceedings.” *Bartholomew I*, 98 Wn.2d at 189. Only after conviction for aggravated murder does the jury consider the penalty at a second proceeding. RCW 10.95.050. The focus of the “penalty” phase is on mitigation, with the jurors being instructed to consider one the one question in RCW 10.95.060(4).

- b. RCW 10.95.060 (3) is unconstitutional because it broadly permits introduction of evidence of the “facts and circumstances” of the crime, without defining the limits of that phrase.

In the *Bartholomew* cases, this Court addressed only the first paragraph of RCW 10.95.060(3), regarding the admission of evidence, finding that the statute as written, by allowing hearsay and non-conviction evidence, was unconstitutional. As a remedy, the Court limited the nature and scope of evidence that the State could admit at a capital sentencing proceeding, prohibiting what it considered to be “non-statutory” aggravating factors. *See Bartholomew II*, 101 Wn.2d at 642-43.

Mr. Gregory challenges the second paragraph of the RCW 10.95.060(3)¹³⁸ – a paragraph not at issue in *Bartholomew*. Yet, this second paragraph allowing introduction of any evidence “concerning the facts and circumstances of the murder” is vague and overbroad in violation of the Eighth and Fourteenth Amendments and article I, sections 3 and 14. *See Zant*, 462 U.S. at 874; *Godfrey*, 446 U.S. at 428.¹³⁹

The statute does not specify what is meant by the “facts and circumstances” of the murder and provides no standards regarding what facts and circumstances the jury is to consider and how it is to consider them. This lack of guidance allows the State to introduce just about any

¹³⁸ RCW 10.95.060(3)’s second paragraph states:

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

¹³⁹ While this Court has described *Bartholomew* as holding portions of RCW 10.95.060(3) paragraph one unconstitutional while “specifically [upholding] paragraph two of the same statute.” *Elmore*, 139 Wn.2d at 287, the holding was only “implied.” *Bartholomew I*, 98 Wn.2d at 218 (Utter, J., concurring in part and dissenting in part). In fact, the overbreadth and vagueness of paragraph two, as applied to a retrial of a capital sentencing proceeding, was never at issue in either *Elmore* nor *Bartholomew*. “In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.” *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. I*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994).

evidence at a penalty phase that tangentially relates to the facts and circumstances of the murder, even if it has nothing to do with the defendant's moral culpability. In essence, the "facts and circumstances" language turns a proceeding that is supposed to be bifurcated – so that discretion is properly channeled – into the type of unitary guilt/penalty proceeding that was common in the pre-*Furman* and pre-*Gregg* era. This breakdown of a bifurcated proceeding violates the Eighth Amendment and article I, section 14, because, as Justice Utter observed, RCW 10.95.060(3) does not give any direction to the jury as to what facts and circumstances are to be considered and how the jury "is to consider them." *Bartholomew I*, 98 Wn.2d at 218-19 (Utter, J., concurring in part, dissenting in part).

The lack of clarity about what "facts and circumstances" can be introduced under RCW 10.95.060(3), is illustrated by this Court's decision in *In re Cross*, 178 Wn.2d 519, 309 P.3d 1186 (2013). There, in holding a defendant could enter an *Alford* plea to capital murder, this Court indicated that a person facing the death penalty could actually gain an advantage by pleading guilty, because he could thereby avoid the introduction of prejudicial facts before the sentencing jury. *Id.* at 531. Yet, the assumption that by pleading guilty one could prevent the sentencing jurors from hearing the gruesome details is not correct if RCW

10.95.060(3) is construed to allow the unlimited presentation of any fact or circumstance of the murder in the penalty phase.

- c. The vagueness of the “facts and circumstances” language led the trial court to allow into evidence prejudicial gruesome evidence.

Over Mr. Gregroy’s objections, the trial court allowed the State free license to introduce any evidence it desired at the penalty proceeding that it could have introduced at the guilt phase of the case. CP 524-42, 666-79, 738-39. Thus, as noted above in Section E(9)(e), the trial court admitted all of the gruesome photographs and video, from both the crime scene and the autopsy, that were admitted at the original guilt-phase trial, and even allowed the State to unfurl a bloody bedspread before the jury. CP 738-39; RP (4/25/12) 2489-96. The jury’s discretion was not channeled in dealing with this evidence, and, instead, the jury was allowed to consider this gruesome evidence in any manner, just as it would in a unitary pre-*Furman* capital trial.

Indeed, the prosecutor began his closing argument by putting some of the photos up on a screen in his Power Point presentation, Ex. 1 (6/13/12) at Slides 5, 6, 8, 9, 12, while arguing that death was appropriate because some crimes are just “so monstrous and so evil” that the person who commits it has “got to face the death penalty.” RP (5/14/12) 3012. The prosecutor noticed that the jurors reacted to the photos, but told

“you're going to see some of those again and again and again.” RP (5/14/12) 3014. The State thus used the crime-scene and autopsy photos for shock value in closing argument. *See Spears v. Mullin*, 343 F.3d 1215, 1228 (10th Cir. 2003) (affirming habeas relief where the prosecutor had not introduced a series of gruesome photographs in the guilt phase, and instead reserved them for introduction at the penalty phase for “shock value”).

While such photographs may have a role in a murder trial, to illustrate the cause of death or even whether there was premeditation,¹⁴⁰ here, where there was no issue before the jury regarding Mr. Gregory’s guilt, there was no legitimate purpose in the sentencing hearing for the introduction of this distressing evidence. The jury’s discretion therefore was not properly channeled, and it was allowed to impose a death sentence simply based upon the emotional impact of visual evidence. In effect, the jury was urged to vote to kill Mr. Gregory simply because the photographs of G.H. were more difficult to look at than if she had been coolly and calmly executed by a professional hitman. In this way, the gruesome visual evidence operated as the type of non-statutory aggravating factor

¹⁴⁰ *But see State v. Bingham*, 105 Wn.2d 820, 827-28, 719 P.2d109 (1986) (facts of savage murder drives jurors to conclude premeditation existed, but judges understand that many brutish murders are committed in heat of frenzy and are only second degree murders).

prohibited by *Bartholomew I* and *II*, the Eighth Amendment and article I, section 14.

- d. The trial court erred in allowing the State to introduce evidence of the lack of residual doubt because, while the circumstances of the crime are relevant at sentencing, whether the defendant committed the crime is not an issue.

Prior to trial, Mr. Gregory moved to exclude the DNA evidence because the jury was going to be told that Mr. Gregory was guilty. CP 677-78. The trial court rejected this argument, simply stating that the evidence was admissible as part of the “facts and circumstances” of the crime, and that this Court had already ruled on issues about admissibility of evidence. CP 738-39. The trial court erred.

Mr. Gregory was found guilty of aggravated murder in 2001 and this Court upheld the conviction. This Court reversed the death sentence, remanding for resentencing only. *Gregory*, 158 Wn.2d at 777-78. The purpose of the new sentencing hearing was solely to determine whether the State has proved the absence of sufficient mitigating circumstances beyond a reasonable doubt, not to determine whether Mr. Gregory was guilty or not guilty.¹⁴¹

¹⁴¹ See RCW 10.95.060(4) (jury is asked, “Having in mind the crime of which the defendant *has been found guilty*, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?”) (emphasis added).

In accordance with this purpose, the jury was instructed multiple times that Mr. Gregory had already been convicted beyond a reasonable doubt of aggravated murder, and Mr. Gregory himself stipulated to the conviction. CP 746-47, 1071; RP (5/7/12) 2642. Yet, despite such stipulations, the trial court allowed the State to introduce significant evidence involving the strength of the case against Mr. Gregory, including extensive DNA evidence¹⁴² and evidence about the high quality of the police investigation.¹⁴³

As Mr. Gregory pointed out in the trial court, evidence as to his guilt was not relevant and should have been excluded. CP 674, 677-78 (citing ER 401, 402; RCW 10.95.060(4)). In fact, if Mr. Gregory wanted to take the opportunity of the new sentencing hearing and try to prove he was not guilty of the murder, and that he was the victim of shoddy police work or that the DNA evidence was inconsistent with his guilt, he would not have been allowed to have done so. This Court has held that

¹⁴² This evidence included the processing of the DNA from the crime scene, how the police obtained Mr. Gregory's DNA, and the statistical probabilities that Mr. Gregory was the donor of the semen found at the scene and in G.H.'s body. RP (4/25/12) 2499-2500; 2628-42.

¹⁴³ This evidence included testimony about the securing, preservation, processing and documentation of the crime scene and G.H.'s body, details about the autopsy, the neighborhood canvass, the attempts to collect fingerprint evidence, the course of the investigation between 1996 and 1998 and how Mr. Gregory was categorized by police as a "person of interest." RP (4/25/12) 2430-35, 2452-58, 2464-66, 2466-68, 2474-75, 2486, 2496-99; RP (4/26/12), 2540-51, 25622603.

arguments regarding residual doubt have no place in the penalty phase of a capital trial: “Residual doubt as to the defendant's guilt is not one of the ‘relevant factors’ listed in RCW 10.95.070 (or the jury instructions), nor does the constitution require that it be treated as a mitigating factor.” *In re Lord*, 123 Wn.2d 296, 330 n. 13, 868 P.2d 835 (1994). “[S]entencing traditionally concerns *how*, not *whether*, a defendant committed the crime.” *Oregon v. Guzek*, 546 U.S. 517, 526, 126 S. Ct. 1226, 163 L.Ed.2d 1112 (2006) (emphases in original). If residual doubt was not an issue, the State should not have been allowed to introduce evidence of a *lack* of residual doubt. Given Mr. Gregory’s stipulation that he had already been found guilty, it was improper and unfair (and an abuse of discretion) then to allow the State to prove again that Mr. Gregory was in fact guilty. *See Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) (abuse of discretion to admit evidence of prior convictions where defendant agreed to stipulate to those convictions).

This Court has held that the strength of the State’s evidence is a factor the elected prosecutor may consider, *prior to trial*, when determining whether to file a notice that the State will seek the death penalty in the event of conviction. *McEnroe*, 179 Wn.2d at 38-46. But once the guilt phase of the trial is concluded, the strength of the evidence is no longer an issue, and the lack of residual doubt cannot be considered

as a reason to impose death. Where guilt or innocence is no longer an issue, evidence that demonstrates a lack of residual doubt becomes an improper non-statutory aggravating factor, in violation of this Court's holdings in *Bartholomew I* and *II*, the Eighth and Fourteenth Amendments and article I, sections 3 and 14. Such evidence could only have had the effect of making the jurors feel good about voting to execute Mr. Gregory simply because of the lack of residual doubt, an improper factor for the jurors to take into account.

This Court should therefore hold that the trial court erred in admitting, as evidence of the "facts and circumstances" of the murder, DNA evidence, evidence related to the police investigation, and other evidence of the lack of residual doubt, at the sentencing phase, and that the language of RCW 10.95.060(3) that arguably allowed that evidence to be admitted violates the Eighth and Fourteenth Amendments and article I, sections 3 and 14.

- e. The trial court erred in allowing the State to introduce evidence that Mr. Gregory owned a knife because it was not relevant to an issue at sentencing and Mr. Gregory had a constitutional right to bear arms.

In the first appeal, this Court upheld the admission at the murder trial of a knife found in Mr. Gregory's car searched pursuant to the investigation in the now dismissed rape charge. Although there was

unrebutted evidence that Mr. Gregory obtained this knife after the murder, and although the medical examiner testified that G.H.'s wounds could have been caused by thousands of instruments, the Court upheld its admission as substantive evidence of Mr. Gregory's guilt. *Gregory*, 158 Wn.2d at 835. The Court also rejected Mr. Gregory's argument that the admission of the knife violated his constitutional right to bear arms and due process under *State v. Rupe, supra*.¹⁴⁴ The Court reasoned that, unlike in *Rupe*, the admission of the knife was relevant to the State's attempt to connect the knife to the murder at issue in this case. *Gregory*, 158 Wn.2d at 836.

Upon remand, Mr. Gregory objected to the admission of the knife as not being relevant to the issue of the lack of mitigating circumstances. CP 678-79. The trial court rejected this argument, ruling that this Court had already decided the issue and that the knife was still relevant. CP 738-39; RP (3/5/12) 74. The trial court's ruling, however, did not consider the admission of the knife as a non-statutory aggravating factor related to weapons' ownership, and thus constituted error.

¹⁴⁴ In *Rupe*, the Court held that the introduction of evidence of a person's ownership of firearms, not linked to the crime, violated due process by punishing the person for exercising his or her right to bear arms, and operated as an unconstitutional non-statutory aggravating factor by allowing jurors to impose the death penalty because they believed he was a dangerous person. 101 Wn.2d at 704-08.

When this Court decided the issue of the admission of the knife, it was deciding it in a specific context – in the context of admission at the *guilt-phase* of the trial where a disputed issue was the identity of the murderer. To the extent that a search of Mr. Gregory’s car in 1998 turned up a knife that was among the thousands of different types of knives that could possibly have been used to kill G.H. in 1996, it was arguably marginally relevant and used to prove that Mr. Gregory was the person who killed G.H. The jury’s use of this evidence was therefore arguably appropriately channeled. What this Court was not asked to decide in the first appeal was the issue of the knife’s admissibility at a second sentencing trial, a proceeding at which the issue was no longer the identity of the murderer, but rather what penalty should be imposed. This is a different issue and, accordingly, this Court’s decision in 2006 does not control the outcome.

At this second proceeding, the jurors were presented with testimony that a knife was used to inflict G.H.’s wounds, and thus this component of the “facts and circumstances of the murder” was already satisfied. RP (4/26/12) 2572-82. As noted above in Section E(12)(d), Mr. Gregory stipulated that he had already been convicted of causing the death of G.H. There were, therefore, no disputed issues at this proceeding such that the knife found in Mr. Gregory’s car in 1998 had any relevancy.

On the other hand, the way the jury heard the testimony about the knife could only have made it prejudicial. The jurors heard (1) that the knife, Ex. 27, was found in Mr. Gregory's car in August 1998 pursuant to a search warrant (and the knife was then shown to the jury on different occasions during the testimony), RP (4/25/12) 2500; RP (4/26/12) 2582; (2) that the knife had been subjected to detailed forensic examination and there was *no* evidence of any blood on the knife, RP (5/7/12) 2637; and (3) that the knife, although capable of inflicting the wounds, was simply one of many knives that could have caused the injuries. RP (4/26/12) 2581-83.

Thus, at the penalty phase of a capital trial, as evidence of a "fact and circumstance" of the murder, the State was allowed to put before the jury evidence that, in August 1998 – two years after the death of G.H. – Mr. Gregory possessed a knife that likely had no tie to the murder, but was a dangerous weapon that was capable of being used to commit murder. This evidence improperly penalized Mr. Gregory for the exercise of a constitutional right and violated due process and the right to bear arms. U.S. Const. amends. II and XIV; Const. art. I §§ 3 and 24. In light of Mr. Gregory's argument that the murder represented only 20 minutes of an otherwise non-violent life, RP (5/14/12) 3066, this evidence of possession of a dangerous weapon two years after the incident was equivalent to a

non-statutory aggravating factor, in violation of the Eighth Amendment, article I, section 14 and *Bartholomew I* and *II*. Rather than the jury using the knife as evidence of identity in the first phase of a bifurcated trial, the jury here was given no direction as to the use of the knife, and were allowed to balance Mr. Gregory's possession of a dangerous weapon against the mitigating evidence. This Court should therefore hold that the trial court erred in admitting Ex. 27 as evidence of the "facts and circumstances" of the murder, and, to the extent RCW 10.95.060(3) allows for admission of such evidence, the statute violates the Eighth and Fourteenth Amendments and article I, sections 3 and 14. The Court should reverse the death sentence.

- f. Providing a different type of sentencing hearing to someone who won an appeal than to someone who is being sentenced in the first instance violates equal protection.

As noted above, the bifurcation of capital trials is an important mechanism to insure that juror discretion in sentencing is properly channeled. There is a decided advantage to capital defendants to have gruesome photographs or a weapon displayed to the jury first in the context of the narrowly channeled proceeding of the murder trial, in a proceeding that is separated in time and purpose from the sentencing proceeding. *See, e.g., In re Elmore*, 162 Wn.2d 236, 255-56, 172 P.3d 335

(2007) (“Dennis Balske states that, by conducting a trial on guilt, the jury can begin to discharge its emotional reactions to the crime.”). This is how such evidence normally is presented to the jury in Washington State – at the murder trial, rather than the sentencing proceeding.

Yet, here, Mr. Gregory’s new sentencing proceeding shifted focus from whether or not the State could prove the absence of mitigating circumstances to a proceeding that instead focused on the bloody bedspread, the gruesome photographs, Mr. Gregory’s ownership of a dangerous knife, or the lack of residual doubt as to his guilt. This placed him at a significant disadvantage than if he had a “normal” bifurcated proceeding.¹⁴⁵

Yet, this difference in treatment was based in this case solely on the fact that Mr. Gregory had a constitutional right to appeal, Const. art. I, § 22, and won that appeal because of legal errors and prosecutorial misconduct. Mr. Gregory has therefore been treated differently in terms

¹⁴⁵ This is not to say that when the same jury that hears the trial testimony also sits during the sentencing hearing it cannot consider the evidence (including gruesome photos) when determining whether the defendant lives or dies. However, the focus of the proceeding clearly shifts from whether the defendant committed the crime to whether the State can overcome its burden of proving the absence of mitigating circumstances, a shift that did not take place in the unitary proceeding below.

of the type of sentencing hearing he had in 2012 simply because he successfully exercised the constitutional right to appeal.

A strict scrutiny standard is applied because RCW 10.95 infringes upon a fundamental right, the right to an appeal under article I, section 22. *See Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992); *State v. Shawn P.*, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993). “Under the strict scrutiny test, a law may be upheld only if it is shown to be necessary to accomplish a compelling state interest.” *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987).

Here, this test is not satisfied. A person who successfully challenges a wrongfully imposed death sentence should not then be treated less favorably than a person who faces capital sentencing in the first instance. The State does not have a compelling interest in a procedure that allows in more prejudicial evidence, in an unstructured way, at the very proceeding where the person’s life is a stake simply because the person successfully exercised the constitutional right to appeal.

It is correct that RCW 10.95.060(3) also applies to defendants who plead guilty to aggravated murder in addition to those whose death sentences are vacated on appeal. However, those who plead guilty and face a jury for the first time for sentencing are in an analytically different situation than someone whose death sentence is vacated on appeal. As

this Court recognized in *Cross*, the person who pleads guilty may do so in order to avoid prejudicial facts from coming out before the jury. *Cross*, 178 Wn.2d at 530. This is a tactical decision, whether it works or not. *See id.* (“The tactic did not work.”).

In contrast, Mr. Gregory did not play a calculated tactical game. He was first sentenced to death at a proceeding that was fundamentally flawed, tainted by improper rape convictions and by prosecutorial misconduct. He did not cause the prosecutor to commit misconduct in the first penalty proceeding, nor did he cause the trial court in the rape case to deny him the ability to examine Ms. Sehmel’s dependency files. Mr. Gregory’s appeal was the only way he could continue to live.

At the very least, when he won his appeal, Mr. Gregory should have been made whole. He should have had at least the same chance for obtaining a life sentence as he had previously, with a bifurcated proceeding whose focus was on mitigation. This differential treatment, whereby successful appellants in capital cases have different rules at their retrials than at a first sentencing hearing, violates equal protection of the laws under the Fourteenth Amendment and article I, section 12. The death sentence should be vacated.

13. To avoid constitutional infirmities with RCW 10.95, this Court should construe RCW 10.95.090 to preclude a second penalty hearing once this Court invalidates a death sentence.

As explained in the preceding sections, there are numerous constitutional problems with subjecting a successful appellant to a second special sentencing proceeding. This Court need not reach these issues, however, because another portion of the statute resolves the problem. Once the death sentence in this case was vacated by this Court, the only statutory remedy available was to remand for imposition of a life without parole sentence.¹⁴⁶

RCW 10.95.090 is explicit:

If any sentence of death imposed pursuant to this chapter is commuted by the governor, or held to be invalid by a final judgment of a court after all avenues of appeal have been exhausted by the parties to the action, or if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder if there was an affirmative response to the question posed by RCW 10.95.060(4) shall be life imprisonment as provided in RCW 10.95.030(1).

Emphases added.

¹⁴⁶ This issue can be raised for the first time on appeal because it involves the imposition of an illegal sentence. See *State v. Wilson*, 170 Wn.2d 682, 688-90, 244 P.3d 950 (2010).

In *Bartholomew I*, in Part VI of the lead opinion, four justices of this Court concluded that this statute precluded a second penalty proceeding after reversal of a death sentence. 98 Wn.2d at 214-16 (Pearson, J. opinion, joined in by Rosellini, J. and Williams, J.); 98 Wn.2d at 216-23 (Utter, J., concurring in part and dissenting in part). However, five justices signed an opinion, authored by Justice Dolliver, which held that RCW 10.95.090 did not preclude a new penalty proceeding. 98 Wn.2d at 223-26 (Dolliver, J., concurring in part and dissenting in part, joined in by Brachtenbach, C.J., Stafford, J., Dore, J., and Dimmick, J.).

This Court should now overrule that portion of *Bartholomew I* which allows the State to subject a defendant to a second penalty proceeding after this court reverses a death sentence. When a party asks this Court to overrule a decision, the party must make a clear showing that the prior decision is incorrect and harmful. *In re Yates*, 177 Wn.2d 1, 25, 296 P.3d 872 (2013). Here, the rule announced in Justice Dolliver's concurring/dissenting opinion in *Bartholomew I* is both incorrect and harmful.

Notably, in *Bartholomew I*, this Court raised the issue of RCW 10.95.090's preclusion of a second sentencing proceeding *sua sponte*, without the benefit of any briefing. *See Bartholomew I*, 98 Wn.2d at 214 ("The final issue to be resolved was not raised by the parties, but must

nevertheless be confronted in order to determine the appropriate disposition of this case.”). As such, although Justice Dolliver’s opinion had the effect of constituting a ruling on the merits, it has less precedential value than a decision issued after full briefing and argument by the parties. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 671, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), *overruled on other grounds, Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (summary decisions not based on briefing and argument to court are of lesser precedential value).

Moreover, *Bartholomew I* was issued in 1982, both before this Court’s decisions in *Bartholomew III* and *Clark*, and before the experiences of the past generation. The constitutional issues raised by the conflict between *Bartholomew III* and *Clark* simply had not arisen, and obviously could not have been discussed or addressed in *Bartholomew I*. The decision is harmful because the rule it adopted – allowing retrials of reversed capital sentences – has been followed inconsistently in the past three decades. A rule that is not consistently followed over time is harmful.

Justice Pearson’s opinion in *Bartholomew I* was based on the plain language of RCW 10.95.090: “If any sentence of death imposed pursuant to this chapter . . . held to be invalid by a final judgment of a court after all

avenues of appeal have been exhausted by the parties to the action . . . the sentence for aggravated first degree murder . . . shall be life imprisonment” “If a statute is clear on its face, its meaning is to be derived from the language of the statute alone.” *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002).

Justice Dolliver, though, had two responses to the plain language of RCW 10.95.090. First, he relied upon RCW 10.95.050(4) which sets out the procedure if “a retrial of the special sentencing proceeding is necessary.” Justice Dolliver concluded that this provision “fits exactly the circumstances of this case,” and that it applied “where there is a remand from an appellate court when there has been no final determination the death penalty or the death sentence are invalid.” 98 Wn.2d at 225 (Dolliver, J., opinion). To Justice Dolliver, even though the Court had reversed Mr. Bartholomew’s death sentence, the decision was not final because the State could still seek certiorari in the United States Supreme Court and thus all “avenues of appeal” have not been exhausted, as contemplated by the statute. 98 Wn.2d at 225 (Dolliver, J., opinion).

Yet, if the State opts not to file a petition for certiorari to the United States Supreme Court (as it chose not to do in Mr. Gregory’s case), this Court’s decision *does* become final and all avenues of appeal *have been* exhausted. Nothing about this Court’s decision reversing the death

sentence in *State v. Gregory, supra*, was “intermediate” or interlocutory in nature. When the mandate issued in Mr. Gregory’s first appeal, the decision of this Court, reversing Mr. Gregory’s death sentence, became final. CP 5; RAP 12.5 & 12.7.

To be sure, RCW 10.95.050(4) appears to contain conflicting language to RCW 10.95.090. However, as Justice Pearson noted, RCW 10.95.040(4) was not controlling because it did not “prescribe when a retrial is necessary,” but rather just sets out the procedures to be used if such a retrial takes place. 98 Wn.2d at 215 (Pearson, J., opinion). A retrial is not “necessary” because RCW 10.95.090 directs the imposition of life sentence upon reversal. *Id.* Justice Pearson further concluded that his construction of the statute was required both under the rule of lenity and the rule that a specific statute takes precedence of a more general statute. 98 Wn.2d at 215-16 (Pearson, J., opinion).¹⁴⁷

¹⁴⁷ The legislative history for RCW 10.95.090 confirms that the Legislature intended this result. The 1975 capital statute had a provision that if the Governor commuted a death sentence or if the U.S. Supreme Court or the Washington Supreme Court held the death penalty to be unconstitutional, the sentence was to be life without parole. Former RCW 9A.32.047. RCW 10.95.090 was intended to expand the former law to make it clear that life was to be the sentence if a death sentence was “invalidated for other than constitutional reasons,” and if it was invalidated by a federal court or on collateral review. *Explanatory Material for “An Act Concerning Murder and Capital Punishment*, December 31, 1980, at 17 (App. K) (original in State Archives for HB 76 (1981)).

Another canon of statutory construction that Justice Pearson did not address, however, is probably the most compelling one in the current context. This Court has a duty to construe a statute to uphold its constitutionality. *State v. Furman*, 122 Wn.2d at 458. “Where a statute is susceptible to more than one interpretation, it is our duty to adopt a construction sustaining its constitutionality if at all possible.” *Anderson v. Morris*, 87 Wn.2d 706, 716, 558 P.2d 155 (1976).

If RCW 10.95 is construed to allow for a second penalty proceeding after this Court reverses a death sentence, the Court would then have to address the issues set out above about the unbridled discretion that prosecutors have to pick and choose which reversed capital cases are retried, and the issues related to the vagueness and overbreadth of the “fact and circumstances” language. Accordingly, to avoid reaching the above-noted constitutional issues, this Court should now construe RCW 10.95.090 in a way that precludes a prosecutor for seeking death a second time, after this Court reverses a death sentence.

This construction makes sense and is in keeping with other policies promoted by RCW 10.95. For instance, the Double Jeopardy provision of the Fifth Amendment does not necessarily bar subjecting a defendant to a second penalty proceeding if the jurors in a penalty proceeding are not unanimous. *See Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732,

154 L. Ed. 2d 588 (2003). Nonetheless, our Legislature determined that if jurors are not unanimous, such lack of unanimity constitutes a negative answer to the question posed in RCW 10.95.060, which results in a life sentence rather than a retrial. RCW 10.95.080.

Similarly, if this Court finds that a death sentence is the result of passion or prejudice, under RCW 10.95.130(2)(c), RCW 10.95.140 requires remanding the case for a life sentence. Yet, a new trial (or new penalty proceeding) could presumably cure this error, and the Legislature could have required that such cases be remanded for new sentencing hearings.

These provisions reveal a legislative judgment that life sentences are preferable to multiple death penalty proceedings. Capital trials are incredibly expensive and time-consuming, and emotionally trying on all parties. It makes sense that the Legislature would want to limit the State's ability to drag out murder cases for years and seek death at repeated proceedings. A rule that terminated efforts to execute a defendant once this Court reversed a death sentence furthers the same interests in finality as do these other sections of RCW 10.95.¹⁴⁸

¹⁴⁸ Gov. Inslee's recent moratorium confirms this analysis as it was based, in part, on concern for the families of victims "must constantly revisit their grief at the additional court proceedings." App. J. at 4.

Accordingly, the Court should overrule the five-justice opinion in *Bartholomew I*. The Court should hold that RCW 10.95.090 precludes a second special sentencing hearing when this Court vacates a death sentence. The remedy here should be the imposition of a sentence of life without the possibility of parole.

14. RCW 10.95.020 is unconstitutional because it fails to narrow the class of eligible defendants and results in the random and arbitrary imposition of the death penalty.

Another reason that this Court should invalidate Washington's capital punishment statute in its entirety is that it does not meaningfully narrow the class of defendants eligible for capital punishment. Pre-trial, Mr. Gregory moved for dismissal of the death notice on this basis. CP 301-45. The motion explained that such narrowing is required under the Eighth and Fourteenth Amendments, and article I, section 14. CP 301. Because so many offenders are eligible for capital punishment and only a random few receive it, the statute suffers the same infirmity as those struck down in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). CP 301-45. The trial court erroneously denied the motion, CP 622-23, and this Court should reverse.

- a. A capital sentencing scheme must narrow the class of persons eligible for the death penalty so as to minimize the risk of arbitrariness.

To comport with the Constitution, a capital sentencing statute “must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Zant v. Stephens*, 462 U.S. at 877. A scheme that does not sufficiently limit application of the death penalty “so as to minimize the risk of wholly arbitrary and capricious action” violates the Eighth and Fourteenth Amendments to the Constitution. *Arave v. Creech*, 507 U.S. 463, 470, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993); U.S. Const. amends. VIII, XIV. Such a statute is also invalid under article I, section 14, which provides greater protection against cruel punishment than its federal counterpart. Const. art. I, § 14; *see Fain*, 94 Wn.2d at 393.

In 1972, the U.S. Supreme Court invalidated then-existing capital punishment statutes as violative of the above rules. *Furman v. Georgia*, 408 U.S. at 239-40. The Court explained the infirmities in multiple concurring opinions. Justice Brennan stated:

[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,

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 (Brennan, J., concurring) (internal citations omitted). “The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it.” *Id.* at 291. Under such circumstances, “it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment.” *Id.* at 294. Indeed, “[w]hen 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.” *Id.* at 293. Justice White agreed, “the death penalty is exacted with great infrequency even for the most atrocious crimes, and ... there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” *Furman*, 408 U.S. at 313 (White, J., concurring).

Justice Stewart echoed his colleagues’ concerns, noting that although numerous defendants had committed equally reprehensible crimes, only a “random handful” had been subjected to the death penalty. *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring). After drawing the oft-cited “lightning strike” analogy, Justice Stewart concluded, “the Eighth and Fourteenth Amendments cannot 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.

- b. RCW 10.95.020 no longer sufficiently narrows the class of persons eligible for the death penalty, resulting in an unconstitutionally random handful of defendants on death row.

Following *Furman*, Washington and other states crafted new capital punishment statutes to address the above deficiencies. Although the statutes were originally written and construed narrowly, signaling the possibility of constitutional conformity, the experiment has failed. *See American Law Institute, Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty* (2009) (“ALI Report”); J. Marceau, S. Kamin, & W. Foglia, “Colorado Capital Punishment: An Empirical Study,” *University of Denver Sturm College of Law, Working Paper* 13-08 (2013)¹⁴⁹ (analysis of all murder cases in Colorado, concluding that in practice system is unconstitutional because of the failure to narrow the death eligible offenders). The American Law Institute has withdrawn the capital punishment section of the Model Penal Code because, after “decades with experience with death-penalty systems modeled on it,” the data show that “no state has successfully confined the

¹⁴⁹ Copy at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2210040##

death penalty to a narrow band of the most aggravated cases.” ALI Report at 4, 30.¹⁵⁰

Washington State is no exception. Governor Inslee recently imposed a moratorium on executions, in large part because “the death penalty is like lightning, randomly striking some defendants and not others.” App. J at 4.

As explained below and as Mr. Gregory demonstrated in the trial court, RCW 10.95.020 has been significantly expanded over the years. The increase in both number and scope of aggravating factors has resulted in a statute which suffers the same frailties as those struck down in *Furman*. Since 1981, around 335¹⁵¹ people in Washington have been convicted of the death-eligible crime of aggravated murder, but just five have been executed and only nine are on death row. There is no question that these fourteen are not the “worst of the worst,” and that defendants who have committed particularly brutal murders of many more victims are serving life sentences. *See* Section (E)(2). The fourteen selected for death are a random handful of defendants arbitrarily consigned to the ultimate punishment, in violation of the Eighth and Fourteenth amendments and

¹⁵⁰ *See also* http://www.ali.org/_news/10232009.htm.

¹⁵¹ Because the trial reports are not complete, it is not clear exactly how many people in Washington have been convicted of aggravated murder since the adoption of the 1981 death penalty statute. 315 trial reports have been filed as of this writing.

article I, section 14. This Court should hold that RCW 10.95.020 is unconstitutional and vacate Mr. Gregory's death sentence.

- i. *Contrary to the constitutional requirement that eligibility for the death penalty be confined to a narrow class, the legislature has expanded the list of aggravating factors which subjects defendants to capital punishment.*

When RCW ch.10.95 was enacted in 1981, there were ten aggravating factors which rendered a premeditated murder eligible for the death penalty. But instead of reserving eligibility for capital punishment for especially heinous murderers who are reasonably distinguishable from all other killers, the Legislature has added four new aggravating factors to the original ten in RCW 10.95.020 for a total of fourteen factors plus subcategories. In 1995, drive-by shooting and gang-motivated murders were added as aggravating factors. RCW 10.95.020(6), (7). In 1998, the legislature added aggravating factors for domestic violence and murders following a history of assault or restraining-order violations. RCW 10.95.020(13), (14). The statute fails to target murders distinguishable as particularly deserving of capital punishment.

Indeed, it would be difficult to find a premeditated murder that could *not* be covered by at least one of the aggravating factors in RCW 10.95.020. And those few murders that do not fall under one or more aggravating factors cannot be said to be less heinous than those that do.

For instance, a person who tortures and kills a small child is not eligible for the death penalty because neither age nor torture are aggravating factors in Washington. Someone who beats to death an 80-year-old grandmother walking home from the store out of race hatred or homophobia or political or religious antipathy is not death-eligible because neither victim vulnerability nor hate motivation are aggravating factors. Assassinating the governor with a high-powered rifle is not aggravated murder in our state.

On the other hand, a gang “wannabe” who shoots and kills a rival gang leader is subject to the death penalty if he drove to the scene of the murder and shot the victim from inside or near his car. The father of a teenager dead from an overdose of drugs would also be subject to an aggravated murder charge if he drove to the drug dealer’s location and shot the dealer to death. But in either case, if the slayer ran over the victim, stabbed him, or bashed his head in with a large rock, the murder would not fall under an aggravating factor. In short, the aggravating factors of RCW 10.95.020 are both over- and under-inclusive such that the statute violates the constitutional prohibition on cruel and unusual punishment.

- ii. Contrary to the constitutional requirement that eligibility for the death penalty be confined to a narrow class, courts have broadly construed the definitions of the aggravating factors.

Exacerbating the increase in number of aggravators is the expansion in scope of each factor. To pass Eighth Amendment muster, “each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of *Furman* itself.” *Zant v. Stephens*, 462 U.S. at 876. That is, “an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Id.* at 877.

Thus, in *Godfrey*, the Court reversed a death sentence because state courts had construed an aggravating factor in an overbroad manner. *Godfrey v. Georgia*, 446 U.S. 420. The aggravating factor at issue was that the offense “was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.” *Id.* at 422 (citing Ga. Code § 27-2534.1(b)(7)(1978)). The U.S. Supreme Court had previously *upheld* the validity of the Georgia statute against overbreadth challenges, assuring doubters that courts would construe it narrowly as required by the Constitution. *Godfrey*, 446 U.S. at 423 (citing *Gregg*, 428 U.S. at 201).

But in *Godfrey*, the Court acknowledged that the expected narrowing had not been achieved, and that the aggravating factor had been applied even where a defendant shot two victims in the head and killed them instantly. Georgia had abdicated its “constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.” *Id.* at 428. Although the Court only invalidated one of Georgia’s aggravating circumstances, the concurring opinion of two justices was that “the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it – and the death penalty – must be abandoned altogether.” *Id.* at 442 (Marshall, J., concurring).

Justice Marshall’s position was prescient. Although the Constitution requires the class of death-eligible defendants to be “genuinely narrowed,” courts in Washington, no less than courts in other states, have *broadly* construed the statutory factors supporting aggravated murder. For instance, RCW 10.95.020(6) was aimed at criminal gangs and cites as an aggravator the fact that “[t]he person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.” But rather than comply with the requirement of strict construction, the Court of Appeals has held that “the range of groups

falling within RCW 10.95.020(6) is *nearly infinite* and can include such entities as a cheerleading squad, a law firm, the Republican or Democratic Parties, or the Catholic Church.” *State v. Monschke*, 133 Wn. App. 313, 330, 135 P.3d 966 (2006), *review denied*, 159 Wn.2d 1010 (2007) (emphasis added).

The drive-by shooting aggravating factor under RCW 10.95.020(7) has also been expansively interpreted. For instance, an aggravated murder conviction was affirmed in *State v. Heath* where a jealous husband trailed his unfaithful wife’s car, stopped his truck and got out of it after she pulled over, then walked over to her and shot her. Brent Heath, TR 315 (Clark 2006); Ex. 13; *State v. Heath*, 143 Wn. App. 1004, *review denied*, 164 Wn.2d 1022 (2008).¹⁵²

The “concealment” aggravator has also been construed broadly, contrary to *Furman* and its progeny. Under RCW 10.95.020(9), premeditated murder is elevated to aggravated murder if “[t]he person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime....” Shortly after its enactment, this Court upheld an aggravated murder conviction where “the jury heard testimony that the defendant stated his intention of leaving

¹⁵² This decision and some others in this section are unpublished, but they are not being cited for legal precedent. *See* GR 14.1. They are cited to show the *fact* that aggravated murder has been expansively applied.

no witnesses to the robbery.” *Bartholomew I*, 98 Wn.2d at 212. But the

Court cautioned:

Unless the jury is presented with evidence which suggests that the killing was intended to postpone for a significant period of time the discovery of the commission of the crime, the aggravating factor will not be established. Such evidence will clearly not be present in every case of felony murder.

Id. at 214. So limited, the factor “does not appear to be so broad as to allow the arbitrary and capricious infliction of the death penalty.” *Id.* at 213-14.

The factor did not remain so limited, though. In *Jeffries*, for example, a conviction for aggravated murder based on “concealment” was affirmed where the defendant killed a couple and was later found in possession of some of their belongings, even though there was no independent evidence that the defendant killed the couple with a *purpose* to conceal a theft. *State v. Jeffries*, 105 Wn.2d 398, 407-08, 717 P.2d 722 (1986). The four dissenters found the inferences drawn were “totally speculative,” and warned that the broad application of the concealment aggravator rendered the imposition of the death penalty arbitrary and capricious in violation of the Constitution. *Id.* at 441-42 (Pearson, J., dissenting).

Yet the concealment aggravator was expanded even further in subsequent cases, where courts continued to uphold aggravated murder convictions based on concealment whenever another crime was proven, regardless of whether independent evidence proved that the purpose of the *murder* was to conceal the other crime. *See, e.g., State v. Dyer*, 86 Wn. App. 1015 (1997). Courts have affirmed aggravated murder convictions based on concealment even where juries did *not* find the defendant committed any other crime. *See, e.g., State v. Longworth*, 52 Wn. App. 453, 463-67, 761 P.2d 67 (1988).

The “multiple murders” and “common scheme” aggravating factor has also been interpreted expansively. *See* RCW 10.95.020(10) (“There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person”). Aggravated murder convictions under this factor have been upheld where only one murder was premeditated, *see Kincaid*, 103 Wn.2d at 313-14, and even where the defendant was found guilty of *only one* homicide. *See State v. Baruso*, 72 Wn. App. 603, 615-18, 865 P.2d 512 (1993).

Contrary to the strict construction requirement, the “felony murder” aggravator has also been expanded beyond the statute’s plain language. The statute lists as an aggravating factor that:

The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes: a) Robbery in the first or second degree, b) Rape in the first or second degree; c) Burglary in the first or second degree or residential burglary; d) Kidnapping in the first degree; or e) Arson in the first degree.

RCW 10.95.020(11). Although the Legislature did not include attempt crimes in the above section, courts have broadly construed this aggravating factor to apply when murder is committed in the course of an attempt to commit any of the listed felonies. *See, e.g., Brett*, 126 Wn.2d at 162-63 (murder committed in course of attempted robbery qualifies as aggravated murder under this factor). The aggravating factor has also been applied where the defendant apparently committed an unlisted felony sometime after the murder. *See State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006) (defendant killed his mother after a heated argument, then went to her bedroom and took a box of cash); *id.* at 12 (Alexander, C.J., dissenting) (“This court has not [previously] construed the robbery statute so broadly as to encompass any theft associated with violence no matter how unrelated”).

In sum, the aggravating factors have been expanded significantly both in number and in scope, such that RCW 10.95.020 no longer genuinely narrows the class of those eligible for the death penalty.

- c. This Court should strike down the death penalty in Washington and remand Mr. Gregory's case for imposition of a life sentence or appoint a special master to collect more information.

The fact that a broad class of defendants is eligible for capital punishment but only a random few are selected renders Washington's death penalty statute unconstitutional. *Furman*, 408 U.S. 238. The few who are selected for capital punishment are not meaningfully distinguishable from those who are not. This Court should hold that capital punishment may no longer be imposed in our state, and should reverse and remand for imposition of a life sentence in Mr. Gregory's case.

Alternatively, as the Court did in 1979,¹⁵³ the Court should remand this case for the appointment of a special master to collect information about all murder cases in Washington State, particularly non-aggravated murder cases, to see if Washington's death penalty scheme meets constitutional standards of narrowing the class of death eligible defendants – to see if in fact there are only fourteen people since 1981 who are worthy of execution.

¹⁵³ See *State v. Floyd William Marr, Nedley G. Norman Jr, & Howard Eugene Foren*, Nos. 45634, 45811 & 45922 (Dec. 4, 1979) (filed with this Court on January 8, 2014).

15. This Court should reverse Mr. Gregory's murder conviction based upon a series of legal errors he raised in the first appeal.

In Mr. Gregory's first appeal, he raised several federal constitutional challenges to his conviction for aggravated murder. The Court rejected Mr. Gregory's arguments and affirmed the conviction. *State v. Gregory*, 158 Wn.2d at 813-18, 836-48. With all due respect, the Court erred and, under RAP 2.5(c)(2), this Court should reverse the conviction on the following grounds:

- a. The trial court improperly excused prospective Juror No. 1, RP (1/23/01) 2224-25, in violation of *Witherspoon v. Illinois, supra; Wainwright v. Witt, supra; Morgan v. Illinois, supra*; the Eighth and Fourteenth Amendments.
- b. There was insufficient evidence of premeditation to support a conviction under the Fourteenth Amendment and *Jackson v. Virginia, supra*.
- c. The State's introduction of evidence that Mr. Gregory declined to be tape recorded during an interrogation (RP (3/7/01) 6004-19) and his failure to contact Det. DeVault after DeVault left a message for his grandmother (RP (2/26/01) 5050; RP (3/7/01) 5975-76) violated Mr. Gregory's right to remain silent and due process of law, protected by the Fifth and Fourteenth Amendments.
- d. The trial court's exclusion of Mr. Gregory's aunt from the courtroom (RP (2/26/01) 5052-54) violated the right of an open and public trial protected by the First, Sixth and Fourteenth Amendments.

- e. Prosecutorial misconduct in closing argument -- improperly shifting the burden of proof regarding Mike Barth, RP (3/19/01) 6723; denigrating defense counsel's cross-examination of John Brown, RP (3/19/01) 6724-25, 6727-28, 6732; commenting on Mr. Gregory's right to remain silent for not returning Det. DeVault's calls, RP (3/19/01) 6714; and by arguing facts not in evidence and misstating the facts regarding the DNA evidence, RP (3/19/01) 6723, 6732-33 -- deprived Mr. Gregory of due process protected by the Fourteenth Amendment.
- f. Cumulative error at the guilt phase violated Mr. Gregory's rights under the Eighth and Fourteenth Amendments.

F. CONCLUSION

This Court should reverse the conviction and remand either for a new trial or for dismissal, or, in the alternative, vacate the death sentence and remand for imposition of a sentence of life without parole or for resentencing.

DATED this 10th day of March, 2014.

Respectfully submitted,

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APPENDICES

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- B. *Fourth Amended Information* (2/12/2001), CP 6120-21.
- C. *Notice of Special Sentencing Proceeding to Determine Imposition of Death Penalty* (4/22/99), CP 5744-46.
- D. *Motion and Order Compelling Defendant to Provide DNA Samples* (filed 9/8/98 in Pierce County Sup. Court No. 98-1-03691-7), CP 410-11.
- E. *Motion and Declaration to Take Samples From Defendant* (filed on 12/17/99 in Pierce County Sup. Court No. 98-1-03691-7), CP 436-42.
- F. *Order to Take Samples From Defendant* (filed on 1/12/00 in Pierce County Sup. Court No. 98-1-03691-7), CP 443-44.
- G. *Findings of Fact and Conclusions of Law Re: Defendant's Motion to Suppress Blood Samples* (3/23/01), CP 473-85.
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APPENDIX A

K. Beckett & H. Evans, *The Role of Race in Washington State Capital Sentencing, 1981-2012*

THE ROLE OF RACE IN WASHINGTON STATE CAPITAL SENTENCING, 1981-2012*

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January 27, 2014

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INTRODUCTION

As is now well-known, many studies indicate that race played an important role in the administration of capital punishment prior to the *Furman v. Georgia* ruling in 1972.¹ The possibility that race continues to influence the imposition of the death penalty concerns many.² Although modern death penalty statutes were designed to reduce arbitrariness and discrimination in capital sentencing, researchers have found that race and other extra-legal factors continue to play a significant role in determining which capital defendants live and which die in the post-Furman era.³ In particular, studies indicate that the race of homicide victims influences the administration of the death penalty in many locales: defendants accused of killing whites are more likely than similarly situated defendants accused of killing blacks to be sentenced to death. Although findings regarding the race of the defendant are more mixed, studies indicate that the race of the defendant continues to impact sentencing outcomes in death-eligible cases over and above case characteristics (such as the number of victims) in some, though not all, locales.⁴

To date, however, no published study has examined the role of race in capital sentencing in Washington State. Washington State's current death penalty statute was enacted in 1981 and is comparatively restrictive. Under RCW Ch. 10.95, the death penalty may only be imposed if the State has filed a notice of intent to seek the death penalty, the defendant is convicted of aggravated first-degree murder, and a judge or jury has determined there are not sufficient mitigating circumstances to merit leniency. (See Appendix A for a list of aggravating factors).

This report assesses whether race influences the administration of the death penalty in Washington State. Since 1981, 313 cases have been adjudicated in Washington State that involved defendants convicted of aggravated murder and for which trial reports are available.⁵

¹ See David C. Baldus and George Woodworth, "Race Discrimination and the Death Penalty" (Chapter 16 in *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction*, edited by James R. Acker, Robert M. Bohm, and Charles S. Lanier, Carolina Academic Press, 2003, 2nd edition), at 516.

² See, for example, American Bar Foundation, "Death Penalty Assessments: Key Findings." Available online at http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=209 (accessed December 15, 2013).

³ *Ibid.*, pp. 519-526. See also Samuel Walker, Cassia Spohn and Miriam Delone, "The Color of Death" (Chapter 8 in *The Color of Justice: Race, Ethnicity and Crime in America*, Thomson-Wadsworth, 4th edition); Jamie L. Flexon, *Racial Disparities in Capital Sentencing* (El Paso: LFB Scholarly Publishing 2012).

⁴ *Ibid.*

⁵ We obtained the trial reports from attorneys for Mr. Allen Gregory; these were originally provided by the Washington State Supreme Court and were current as of May 2013. However, according to these attorneys,

Twenty-eight of these cases involved defendants who were under the age of 18 at the time of the offense. Prosecutors sought the death penalty in just under one-third (30.9%) of the cases involving adults, and juries imposed it in about one eighth (12.3%) of them. Some of these death sentences have been over-turned on appeal. Of the 285 adults convicted of aggravated murder in Washington State since 1981, five have been executed, and another eight are currently on death row.⁶

Recent studies stress the importance of analyzing prosecutorial and jury decision-making in capital cases separately in order to specify where race matters in capital sentencing, if it does at all.⁷ The following analysis therefore explores the impact of race on prosecutorial decisions to seek the death penalty and, separately, on juries' decisions to impose it in aggravated murder cases involving adult defendants.⁸ Specifically, we examine whether prosecutors are more likely to seek, and juries more likely to impose, the death penalty in cases involving defendants of color, and black defendants specifically. We also assess whether the race of the victim(s) influences prosecutorial and/or jury decision-making in capital cases.

Key findings pertaining to race include the following:

- Prosecutors sought the death penalty in a larger share of aggravated murder cases involving white defendants than they did in cases involving non-white defendants.
- By contrast, juries imposed a death sentence in a notably larger share of cases involving black defendants than in cases involving white or other defendants.
- The results of regression analyses indicate that neither the race of the victim(s) nor the race of the defendant influenced whether prosecutors sought the death penalty.
- By contrast, the results of regression analyses indicate that *juries were three times more likely to impose a sentence of death when the defendant was black than in cases involving similarly situated white defendants.*

approximately twenty such reports have not been filed with the Supreme Court and are therefore unavailable. The implications of this are discussed in footnote 8.

⁶ See Washington State Department of Corrections, "Capital Punishment in Washington State." Available at <http://www.doc.wa.gov/offenderinfo/capitalpunishment/> (accessed November 3, 2013).

⁷ See David C. Baldus and George Woodworth, "Race Discrimination and the Death Penalty" (Chapter 16 in *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction*, edited by James R. Acker, Robert M. Bohm, and Charles S. Lanier, Carolina Academic Press, 2003, 2nd edition).

⁸ If a defendant waives his or her right to a jury trial, a judge may impose the death penalty in cases in which a death notice has been filed following a special sentencing proceeding. As a practical matter, however, it is juries that almost always decide whether to impose a sentence of death. We therefore link sentencing decisions to jury decision-making throughout the discussion.

Other key findings include the following:

- The proportion of death-eligible cases in which prosecutors sought the death penalty varied notably by county, from a high of 67% in Thurston County to a low of 0% in Okanogan County. Among larger counties with more aggravated murder cases, the proportion of cases in which prosecutors sought death also varied markedly, from a high of 48% in Kitsap County to a low of 0% in Yakima County.
- Case characteristics such as the number of aggravating circumstances and victims explain only 6% of the variation in decisions to seek the death penalty and 18% of the variation in the decision to impose the death penalty.
- Two case characteristics were significant predictors of prosecutorial decisions to seek death: the number of prior convictions possessed by the defendant, and the number of aggravating circumstances alleged to exist by prosecutors. Neither the number of victims nor evidence of prolonged victim suffering were significant predictors of prosecutorial efforts to seek the death penalty.
- Prosecutors were nearly three times more likely to seek death in cases that received extensive publicity than in cases that did not.

DATA AND ANALYTIC STRATEGY

Trial judges are required to file reports in all aggravated murder cases, citing the relevant details of the crime and the defendant, in order to facilitate proportionality review in capital cases. Specifically, RCW 10.95.130(2)(b) mandates that the Court determine whether “the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” “Similar cases” means all cases resulting in one or more convictions for aggravated murder, regardless of whether a death sentence was sought or imposed. The purpose of this review “is to ensure that the sentence, in a particular case, is proportional to sentences given in similar cases, is not freakish, wanton or random, and is not based on race or other suspect classifications.”⁹

This study analyzes data derived from all of the available trial reports pertaining to these cases.¹⁰ These were provided by Mr. Gregory’s attorneys. The full sample thus includes all

⁹ *State v. Cross*, 156 Wn.2d 580, 630, 132 P.3d 80 (2006).

¹⁰ According to attorneys for Mr. Gregory, approximately twenty such reports pertaining to cases in which the defendant was sentenced to life without parole have not been filed with the Supreme Court and are therefore unavailable. If this is correct, the dataset analyzed in this report is incomplete, and it is impossible to determine if there is any systematic bias in the sample of cases analyzed. That is, if the missing trial reports have

aggravated murder cases in which the defendant was sentenced in Washington State between December 1981 and May 2013 for which a trial report is available.

As noted previously, however, 28 of these cases involved defendants who are known to have been under 18 years of age at the time of offense.¹¹ Because the Washington State Supreme Court determined that juveniles are ineligible for the death penalty in 1993,¹² including juveniles would create a systematic bias in the sample. Moreover, the Court did not hold that the statute in question was unconstitutional, but rather construed the statute to mean that the death penalty could never have been imposed upon juveniles. From a legal point of view, this means that juveniles were never eligible for the death penalty under Washington's statute. For these reasons, we have removed minors from the analyses presented here. As a result, the sample analyzed includes 285 aggravated first-degree murder cases involving adult defendants.

The trial reports were coded according to a detailed coding protocol (available upon request). Two University of Washington students were trained to code the trial reports; their work was periodically audited to ensure reliability. Although the trial reports ask judges to supply detailed information about a variety of case, defendant and victim characteristics, we discovered through the coding process that many of the trial reports were quite incomplete. We were therefore unable to include a number of relevant factors (such as defendant IQ, mental health status, and victim occupation) in our analyses that may, in fact, influence the administration of capital punishment.

In the aggravated murder cases we analyze, prosecutors may or may not have sought the death penalty, and juries may or may not have imposed it. The analysis presented here employs a variety of methods to analyze the role of race in these two stages of capital sentencing in Washington State.¹³ Part I provides descriptive statistics in order to illuminate the prevalence and distribution of death sentences. We begin by comparing the distribution of efforts to seek death and death sentences at the county level. Next, we compare the proportion of black, white and other defendants who were convicted of aggravated murder against whom prosecutors sought death, who were sentenced to death, and who have been executed or are currently on death row. Finally, we compare the proportion of cases involving a black

some characteristic in common (e.g., they involve defendants of overwhelmingly one race), the sample analyzed here is not a representative one.

¹¹ In seven cases, the age of the defendant at the time of offense could not be determined from the trial report. Because they were not noted to be juveniles, these defendants are assumed to be adults and are included in the regression models.

¹² *State v. Furman*, 858 P.2d 1092 (1993).

¹³ Prosecutors also exercise discretion in deciding whether to charge aggravated vs. non-aggravated murder and whether to allow a defendant to plead down from an aggravated murder charge. These decisions are also quite consequential but cannot be analyzed with the dataset utilized in this report.

defendant and white victim that resulted in a death sentence with the proportion of cases with different defendant-victim configurations in which a death sentence was sought or imposed.

The results of these descriptive analyses show that there is notable variation in the proportion of aggravated murder cases in which prosecutors seek, and juries impose, the death penalty at the county level. They also suggest that prosecutors sought death in a larger share of cases involving white than black defendants. However, a comparatively large proportion of black defendants were sentenced to death (and have had this sentence retained as of December 2013). However, it is important to note that these descriptive statistics are suggestive rather than conclusive because they capture only two or three variables at once and do not take simultaneously into account the other case characteristics that may influence prosecutorial and jury decision-making.

To remedy this, Part II presents the results of statistical regression analysis to assess whether the race differences described in Part I are affected when case characteristics are taken into account. Regression analysis is a statistical technique used to estimate the degree of correlation among variables included in a given model. Regression models include an outcome or dependent variable – such as a death sentence – as well as a number of factors (independent variables) that may affect the outcome. The results of the regression analysis reveal how much the outcome changes when any one of the independent variables is varied and the other independent variables are held constant. *Regression analysis allows researchers to identify the unique impact of each independent variable – including race of the defendant and victim – on a particular outcome over and above any differences in case characteristics.*

Two types of variables were included in the regression models: case characteristics, which could be expected to impact case outcomes, and extra-legal or social factors (such as race), which ideally would not. Several case characteristics were included in the regression models. In the analysis of prosecutorial decision-making, we included case characteristics that would have been known to prosecutors early in the criminal process: the number of aggravators alleged by prosecutors; the number of defendant prior convictions; the number of victims; and whether the victim's suffering was prolonged. In the analysis of jury decision-making, case characteristics that would have been known by judges and jurors were incorporated in the models. These include: the number of aggravating circumstances affirmed by the jury; the nature of the defendant's plea (guilty vs. not guilty); the number of victims; and whether the victim was held hostage.¹⁴

¹⁴ We treat evidence that the victim was held hostage or subjected to prolonged suffering as two measures of victim-suffering. Whether a victim was held hostage is included as a discrete section (marked 'yes' or 'no') completed (in most cases) by the judge on the trial report. Evidence of prolonged suffering was noted when judges

After assessing the role of case characteristics, several extra-legal (i.e. social) factors were added to the models. In the analysis of prosecutorial discretion, these included: race of the defendant and victim(s); victim-gender; population density of the county in which the conviction occurred; and whether there was extensive publicity about the case. Unfortunately, not all of these factors could be included simultaneously in the analysis of sentencing decisions because the smaller sample size in these analyses reduces the number of variables that can be included in the models. For this reason, the only social factors included in the analysis of sentencing decisions were the race of the defendant and the race of the victim(s). See Appendix B for details about the measurement of each of the aforementioned variables.

For each set of regression analyses, we first report the regression results obtained when only case characteristics are included in the model. This allows us to identify which case characteristics influence decision-making in death-eligible cases; it also allows us to assess the proportion of the variation in outcomes that is explained by case characteristics as a group. Next, we present the results of a more complete model that also includes social factors. These results allow us to assess the degree to which outcomes in aggravated murder cases are influenced by race over and above any differences in case characteristics.

Regression analysis allows researchers to assess whether a given variable is a significant predictor of an outcome. By convention, social scientists often identify statistical significance when there is a 5 percent or less chance of finding this result by random chance (noted as $p\text{-value} \leq .05$.) However, when samples are small or hypotheses are directional (e.g., the researcher expects covariates to increase and not decrease the probability of receiving the death penalty) a cut off of $p\text{-value} \leq .10$ is used instead. For this reason, we report the $p\text{-values}$ of covariates that are statistically significant at both the .05 and .10 levels.

Diagnostic tools were used to help identify the most appropriate regression models. In this case, diagnostic tests indicated that there were a handful of outliers with respect to the number of victims. We therefore measured the number of victims in terms of three categories: 1 victim; 2-4 victims; or 5 or more victims. Diagnostics also showed that number of prior convictions was heavily skewed; logging this variable normalizes its distribution. The number of

indicated such in their narrative description of the crime. Although these measures were correlated (0.38) they did not match as closely as we might have expected. For this reason, we tested both measures in each model. The latter measure was included in the models analyzing prosecutorial decision-making because it provides a comprehensive evaluation of victim suffering. (Neither measure was significantly correlated with the decision to seek death). Because we found that "prolonged suffering" was not a significant predictor of sentencing decisions, but whether the victim was held hostage did have a significant impact on sentencing outcomes, we include the latter as our measure of victim suffering in the analysis of sentencing decisions.

defenses and number of aggravators also showed some signs of skew, but after testing, the model fit was better (assessed by comparing pseudo R^2 scores) when these variables were included as raw values rather than logged. We fitted a logistic regression model, each with an outcome of 0 or 1, using Maximum Likelihood Estimation (MLE) procedures to estimate the probability of receiving the death penalty given a number of covariates. In general, MLE estimates should be interpreted with caution for samples with fewer than 100 cases.¹⁵

PART I. DESCRIPTIVE STATISTICS

The descriptive statistics presented below provide an initial overview of the distribution of efforts to obtain, decisions to impose, and retained death sentences by county and across various groups of defendants. Table 1 shows the proportion of aggravated murder cases involving adult defendants in which prosecutors sought death and death was imposed across Washington State counties. All counties in which five or more aggravated murder cases occurred between 1981 and 2012 are identified individually.

As the table makes evident, the proportion of cases for which prosecutors seek death varies notably. In Thurston County, for example, prosecutors sought the death penalty in 67% of the aggravated murder cases, whereas prosecutors in Okanogan County did not seek the death penalty in any of the six aggravated murder cases that took place there. In larger counties with more aggravated murder cases, the proportion of cases in which prosecutors sought death also varied markedly, from a high of 48% in Kitsap County to a low of 0% in Yakima County. The proportion of cases in which juries imposed a sentence of death also varies notably, from a high of 40% in Clallam County to 0% in several counties. Moreover, it does not appear that these differences are a function of the number of aggravating circumstances or the number of victims involved in the relevant cases.

¹⁵ See Long, J. Scott and Jeremy Freese, *Regression Models for Categorical Dependent Variables Using Stata*, 2nd Ed. College Station, Texas: StataCorp LP, 2006).

Table 1. Death Penalty Sought and Imposed as a Proportion of Aggravated Murder Cases with Adult Defendants, by County, 1981-2012

County	Proportion of Aggravated Murder Cases in which Death Penalty was Sought	Proportion of Aggravated Murder Cases in which Death Penalty was Imposed	Median Number of Victims	Median Number of Aggravators
Thurston	67% (4/6)	33% (2/6)	1	1
Clallam	60% (3/5)	40% (2/5)	2	1
Kitsap	48% (10/21)	10% (2/21)	1	2
Pierce	47% (26/55)	22% (12/55)	1	1
Spokane	47% (8/17)	6% (1/17)	1	1
Snohomish	25% (7/28)	14% (4/28)	1	2
King	22% (16/73)	8% (6/73)	1	1
Benton	17% (1/6)	17% (1/6)	1	2
Clark	20% (4/20)	15% (3/20)	1	3
Skagit	20% (1/5)	0% (0/5)	1	2
Whatcom	17% (1/6)	17% (1/6)	1	1
Cowlitz	13% (1/8)	0% (0/8)	1	1
Okanogan	0% (0/6)	0% (0/6)	2	1
Yakima	0% (0/9)	0% (0/9)	1	1
All Washington State Counties	31% (88/285)	11% (35/285)	1	1

Note: Counties with five or more aggravated murder cases from 1981-2012 are included.

The figures above provide evidence that the likelihood that prosecutors will seek and juries will impose death for a given defendant in an aggravated murder case depends in part on the place in which the case is adjudicated.

Below, Table 2 compares the proportion of black, white and other death-eligible defendants against whom prosecutors sought death, who received a sentence of death, and whose death sentences have been retained as of December 2013. The results indicate that prosecutors sought death sentences in a larger proportion (33.9%) of aggravated murder cases involving white defendants than they did in cases involving black (26.8%) or other (23.5%) defendants. However, juries imposed death in a larger share (16.1%) of cases involving black defendants than they did in cases involving white defendants (12.4%) or other defendants (7.8%). Moreover, the death penalty has been retained in a larger proportion of cases involving black defendants (7.1%) than it has in cases involving white (4.5%) or other (2%) defendants (see Table 2).¹⁶

Table 2. Capital Sentence Outcomes among Washington State Aggravated Murder Defendants, 1981-2012, by Race of Defendant

Defendant Race	Death Penalty Sought	Death Penalty Imposed	Death Penalty Retained
White	33.9% (60/177)	12.4% (22/177)	4.5% (8/177)
Black	26.8% (15/56)	16.1% (9/56)	7.1% (4/56)
Other	23.5% (12/51)	7.8% (4/51)	2.0% (1/51)
All	30.6% (87/284)	12.3% (35/284)	4.6% (13/284)

Note: Defendant race is missing for one case.

The over-representation of black defendants among those sentenced to death is especially striking given that prosecutors were more likely to seek death in cases involving white defendants. Based on these figures, we can calculate that juries imposed death in 36.6% of the cases involving white defendants, but 60% of the cases involving black defendants, in which prosecutors sought the death penalty.

In light of research indicating that the race of victims often influences the likelihood that similarly situated defendants receive the death penalty, Table 3 compares outcomes for black and white defendants convicted of killing a single white victim versus a single black victim. The results show that prosecutors sought death in a slightly larger share of cases involving a white defendant and white victim (30%) and cases involving a black defendant and white victim (28%)

¹⁶ "Retained" means that the death sentence was re-imposed after reversal of the original death sentence.

than in cases involving a black defendant and black victim (25%). However, a death sentence was imposed in a larger proportion of cases involving black defendants than of cases involving white defendants – regardless of the race of the victim. Interestingly, the death penalty has been retained in a notably larger share (8%) of cases involving a black defendant and white victim than in cases involving other racial configurations.

Table 3. Capital Sentence Outcomes among Washington State Aggravated Murder Defendants, 1981-2012, by Race of Defendant and Race of Victim

Defendant/ Victim Race	Death Penalty Sought	Death Penalty Imposed	Death Penalty Retained
Black Defendant/ White Victim	28% (7/25)	20% (5/25)	8% (2/25)
Black Defendant/ Black Victim	25% (1/4)	25% (1/4)	0% (0/4)
White Defendant/ White Victim	30% (33/110)	7.3% (8/110)	2.7% (3/110)
White Defendant/ Black Victim	0% (0/0)	0% (0/0)	0% (0/0)

Note: Figures include only black and white “death eligible” defendants with one white or black victim.

In summary, the descriptive results presented above suggest that counties vary in terms of their propensity to seek and impose death in aggravated murder cases. They also provide support for the hypothesis that the race of the defendant notably influenced decisions to impose (but not seek) the death penalty in aggravated murder cases adjudicated in Washington State since 1981. However, it is conceivable that the racial differences described above are a function of case characteristics rather than of race itself. Below, we present the results of regression analyses that control for case characteristics and isolate the impact of race on case outcomes.

PART II. REGRESSION ANALYSES

Below, we present two sets of regression analyses. The first set analyzes the impact of case characteristics and social factors on prosecutors’ decisions to seek the death penalty. The second set identifies the case characteristics and social factors that influence sentencing outcomes in capital cases in which prosecutors sought death. As noted previously, multivariate regression analysis tests for significant relationships between the independent variables included in the model and the outcome or dependent variable. Regression results provide a measure of the direction and strength of the correlation between each potential explanatory

variable and the outcome being analyzed. In this case, the direction of the association (i.e. whether the coefficient has a negative or positive value) indicates whether the variable causes a decrease or increase the likelihood of receiving the death penalty; the strength (statistical significance) of the association indicates how likely it is that the correlation is due to chance. Estimates resulting from a logistic MLE model are presented as log-odds. In order to facilitate interpretation, we convert these to odds and provide a general interpretation of each coefficient.

It is important to note that the results of this analysis identify which of the explanatory variables included in the model are significantly associated with the dependent variable *holding all other variables included the model constant*. That is, regression analysis simultaneously takes a number of factors into consideration and identifies the unique impact of each variable on the outcome. If the regression results indicate that being black is positively and significantly associated with being sentenced to death, this would mean that defendants who are black are more likely to be sentenced to death *after taking all other variables in the model, including number of priors, aggravators, and victims, into account*.

Factors Influencing Prosecutorial Discretion in Aggravated Murder Cases

Prosecutors may or may not elect to seek the death penalty in aggravated murder cases. The regression models presented below assess the extent to which a variety of case characteristics predict whether prosecutors sought the death penalty in aggravated murder cases involving adult defendants. These models include case characteristics that are evident in the early stages of criminal processing: the number of prior convictions; the number of aggravating circumstances alleged by prosecutors to exist; the number of victims; and whether the victim(s) experienced prolonged suffering. Because the defendant's plea is sometimes entered after prosecutors have decided whether to seek death, it is not included as a potential predictor in this analysis. In this model, the number of aggravating circumstances alleged by prosecutors to exist is included, as this measure best captures the prosecutors' view of the case and because it is not yet known how many of these aggravating circumstances will be affirmed by the judge or jury.

Table 4 shows the results that are obtained when only these case characteristics are included in the model. (For a more complete presentation of the regression results, see Appendix C). Note that coefficient results are log-odds ratios. Negative values indicate that the predictor reduces the probability of prosecutors seeking the death penalty; positive coefficients indicate that the variable in question increases the probability that prosecutors sought the death penalty. There

are missing data on at least one of the variables included for 13 cases (4.6%); these cases were dropped from the analysis.

Table 4. Impact of Case Characteristics on Prosecutorial Decisions to Seek the Death Penalty in Washington State Aggravated Murder Cases with Adult Defendants, 1981-2012

N= 272		Death Penalty Sought		R ² = 0.0603
Variable	Coefficient	Statistical Significance	Odds	Referent (Compared to)
Prior Convictions	0.116	**	1.123	
1 Victim	-0.199		0.820	5 or more victims
2-4 Victims	0.175		1.191	5 or more victims
Alleged Aggravators	0.256	***	1.292	
Prolonged Suffering	0.531		1.701	Not indicated

* significant at $\alpha = .10$

** significant at $\alpha = .05$

*** significant at $\alpha = .01$

Overall, these results show that legal factors explain a small proportion (just 6%) of the variation in whether the death penalty is sought. That is, most of the variation in prosecutorial decisions regarding whether to seek the death penalty is *not* a function of the case characteristics included in this model. However, two case characteristics are significant predictors of prosecutors' decisions to seek the death penalty. Specifically, prosecutors are significantly more likely to seek death in cases involving defendants with more alleged aggravators and more prior convictions. In a separate analysis, we found that the number of prior violent convictions also increases the likelihood that prosecutors will seek death.¹⁷ By contrast, neither the number of victims nor prolonged victim suffering appears to significantly impact prosecutors' decisions.

The next model includes social factors as well as case characteristics to identify significant extra-legal predictors of prosecutorial discretion. There are missing data on some of these variables; 33 cases (11.6%) were thus dropped from the analysis. Adding social factors to the model doubles the proportion of variation in outcomes explained (to 12%).

Table 5 displays the results obtained when social characteristics are included in the model. These results indicate that neither the race of the defendant nor the race of the victim(s) impact prosecutorial decision-making; victim-gender also appears to be irrelevant at this stage

¹⁷ Although the results indicate that the total number of prior convictions and number of violent prior convictions are significant predictors of prosecutorial efforts to seek death, we found in separate analyses that the number of prior homicide convictions and the number of prior sex offense convictions were not. Results available upon request.

of the criminal process.¹⁸ However, whether a case received extensive publicity does impact prosecutors' decisions: prosecutors were 2.8 times more likely to seek death in cases characterized by extensive publicity (as indicated by the judge in the trial report) than they were in cases that were not highly publicized. This finding is significant at a p-value ≤ 0.01 .

Table 5. Impact of Case Characteristics and Social Factors on Prosecutorial Decisions to Seek the Death Penalty in Aggravated Murder Cases with Adult Defendants, 1981-2012

N= 252		Death Penalty Sought		R ² = 0.1174
Variable	Coefficient	Statistical Significance	Odds	Referent (Compared to)
Case Characteristics				
Prior Convictions	0.141	**	1.151	
1 Victim	-0.722		0.486	5 or more victims
2-4 Victims	-0.237		0.789	5 or more victims
Alleged Aggravators	0.213	**	1.237	
Prolonged Suffering	0.424		1.528	Not indicated
Social Factors				
Black Defendant	-0.121		0.886	White defendants
Other Race Defendant	-0.241		0.786	White defendants
Black Victim(s)	-0.608		0.544	White victim(s)
Other Race Victim(s)	-0.763		0.466	White victim(s)
Multiple Race Victim(s)	-0.869		0.419	White victim(s)
Female Victim(s)	0.389		1.476	Males/Both sexes
Publicity	1.025	***	2.787	No publicity

* significant at $\alpha = .10$

** significant at $\alpha = .05$

*** significant at $\alpha = .01$

Overall, these results indicate that case characteristics explain a very small proportion of the variation that characterizes prosecutorial decisions about whether to seek death, although two case characteristics – the number of alleged aggravators and the number of defendant prior convictions – were found to be significant predictors of these decisions. The results also indicate that neither the race of the victim nor the race of the defendant had a significant impact on prosecutorial decision-making, although one extra-legal factor – publicity – does influence this process.

¹⁸ This variable was included because some studies have found that death sentences are more likely to be sought or imposed when the victim(s) are female. See David C. Baldus and George Woodworth, "Race Discrimination and the Death Penalty" (Chapter 16 in *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction*, edited by James R. Acker, Robert M. Bohm, and Charles S. Lanier, Carolina Academic Press, 2003, 2nd edition).

Factors Influencing the Imposition of Death Sentences in Aggravated Murder Cases

The death penalty was sought in 88 cases involving adults charged with aggravating murder. It was imposed in 35 (39.8%) of these cases. The next regressions identify the factors that predict the decision to impose a sentence of death in these cases. (For a more complete presentation of the regression results, see Appendix D). Because these analyses only include cases in which a death sentence was sought by prosecutors, the sample size is notably smaller than it was in the previous analyses. As a result, the number of predictors that can be included in a given model is limited and the results should be interpreted with caution.

A number of case characteristics that would have been known by judges and jurors are included in the first model: the number of victims (included here as a binary variable for 1 victim/multiple victims); the number of applied aggravators (as determined by the judge or jury); the nature of the defendant's plea; and whether the victim was held hostage. In this model, 4 cases (4.5%) were missing data and were dropped from the analysis.

The results are shown in Table 6 below. Together, case characteristics explain 17 percent of the variation that characterizes decisions to impose the death penalty. Several case characteristics were significant predictors of the imposition of a death sentence. Specifically, each additional aggravating circumstance increased the odds that a defendant was sentenced to death by 1.4. Holding a victim hostage also had a significant impact on receiving a death sentence: these defendants were nearly four times more likely to be sentenced to death than others. On the other hand, each defense mounted on behalf of the defendant significantly decreased the odds of the jury imposing death (by 0.4). Defendants who pled guilty were also significantly less likely to receive the death penalty than those who did not. The number of victims did not influence decisions to impose the death penalty.

Table 6. Impact of Case Characteristics on Decisions to Impose the Death Penalty in Aggravated Murder Cases with Adult Defendants, 1981-2012

N= 84		Death Penalty Imposed		R ² = 0.1720
Variable	Coefficient	Statistical Significance	Odds	Referent (compared to)
1 Victim	-0.286		0.751	Multiple victims
Applied Aggravators	0.318	*	1.374	
Defenses	-0.954	***	0.385	
Pled Guilty	-1.236	*	0.291	Pled Not Guilty
Victim Held Hostage	1.447	**	4.250	Not Held Hostage

* significant at $\alpha = .10$

** significant at $\alpha = .05$

*** significant at $\alpha = .01$

The results obtained when both case characteristics and social factors are included in the model are shown in Table 7 below. Because the number of victims is not significant predictor of the decision to impose death, it is not included in this model. Adding social characteristics improves the model: the amount of variation explained increases from 17 to 21 percent. After controlling for social characteristics, the number of defenses continues to significantly decrease the odds that the death penalty was imposed. Conversely, each additional aggravator and having held the victim hostage significantly increase the odds that the death penalty was imposed. Notably, the results indicate that *black defendants are more than three times more likely than similarly situated white defendants to be sentenced to death, after controlling for all other variables in the model.*

Table 7. Impact of Case Characteristics and Social Factors on Decisions to Impose the Death Penalty in Aggravated Murder Cases with Adult Defendants, 1981-2012

N= 83		Death Penalty Imposed		R ² = 0.2089
Variable	Coefficient	Statistical Significance	Odds	Referent (Compared to)
Applied Aggravators	0.411	**	1.508	
Defenses	-0.921	**	0.398	
Pled Guilty	-0.740		0.477	Pled Not Guilty
Victim(s) Held Hostage	1.431	**	4.183	Not Held Hostage
Black Defendant	1.179	*	3.251	White Defendant
Other Race Defendant	-0.039		0.962	White Defendant
White Victim(s)	-0.772		0.462	Not White Victim

* significant at $\alpha = .10$

** significant at $\alpha = .05$

*** significant at $\alpha = .01$

CONCLUSIONS

The results of the analyses presented above support three main conclusions. First, there is significant variation in efforts to obtain death sentenced, and decisions to impose them, at the county level. The proportion of cases in which prosecutors sought the death penalty varies notably by county, from a high of 67% in Thurston County to a low of 0% in Okanogan County. Among larger counties with more aggravated murder cases, the proportion of cases in which prosecutors sought death also varied markedly, from a high of 48% in Kitsap County to a low of 0% in Yakima County. Although the regression models do not indicate that county-level population density is a significant predictor of case outcomes in the regression models, the descriptive statistics nonetheless indicate that considerable variation in death penalty-related practices exists at the county level.

Second, the regression results indicate that case characteristics such as the number of aggravating circumstances and victims explain only a small proportion of the variation in the case outcomes analyzed here. Two case characteristics were significant predictors of prosecutorial decisions to seek death: the number of prior convictions possessed by the defendant, and the number of aggravating circumstances alleged by prosecutors to exist. The number of victims was not found to be a significant predictor of decisions to seek a death sentence. Several case characteristics were also significant predictors of the decision to impose a sentence of death: the number of defenses, whether the victim was held hostage, the nature of the defendant's plea, and the number of applied aggravating circumstances. Overall, however, case characteristics explain a small proportion of the variance in case outcomes in aggravated murder cases.

Two factors likely explain the fact that case characteristics explain a small proportion of the variation in case outcomes. First, as noted previously, many trial reports – from which the data analyzed here were derived – were incomplete. As a result, we were unable to include a number of factors (such as defendant IQ and mental health status) in our analyses that may, in fact, be relevant in the administration of capital punishment. Second, it also appears that decision-making in aggravated murder cases is driven, to a large extent, by extra-legal factors, only some of which could be included in our models. The results of the regression analyses confirm that one such factor – extensive publicity – has a significant impact on prosecutorial decisions to file a death notice. Notably, the race of the defendant was also found to be a significant predictor of sentencing outcomes. The large proportion of remaining unexplained variation in these models suggest that other extra-legal and social factors – not captured by our statistical models – are likely playing important roles in death penalty case dynamics.

A final set of findings concerns the role of race in the administration of capital punishment. On the one hand, race does not appear to influence prosecutorial decisions regarding whether to seek the death penalty. In fact, the results of regression analyses indicate that neither the race of the victim(s) nor the race of the defendant significantly influenced whether prosecutors sought the death penalty. On the other hand, juries imposed a death sentence in a notably larger share of cases involving black defendants than they did in cases involving white or other defendants. Indeed, the regression results indicate that *juries were three times more likely to impose a sentence of death when the defendant was black than in cases involving similarly situated white defendants*. Although these results are based on analysis of a relatively small sample, they nonetheless indicate that the race of the defendant has had a marked impact on sentencing in aggravated murder cases in Washington State since the adoption of the existing statutory framework.

APPENDIX A. AGGRAVATING FACTORS

Under RCW 10.95.020, aggravating factors include the following: (1) The victim was a law enforcement officer, corrections officer, or a fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing; (2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes; (3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony; (4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder; (5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder; (6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group; (7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge; (8) The victim was: (a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and (b) The murder was related to the exercise of official duties performed or to be performed by the victim; (9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030; (10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person; (11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes: (a) Robbery in the first or second degree; (b) Rape in the first or second degree; (c) Burglary in the first or second degree or residential burglary; (d) Kidnapping in the first degree; or (e) Arson in the first degree; (12) The victim was regularly employed or self-employed as a news-reporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim; (13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order; (14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is

defined in RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted: (a) Harassment as defined in RCW 9A.46.020; or (b) Any criminal assault. In addition, the following conditions must be met: 1) The jury affirmatively answers whether “having in mind the crime of which the defendant has been found guilty, are convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency” at the conclusion of the special sentencing proceeding; and 2) The Washington Supreme Court conducts a proportionality review of a death sentence to determine: (a) whether there was sufficient evidence to justify the death sentence; (b) whether the defendant was mentally retarded; (c) whether it was brought on by passion or prejudice; and (d) whether the sentence was excessive or disproportionate. See RCW 10.95.60, RCW 10.95.70, and RCW 10.95.100.

APPENDIX B. MEASUREMENT OF VARIABLES

Table B1. Variables and Measurement Included in Analysis		
	Indicators	Measures Included in the Analysis
Outcomes		
Death Penalty Sought	A Special Sentencing Proceeding was Held	Coded: 1=DP Sought; 0= DP Not Sought
Death Penalty Imposed by Jury	Sentenced entered as Death	Coded: 1= Death; 0= Not Death
Predictors – Case Characteristics		
Number of Alleged Aggravators	Total Number of Alleged Aggravators	Number
Number of Applied Aggravators	Total Number of Applied Aggravators	Number
Number of Confirmed Aggravators*	Total Number of Aggravators confirmed by Mr. Gregory’s attorneys	Number
Number of Prior Convictions	Total Number of Prior Convictions	Number (logged)
Number of Defenses Offered	Total Number of Defenses	Number
Plea	Plea entered	Coded: 1=Plead Guilty; 0= Plead Not Guilty
Number of Victims	Total Number of Victims	3 Coding Categories: 1 Victim; 2-4 Victims; 5 or more Victims; Each coded as 0/1
Victim Held Hostage	If Victim was held hostage	Coded: 1=Yes; 0= No
Predictors – Social Characteristics		
Defendant Race	Defendant’s Race	3 Coding Categories: White; Black; Other Race Each coded as 0/1

Victim Race	Victims' Race	4 Coding Categories: All Victims White; All Victims Black; All Victims Other Race; Victims of Multiple Races. Each coded as 0/1
Victim Sex	Victims' Sex	3 Coding Categories: All Victims Female; All Victims Male; Victims Mixed Sexes. Each coded as 0/1
Jury All White	All Jurors were White	Coded: 1=Yes; 0= No
Population Density*	Population Density of each County at the Time of Sentencing (taken from U.S. Census Bureau)	Number
Publicity	If there was extensive publicity about the trial according to the judge	Coded: 1=Yes; 0= No

Note: All indicators were taken from trial reports unless marked with an asterisk.

Appendix C. Complete Regression Results for Analysis of Death Penalty Sought

	N	Minimum	Maximum	Mean	Std. Deviation
Death Penalty Sought	285	0	1	.31	.463
Number of Priors	272	0	68	3.82	5.959
1 Victim	285	0	1	.64	.482
2-4 Victims	285	0	1	.34	.473
5 or more Victims	285	0	1	.03	.165
Alleged Aggravators	285	1	14	2.19	1.586
Prolonged Suffering	285	0	1	.12	.321
White Defendant	284	0	1	.62	.485
Black Defendant	284	0	1	.20	.399
Other Race Defendant	284	0	1	.18	.385
Mixed Sexes Victims	285	0	1	.19	.393
Female Victim(s)	285	0	1	.40	.491
Male Victim(s)	285	0	1	.41	.492
White Victim(s)	280	0	1	.74	.440
Black Victim(s)	280	0	1	.05	.211
Other Race Victim(s)	280	0	1	.19	.390
Multiple Races Victim(s)	280	0	1	.03	.167
Publicity	269	0	1	.76	.429
Population Density	285	5.13	915.97	378.99	254.77

N= 272		Death Penalty Sought		Pseudo R ² = 0.0603
	Coef.	Std. Error	P-value	Reference Category (compared to)
Case Characteristics				
Prior convictions (logged)	0.116**	0.056	0.037	
1 Victim	-0.199	0.863	0.818	5 or more Victims
2-4 Victims	0.175	0.874	0.841	5 or more Victims
# of Alleged Aggravators	0.256***	0.095	0.007	
Prolonged Suffering	0.531	0.398	0.182	No Prolonged Suffering
Intercept	-1.347	0.861	0.118	

* significant at $\alpha = .10$

** significant at $\alpha = .05$

*** significant at $\alpha = .01$

^ 13 cases or 4.5% missing from the analysis

Appendix Table C3. MLE Logistic Regression Results: Impact of Case Characteristics and Social Factors on Prosecutorial Decisions to Seek the Death Penalty in Aggravated Murder Cases with Adult Defendants, 1981-2012

N= 252		Death Penalty Sought		Pseudo R ² = 0.1174
	Coef.	Std. Error	P-value	Reference Category (compared to)
<i>Case Characteristics</i>				
Priors(logged)	0.141**	0.063	0.026	
1 Victim	-0.722	0.944	0.445	5 or more Victims
2-4 Victims	-0.237	0.939	0.801	5 or more Victims
Alleged Aggravators	0.213**	0.102	0.038	
Prolonged Suffering	0.424	0.438	0.333	No Prolonged Suffering
Intercept	-1.536	1.057	0.146	
<i>Social Characteristics</i>				
Black Defendant	-0.122	0.439	0.782	White Defendants
Other Race Defendant	-0.241	0.479	0.616	White Defendants
Black Victim(s)	-0.608	0.945	0.520	White Victims
Other Race Victim(s)	-0.763	0.494	0.122	White Victims
Multiple Race Victim(s)	-0.869	0.979	0.375	White Victims
Female Victim(s)	0.389	0.331	0.239	Males/Both Sexes
Publicity	1.025***	0.389	0.008	No Publicity

* significant at $\alpha = .10$

** significant at $\alpha = .05$

*** significant at $\alpha = .01$

^ 33 cases or 11.5% missing from the analysis

+ Tested 'Held Hostage' (by replacing 'Prolonged Suffering'): no change to results

++ Tested Population Density: no change to results

Appendix D. Complete Regression Results for Analysis of Imposition of Death Penalty

	N	Minimum	Maximum	Mean	Std. Deviation
Death Imposed	88	0	1	.40	.492
Applied Aggravators	88	1	12	2.25	1.883
Defenses	88	0	5	.82	1.023
Pled Guilty	88	0	1	.22	.414
Victim Held Hostage	84	0	1	.27	.449
White Defendant	87	0	1	.69	.465
Black Defendant	87	0	1	.17	.380
Other Race Defendant	87	0	1	.14	.347
White Victim(s)	86	0	1	.84	.371

N= 84		Death Penalty Imposed			Pseudo R ² = 0.1720
	Coef.	Std. Error	P-value	Reference Category (compared to)	
Case Characteristics					
1 Victim	-0.286	0.539	0.596	Multiple Victims	
Applied Aggravators	0.318*	0.184	0.083		
Defenses	-0.954***	0.355	0.007		
Pled Guilty	-1.236*	0.694	0.075	Pled Not Guilty	
Victim Held Hostage	1.447**	0.580	0.013	Not Held Hostage	
Intercept	-0.437	0.671	0.515		

* significant at $\alpha = .10$

** significant at $\alpha = .05$

*** significant at $\alpha = .01$

^ 4 cases or 4.5% missing from the analysis

+ Prolonged Suffering was also tested (replacing 'Held Hostage'): not significant

Appendix Table D3. MLE Logistic Regression Results: Impact of Case Characteristics on Decisions to Impose the Death Penalty in Aggravated Murder Cases with Adult Defendants, 1981-2012

N= 83		Death Penalty Imposed		Pseudo R ² = 0.2089
	Coef.	Std. Error	P-value	Reference Category (compared to)
Case Characteristics				
Applied Aggravators	0.411**	0.199	0.039	
Defenses	-0.921**	0.377	0.015	
Pled Guilty	-0.740	0.742	0.318	Pled Not Guilty
Victim(s) Held Hostage	1.431**	0.588	0.015	Not Held Hostage
Intercept	-0.503	0.881	0.568	
Social Characteristics				
Black Defendant	1.179*	0.709	0.096	White Defendant
Other Race Defendant	-0.039	0.811	0.961	White Defendant
White Victim(s)	-0.772	0.759	0.309	Not White Victim(s)

* significant at $\alpha = .10$

** significant at $\alpha = .05$

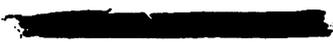
*** significant at $\alpha = .01$

^ 5 cases or 5.7% missing from the analysis

+ Also tested Population Density; Publicity; Prolonged Suffering (in place of 'Held Hostage'): no change to results

APPENDIX B

Fourth Amended Information (2/12/2001), CP 6120-21



FEB 12 2007

Handwritten signature/initials

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 98-1-04967-9

vs.

Handwritten initials
THIRD AMENDED INFORMATION

ALLEN EUGENE GREGORY,

Defendant.

DOB: 06/09/1972	SEX: MALE	RACE: BLACK
SS#: 538-68-3173	SID#: WA19142642	DOL#: WA GREGOAE288LZ

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse ALLEN EUGENE GREGORY of the crime of MURDER IN THE FIRST DEGREE WITH AGGRAVATING CIRCUMSTANCES (also known as AGGRAVATED MURDER IN THE FIRST DEGREE), committed as follows:

That ALLEN EUGENE GREGORY, in Pierce County, Washington, on or about the 27th day of July, 1996, did unlawfully and feloniously, with premeditated intent to cause the death of another person, stab Geneine Harshfield and/or cut Geneine Harshfield's throat, thereby causing the death of Geneine Harshfield, a human being, who died on or about the 27th day of July, 1996, contrary to RCW 9A.32.030(1)(a), and in the commission of that crime, the defendant was armed with a deadly weapon as defined in RCW 9.94A.125, to wit: a knife, thereby invoking the provisions of RCW 9.94A.310 and adding additional time to the presumptive sentence as provided in RCW 9.94A.370, and

That further, aggravating circumstances exist, to-wit: 1) the murder was committed in the course of, in furtherance of, or in immediate flight from the crime of Rape in the First or Second Degree, contrary to

1849

THIRD AMENDED INFORMATION - 1

ORIGINAL

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

APPENDIX C

*Notice of Special Sentencing Proceeding to Determine Imposition of
Death Penalty (4/22/99), CP 5744-46*

1
2
3 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
4 IN AND FOR THE COUNTY OF PIERCE

5 STATE OF WASHINGTON,
6 Plaintiff,
7 vs.
8 ALLEN EUGENE GREGORY,
9 Defendant.

CAUSE NO. 98-1-04967-9
NOTICE OF SPECIAL SENTENCING
PROCEEDING TO DETERMINE
IMPOSITION OF DEATH PENALTY
IN COUNTY CLERK'S OFFICE

A.M. APR 22 1999 P.M.

3 APR 22 1999

10
11 TO: ALLEN EUGENE GREGORY, DEFENDANT, AND
12 LLOYDE ALTON, HIS ATTORNEY

PIERCE COUNTY WASHINGTON
TED RUTT, COUNTY CLERK
BY _____ DEPUTY

13 YOU WILL TAKE NOTICE AS FOLLOWS:

14 I.

15 That you are charged in this court with the crime of Aggravated
16 Murder in the First Degree as defined in RCW 10.95.020.

17 II.

18 That the Prosecuting Attorney of Pierce County, Washington,
19 hereby gives notice of intent to request a special proceeding pursuant
20 to RCW 10.95.040 to determine imposition of the death penalty upon the
21 defendant, ALLEN EUGENE GREGORY, pursuant to RCW 10.95.020 and RCW
22 10.95.030(2).

23 III.

24 That the Prosecuting Attorney for Pierce County, Washington has
25 reason to believe that one or more aggravating circumstances was
26 present at the commission of the aforesaid Murder(s) in the First
27

28 NOTICE - 1

35

ORIGINAL

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

Degree and intends to prove the presence of such circumstances in a special sentencing proceeding pursuant to statute.

IV.

That the aggravating circumstances referred to herein are as follows:

(1) The murder was committed in the course of, in furtherance of, or in immediate flight from the crime of Rape in the First or Second Degree (RCW 10.95.020(11) (b);

The murder was committed in the course of, in furtherance of, or in immediate flight from the crime of Robbery in the First or Second Degree (RCW 10.95.020(11) (a);

The murder was committed in the course of, in furtherance of, or in immediate flight from the crime of Kidnapping in the First Degree (RCW 10.95.020(11) (d).

V.

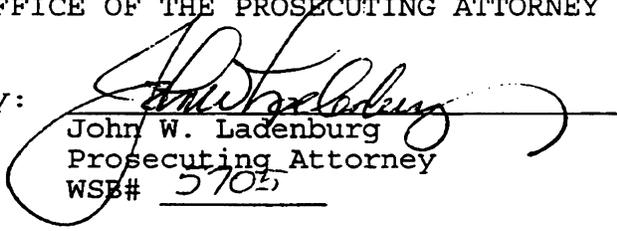
That further, there is reason to believe that there are not sufficient mitigating circumstances to merit leniency. The prosecution may open the sentencing phase only with the defendant's criminal record and evidence which would have been admissible at the guilt phase of the trial, as well as statement(s) from survivor(s) of the victim(s). Presentation of mitigating circumstances is the responsibility of the defendant. To the date of this notice, such

mitigating circumstances as have been submitted to the prosecuting attorney have been deemed by him not sufficient to merit leniency.

DATED at Tacoma, Washington, this 22 day of April, 1999.

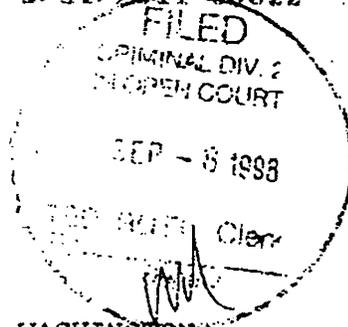
OFFICE OF THE PROSECUTING ATTORNEY

By:


John W. Ladenburg
Prosecuting Attorney
WSE# 5705

APPENDIX D

Motion and Order Compelling Defendant to Provide DNA Samples (filed
9/8/98 in Pierce County Sup. Court No. 98-1-03691-7), CP 410-11



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

ALLEN EUGENE GREGORY,

Defendant.

CAUSE NO. 98 1 03691 7

MOTION AND ORDER COMPELLING
DEFENDANT TO PROVIDE DNA
SAMPLES

MOTION

COMES NOW THE STATE, by and through Pierce County Prosecuting Attorney John W. Ladenburg, or his deputy, and moves the court for an order compelling the defendant to provide blood for DNA testing. The State requests that said blood samples be obtained at the direction of Detective Chris Pollard, or his designee, by a person qualified to take such samples and at a medical facility if necessary. Said samples should be obtained prior to defendant being released from the Pierce County Jail where he is currently being detained.

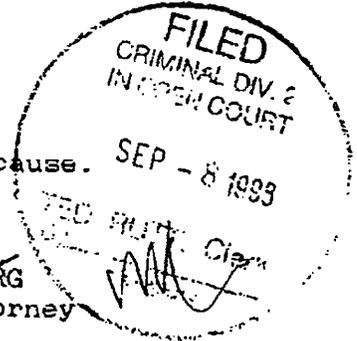
The legal basis of this motion is CrR 4.7(b)(2)(vi) which authorizes the court to "permit the taking of samples of or from the defendant's blood..." upon motion of the prosecuting attorney.

The factual basis of this motion is set out in the declaration

MOTION AND ORDER
COMPELLING DEFENDANT TO
PROVIDE DNA SAMPLES - 1



98 1 03691 7



for determination of probable cause filed in this cause.

DATED this 25th day of August, 1998.

JOHN W. LADENBERG
Prosecuting Attorney

By: Sue L. Sholin WSBA# 21333
Deputy Prosecuting Attorney

ORDER

Based on the foregoing motion, the court hereby orders the defendant ALLEN EUGENE GREGORY to provide blood samples as requested, at the direction of Detective Chris Pollard, or his designee, by a person qualified to take such samples and at a medical facility if necessary. Said samples should be obtained prior to defendant being released from the Pierce County Jail where he is currently being detained. This order provides Detective Pollard with the authority to temporarily remove the defendant from the custody of the jail as may be needed to effect this order.

DONE IN OPEN COURT this 25th day of August, 1998.

JH Poll
J U D G E

Presented by:

Approved as to Form:

Sue L. Sholin
Deputy Prosecuting Attorney
WSB# 21333

Allen 1846
Attorney for Defendant

MOTION AND ORDER
COMPELLING DEFENDANT TO
PROVIDE DNA SAMPLES - 2

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

APPENDIX E

Motion and Declaration to Take Samples From Defendant (filed on 12/17/99 in Pierce County Sup. Court No. 98-1-03691-7), CP 436-42.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

CAUSE NO. 98-1-03691-7

Plaintiff,

vs.

ALLEN EUGENE GREGORY,

Defendant.

MOTION AND DECLARATION TO
DEPTAKE SAMPLES FROM DEFENDANT
IN OPEN COURT

DEC 7 1999

By Lilah Amos
Pierce County Clerk
Deputy Prosecuting Attorney for Pierce
County

COMES NOW Lilah Amos, Deputy Prosecuting Attorney for Pierce
County, Washington, and moves the court for an order authorizing and
directing Chris Pollard, of the Tacoma Police Department, or another
member of the said department, to transport the defendant, ALLEN
EUGENE GREGORY, to the laboratory area of Tacoma General Hospital, for
purpose of obtaining samples of blood from the defendant. These blood
samples are to be obtained by an appropriately licensed medical
technician and defense counsel may be present and provided like
samples if said attorney so desires. This motion is made pursuant to
CrR 4.7(b) (2) (vi) under the general heading "Discovery".

JOHN W. LADENBURG
Prosecuting Attorney

By: Lilah Amos
Lilah Amos,
Deputy Prosecuting Attorney
WSB# 7168

MOTION AND DECLARATION TO TAKE
SAMPLES FROM DEFENDANT - 1

EXHIBIT
C

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

DEC 20 1999

DECLARATION

STATE OF WASHINGTON)
) ss.
County of Pierce)

Lilah Amos, declares under penalty of perjury;

That I am one of the Deputy Prosecuting Attorneys assigned to the prosecution of the above entitled matter.

I have read the discovery provided by the Tacoma Police Department and believe that the following summary of evidence in the above-referenced case is true and correct:

Robin Sehmel contacted officers of the Tacoma Police Department on 8/21/98 and advised them that she had been raped. They transported her to Tacoma General Hospital for a medical examination and "rape kit" examination, in which it is standard procedure to collect samples of any bodily fluid left by the perpetrator of the rape to use in prosecution of the rapist.

At the hospital Robin Sehmel told TPD officers that she had left the residence of a friend and was talking to another acquaintance when she saw a vehicle which she thought belonged to a friend but which was later determined to belong to the defendant. She described the vehicle as a small black Ford automobile, maybe a Mustang hatchback.

MOTION AND DECLARATION TO TAKE
SAMPLES FROM DEFENDANT - 2

98-1-03691-7

1
2 The victim walked toward it and saw that the driver was not her
3 friend, as she had expected. The driver was a black male, 26 years of
4 age, wearing glasses and dark-colored t-shirt and sweat pants. He
5 offered her a ride, and then took her to an area near Jason Lee Middle
6 School, possibly the 700 block of N. Grant.
7

8 The driver produced a 6-inch buck knife from the middle console
9 of the vehicle. He placed the blade under the victim's throat and
10 turned off the car. He told her to take off her pants, and she
11 refused. The driver grabbed her throat and threatened to cut off her
12 nose. He also said he would "fuck you up" if she didn't do what he
13 wanted. The driver then exposed his penis and directed her to perform
14 oral sex on him. The driver then pulled her head up and obtained a
15 condom from the glove box. He put the condom on and performed
16 forcible vaginal intercourse. The rapist ejaculated during this
17 contact. The victim observed that the condom broke. The rapist then
18 anally raped the victim, and this activity continued several more
19 times, involving both vaginal and anal rape with the rapist's penis
20 and fingers. The victim told officers that she believed that the
21 suspect ejaculated approximately 4 times. He then started the car and
22 told her to leave.
23
24
25
26

27 MOTION AND DECLARATION TO TAKE
28 SAMPLES FROM DEFENDANT - 3

98-1-03691-7

1
2 The victim was able to get the license plate of the car as it
3 drove away - WA. License 715 JPJ. The victim then ran to a nearby
4 business, where police were called. The vehicle was registered to
5 defendant Gregory. The victim told officers that the door locks of
6 the vehicle looked like "bullets". She saw on the driver's door, as
7 either a handle or a mirror control, a Mickey's Beer tap. In the
8 middle of the dash board was a "Tweety Bird" cutout, possibly an air
9 freshener. The victim also directed the officers to the location
10 where the car was parked during the rape. They found an empty condom
11 wrapper lying in the street.
12
13

14 In a handwritten statement provided at approximately 5:15 a.m. on
15 August 21, 1998, Robin Sehmel again described the same events as she
16 had told officers verbally. She also said that the rapist had told
17 her that his name was "Allen". She stated that the defendant slugged
18 her with his fist on the left side of her head when she tried to open
19 the door at one point during the rape.
20

21 During a tape-recorded statement to detectives on August 24, 1998
22 Robin Sehmel stated that the defendant raped her vaginally and then
23 forced her to turn over. She noticed at that time that the condom had
24 broken and asked him to put on another condom. He did not do so, and
25
26

27 MOTION AND DECLARATION TO TAKE
28 SAMPLES FROM DEFENDANT - 4

98-1-03691-7

1
2 anally raped her. He then again raped her vaginally and anally. She
3 confirmed that she believed he ejaculated four times.
4

5 The victim's clothing was taken at the hospital for possible use
6 as evidence. Stains were noted on the victim's panties by Forensic
7 Technician Taylor and were preserved for future laboratory
8 examination.
9

10 Detectives seized and searched the defendant's car, a black 1986
11 Ford Mustang, Washington license 715 JPJ. Inside the vehicle they
12 found a condom of the same brand as that found in the street at the
13 location of the rape. They also found a folding knife, 8 inches in
14 total length, in the middle console. Detectives observed that the
15 vehicle had a flat plastic "Tweety Bird" toy on the front passenger
16 floorboard. Prior to executing the search warrant, on August 24, 1998
17 detectives observed that this vehicle had bullet casings over the door
18 locking mechanisms and a Mickey's beer tap handle near the driver's
19 side window.
20

21 Defendant Gregory was interviewed by detectives about the rape on
22 August 24, 1998. He claimed that he was with friends at the Ram
23 Restaurant on Ruston Way, then went to a friend's house where he
24 stayed until approximately 8 a.m. Detectives contacted one of the
25
26

27 MOTION AND DECLARATION TO TAKE
28 SAMPLES FROM DEFENDANT - 5

98-1-03691-7

1
2 persons whom the defendant claimed he was with at the residence, and
3 that friend told detectives that he was gone from the residence from
4 approximately 1 a.m. until approximately 2 a.m. However, he was not
5 present at the home when TPD officers brought a juvenile runaway back
6 to that home at approximately 2:30 a.m.
7

8 The other witness contacted by police about the defendant's
9 whereabouts during the early morning hours of 8/22/98, Karleen
10 Dillion, initially told officers that the defendant was at her home
11 from 12:30 a.m. to approximately 6 or 6:30 a.m. She said that between
12 2:30 to 3 a.m. she went to another area of the house and does not know
13 his whereabouts for sure. She later contacted police and told them
14 that the suspect was at her residence when she went to the basement at
15 approximately 12:30 a.m. She stayed there until approximately 2:30
16 a.m. She did not say that she saw defendant Gregory during that time.
17
18

19 A review of the medical records from the emergency room at Tacoma
20 General Hospital dated 8/21/98 indicate that Robin Sehmel exhibited a
21 "contusion to the left forehead and temporal scalp area consistent
22 with her history of having been punched there with a fist". Non-
23 motile spermatozoa were located in the victim's vagina during the
24 examination. A "Wood's Lamp" examination showed possible sperm
25
26

27 MOTION AND DECLARATION TO TAKE
28 SAMPLES FROM DEFENDANT - 6

98-1-03691-7

1
2 present. Vaginal, oral, and rectal swabs were taken for laboratory
3 analysis.
4

5 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
6 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

7 DATED: December 17, 1999
8 PLACE: TACOMA, WASHINGTON

9 
10 Lilah Amos
11 WSB# 7168

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27 MOTION AND DECLARATION TO TAKE
28 SAMPLES FROM DEFENDANT - 7

APPENDIX F

Order to Take Samples From Defendant (filed on 1/12/00 in Pierce
County Sup. Court No. 98-1-03691-7), CP 443-44

01957 .1470

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

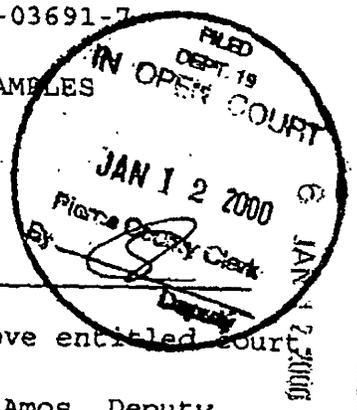
Plaintiff,

vs.

ALLEN EUGENE GREGORY,

Defendant.

CAUSE NO. 98-1-03691-7
ORDER TO TAKE SAMPLES
FROM DEFENDANT



THIS MATTER coming on regularly before the above entitled court
the State of Washington being represented by Lilah Amos, Deputy
Prosecuting Attorney, and the defendant, ALLEN EUGENE GREGORY, being
represented by his attorney of record Les Tolzin, and the court having
reviewed the record and file herein, and being in this matter fully
advised, Now, Therefore,

IT IS HEREBY ORDERED that the defendant, ALLEN EUGENE GREGORY,
shall be released from the Pierce County Jail to the custody of Chris
Pollard, of the Tacoma Police Department, or another member of said
department, for the purpose of transporting the defendant to the
laboratory area of Tacoma General Hospital, for the purpose of
obtaining blood samples from the defendant. These samples are to be

ORDER TO TAKE BLOOD
SAMPLES FROM DEFENDANT - 1



01957-1471

98-1-03691-7

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obtained by an appropriately licensed medical technician and defense counsel may be present and provided like samples if desired.

IT IS FURTHER ORDERED that immediately following the taking of blood samples, the defendant shall be returned to the custody of the Pierce County Jail.

DONE IN OPEN COURT this 12 day of January, 2000 ⁱⁿ ~~December 1999~~.

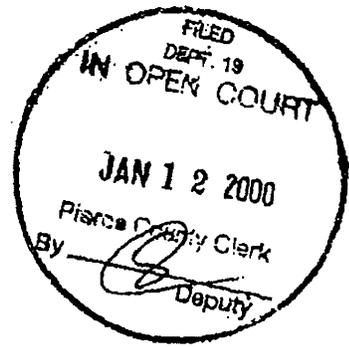
Maryrove Vandoren
JUDGE

Presented by:

Lilah Amos #7168
Lilah Amos
Deputy Prosecuting Attorney

Approved as to Form only:

[Signature]
Les Tolzin, WSB #20177
Attorney for Defendant



ORDER TO TAKE BLOOD
SAMPLES FROM DEFENDANT - 2

APPENDIX G

*Findings of Fact and Conclusions of Law Re: Defendant's Motion to
Suppress Blood Samples (3/23/01), CP 473-85*

~~COPIES~~ 311



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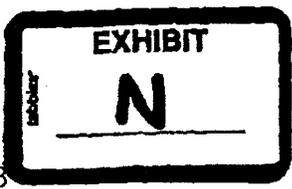
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

<p>STATE OF WASHINGTON,</p> <p>Plaintiff,</p> <p>vs.</p> <p>ALLEN EUGENE GREGORY,</p> <p>Defendant.</p>	<p>CAUSE NO. 98-1-04967-9</p> <p>FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: DEFENDANT'S MOTION TO SUPPRESS BLOOD SAMPLES</p>
---	---

This matter came before the Honorable Rosanne Buckner on the 15th and 18th days of December, 2000. The defendant was present and represented by his attorneys Philip Thornton and Michael Schwartz. The State was represented by deputy prosecuting attorneys Mary E. Robnett and John M. Neeb. The court reviewed the file, reviewed the pleading, briefs, memoranda and declarations, heard the testimony of

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
DEFENDANT'S MOTION TO
SUPPRESS BLOOD SAMPLES - 1

ORIGINAL



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473

98-1-04967-9

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2 witnesses, and entered an oral ruling. The court now enters the
3 following findings of fact and conclusions of law:
4
5

6 **FINDINGS OF FACT**
7

8 1. Geneine Harshfield was raped and murdered on or about July 27,
9 1996. Semen was collected from her at autopsy by the Pierce County
10 Medical examiner. Semen samples were collected from her vagina, anus,
11 and thigh. Semen was also collected from the bedspread at the scene
12 of the rape and murder.
13

14
15 2. The Washington State Patrol Crime lab obtained an RFLP DNA
16 profile from the semen found on the bedspread at the murder scene.
17 The DNA profile remained in the Washington State Patrol records of
18 unsolved crimes.
19

20
21 3. On August 21, 1998, Robin Sehmel was repeatedly raped by one
22 assailant. Semen was found on vaginal and anal swabs collected from
23 Ms. Sehmel.
24

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26 FINDINGS OF FACT AND
27 CONCLUSIONS OF LAW RE:
28 DEFENDANT'S MOTION TO
SUPPRESS BLOOD SAMPLES - 2

2662

JUL 13 2011

98-1-04967-9

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3 4. On August 24, 1998, the defendant was arrested and charged with
4 three counts of Rape in the First Degree under Cause No. 98-1-03691-7
5 for the attack on Ms. Sehmel.
6

7
8 5. At the time of the defendant's arraignment, the State presented
9 an order; the defendant's blood pursuant to CrR 4.7. The attorney who
10 represented the defendant at the arraignment objected to such an
11 order, and the order was not entered.
12

13
14 6. After the arraignment and prior to the pre-trial conference, Ms.
15 Mary Robnett, the Deputy Prosecuting Attorney, talked to the
16 defendant's attorney, Mr. Richard Whitehead. Ms. Robnett told Mr.
17 Whitehead there was forensic evidence recovered from the victim and
18 that the State intended to seek an order for the defendant's blood.
19

20
21 7. On the pre-trial conference date, the State's "Motion and Order
22 Compelling Defendant To Provide DNA Samples" was presented to Judge
23

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26 FINDINGS OF FACT AND
27 CONCLUSIONS OF LAW RE:
28 DEFENDANT'S MOTION TO
SUPPRESS BLOOD SAMPLES - 3

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102133.3034

98-1-04967-9

1
2 Thomas Larkin as an agreed order. The order was signed by a Deputy
3 Prosecuting Attorney and the defendant's attorney, Mr. Whitehead.
4

5
6 8. When the order for blood draw was signed by Judge Larkin, the
7 State possessed sufficient facts to establish probable cause for that
8 blood draw. All the facts had been disclosed to Mr. Whitehead prior
9 to the agreed order being presented to the court.
10

11
12 9. If the defendant had objected to the entry of the order on the
13 date it was signed, a hearing would have been held. The State would
14 have prevailed at that hearing and the order for a blood draw would
15 have been signed.
16

17
18 10. Mr. Whitehead had the opportunity to talk with the defendant
19 about the order before signing it and presenting it as an agreed
20 order.
21

22
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26 FINDINGS OF FACT AND
27 CONCLUSIONS OF LAW RE:
28 DEFENDANT'S MOTION TO
SUPPRESS BLOOD SAMPLES - 4

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002133.3035

98-1-04967-9

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2 11. The defendant appeared to agree to the order at the time of its
3 entry. The defendant has not demonstrated that he did not consent to
4 the order.
5

6
7 12. The presentation of an order to submit to a blood draw is a
8 procedural matter. The defendant was given proper notice of the
9 State's intent to seek that order. The defendant is entitled to a
10 hearing on the substance of the State's motion if he contests it. The
11 timing of the motion (having been continued from an earlier date at
12 defense counsel's request), the fact that sufficient discovery to
13 establish probable cause for the blood draw had already been served,
14 and the presentation of the order "approved as to form" by defense
15 counsel indicated that the defendant waived his objection to the
16 substance of the order and agreed to its presentation.
17
18

19
20 13. The defendant's attorney, Richard Whitehead, is a competent and
21 experienced defense lawyer. The defendant has not established that
22 Mr. Whitehead's representation of the defendant was ineffective in any
23

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26 FINDINGS OF FACT AND
27 CONCLUSIONS OF LAW RE:
28 DEFENDANT'S MOTION TO
SUPPRESS BLOOD SAMPLES - 5

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98-1-04967-9

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2 way. This finding necessarily factors into the court's determination
3 that objecting to the State's motion would have been unsuccessful.
4

5
6 14. In September 1998, after the court order was entered, the State
7 obtained a sample of the defendant's blood.
8

9
10 15. On October 27, 1998, the Washington State Patrol Crime lab
11 obtained an RFLP DNA profile from the semen on the swabs collected
12 from Robin Sehmel and an RFLP DNA profile from the defendant's blood.
13 The Washington State Patrol determined that two profiles were
14 consistent with each other.
15

16
17 16. The Washington State Patrol also determined that the RFLP DNA
18 profile from the defendant's blood was consistent with the RFLP DNA
19 profile from the semen found on the bedspread at the scene of this
20 murder.
21

22
23 17. On November 18, 1998, the defendant was charged in this case with
24 Murder in the First Degree with Aggravating Circumstances.
25

26 FINDINGS OF FACT AND
27 CONCLUSIONS OF LAW RE:
28 DEFENDANT'S MOTION TO
SUPPRESS BLOOD SAMPLES - 6

2666

CR133 . 3087

98-1-0490

18. In December of 1999, the defendant moved to suppress his blood evidence in Cause No. 98-1-03691-7, claiming that the State had not established probable cause for the September 1998 blood draw.

19. On January 14, 2000, the State obtained a second sample of the defendant's blood in Cause No. 98-1-03669-7, the rape case, pursuant to a court order issued under CrR 4.7 and following a formal, contested hearing. The factual basis for the second blood draw was set forth in an affidavit of Lilah Amos, and it contained only the facts known to the State at the time it sought the first blood draw. The second order for a blood draw was granted while the defendant's motion to suppress the first blood draw was pending.

20. The State did not misrepresent any fact in the affidavit in support of the order for the second blood draw.

21. The State did not omit any material fact in the affidavit in support of the order for the second blood draw.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
DEFENDANT'S MOTION TO
SUPPRESS BLOOD SAMPLES - 7

002133 . 3038

98-1-04967-9

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2 22. Even if the affidavit in support of the second blood draw had
3 included information that the defendant was a suspect in an unrelated
4 murder case and/or that the State intended to use the defendant's
5 blood in an unrelated investigation, that would not change the fact
6 that probable cause existed for the second blood draw.
7

8
9 23. In 2000, the Washington State Patrol was no longer performing
10 RFLP DNA analysis. The FBI obtained an RFLP DNA profile from the
11 defendant's blood that was drawn in January 2000.
12

13 23. The RFLP DNA profile prepared by the FBI was consistent with the
14 profile from the semen evidence in Cause No. 98-1-03691-7, the rape
15 case. The RFLP DNA profile prepared by the FBI was consistent with
16 the profile of the semen found on the bedspread at the murder scene in
17 this matter.
18

19
20 24. The defendant previously litigated the issue of the suppression
21 of the September 1998 blood draw in Cause No. 98-1-03691-7 before the
22 Honorable Marywave Van Deren. That suppression motion was denied.
23
24
25

26 FINDINGS OF FACT AND
27 CONCLUSIONS OF LAW RE:
28 DEFENDANT'S MOTION TO
SUPPRESS BLOOD SAMPLES - 8

2668

TOPICS 3039

98-1-04967-9

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2 The case was resolved with a jury verdict of guilty on three counts of
3 Rape in the First Degree as charged.
4

5
6 25. This suppression hearing involves the same parties and an
7 identical issue.
8

9
10 26. Application of the doctrine of collateral estoppel applied in
11 this case does not create an injustice to the defendant.
12

13 27. Even if the defendant were not collaterally estopped from raising
14 the issue here, the defendant has failed to make a preliminary showing
15 that the original order for a blood draw was not an agreed order.
16
17

18 28. The State properly presented a motion for a second blood draw
19 while the defendant's motion to suppress was pending. After a
20 hearing, the court determined that probable cause existed for that
21 blood draw and, accordingly, issued an order allowing the State to
22 obtain the defendant's blood, which was accomplished in January of
23
24

25
26 FINDINGS OF FACT AND
27 CONCLUSIONS OF LAW RE:
28 DEFENDANT'S MOTION TO
SUPPRESS BLOOD SAMPLES - 9

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00133 30443

98-1-04967-9

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2000. The judgment of that court was correct that probable cause did exist for a blood draw in January of 2000.

29. Once the State was in possession of the defendant's blood, he had no further expectation of privacy in his blood or in his DNA profile.

30. The comparison of the defendant's DNA profile to evidence in this unsolved murder case was not a search and was not a seizure.

31. The defendant was not treated differently than any similarly situated person.

Based on the foregoing findings of fact, the court enters the following:

CONCLUSIONS OF LAW

1. Once the State was in possession of the defendant's blood, he had no further expectation of privacy in his blood or in his DNA profile.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
DEFENDANT'S MOTION TO
SUPPRESS BLOOD SAMPLES - 10

002133 .3041

98-1-04967-9

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2. The comparison of the defendant's DNA profile to evidence in this unsolved murder case was not a search and was not a seizure.

3. The defendant was not treated differently than any similarly situated person.

4. The defendant's Fourth Amendment rights were not violated by the September 1998 blood draw.

5. The defendant's Fourth Amendment rights were not violated by the January 2000 blood draw.

6. The defendant's Fifth Amendment rights were not violated by the September 1998 blood draw.

7. The defendant's Fifth Amendment rights were not violated by the January 2000 blood draw.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
DEFENDANT'S MOTION TO
SUPPRESS BLOOD SAMPLES - 11

JURIES, BONE

98-1-04967-9

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8. The defendant was not denied effective assistance of counsel with respect to the September 1998 blood draw.

9. The defendant was not denied effective assistance of counsel with respect to the January 2000 blood draw.

10. The defendant's Sixth Amendment rights were not violated by the September 1998 blood draw,

11. The defendant's Sixth Amendment rights were not violated by the January 2000 blood draw.

12. The defendant's rights under the Washington State Constitution were not violated by the September 1998 blood draw.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
DEFENDANT'S MOTION TO
SUPPRESS BLOOD SAMPLES - 12

JURISDICTION

98-1-04967-9

13. The defendant's rights under the Washington State Constitution were not violated by the January 2000 blood draw.

ORAL RULING GIVEN IN OPEN COURT in the presence of the defendant on the 18th day of December, 2000.

ORDER SIGNED IN OPEN COURT in the presence of the defendant on this 23rd day of March, 2001.

Rosanne Buckner
Rosanne Buckner
J U D G E

Presented by:

Mary E. Robnett
Mary E. Robnett
Deputy Prosecuting Attorney
WSB# 21129

John M. Neeb
John M. Neeb
Deputy Prosecuting Attorney
WSB# 21322

Approved as to Form:

Michael E. Schwartz
Michael E. Schwartz
Attorney for the Defendant
WSB# 21824

Philip E. Thornton
Philip E. Thornton
Attorney for the Defendant
WSB# 20014

FILED
DEPT 6
IN OPEN COURT
MAR 23 2001
Pierce County Clerk
By: *RSM*
DEPUTY

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
DEFENDANT'S MOTION TO
SUPPRESS BLOOD SAMPLES - 13

APPENDIX H

Findings of Fact and Conclusions of Law Re: Defendant's Motion to Suppress Evidence Obtained from DNA Comparison (4/2/01), CP 6157-67



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

ALLEN EUGENE GREGORY,

Defendant.

CAUSE NO. 98-1-04967-9

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
DEFENDANT'S MOTION TO
SUPPRESS EVIDENCE OBTAINED
FROM DNA COMPARISON

This matter came before the Honorable Rosanne Buckner on the 15th and 18th days of December, 2000. The defendant was present and represented by his attorneys Philip Thornton and Michael Schwartz. The State was represented by Deputy Prosecuting Attorneys Mary E. Robnett and John M. Neeb. The court reviewed the file, reviewed the briefs and memoranda, reviewed the exhibits, reviewed the declarations and affidavits, heard the testimony of witnesses, heard argument, and entered an oral ruling. The court now enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: DEFENDANT'S MOTION TO
SUPPRESS DNA COMPARISONS - 1

ORIGINAL

FINDINGS OF FACT

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3 1. Geneine Harshfield was raped and murdered on or about July 27,
4 1996. The Pierce County Medical Examiner collected semen from the
5 victim at an autopsy. Semen was collected from the victim's vagina,
6 anus, and right thigh. Semen was also collected from the scene of the
7 murder on the bedspread where Ms. Harshfield's body was found. The
8 Washington State Patrol Crime Lab prepared an RFLP DNA profile from
9 the semen on the bedspread. The profile was compared to the convicted
10 felon data base without a match. The DNA profile remained in the
11 Washington State Patrol records.
12
13
14

15 2. On August 25, 1998, the defendant was charged under Cause No. 98-
16 1-03691-7 with three counts of Rape in the First Degree for a sexual
17 assault on Robin Sehmel that occurred on August 21, 1998.
18
19

20 3. On September 10, 1998, the State obtained a blood sample from
21 the defendant pursuant to CrR 4.7 on Cause No. 98-1-03691-7, the
22 charged rape case. George Chan, a scientist with the Washington State
23 Patrol, prepared an RFLP DNA profile from the evidence in that case
24
25

26 FINDINGS OF FACT AND CONCLUSIONS
27 OF LAW RE: DEFENDANT'S MOTION TO
28 SUPPRESS DNA COMPARISONS - 2

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including vaginal swabs, anal swabs, Robin sehmel's reference blood sample, and the defendant's blood sample.

4. In a report dated October 27, 1998, the Washington State Patrol determined that the defendant's DNA profile was consistent with the profile from the vaginal and anal swabs in Cause No. 98-1-03691-7, the rape case.

5. Between October 27, 1998 and November 2, 1998, Washington State Patrol Crime Lab scientist Dr. John Brown compared the defendant's RFLP DNA profile to the profile from the bedspread in the Geneine Harshfield murder case. John Brown determined that the DNA profiles between these two items were consistent with each other.

6. The Washington State Patrol routinely compares the DNA profiles of unsolved cases against the DNA profiles of suspected persons.

7. Prior to the defendant being charged in the Rape Case, Cause No. 98-1-03691-7, Detective DeVault met with Deputy Prosecuting Attorney Lilah Amos and sought advise as to whether there was sufficient

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: DEFENDANT'S MOTION TO
SUPPRESS DNA COMPARISONS - 3

1
2 evidence to obtain a court order to take blood from the defendant. At
3 no time prior to the DNA comparison between the defendant's profile
4 and the Harshfield crime scene evidence did the Detective DeVault feel
5 that he had probable cause to arrest the defendant for the murder of
6 Geneine Harshfield.
7

8 8. On November 18, 1998, the defendant was charged in this matter
9 with Murder in the First Degree with Aggravating Circumstances for the
10 murder of Geneine Harshfield.
11

12
13 9. The State did not seek to obtain a blood sample from the
14 defendant under an order in this matter (Cause No. 98-1-04967-9).
15 After the defendant was charged in this matter, Karen Lindell of the
16 Washington State Patrol Crime Lab prepared a PCR DNA profile from the
17 defendant's September 10, 1998 blood sample and a PCR DNA profile from
18 the evidence collected from the vaginal swab from Geneine Harshfield.
19
20

21 10. After the defendant was charged with in this matter, Cause No.
22 98-1-04967-9, Forensic Science Associates prepared an STR DNA profile
23 from the defendant's blood. Forensic Science Associates also prepared
24
25

26 FINDINGS OF FACT AND CONCLUSIONS
27 OF LAW RE: DEFENDANT'S MOTION TO
28 SUPPRESS DNA COMPARISONS - 4

1
2 an STR DNA profile from semen found on the bedspread, the vaginal
3 swab, the anal swab and the thigh swab.
4

5
6 11. In December of 1999, the defendant moved to suppress his blood
7 evidence in Cause No. 98-1-03691-7, the rape case, claiming that the
8 State had not established probable cause for the September 10, 1998
9 blood draw. The defendant's motion to suppress the blood draw was not
10 heard until March of 2000.
11

12
13 12. On January 14, 2000, the State obtained a second sample of the
14 defendant's blood in Cause No. 98-1-03691-7, the rape case. The
15 January 2000 blood draw was ordered pursuant to CrR 4.7 following a
16 hearing before the Honorable Marywave Van Deren. There was ample
17 blood sample remaining from the September 10, 1998 blood draw to do
18 additional forensic testing. The purpose in obtaining the second
19 blood draw was to overcome any constitutional infirmities alleged by
20 the defendant in his motion to suppress the September 10, 1998 blood
21 draw.
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26 FINDINGS OF FACT AND CONCLUSIONS
27 OF LAW RE: DEFENDANT'S MOTION TO
28 SUPPRESS DNA COMPARISONS - 5

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2 13. The factual basis for the January 12, 2000 blood draw was set
3 forth in an affidavit of Lilah Amos. The affidavit included only the
4 facts known to the State when the first blood draw was sought. The
5 order for a second blood draw was issued while the defendant's motion
6 to suppress the first blood draw was pending.
7

8
9 14. In January 2000, the Deputy Prosecuting Attorneys handling Cause
10 No. 98-1-03691-7 were Lilah Amos and Mary Robnett. They were also the
11 attorneys of record in this matter, Cause No. 98-1-04967-9, which was
12 pending before the Honorable Rosanne Buckner. The defendant was
13 represented by different counsel in the rape case and this murder
14 case. At no time did Deputy Prosecuting attorneys Mary Robnett or
15 Lilah Amos inform the Honorable Rosanne Buckner or defendant's counsel
16 in the murder case of their intent to obtain blood from the defendant
17 in the rape case.
18
19

20
21 15. The FBI prepared an RFLP DNA profile from the defendant's blood
22 that was drawn in January of 2000. In January 2000, the Washington
23 State Patrol was no longer performing RFLP DNA analysis. The FBI
24

25
26 FINDINGS OF FACT AND CONCLUSIONS
27 OF LAW RE: DEFENDANT'S MOTION TO
28 SUPPRESS DNA COMPARISONS - 6

2811

1
2 report documenting the defendant's RFLP DNA profile is dated March 14
3 2000.

4
5
6 16. The RFLP DNA profile from the defendant's January 2000 blood draw
7 is consistent with the profile of the semen donor in Cause No. 98-1-
8 03691-7, the rape case.

9
10
11 17. The RFLP DNA profile obtained by the FBI from the defendant's
12 January 2000 blood draw is consistent with the profile of the semen on
13 the bedspread in this matter, Cause No. 98-1-04967-9.

14
15
16 18. On March 27, 2000, the Honorable Marywave Van Deren denied the
17 defendant's motion to suppress the first blood draw in Cause No. 98-1-
18 03691-7, the rape case.

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21 19. On April 14, 2000, the State requested Forensic Science
22 Associates prepare an STR DNA profile from the defendant's blood drawn
23 in January of 2000.

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26 FINDINGS OF FACT AND CONCLUSIONS
27 OF LAW RE: DEFENDANT'S MOTION TO
28 SUPPRESS DNA COMPARISONS - 7

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20. Neither the Tacoma Police Department nor the Washington State Patrol obtained a warrant to compare the defendant's DNA profile obtained from the September 10, 1998 blood draw with the DNA profile obtained from the evidence collected at the scene of the murder in this matter.

21. The comparison of the defendant's DNA profile to evidence in this unsolved case was not a search and was not a seizure.

22. The defendant had no further expectation of privacy in his blood after the State had obtained it.

23. The defendant was not treated differently than any similarly situated person.

CONCLUSIONS OF LAW

1. The comparison of the defendant's DNA profile to evidence in this unsolved case was not a search and was not a seizure.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: DEFENDANT'S MOTION TO
SUPPRESS DNA COMPARISONS - 8

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2 2. The defendant had no further expectation of privacy in his blood
3 after the State had obtained it.

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6 3. The defendant was not treated differently than any similarly
7 situated person.

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9 4. The defendant's Fourth Amendment rights were not violated when
10 the State compared the DNA profile from the defendant's September 1998
11 blood draw to DNA profiles from the evidence in this matter.

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14 5. The defendant's Fourth Amendment rights were not violated when
15 the State compared the DNA profile from defendant's January 2000 blood
16 draw to the DNA profile from the evidence in this matter.

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19 6. The defendant was not denied equal protection of the laws when
20 the State compared the DNA profile from defendant's September 1998
21 blood draw to the DNA profile from the evidence in this matter.

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26 FINDINGS OF FACT AND CONCLUSIONS
27 OF LAW RE: DEFENDANT'S MOTION TO
28 SUPPRESS DNA COMPARISONS - 9

2814

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2 7. The defendant was not denied equal protection of the laws when
3 the State compared the DNA profile from defendant's January 2000 blood
4 draw to the DNA profile from the evidence in this matter.
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6
7 8. The defendant's rights under the Washington State Constitution
8 were not denied when the State compared the DNA profile from the
9 defendant's September 1998 blood draw to the DNA profile from the
10 evidence in this matter.
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13 9. The defendant's rights under the Washington State Constitution
14 were not denied when the State compared the DNA profile from the
15 defendant's January 2000 blood draw to the DNA profile from evidence
16 in this matter.
17

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19 10. The State has not violated RCW 43.43 or the provisions of
20 Washington Administrative Code 446-75-030 when the State compared the
21 DNA profile from the defendant's September 1998 blood draw to the DNA
22 profile from evidence in this matter.
23

24
25 ORAL RULING GIVEN IN OPEN COURT in the presence of the defendant
on the 18th day of December, 2000.

26
27 FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: DEFENDANT'S MOTION TO
28 SUPPRESS DNA COMPARISONS - 10

ORDER SIGNED IN OPEN COURT in the presence of the defendant on this 2 day of January, 2001.

[Signature]
Judge Rosanne Buckner

Presented by:

Approved as to Form:

[Signature]
Mary E. Robnett
Deputy Prosecuting Attorney
WSB# 21129

[Signature] #20017
Michael Schwartz
Attorney for the Defendant
WSB#

[Signature]
John M. Neeb
Deputy Prosecuting Attorney
WSB# 21322

[Signature]
Philip Thornton
Attorney for the Defendant
WSB # 20017



FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: DEFENDANT'S MOTION TO SUPPRESS DNA COMPARISONS - 11

APPENDIX I

Search Warrant and Affidavit (8/25/98), CP 486-88

FILED
CLERK'S OFFICE

AUG 26 1998 PM

WASH. COUNTY CLERK
TED RUTT. DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY
COMPLAINT FOR SEARCH WARRANT
(Evidence)

98 1 No. 07414 2

STATE OF WASHINGTON)

—SS.

County of Pierce)

COMES NOW Detective Chris Pollard #272, being first duly sworn, under oath, deposes and says:

That on or about the 21st day of August, 1998 in Pierce County, Washington, a felony, to-wit: RAPE IN THE FIRST DEGREE AND ROBBERY IN THE FIRST DEGREE, CASE NUMBER 98-2330140, was committed by the act, procurement or omission of another, that the following evidence, to-wit:

trace evidence, i.e., hairs, fibers, semen, blood; condoms; folding buck knife; U.S. currency totaling \$8.00; documents establishing dominion and control of the listed vehicle

is material to the investigation or prosecution of the above described felony for the following reasons:

evidence of the crime

that affiant verily believes that above evidence is concealed in or about a particular house or place, to-wit:

could be found in the suspect's 1986 Ford Mustang, two door, black in color, Washington License 715JPI VIN #1FABP28M9GF219818, registered to Allen E. Gregory, 1714 South 9th Street, in Tacoma, Washington, located at Bill's Towing at 1240 South Sprague Avenue, Tacoma, Washington,

in said County and State; that affiant's belief is based upon the following facts and circumstances:

On the 21st of August, 1998, a 41-year old female reported to the Tacoma Police that a black male orally, vaginally and anally raped her, while threatening her with a buck knife, and stole \$8.00 in U.S. currency, after she accepted the offer of a ride in his vehicle. The rape occurred inside the vehicle. During the course of the rape, the suspect wore a condom which ruptured. Upon initially contacting the suspect, the suspect introduced himself as Allen, and further stated that he lived in the City of Tacoma, on the east side of town. The victim described the suspect as a black male, mid-20's, with a slim to medium build, 5'10 or taller in height, wearing glasses.



FILED
CLERK OF SUPERIOR COURT
WASHINGTON
AUG 26 1998
PAGE 2 OF 2
TED RUTZ, COUNTY CLERK
BY _____ DEPUTY

98 1 07414 2

The victim described the suspect vehicle as a black two door Ford, with bullet casings covering the door lock mechanisms, a Mickey's beer tap mechanism as a mirror control, and having at least one Looney Tunes air freshener, possibly Tweety Bird. As the suspect left the victim, she noted the vehicle's Washington license plate number as 715JPI, this plate, per Department of Licensing, is a 1986 Ford Mustang, 2 door, black in color, registered to Allen E. Gregory, 1714 South 9th Street, Tacoma, Washington. The victim was transported to Tacoma General Hospital where a standard rape examination was performed by Dr. Fletcher, and evidence of the rape obtained. A photo montage containing Allen E. Gregory's photo was shown to the victim, but she was unable to identify him. Allen E. Gregory is a black male, 26 years of age, 6'03" in height, slim to medium build, who wears glasses. The affiant located the listed vehicle in the alley east of 1714 South 9th Street, adjacent to the home of Allen Gregory. A visual inspection from the exterior of the vehicle showed that bullet casings covered the locking mechanisms on the doors, a beer tap dispenser was present in the vehicle, and air fresheners were also present. Affiant contacted Allen Gregory at his residence at 1714 South 9th Street and took him into custody. Gregory was transported to the County-City Building where he was advised of his rights, and denied any contact with the victim, or involvement in the crime. However, Gregory did state that he does keep a folding buck knife in the vehicle, and that the vehicle was parked outside of 828 South Anderson during the hours this crime was committed. Gregory also stated only he and his grandmother have keys to the vehicle, and he is certain that the vehicle was not driven by anyone from 6:00 p.m. on Thursday, August 20, 1998, through 9:00 a.m. on Friday, August 21, 1998. Affiant believes that the suspect's statement is an attempt at deception. Gregory's vehicle was impounded to Bill's Towing. Affiant consulted with Deputy Prosecutor Sue Sholin. Gregory was booked for Rape First Degree and Robbery First Degree.

Affiant believes the above listed evidence will be located in the listed vehicle.

SUBSCRIBED AND SWORN to before me this 25 day of August, 19 98

Presented By: Det C Pallant #272 TPO

[Signature]

JUDGE

FILED
CLERK'S OFFICE
AUG 26 1998 PM
BY [Signature]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY
SEARCH WARRANT
(Evidence)

98 L No. 07414 2

STATE OF WASHINGTON)
County of Pierce)

ss.

THE STATE OF WASHINGTON TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY: -

WHEREAS, DETECTIVE CHRIS POLLARD #272 has this day made complain on oath to the undersigned one of the judges of the above entitled court in and for said County that on or about 21st day of AUGUST, 1998, in Pierce County, Washington, a felony, to-wit: RAPE IN THE FIRST DEGREE AND ROBBERY IN THE FIRST DEGREE, CASE NUMBER 98-2330140, was committed by the act, procurement or omission of another, and that the following evidence, to-wit:

trace evidence, i.e., hairs, fibers, semen, blood; condoms; folding buck knife; U.S. currency totaling \$8.00; documents establishing dominion and control of the listed vehicle,

is material to the investigation or prosecution of the above described felony and that said affiant believes said evidence can be found in or about a vehicle, to-wit:

1986 Ford Mustang, two door, black in color, Washington License 715JPJ VIN #1FABP28M9GF219818, registered to Allen E. Gregory, 1714 South 9th Street, in Tacoma, Washington, located at Bill's Towing at 1240 South Sprague Avenue, Tacoma, Washington.

THEREFORE, in the name of the State of Washington, you are commanded that within ten days from this date, with necessary and proper assistance, you enter into and/or search the said house, person, place or this, to-wit:

1986 Ford Mustang, two door, black in color, Washington License 715JPJ VIN #1FABP28M9GF219818, registered to Allen E. Gregory, 1714 South 9th Street, in Tacoma, Washington, located at Bill's Towing at 1240 South Sprague Avenue, Tacoma, Washington,

and then and there diligently search for said evidence, and any other, and if same, or evidence material to the investigation or prosecution of said felony or any part thereof, be found on such search, bring the same forthwith before me, to be disposed of according to law. A copy of this warrant shall be served upon the person or persons found in or on said house or place and if no person is found in or on said house or place, a copy of this warrant shall be posted upon any conspicuous place in or on said house, place, or thing, and a copy of this warrant and inventory shall be returned to the undersigned judge or his agent promptly after execution.

GIVEN UNDER MY HAND this 25 day of August, 19 98

[Signature]
JUDGE

EXHIBIT
P

APPENDIX J

*Governor Inslee's Remarks Announcing a Capital Punishment
Moratorium, Feb. 11, 2014*



STATE OF WASHINGTON
Office of the Governor

**Governor Inslee's remarks announcing a capital punishment
moratorium**

Feb. 11, 2014

Remarks as prepared

Good morning.

I'm here today to talk to you about an important criminal justice issue.

Over the course of the past year, my staff and I have been carefully reviewing the status of capital punishment in Washington State.

We've spoken to people in favor and strongly opposed to this complex and emotional issue, including law enforcement officers, prosecutors, former directors of the Department of Corrections, and the family members of the homicide victims.

We thoroughly studied the cases that condemned nine men to death. I recently visited the state penitentiary in Walla Walla and I spoke to the men and women who work there. I saw death row and toured the execution chamber, where lethal injections and hangings take place.

Following this review, and in accordance with state law, I have decided to impose a moratorium on executions while I'm Governor of the state of Washington.

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.

The use of the death penalty in this state is unequally applied, sometimes dependent on the budget of the county where the crime occurred.





STATE OF WASHINGTON
Office of the Governor

Let me acknowledge that there are many good protections built into Washington State's death penalty law.

But there have been too many doubts raised about capital punishment. There are too many flaws in the system. And when the ultimate decision is death there is too much at stake to accept an imperfect system.

Let me say clearly that this policy decision is not about the nine men currently on death row in Walla Walla.

I don't question their guilt or the gravity of their crimes. They get no mercy from me.

This action today does not commute their sentences or issue any pardons to any offender.

But I do not believe their horrific offenses override the problems that exist in our capital punishment system.

And that's why I am imposing a moratorium on executions. If a death penalty case comes to my desk for action, I will issue a reprieve.

What this means is that those on death row will remain in prison for the rest of their lives. Nobody is getting out of prison -- period.

I have previously supported capital punishment. And I don't question the hard work and judgment of the county prosecutors who bring these cases or the judges who rule on them.

But my review of the law in Washington State and my responsibilities as Governor have led me to reevaluate that position.





STATE OF WASHINGTON
Office of the Governor

I recognize that many people will disagree with this decision. I respect everyone's beliefs on this and have no right to question or judge them.

With my action today I expect Washington State will join a growing national conversation about capital punishment. I welcome that and I'm confident that our citizens will engage in this very important debate.

I'd like to tell Washingtonians about what lead me to this decision.

First, the practical reality is that those convicted of capital offenses are, in fact, rarely executed. Since 1981, the year our current capital laws were put in place, 32 defendants have been sentenced to die. Of those, 19, or 60%, had their sentences overturned. One man was set free and 18 had their sentences converted to life in prison.

When the majority of death penalty sentences lead to reversal, the entire system itself must be called into question.

Second, the costs associated with prosecuting a capital case far outweigh the price of locking someone up for life without the possibility of parole.

Counties spend hundreds of thousands of dollars – and often many millions -- simply to get a case to trial.

And after trial, hundreds of thousands of dollars are spent on appellate costs for decades.

Studies have shown that a death penalty case from start to finish is more expensive than keeping someone in prison for the rest of their lives – even if they live to be 100 years of age.



JAY INSLEE
Governor



STATE OF WASHINGTON
Office of the Governor

Third, death sentences are neither swift nor certain. Seven of the nine men on death row committed their crimes more than 15 years ago, including one from 26 years ago. While they sit on death row and pursue appeal after appeal, the families of their victims must constantly revisit their grief at the additional court proceedings.

Fourth, there is no credible evidence that the death penalty is a deterrent to murder. That's according to work done by the National Academy of Sciences, among other groups.

And finally, our death penalty is not always applied to the most heinous offenders.

That is a system that falls short of equal justice under the law and makes it difficult for the State to justify the use of the death penalty.

In 2006, state Supreme Court Justice Charles Johnson wrote that in our state, "the death penalty is like lightening, randomly striking some defendants and not others."

I believe that's too much uncertainty.

Therefore, for these reasons, pursuant to RCW 10.01.120, I will use the authority given to the Office of the Governor to halt any death warrant issued in my term.

I will take your questions.



APPENDIX K

Explanatory Materials for 1981 Death Penalty Statute

RAF:jhpc
December 31, 1980

EXPLANATORY MATERIAL FOR "AN
ACT CONCERNING MURDER AND
CAPITAL PUNISHMENT"

Hereinafter is a section-by-section explanation of a proposed act entitled "An Act Concerning Murder And Capital Punishment". This material should provide the reasons why this proposal is the way it is -- in both what it does contain and does not contain.

While the proposal is by no means cast in stone, any changes should be made with caution. An alteration in or to one section could very likely impact some other section and could, ultimately, introduce a fatal flaw into what is intended to be a concise, consistent statutory scheme.

The goals of this proposal are as follows:

- (1) To correct the deficiencies found in our current statutes in State v. Martin, 94 Wn. 2d 1, _____ P.2d _____ (1980);
- (2) To eliminate various requirements from our current statutes which are not constitutionally necessary;
- (3) To eliminate numerous problems and inconsistencies present in our current statutes; and
- (4) To anticipate and provide for, to the greatest extent possible, the elimination of obstacles to the execution of certain murderers.

This proposal seeks not to be innovative. The road from the commission of a murder to the ultimate execution of the murderer is a long one which is fraught with pitfalls. Innovation in legislation of this sort must be avoided if at all possible. Therefore, this proposal relies upon concepts which have already been approved by the United States Supreme Court.

SECTION 1.

This section contains a legislative declaration of what the act is intended to do. Such a declaration can be helpful to a court in interpreting legislation because it sets the stage and lets a court know what it is that the legislature wants to accomplish.

The substance of this declaration is the statements typically advanced in support of capital punishment. The last paragraph of the declaration is an acknowledgment that capital punishment cannot be imposed with mathematical precision but that such imperfections in our justice system are not sufficient to abandon capital punishment. → *pragmatic*

SECTION 2.

This section provides instructions to a court construing the act on what rules of statutory construction to use. It should ultimately buttress the act against the attacks that will unquestionably come.

Typically, a criminal statute is strictly construed but this section requires that it be liberally construed. This basically tells a court not to nitpick.

The rule of lenity is a rule of statutory construction applied to avoid harsh results to defendants when there is some ambiguity in a statute. (Its application to this statute can serve no useful purpose.

The legislature by RCW 2.04.190 and 2.04.200 has empowered the Supreme Court to make rules to govern the judicial process. In State v. Martin, id. it was a court rule which the court said gave a defendant the right to plead guilty and thus avoid the death penalty. It can be argued that this court-made rule over-rode the intent of the legislature to pass a constitutional capital punishment statute. Thus, it is desirable to remove the court's power to enact rules which can be used to thwart the legislative purpose. As long as a court rule did not conflict with any provision of this act, it would be applicable and valid. This does not guarantee, of course, that this act will never run afoul of a court rule because the court could say that it still had the power to enact some rule through its "inherent powers".

SECTION 3.

This section establishes the penalty for a non-capital, non-aggravated first degree murder. While an act which deals largely with capital punishment is not a particularly appropriate place to establish the penalty for this variety of murder, the current statute, RCW 9A.32.040, does so and it will be necessary to repeal RCW 9A.32.040 in the enactment of this

proposal.

RCW 9A.32.030(2) states that first degree murder is a class A felony. Thus, without the language of this section first degree murder would be punishable by from twenty (20) years to life imprisonment.

SECTION 4.

To He
 This section creates a new category of murder called aggravated first degree murder for which the penalty is life imprisonment without parole. A conviction for aggravated first degree murder is the predicate for a special sentencing proceeding through which the death penalty may be imposed. This reflects a substantial change from our current statute where the aggravating circumstance is proved in the sentencing proceeding. Under this proposal the aggravating circumstances is proved in the first phase of the trial -- it is essentially an additional element of the crime of premeditated first degree murder which, of course, must be proved beyond a reasonable doubt. Texas has a statute similar to that proposed here where ~~the aggravating factor is an element of the crime which is~~ proved at the "guilt" stage of the trial. The Texas statute was upheld in Jurek v. Texas, 428 U.S. 153, 96 S.Ct. 2950, 49 L. Ed. 2d 929 (1976).

We contemplated proposing that all varieties of first degree murder, i.e. premeditated and first degree felony murder, be available as the predicate for a special sentencing proceeding through which the death penalty could be levied. Ultimately

we elected not to do so because such would require the alteration of some of the aggravating circumstances presently in our current statute and because it seems fair that a premeditated murder be the predicate for the ultimate penalty.

The aggravating factors set forth in subsection (a) - (j) are largely drawn from the current statute, RCW 9A.32.045.

There are some changes which are explained below:

Subsection (a): In addition to the murder of a police officer and firefighter, the murder of a corrections officer is an aggravating factor. Corrections officers need the protection that capital punishment will provide.

Subsection (b): The term "state correctional institution" has been broadened to "state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes". Thus, as expanded, the proposal includes those incarcerated or escaped from all state prisons, half-way houses, honor camps, some programs at state hospitals, and so forth. This revision avoids an argument that capital punishment is available only when one is incarcerated at or escapes from the correctional facility at Shelton.

Subsection (c): The current statute covers murders while incarcerated in or escaped from a local jail while one is subject to commitment to a correctional

facility. The proposal is expanded to cover murders while incarcerated in or escaped from a jail after having been adjudicated guilty of a felony. This not only covers those awaiting transfer to prison but also covers those serving time in jail as a condition of a deferred or suspended sentence in a felony conviction.

Subsections (d) and (e): These deal with murder for hire and are changed in no material way from the current statute.

Subsection (f): This concerns the murder of certain people involved in the judicial system and state government. It adds protection to state legislators and to elected officials of the executive branch of state government. It is revised to avoid the facial narrowness of the current statute concerning the murder of those involved in the judicial process. For example, under the current statute, if a judge

were murdered by an irate husband because of a proceeding against his wife, there would not be an aggravating factor because the murder was not the result of the judge's relation to the husband. This deficiency and others are cured by the proposal.

Subsection (g): This adds an aggravating factor for a murder committed to conceal commission of a crime. This aggravating factor was present in

our former, mandatory death penalty statute.

Perhaps, under our current statute, it was thought that this aggravating factor was included by the murder of a "witness". However, one is probably not a "witness" until he has actually testified in a proceeding or is at least subpoenaed to testify.

Subsection (h): This covers multiple murders and is unchanged from current statute.

○ Subsection (i): This expands coverage for murders committed in the course of certain crimes. For all crimes attempts have been added. Under our current statute a murder committed in the attempt to commit the enumerated crimes would not be an aggravated murder. Thus, a murder committed in an attempted robbery which failed because the victim had no money would not, under our present scheme, be an aggravated murder. The proposal rectifies this deficiency.

Added to the list of crimes in which an aggravated murder is possible is second degree burglary. Under the current statute a murder committed in the course of a first degree burglary, i.e. the burglary of a dwelling, is aggravated but one committed in the burglary of a building, e.g. a store or warehouse, is not. The proposal, by adding second degree burglary, would make the murder of a storekeeper or warehouseman in the course of a burglary aggravated murder.

Subsection (j): This remains basically the same as the present statute where the murder of a newsreporter can be an aggravated murder.

SECTION 5.

This section establishes the penalty for aggravated murder as life imprisonment without the possibility of release or parole. However, if in a special sentencing proceeding the judge or jury finds that there are not sufficient mitigating circumstances to merit leniency, then the penalty is death.

SECTION 6.

This section provides for the notice of special sentencing proceeding through which the death penalty may be imposed. The notice must be filed within thirty (30) days of the defendant's arraignment on a charge of aggravated first degree murder unless the period for filing the notice is extended by the court.

During the period in which the notice may be filed, the defendant may not plead guilty to the murder with which he is charged. This corrects one of the problems in our current statute found by the court in State v. Martin, supra. This time is needed by the prosecuting attorney to adequately determine if a particular defendant is a suitable candidate for the death penalty. Such an investigation typically requires an extensive records and background investigation of the defendant from sources not quickly available.

SECTION 7.

This section concerns the nature of the special sentencing

proceeding and contains the heart of this proposed capital punishment scheme. Its subsections (a) - (h) will be discussed individually.

Subsection (a): This requires that a special sentencing proceeding be held when a defendant is found guilty of aggravated first degree murder if notice thereof has been served and filed. It also makes it clear that guilt can be established by jury verdict, court trial, or by plea of guilty.

Subsection (b): This provides that a jury shall sit in the special sentencing proceeding unless a jury be waived with the consent of the court and both parties. It further provides that there can be no sort of admission to the questions presented in the special sentencing proceeding -- there must be a trial.

This subsection reflects a firm belief in and preference for a jury in the special sentencing proceeding. Serious consideration, however, was given to having only a judge or judges preside at the special sentencing proceeding. In Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976) the Supreme Court upheld a sentencing procedure wherein the jury gave an advisory verdict but the ultimate decision on life or death rested with the judge. The three justices who announced the decision of the court in Proffitt had some comments that were quite favorable to judge, rather than jury, sentencing because judges have more

expertise in performing the sentencing function. After the decision in Proffitt the court decided Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). The Ohio statute provided for no jury input of any kind into the sentencing function. The court specifically declined to rule whether judge-sentencing in a capital case violated one's right to a jury trial. Thus, we believe that judicial sentencing in a capital case is an open question and is too risky for inclusion into this proposal. Ultimately, therefore, we rejected judicial sentencing having in mind the potential constitutional challenge and the factors which favor jury sentencing which are set forth below:

- (1) A jury can reflect the conscience of the community as to whether a defendant will live or die;
- (2) Placing a life or death decision in the hands of one person -- even an experienced trial judge -- is a very heavy burden; and
- (3) Washington has a long history of allowing juries to decide a defendant's fate in a capital trial.

Subsection (c): This requires that the same jury that decided the defendant's guilt also hear the special sentencing proceeding if such is possible. There is an escape valve, however. If for some reason

the same jury cannot hear the sentencing proceeding, e.g. a juror becomes ill, then the trial jury can be dismissed and another jury empaneled. This is an important procedural provision not provided for in our current statute.

Subsection (d): This subsection introduces flexibility in empaneling juries for special sentencing proceedings. It covers empaneling a jury where guilt was established by plea or court trial. It also provides for the retrial of special sentencing proceeding as a consequence of a mistrial in a previous sentencing proceeding or as a result of a remand from an appellate court due to an error in a special sentencing proceeding which had been appealed.

The subsection also provides for the selection of jurors for the sentencing proceeding. The language having to do with jury selection is drawn largely from CrR 6.4 and 6.5.

Subsection (e): This requires that the jury be advised of the consequences of its finding in the special sentencing proceeding. This is taken from our current statute, RCW 10.94.020(3).

Subsection (f): This simply establishes the contents and order in the special sentencing proceeding regarding argument and presentation of evidence.

Subsection (g): This provides that any relevant evidence which has probative value is admissible in the special sentencing proceeding and, in this regard, it is similar to the current statute. It provides for the admission of hearsay evidence which, under some circumstances, is constitutionally required by Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, ___ L. Ed. 2d ___ (1979). Evidence of previous criminal activity of the defendant is specifically mentioned as being admissible because it is such an important factor in determining if a death penalty is appropriate for a specific defendant.

Also admissible is evidence concerning the crime of aggravated first degree murder if the jury at the sentencing proceeding was not the jury that decided his guilt. This is important for the jury must be apprised of the nature of the crime for it is against the backdrop of the crime that it weighs if there are circumstances to merit leniency.

The current statute proscribes the admission of evidence secured in violation of the federal or state constitutions. This proscription has been omitted. Such is not to suggest, however, that such evidence must be admitted. Rather, it was deleted for the following reasons:

- (1) Under the usual rules of evidence some

evidence secured in violation of our constitutions is admissible, e.g. statements secured in violation of one's Miranda rights are admissible for impeachment purposes; and

- (2) In light of the broad variety of evidence which is constitutionally required to be admitted, the statutory prohibition against admission of some types of evidence could be itself constitutional error.

Subsection (h): This subsection contains the touchstone of the special sentencing proceeding. There is only a single question presented in the proceeding. If the jury is unanimously convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency, then the sentence is death. However, if at least ten jurors are not convinced beyond a reasonable doubt that there are not sufficient mitigating facts to merit leniency, then the sentence is life imprisonment without release or parole. If the jury is unable to decide one way or the other, the court may declare a mistrial just as in any other case where the jury cannot return a verdict. The possibility of a mistrial and, eventually, another special sentencing proceeding is important, for some jurors when put to the test of deciding a question upon which a person's life depends, simply

cannot do so. The current statute contains no provision concerning what happens if the jury is unable to answer the questions in the sentencing proceeding.

This subsection contains some significant departures from our current statute in both what it does and does not contain. In the current statute there are four questions in the sentencing proceeding having to do with aggravating circumstances, mitigating circumstances, guilt with clear certainty, and probability of future criminal acts.

In this proposal the aggravating circumstance is shifted from the sentencing proceeding to the "guilt" phase in which it is an additional element of the crime of premeditated murder. The question concerning mitigating circumstances is retained in this proposal in largely the same form as the current statute.

The question having to do with guilt with clear certainty has been deleted. Apparently it is supposed to be a higher burden of proof than proof beyond a reasonable doubt. However, no one really knows what it means or how to define it. Our legal system has spent hundreds of years grappling with the meaning of proof beyond a reasonable doubt. We suggest that a capital murder statute is not the place to introduce novel legal concepts if such can be avoided. None of the statutes which have been upheld by the United States Supreme Court require guilt be proved with "clear certainty"

and, therefore, it is not constitutionally necessary. Furthermore, to our knowledge at least, no other state requires proof of guilt with clear certainty.

Also abandoned is the last question contained in the current statute having to do with probability of future criminal acts of violence that would constitute a continuing threat to society. This question was drawn from the Texas statute and was very important to the decision in Jurek v. Texas in which the Texas statute was upheld. However, it was not significant because of the question on its face but because it was through this question that the Supreme Court observed that the Texas courts admitted evidence that went to the existence or not of mitigating circumstances. The Texas statute on its face, queried nothing of mitigating circumstances.

The statutes in Proffitt v. Florida, supra and Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 849 (1976) have no questions concerning future criminal acts of violence. Therefore, it is not constitutionally required.

Frankly, the question immerses a capital punishment statute into a quagmire. The overwhelming quasi-scientific evidence (usually from anti-capital punishment scholars) is that it cannot be proved that one will probably commit future criminal acts of violence. Since

"?" dropped re aggravating
added re mitigating

the question is not necessary for a constitutional capital punishment statute, it should be forever abandoned. O

SECTION 8.

This section enumerates some circumstances which the jury could find as mitigating circumstances to merit leniency. Importantly; however, it does not restrict the jury from finding mitigating circumstances not enumerated -- in Lockett v. Ohio, supra the Ohio statute was ruled unconstitutional because the mitigating circumstances which could be considered were too limited.

Subsections (a) - (g) enumerate the mitigating circumstances which are contained in our current statute. There are some wording changes, however. Subsection (h) is new and concerns whether there is a likelihood that the defendant will be a danger to others in the future. Through such an inquiry, testimony of the defendant's psychological or psychiatric condition would clearly be admissible. Such testimony would frequently reveal that the defendant is afflicted with some sort of personality disorder.

cf →

SECTION 9.

This section provides as does the current statute, RCW 9A. 32. 046, that once a defendant is adjudged guilty of aggravated first degree murder and where it is found that there are not sufficient mitigating circumstances to merit leniency, then the sentence is death.

SECTION 10.

This section contains basically the same notion as the

current statute, RCW 9A. 32. 047, that when a death sentence is commuted by the governor or invalidated by a court, that the sentence is life imprisonment without release or parole. The proposal, however, is expanded to provide the alternative sentence in some situations not covered by the current law.

For example, under the current statute if a death sentence were invalidated for other than constitutional reasons, the alternative sentence would be inapplicable. Also the current statute does not cover invalidations of death sentences by courts other than the state or federal supreme courts. Thus, the current statute would not necessarily cover an invalidation through federal habeas corpus or state personal restraint petition. The proposal corrects these deficiencies.

SECTION 11.

Subsection (a): This provides for the automatic review of a death sentence. This is an important factor in any constitutional capital punishment scheme.

Subsection (b): This subsection requires the clerk of the trial court to give notice to the supreme court and the parties that a sentence of death has been imposed. It is by this notice that the automatic sentencing review is commenced.

Subsection (c): Since a verbatim report of the trial court proceedings is necessary for the supreme court to conduct its review, this subsection requires that the defendant or his attorney order these documents within ten (10) days of the entry of judgment and sentence.

Subsection (d): Once the verbatim report of proceedings is filed in the clerk's office and approved, the trial court clerk mails it and copies of all the clerk's papers to the clerk of the supreme court. The clerk of the supreme court acknowledges receipt of these documents. This is significant for it is from the date of receipt that the supreme court's time for review begins to run.

Subsection (e): This requires that the trial court judge submit a report concerning the trial, the crime, the victim, and the defendant to the supreme court. Our current statute, RCW 10.94.030, requires such a report which requirement was probably drawn from the Georgia capital murder statute. However, there is no such report in the Texas or Florida statutes.

Frankly, the report is of marginal value since the supreme court in its sentencing review will examine the entire record of the trial. The report may, however, be useful to the supreme court in focusing its attention on potential problem areas.

The form of the report contained in this proposal is largely the product of a task force which was appointed by the supreme court to develop a form under our current statute. There are, of course, modifications to accommodate this revised capital murder scheme.

If the trial judge is to make a report, it is desirable that the form of the report be statutorily specified. Although a report form was developed for use with the current statute, we do not believe that the form presently available through the supreme court has ever been approved by the court.

Subsection (f): As does the current statute, this subsection requires that any sentence review and appeal be consolidated for consideration and disposition.

Subsection (g): This is an important addition for it specifies exactly what the supreme court must do in a sentence review. Specificity is necessary so that capital cases do not get sidetracked as are the current death penalty cases now pending before the Supreme Court. It must be borne in mind that the items which the court is to consider in a sentencing review are independent of what may be considered by way of appeal.

Under subsections (g) (1) or (2) either the evidence of guilt or voluntariness of a plea of guilty, whichever is appropriate, are considered.

Subsection (g) (3) requires that the court determine the sufficiency of evidence as to whether there were not sufficient mitigating circumstances to merit leniency.

Subsection (g) (4) requires that the court compare the sentence of death in the case before it with "similar cases", considering both the crime and the defendant. This is an important feature in a sentencing review for it will enhance uniformity in the imposition of capital punishment. Importantly, the proposal defines "similar cases". Under our current statute this was not defined and the supreme court remanded the capital cases pending before it for the gathering of data on approximately 1,000 homicide cases, most of which had dubious comparative value. The proposal defines "similar cases" as those murder cases

reported in the appellate reports since January 1, 1965 in which the death penalty was sought. This should provide sixty to seventy cases for review purposes. There should be no problem in selecting for comparison cases reported since 1965 for in Gregg v. Georgia, supra the federal supreme court allowed the use of cases which occurred prior to the passage of the capital statute there under review.

Subsection (g) (5) adds a new factor which must be considered in a sentence review, i.e. whether the death sentence was the product of passion or prejudice. As alluded to, this factor is not present in our current statutory scheme. We have added it because it seems appropriate that one not be executed as a result of a jury's passion or prejudice and because a similar factor was in Georgia's sentencing review process.

Subsection (h): This subsection specifies precisely what the supreme court is to do as a consequence of its review of a sentence of death. If the court finds a deficiency as a consequence of its sentence review, then it must invalidate the sentence and remand for re-sentencing. At the re-sentencing the defendant would get life without parole. On the other hand, if a sentence of death is affirmed, the case is remanded to the trial court for the signing of the death warrant and so forth.

Subsection (i): This subsection requires that the supreme court decide a death penalty case within one-hundred and eighty days from the time it received the report of proceedings and clerk's papers. This requirement is drawn from California Penal

Code §190.6 wherein the California supreme court must decide a capital case within one-hundred and fifty days.

A time requirement for state appellate review is desirable. Some of the capital cases presently pending before the court have been there almost three years and in none are there even briefs on the merits.

SECTION 12.

Our current statutes are in conflict as to when a death warrant is issued. This proposal makes it clear that the warrant is issued once a sentence of death is affirmed by the supreme court. As to the contents of the death warrant, the proposal draws heavily upon RCW 10.70.050.

SECTION 13.

This section deals with the confinement of a defendant after the entry of a judgment and sentence imposing the death penalty. Our current statutes are confused in regard to this issue.

Basically after a death sentence is imposed the defendant is confined in segregation at the penitentiary. Segregation is appropriate because one under sentence of death has less to lose than other prisoners. Thus, segregation in confinement should minimize the danger to others.

SECTION 14.

This section establishes a new method of execution -- by lethal injection. Presently, some controversy surrounds the infliction of death by hanging which can be avoided by

providing a new means of execution.

The proposal here is a synthesis of the statutes of Texas and Oklahoma which both provide for death by lethal injection. The Texas statute was approved in Ex Parte Granviel, 561 S.W. 2d 503 (Tex. 1978). Both the Texas and Oklahoma statutes can be found in that case.

The statute specifies the use of sodium thiopental which is a fast-acting anesthetic. The authorities we have contacted state that sodium thiopental will adequately accomplish the task but that there are a variety of other drugs equally as satisfactory. Sodium thiopental will produce unconsciousness in about fifteen seconds and death will follow painlessly. The only pain will be that associated with the prick of the needle.

Hanging is included as a fall back to lethal injection in the unlikely event that some court finds fault with the primary means of execution.

SECTION 15.

This is drawn from RCW 10.70.100 and 10.70.110 and concerns maintenance of records and return on the death warrant.

SECTION 16.

This deals with the establishment of a new execution date if, for any reason, a defendant is not executed on the appointed day. A provision such as this is necessary because in any case there are likely to be several, if not many, stays of execution from state and federal courts.

SECTION 17.

This repeals our current statutes which would no longer be needed once this proposal is enacted.

SECTION 18.

This is an emergency clause for the immediate effectiveness of this act. This is desirable since our current statutes are probably no good.

SECTION 19.

A severability clause is obviously necessary for this act.

APPENDIX L

Statutory Appendix

Relevant Statutory Provisions and Rules

CrR 2.3(c) provides:

A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant. There must be an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. The sworn testimony may be an electronically recorded telephonic statement. The recording or a duplication of the recording shall be a part of the court record and shall be transcribed if requested by a party if there is a challenge to the validity of the warrant or if ordered by the court. The evidence in support of the finding of probable cause shall be preserved and shall be subject to constitutional limitations for such determinations and may be hearsay in whole or in part. If the court finds that probable cause for the issuance of a warrant exists, it shall issue a warrant or direct an individual whom it authorizes for such purpose to affix the court's signature to a warrant identifying the property or person and naming or describing the person, place or thing to be searched. The court shall record a summary of any additional evidence on which it relies. The warrant shall be directed to any peace officer. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person, place, or thing named for the property or person specified. It shall designate to whom it shall be returned. The warrant may be served at any time.

CrR 4.7(b) provides in part:

(2) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to: . . .

...

(vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof

...

RAP 2.5 provides in part:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court. . . .

...

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) Prior Trial Court Action. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) **Prior Appellate Court Decision.** The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

RAP 9.11 provides:

(a) **Remedy Limited.** The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

(b) **Where Taken.** The appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.

RCW 5.28.010 provides:

Every court, judge, clerk of a court, state-certified court reporter, or notary public, is authorized to take testimony in any action, suit or proceeding, and such other persons in particular cases as authorized by law. Every such court or officer is authorized to collect fees established under RCW 36.18.020 and 36.18.012 through 36.18.018 and to administer oaths and affirmations generally and to every such other person in such particular case as authorized.

Former RCW 9A.32.047 (Laws of 1975, 2d Ex. Sess., ch. 9, § 3) provided:

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 section 1 of this act [RCW 9A.32.045], the penalty for aggravated murder in the first degree in those circumstances shall be imprisonment in the state penitentiary for life. 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 reduce the period of confinement nor release the convicted person as a result of any automatic good time calculation nor shall the department of social and health services permit the convicted person to participate in any work release or furlough program..

RCW 9A.32.050 provides:

(1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or

(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying

crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the second degree is a class A felony.

RCW 9A.32.030 provides:

(1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person; or

(b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or

(c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first

degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants: Except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the first degree is a class A felony.

RCW 9A.72.085 provides:

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved

in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

- (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
- (2) Is subscribed by the person;
- (3) States the date and place of its execution; and
- (4) States that it is so certified or declared under the laws of the state of Washington.

The certification or declaration may be in substantially the following form:

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

.....
(Date and Place) (Signature)

This section does not apply to writings requiring an acknowledgment, depositions, oaths of office, or oaths required to be taken before a special official other than a notary public.

RCW 10.01.120 provides:

Whenever a prisoner has been sentenced to death, the governor shall have power to commute such sentence to imprisonment for life at hard labor; and in all cases in which the governor is authorized to grant pardons or commute sentence of death, he or she may, upon the petition of the person convicted, commute a sentence or grant a pardon, upon such conditions, and with such restrictions, and under such limitations as he or she may think proper; and he or she may issue his or her warrant to

all proper officers to carry into effect such pardon or commutation, which warrant shall be obeyed and executed, instead of the sentence, if any, which was originally given. The governor may also, on good cause shown, grant respites or reprieves from time to time as he or she may think proper.

RCW 10.95.020 provides:

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or firefighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;

(7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;

(8) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030;

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree or residential burglary;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

(12) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;

(13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;

(14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:

(a) Harassment as defined in RCW 9A.46.020; or

(b) Any criminal assault.

RCW 10.95.030 provides:

(1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment

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 indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person had an intellectual disability at the time the crime was committed, under the definition of intellectual disability set forth in (a) of this subsection. A diagnosis of intellectual disability shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of intellectual disabilities. The defense must establish an intellectual disability by a preponderance of the evidence and the court must make a finding as to the existence of an intellectual disability.

(a) "Intellectual disability" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

RCW 10.95.040 provides:

(1) If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

RCW 10.95.050 provides:

(1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by RCW 10.95.040. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

(2) A jury shall decide the matters presented in the special sentencing proceeding unless a jury is waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney.

(3) If the defendant's guilt was determined by a jury verdict, the trial court shall reconvene the same jury to hear the special sentencing proceeding. The proceeding shall commence as soon as practicable after completion of the trial at which the defendant's guilt was determined. If, however, unforeseen circumstances make it impracticable to reconvene the same jury to hear the special sentencing proceeding, the trial court may dismiss that jury and convene a jury pursuant to subsection (4) of this section.

(4) If the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury, or if a retrial of the special sentencing proceeding is necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary. The defense and prosecution shall each be allowed to peremptorily challenge twelve jurors. If there is more than one defendant, each defendant shall be allowed an additional peremptory challenge and the prosecution shall be allowed a like

number of additional challenges. If alternate jurors are selected, the defense and prosecution shall each be allowed one peremptory challenge for each alternate juror to be selected and if there is more than one defendant each defendant shall be allowed an additional peremptory challenge for each alternate juror to be selected and the prosecution shall be allowed a like number of additional challenges.

RCW 10.95.060 provides:

(1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in RCW 10.95.030.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the

jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

RCW 10.95.070 provides:

In deciding the question posed by RCW 10.95.060(4), the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the 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. However, a person found to have an intellectual disability under RCW 10.95.030(2) may in no case be sentenced to death;

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

RCW 10.95.080 provides:

(1) If a jury answers affirmatively the question posed by RCW 10.95.060(4), or when a jury is waived as allowed by RCW 10.95.050(2) and the trial court answers affirmatively the question posed by RCW 10.95.060(4), the defendant shall be sentenced to death. The trial court may not suspend or defer the execution or imposition of the sentence.

(2) If the jury does not return an affirmative answer to the question posed in RCW 10.95.060(4), the defendant shall be sentenced to life imprisonment as provided in RCW 10.95.030(1).

RCW 10.95.090 provides:

If any sentence of death imposed pursuant to this chapter is commuted by the governor, or held to be invalid by a final judgment of a court after all avenues of appeal have been exhausted by the parties to the action, or if the

death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder if there was an affirmative response to the question posed by RCW 10.95.060(4) shall be life imprisonment as provided in RCW 10.95.030(1).

RCW 10.95.120 provides:

In all cases in which a person is convicted of aggravated first degree murder, the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the supreme court of Washington, to the defendant or his or her attorney, and to the prosecuting attorney which provides the information specified under subsections (1) through (8) of this section. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington and shall include the following:

(1) Information about the defendant, including the following:

(a) Name, date of birth, gender, marital status, and race and/or ethnic origin;

(b) Number and ages of children;

(c) Whether his or her parents are living, and date of death where applicable;

(d) Number of children born to his or her parents;

(e) The defendant's educational background, intelligence level, and intelligence quotient;

(f) Whether a psychiatric evaluation was performed, and if so, whether it indicated that the defendant was:

- (i) Able to distinguish right from wrong;
 - (ii) Able to perceive the nature and quality of his or her act; and
 - (iii) Able to cooperate intelligently with his or her defense;
 - (g) Any character or behavior disorders found or other pertinent psychiatric or psychological information;
 - (h) The work record of the defendant;
 - (i) A list of the defendant's prior convictions including the offense, date, and sentence imposed; and
 - (j) The length of time the defendant has resided in Washington and the county in which he or she was convicted.
- (2) Information about the trial, including:
- (a) The defendant's plea;
 - (b) Whether defendant was represented by counsel;
 - (c) Whether there was evidence introduced or instructions given as to defenses to aggravated first degree murder, including excusable homicide, justifiable homicide, insanity, duress, entrapment, alibi, intoxication, or other specific defense;
 - (d) Any other offenses charged against the defendant and tried at the same trial and whether they resulted in conviction;

(e) What aggravating circumstances were alleged against the defendant and which of these circumstances was found to have been applicable; and

(f) Names and charges filed against other defendant(s) if tried jointly and disposition of the charges.

(3) Information concerning the special sentencing proceeding, including:

(a) The date the defendant was convicted and date the special sentencing proceeding commenced;

(b) Whether the jury for the special sentencing proceeding was the same jury that returned the guilty verdict, providing an explanation if it was not;

(c) Whether there was evidence of mitigating circumstances;

(d) Whether there was, in the court's opinion, credible evidence of the mitigating circumstances as provided in RCW 10.95.070;

(e) The jury's answer to the question posed in RCW 10.95.060(4);

(f) The sentence imposed.

(4) Information about the victim, including:

(a) Whether he or she was related to the defendant by blood or marriage;

(b) The victim's occupation and whether he or she was an employer or employee of the defendant;

(c) Whether the victim was acquainted with the defendant, and if so, how well;

(d) The length of time the victim resided in Washington and the county;

(e) Whether the victim was the same race and/or ethnic origin as the defendant;

(f) Whether the victim was the same sex as the defendant;

(g) Whether the victim was held hostage during the crime and if so, how long;

(h) The nature and extent of any physical harm or torture inflicted upon the victim prior to death;

(i) The victim's age; and

(j) The type of weapon used in the crime, if any.

(5) Information about the representation of the defendant, including:

(a) Date counsel secured;

(b) Whether counsel was retained or appointed, including the reason for appointment;

(c) The length of time counsel has practiced law and nature of his or her practice; and

(d) Whether the same counsel served at both the trial and special sentencing proceeding, and if not, why not.

(6) General considerations, including:

(a) Whether the race and/or ethnic origin of the defendant, victim, or any witness was an apparent factor at trial;

(b) What percentage of the county population is the same race and/or ethnic origin of the defendant;

(c) Whether members of the defendant's or victim's race and/or ethnic origin were represented on the jury;

(d) Whether there was evidence that such members were systematically excluded from the jury;

(e) Whether the sexual orientation of the defendant, victim, or any witness was a factor in the trial;

(f) Whether any specific instruction was given to the jury to exclude race, ethnic origin, or sexual orientation as an issue;

(g) Whether there was extensive publicity concerning the case in the community;

(h) Whether the jury was instructed to disregard such publicity;

(i) Whether the jury was instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding;

(j) The nature of the evidence resulting in such instruction; and

(k) General comments of the trial judge concerning the appropriateness of the sentence considering the crime, defendant, and other relevant factors.

(7) Information about the chronology of the case, including the date that:

- (a) The defendant was arrested;
- (b) Trial began;
- (c) The verdict was returned;
- (d) Post-trial motions were ruled on;
- (e) Special sentencing proceeding began;
- (f) Sentence was imposed;
- (g) Trial judge's report was completed; and
- (h) Trial judge's report was filed.

(8) The trial judge shall sign and date the questionnaire when it is completed.

RCW 10.95.130 provides:

(1) The sentence review required by RCW 10.95.100 shall be in addition to any appeal. The sentence review and an appeal shall be consolidated for consideration. The defendant and the prosecuting attorney may submit briefs within the time prescribed by the court and present oral argument to the court.

(2) With regard to the sentence review required by chapter 138, Laws of 1981, the supreme court of Washington shall determine:

(a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4); 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. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120;

(c) Whether the sentence of death was brought about through passion or prejudice; and

(d) Whether the defendant had an intellectual disability within the meaning of RCW 10.95.030(2).

RCW 10.95.140 provides:

Upon completion of a sentence review:

(1) The supreme court of Washington shall invalidate the sentence of death and remand the case to the trial court for resentencing in accordance with RCW 10.95.090 if:

(a) The court makes a negative determination as to the question posed by RCW 10.95.130(2)(a); or

(b) The court makes an affirmative determination as to any of the questions posed by RCW 10.95.130(2) (b), (c), or (d).

(2) The court shall affirm the sentence of death and remand the case to the trial court for execution in accordance with RCW 10.95.160 if:

(a) The court makes an affirmative determination as to the question posed by RCW 10.95.130(2)(a); and

(b) The court makes a negative determination as to the questions posed by RCW 10.95.130(2) (b), (c), and (d).

RCW 36.27.005 provides:

Prosecuting attorneys are attorneys authorized by law to appear for and represent the state and the counties thereof in actions and proceedings before the courts and judicial officers.

RCW 36.27.020 provides in part:

The prosecuting attorney shall: . . .

. . .

(4) Prosecute all criminal and civil actions in which the state or the county may be a party

RCW 43.43.759 provides:

The Washington state patrol shall consult with the forensic investigations council and adopt rules to implement RCW 43.43.752 through 43.43.758. The rules shall prohibit the use of DNA identification data for any research or other purpose that is not related to a criminal investigation, to the identification of human remains or missing persons, or to improving the operation of the system authorized by RCW 43.43.752 through 43.43.758. The rules must also identify appropriate sources and collection methods for biological samples needed for purposes of DNA identification analysis.

U.S. Const. amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. II provides:

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

U.S. Const. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VIII provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § 1 provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WAC 446-75-030 provides:

DNA identification systems as authorized by chapter 43.43 RCW shall be used only for three purposes:

- (1) Identification of possible suspects in criminal investigations;
- (2) Convicted felon identification databanking; and
- (3) Identification of human remains or missing persons. Nothing in this section prohibits the submission of results derived from the biological samples to the Federal Bureau of Investigation combined DNA index system.

WAC 446.75.070 provides:

- (1) A person desiring the destruction of his DNA identification data from a DNA databank shall make his

request therefor on a form furnished by the chief of the Washington state patrol. The request shall be mailed or delivered to the Washington State Patrol Crime Laboratory Division, Olympia, WA.

(2) The request shall be completed, signed by the person whose record is sought to be expunged. The signature shall be notarized. It shall include the address of the applicant, the printed name and the address of the witness to the applicant's signature and such other information requested on the application as identifies the applicant and the offense for which the request of expungement is made.

(3) The request shall include proof that the person making the request for expungement is the same person whose DNA data is sought to be expunged. Such proof shall include a sworn statement of identity. When requested by the patrol, fingerprints and a blood sample shall also be required from the applicant.

(4) The request shall include proof that the person making the request has no record as a convicted felon under RCW 43.43.754 or has other lawful grounds for expungement. Such proof shall include a sworn statement from the applicant, and not-guilty or released without conviction documentation from such criminal charges. Where the finding or release is based on an order of a court, the applicant shall furnish a certified true copy of the court order.

(5) The Washington state patrol crime laboratory has discretion to deny the request for expungement.

WAC 446-75-080 provides:

The use of any data obtained from DNA identification procedures is prohibited for any research or other purpose not related to a criminal investigation, to identification of human remains or missing persons, or to improving the operation of the system established by the Washington state patrol and authorized by RCW 43.43.752 through 43.43.759.

Wash. Const. art. 1, § 3 provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. 1, § 7 provides:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Wash. Const. art. 1, § 12 provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Wash. Const. art. 1, § 14 provides:

Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

Wash. Const. art. 1, § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for

waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. 1, § 22 (amend. 10) provides in part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.

Wash. Const. art. 1, § 24 provides:

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

Wash. Const. art. III, § 2 provides:

The supreme executive power of this state shall be vested in a governor, who shall hold his office for a term of four years, and until his successor is elected and qualified.

Wash. Const. art. III, § 5 provides:

The governor may require information in writing from the officers of the state upon any subject relating to the duties of their respective offices, and shall see that the laws are faithfully executed.

Wash. Const. art. III, § 9 provides:

The pardoning power shall be vested in the governor under such regulations and restrictions as may be prescribed by law.

Wash. Const. art. XI, § 5 provides in part:

The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys and other county, township or precinct and district officers, as public convenience may require, and shall prescribe their duties, and fix their terms of office:

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
) NO. 88086-7
 v.)
)
 ALLEN GREGORY,)
)
 Appellant.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KATHLEEN PROCTOR, DPA	<input type="checkbox"/> U.S. MAIL
JOHN NEEB, DPA	<input type="checkbox"/> HAND DELIVERY
[PCpatcecf@co.pierce.wa.us]	<input checked="" type="checkbox"/> E-MAIL
PIERCE COUNTY PROSECUTOR'S OFFICE	
930 TACOMA AVENUE S, ROOM 946	
TACOMA, WA 98402-2171	
<input checked="" type="checkbox"/> ALLEN GREGORY	<input checked="" type="checkbox"/> U.S. MAIL
795777	<input type="checkbox"/> HAND DELIVERY
WASHINGTON STATE PENITENTIARY	<input type="checkbox"/> _____
1313 N 13 TH AVE	
WALLA WALLA, WA 99362	

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF MARCH, 2014.



X _____

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