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

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

"*Fairness is really what justice is*."

- U.S. Supreme Court Justice Potter Stewart.[1]

Allen Gregory's death sentence is the antithesis of fairness, and the antithesis of justice. He was convicted of the aggravated murder of a single victim when he was 24 years old. He has no other violent felony convictions. Yet he is on death row, while scores of other defendants who brutally killed multiple victims and have serious criminal histories are serving life sentences. The death sentence fails proportionality review.

The unfairness is not just in the result, but in the process through which it was achieved. The prosecutor engaged in extraordinary levels of misconduct during closing argument. This Court can have no confidence in the verdict obtained.

Although Mr. Gregory's sentence must be reversed, this Court should not stop there. The problems in this case are symptomatic of a system infected with unfairness. This Court should invalidate the death penalty in Washington.

In answer to these and other arguments, the State's primary strategy is to urge this Court to ignore the issues, disregard the record, and

[1] Quoted in 4 Yale Law Report No. 3, p. 10 (Winter 1958).

abdicate its obligations under the Constitution and statutes. This Court should reject the invitation to avoid the inevitable. Reversal is required.

B. ARGUMENT

1. The State admits intentional misconduct but pretends there was no PowerPoint presentation and ignores this Court's cases demonstrating reversal is required.

a. Summary.

As explained in the opening brief, the prosecutor obtained a death sentence by delivering a closing argument riddled with improprieties. In his zeal to ensure Mr. Gregory's execution, the prosecutor disregarded multiple appellate decisions prohibiting particular tactics. He shifted the burden of proof, urged the jury to "speak the truth," commented on Mr. Gregory's alleged demeanor, presented his personal opinions on the politics of the death penalty and the propriety of the sentence, discussed irrelevant and false facts outside the evidence, and commented on Mr. Gregory's exercise of his constitutional rights. The prosecutor accompanied his improper oral argument with an inflammatory multimedia presentation. The repeated misconduct rendered the trial unfair and resulted in an invalid death sentence. AOB at 20-58.[2]

[2] For brevity, Mr. Gregory will refer to the Appellant's Opening Brief as "AOB" and the Brief of Respondent as "BOR."

In response, the State admits it intentionally disregarded multiple appellate decisions disapproving the "speak the truth" argument and also acknowledges other improprieties. But it disclaims responsibility for ensuring a fair trial, and urges the Court to affirm despite its purposeful misconduct. The State erroneously denies other instances of misconduct, pretends there was no PowerPoint presentation, and ignores the multiple cases decided after the opening brief was filed in which this Court reversed Pierce County convictions for prosecutorial misconduct. This Court should not tolerate a death sentence obtained under such circumstances.

b. The State admits it intentionally flouted appellate decisions prohibiting certain arguments, but wrongly places the onus of ensuring a fair trial on Mr. Gregory.

The State concedes multiple instances of misconduct. It acknowledges that the prosecutor[3] wrongly commented on Mr. Gregory's alleged demeanor.[4] It also concedes he improperly claimed the victim

[3] The deputy prosecutor who handled the trial and delivered the closing argument is one of the two deputy prosecutors who are handling the appeal.

[4] The propriety of this concession is buttressed by this Court's recent opinion stating that "a prosecutor who comments on the defendant's demeanor is 'strolling in a minefield' strewn with both constitutional and evidentiary hazards." *State v. Barry*, ___ Wn.2d ___, ___ P.3d ___ , 2015 WL 3511916, at *13 n.4 (No. 89976-2, filed June 4, 2015) (internal citation omitted).

suffered a certain physical injury despite the absence of any evidence supporting the claim.[5] BOR at 81, 85; AOB at 47-48, 55-56.

The State further acknowledges that at both the beginning and the end of its closing argument the prosecutor improperly urged the jury to "declare the truth" that Mr. Gregory deserves the death penalty.[6] BOR at 61-63, 65. As it had done in numerous other cases, the prosecution based this argument on the word "verdict," telling the jury that its job was to "speak the truth," consistent with a literal interpretation of the Latin root. The prosecutor presented this argument despite knowing that the Court of Appeals had repeatedly condemned it as misstating the jury's role. BOR at 63 ("By the time of this closing argument, the State knew that the appellate courts did not approve of that argument."); AOB at 23-24.

Not only did the State intentionally mischaracterize the jury's role in closing argument, it fundamentally misunderstands its *own* role in our system of justice. The prosecutor admits that he willfully disregarded appellate decisions prohibiting certain arguments, but claims this Court should affirm anyway because Mr. Gregory's attorneys failed to stop him

[5] The State notes that a heading in Mr. Gregory's opening brief alleges that the prosecutor called Mr. Gregory names. BOR at 71 n. 6. Mr. Gregory corrected this page through a substitution on March 17, 2014, and the version of the brief that is currently on the Court's website does not contain this reference.

[6] The State does not mention that it also made this improper argument in multiple PowerPoint slides. Ex. 1 (6/13/12) Slides 18, 102. Nor does it mention that this Court reaffirmed the impropriety of this argument in *State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125 (2014) ("Telling the jury that its job is to 'speak the truth,' or some variation thereof, misstates the burden of proof and is improper.").

from doing what he already knew was wrong. BOR at 63. The State implies that it is an "abuse of the appellate system" for Mr. Gregory to seek a new trial based on the prosecutor's knowing, intentional use of improper arguments to achieve a death verdict. BOR at 60. To the contrary, it is an abuse of prosecutorial power for the State to flout appellate decisions and reuse tactics it knows to be unlawful, in the hopes that defense counsel will not catch the error and the resulting verdict will be upheld as harmless. A prosecutor is "a quasi-judicial officer." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). "Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *Id.* The State violated its duty in this case.

c. <u>The State pretends there was no PowerPoint presentation and ignores this Court's cases reversing for improper and inflammatory slideshows</u>.

Throughout the opening brief, Mr. Gregory referenced the PowerPoint presentation the prosecutor put before the jury during his closing argument, and noted that the slideshow not only repeated the improper oral arguments but also augmented the misconduct by using inflammatory colors and imagery. Mr. Gregory cited cases in which this Court and the Court of Appeals had reversed for improper PowerPoint

presentations. AOB at 20, 29, (citing *In re Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012)); AOB at 25 n.6, 36-37, 40 (citing *State v. Hecht*, 179 Wn. App. 497, 319 P.3d 836 (2014)); AOB at 23, 27-29, 33, 37-40, 52-54 (citing PowerPoint slides in State's closing argument, filed as Ex. 1 on 6/13/12).[7]

The State does not discuss the propriety of its PowerPoint presentation in light of *Glasmann* and *Hecht.* In fact, the response brief includes not a single citation to the slideshow, and not a single citation to the relevant caselaw. A person reading only the State's response brief would not realize that the prosecutor presented a PowerPoint slideshow during closing argument at all.

Not only does the State fail to address the cases cited in the opening brief, it refuses to acknowledge critically relevant decisions this Court issued after the filing of the opening brief but before the filing of the response brief. *See State v. Walker*, 182 Wn.2d 463, 341 P.3d 976 (2015); *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015); *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014). In all three cases, this Court reversed Pierce County convictions for prosecutorial misconduct.

[7] Mr. Gregory urges the Court to view the PowerPoint presentation in "Slide Show" mode because this is how it was presented to the jury and it includes transitions and emphases which are not apparent in other modes.

Walker is particularly important. There, this Court reversed convictions for first-degree murder, robbery, and other crimes because the prosecutor in closing argument delivered a PowerPoint presentation that expressed the prosecutor's personal opinion, displayed altered evidence, and appealed to passion and prejudice. *Walker*, 341 P.3d at 979. This Court reversed even though defense counsel had not objected in the trial court, because "the failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial." *Id.* at 984.

The presentation in *Walker* included over 100 slides with the heading "DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER." *Id.* at 981. There was also a slide with the words "GUILTY BEYOND A REASONABLE DOUBT" superimposed over the defendant's booking photo. *Id.* This Court described the sequence of slides at the end of the presentation as "particularly problematic." *Id.* at 982. It began with a slide depicting an in-life photograph of the victim with a superimposed heading reading "DEFENDANT'S GREED AND CALLOUS DISREGARD FOR HUMAN LIFE" and text detailing the money stolen and its distribution amongst the participants. The next slide showed the defendant and his family enjoying dinner at a restaurant, with a caption of a statement the defendant made at dinner. Following that

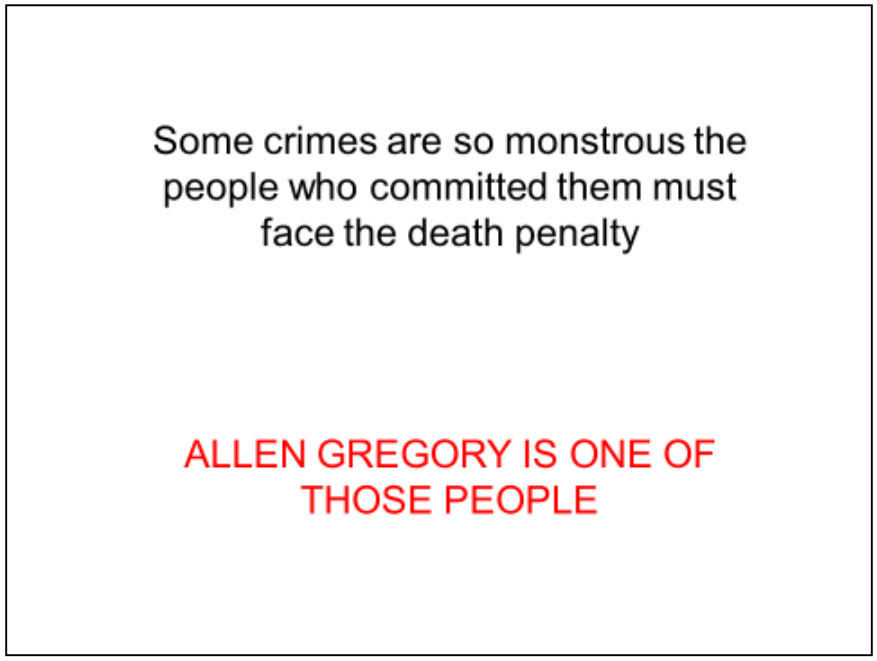
slide was a picture of the defendant's booking photo altered with the caption "WE ARE GOING TO BEAT THIS," contrasted with the final image, an in-life photograph of the victim. *Id.* at 982-83.

This Court forcefully denounced the above tactics. It began its analysis by referencing *Glasmann* and noting, "it is regrettable that some prosecutors continue to defend these practices and the validity of convictions obtained by using them." *Walker*, 341 P.3d at 984. The Court reiterated that prosecutors have a dual role of seeking convictions and acting in the interest of justice. Employing improper tactics to obtain a conviction and sentence is inconsistent with both roles, and "in fact undermine[s] the integrity of our entire criminal justice system." *Id.*

This Court held it was improper for the prosecutor to express personal opinions about the defendant's guilt, and to alter photographic exhibits by adding inflammatory captions and superimposed text. *Id.* at 985. The prosecutor wrongly juxtaposed photographs of the victim with photographs of the defendant and his family, and suggested that the defendant should be convicted because he is a callous and greedy person who spent robbery proceeds on video games and lobster. In all, the presentation improperly "included altered exhibits, expressions of the prosecutor's opinion on the defendant's guilt, and clear efforts to distract the jury from its proper function as a rational decision-maker." *Id.* This

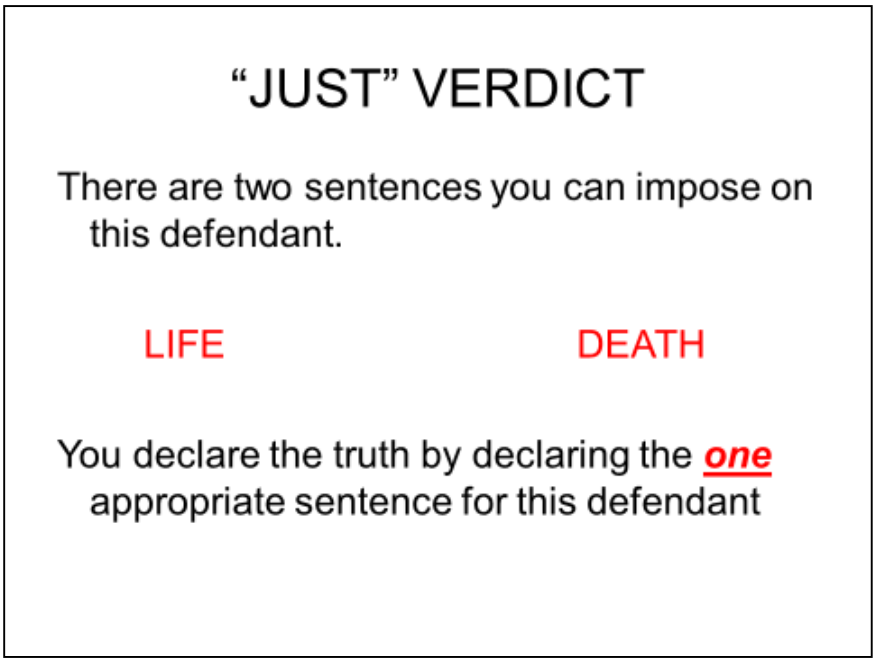
Court reversed despite the absence of objections because the misconduct was "flagrant, pervasive, and prejudicial." *Walker*, 341 P.3d at 985.

The same is true here. As in *Walker*, the prosecutor's slide show was filled with personal opinions, altered evidence, and inflammatory colors and imagery. For example, Slide 15's heading states, "Some crimes are so monstrous the people who committed them must face the death penalty." Clicking "next" on the slideshow then reveals, in red, all capital letters: "ALLEN GREGORY IS ONE OF THOSE PEOPLE." Ex. 1 (6/13/12) Slide 15.[8]



[8] Because this brief is being filed electronically, the Court should be able to see the color in the slides presented. If the Court prints the brief and then scans it before distribution, the color may be lost and the image quality may be compromised. Upon request, counsel would be happy to send printed color copies of the brief to the Court.

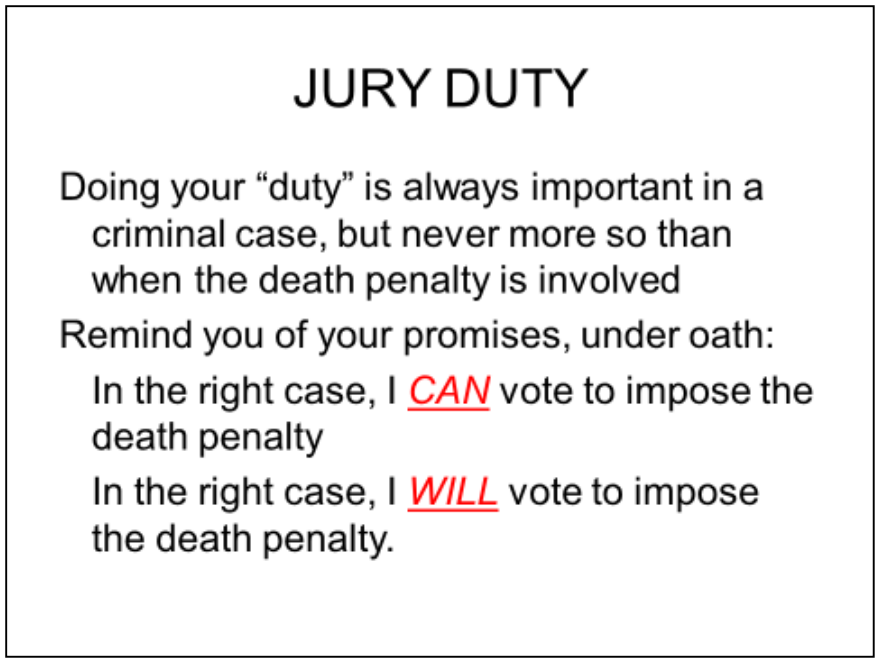
Slide 18, titled "'JUST' VERDICT," described "two sentences you can impose on this defendant." "LIFE" was in red letters on the left and "DEATH" was in red letters on the right. Ex. 1 (6/13/12) Slide 18. Underneath these options, the slide read, "You declare the truth by declaring the ***one*** appropriate sentence for this defendant." *Id.* "One" is red, bold, italicized, and underlined, and it is aligned under the "death" option rather than the "life" option:



This slide not only invoked the forbidden "declare the truth" argument, it suggested that the jury's duty was to impose a death sentence, rather than to determine whether the State had proved its case. *Cf. Allen*, 182 Wn.2d at 377 (noting that when oral misstatements of law are

repeated in a slideshow, the misconduct "may be 'even more prejudicial'" than oral misstatements alone) (citing *Glasmann*, 175 Wn.2d at 708). This message was reinforced over the next several slides. Ex. 1 (6/13/12) Slides 19-21.

Slides 22 and 23 falsely implied to the jury, based on "facts" not in evidence, that the death penalty is "Normal," that it exists in "39 counties in Washington" and "49 other states," that a majority of people in the country and the state favor the death penalty, and that "MANY TIMES EACH YEAR, JURIES JUST LIKE YOU ARE ASKED TO IMPOSE THE ULTIMATE PENALTY ON THE WORST OFFENDERS." Ex. 1 (6/13/12) Slide 23. *See* AOB at 37-38, 40-41. The State concluded the "duty to impose death" theme with Slide 24:



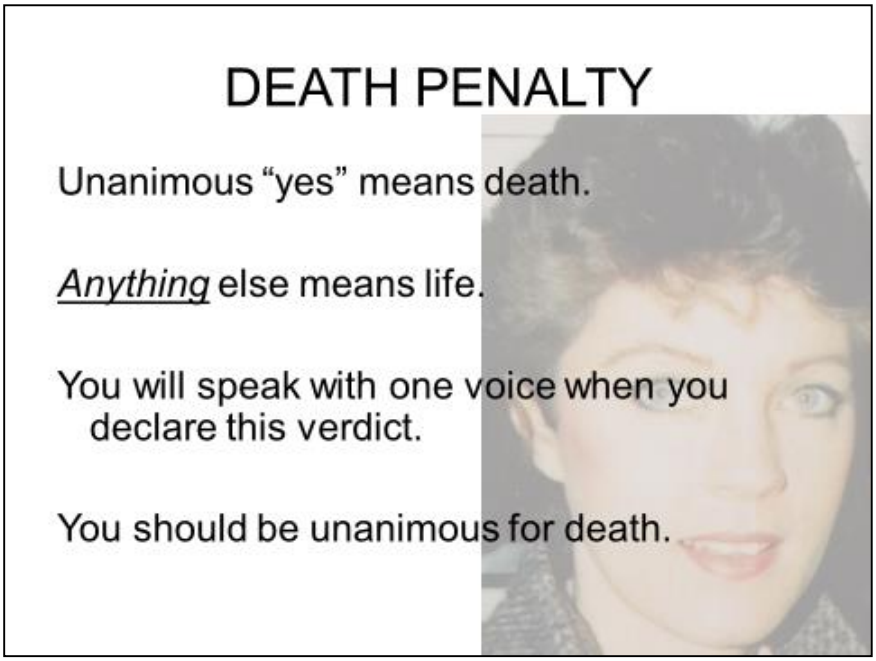
In addition to being all-caps, underlined, and italicized, the words "can" and "will" are in red. Ex. 1 (6/13/12) Slide 24.

The slideshow then transitioned into an altered image of trial exhibit 1 – a softened in-life photograph of G.H. Ex. 1 (6/13/12) Slide 25. This altered exhibit is on no fewer than 50 of the 102 slides. Ex. 1 (6/13/12) Slides 2, 25, 27-28, 30-40, 42-49, 52-53, 60, 62-65, 67, 76-78, 82, 88-102.[9] The softened picture of G.H.'s face, with the eyes looking directly at the camera, is a powerful image. The use of this image on 50 slides (and many more frames) makes the case about avenging the death of a beautiful woman rather than whether the State has proved that, in light of

[9] Slide 83 shows exhibit 1 in its original, admitted form. All of the slides listed above show it in an altered form (a softened image).

the crime, there are not sufficient mitigating circumstances to merit leniency. RCW 10.95.060(4).

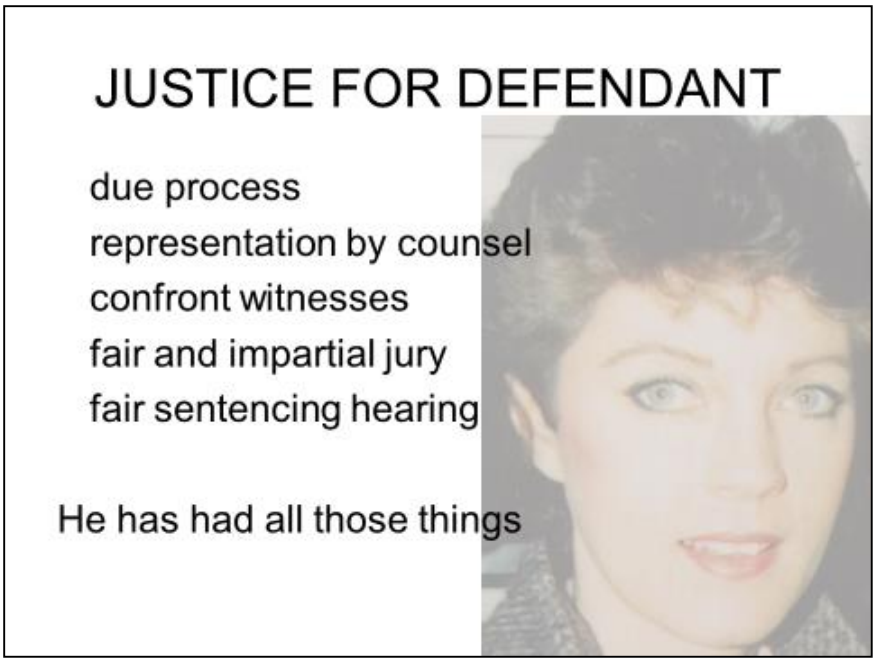
Not only is the image of G.H. altered, but, as in *Walker*, on many of the slides the doctored exhibit is accompanied by inflammatory captions and superimposed text. *See Walker*, 341 P.3d at 985; *see also State v. Fedoruk*, 184 Wn. App. 866, 888, 339 P.3d 233 (2014) (holding prosecutor committed misconduct during closing argument by showing four slides with an admitted photograph altered with the words "Murder 2" in red letters above it). Slide 27 provides an example:



The above slide includes an altered exhibit (the in-life photograph of G.H. is softened), superimposed with an improper personal opinion

("You should be unanimous for death"). *See Glasmann*, 175 Wn.2d at 706 (it was misconduct for prosecutor to display slide with an admitted photograph along with the caption "Why should you believe anything he says about the assault?"); *Hecht*, 179 Wn. App. at 506 (misconduct for prosecutor to display slide with admitted photograph along with caption stating "You shouldn't" believe defendant). Other slides are similarly improper. *See, e.g.*, Ex. 1 (6/13/12) Slide 40 (altered in-life photo with prosecutor's opinion that "Allen Gregory is very close to getting a sentence that he richly deserves"); AOB at 40.

In *Walker*, this Court denounced the prosecutor's juxtaposition of in-life photographs of the victim with photographs of the defendant and his family enjoying a lobster dinner, and criticized the State's suggestion that the defendant should be convicted because "he is a callous and greedy person who spent the robbery proceeds on video games and lobster." *Walker*, 341 P.3d at 986. The prosecutor employed similar tactics here, juxtaposing the altered image of the victim with a list of the constitutional rights afforded Mr. Gregory, and suggesting that Mr. Gregory should be sentenced to death because he "had all his rights." AOB at 33-34; RP (5/14/12) 3021-22; Ex. 1 (6/13/12) Slide 30.

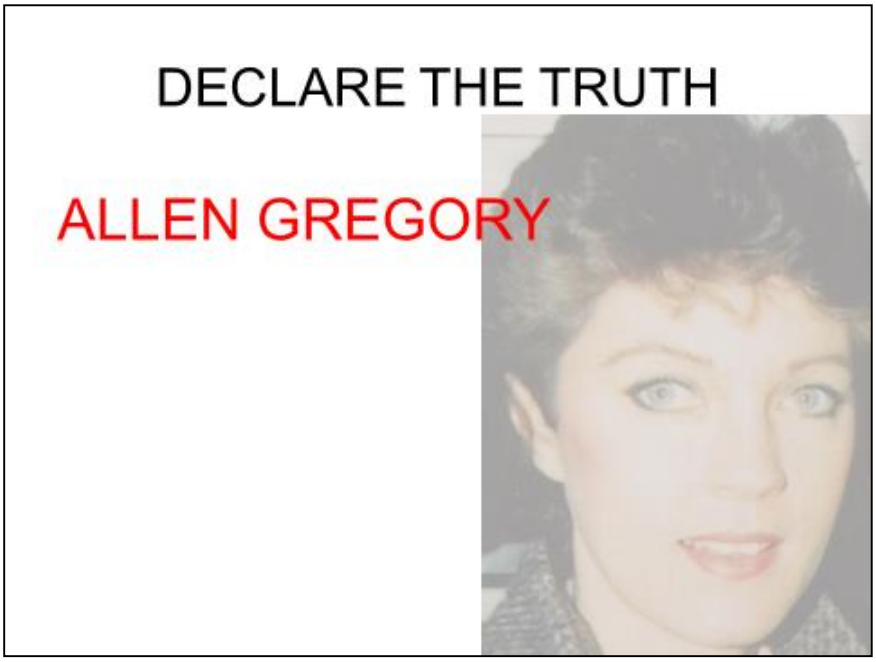


The prosecutor similarly exploited the contrast between G.H. and an inmate serving a life sentence by listing all of the actions an inmate could perform (like eating and watching television), while emphasizing that G.H. "CANNOT DO ANY OF THOSE THINGS." Ex. 1 (6/13/12) Slides 43-44. The juxtaposition suggested that Mr. Gregory should be put to death not because the State satisfied its burden of proof, but because he did not deserve to eat and watch television since G.H. could no longer do those things. The emotional appeal of such an argument cannot be overstated. It was a "clear effort[] to distract the jury from its proper function as a rational decision-maker." *Walker*, 341 P.3d at 985; *cf. State v. Rizzo*, 266 Conn. 171, 833 A.2d 363 (2003) (argument urging jury to

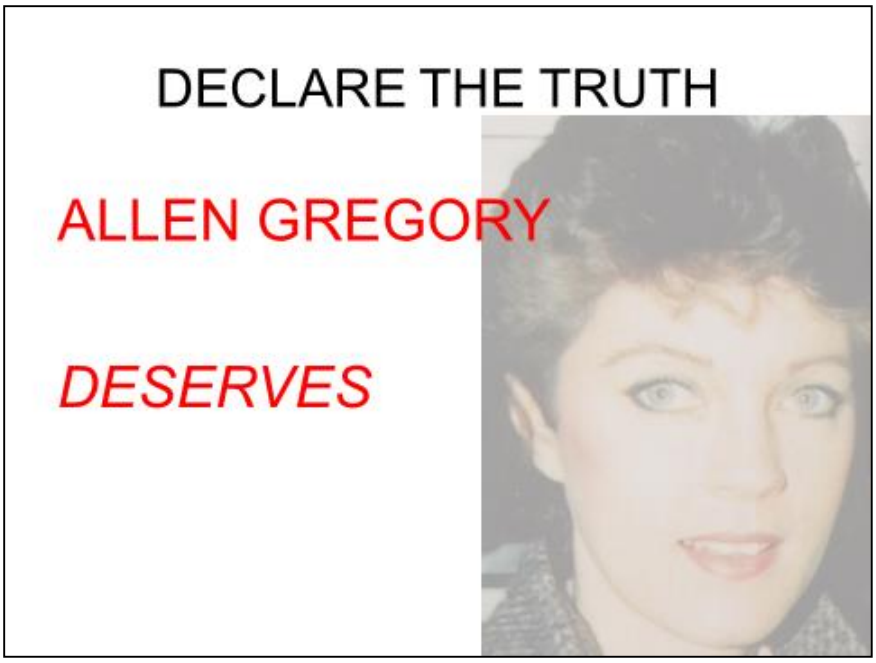
balance defendant's life against victim's was improper emotional appeal); *see* AOB at 35-36.

Also as in *Walker*, the final series of slides was "particularly problematic." *Walker*, 341 P.3d at 982. After an extended, irrelevant, and factually inaccurate discussion of the politics of the death penalty and nationwide practices, the prosecutor returned to a discussion of this case and pronounced his opinion that Mr. Gregory deserved the death penalty. Ex. 1 (6/13/12) Slides 33-36, 50; RP (5/14/12) 3020-22, 3027. The final four frames of the PowerPoint presentation begin with the altered image of G.H. and a header referencing the improper "Declare the Truth" argument:

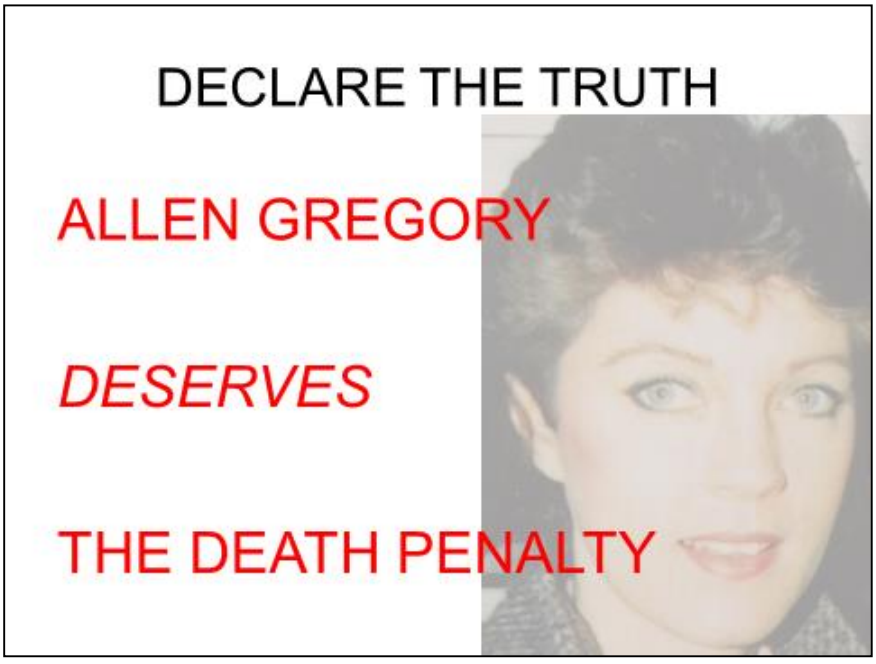
Ex. 1 (6/13/12) Slide 102, Frame 1. The next three frames create a crescendo of emotion and convey the prosecutor's opinion – in red all-capital letters – that Mr. Gregory deserves the death penalty and it is the jury's duty to declare that truth:



Ex. 1 (6/13/12) Slide 102, Frame 2.



Ex. 1 (6/13/12) Slide 102, Frame 3.



Ex. 1 (6/13/12) Slide 102, Frame 4.

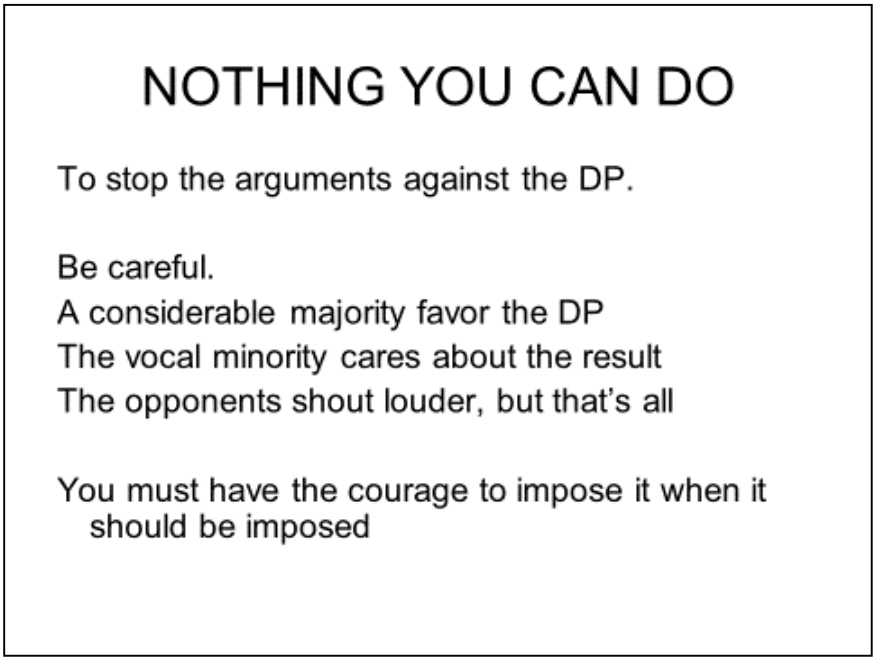
In sum, the prosecutor's PowerPoint presentation improperly "included altered exhibits, expressions of the prosecutor's opinion on the defendant's [sentence], and clear efforts to distract the jury from its proper function as a rational decision-maker." *Walker*, 341 P.3d at 985. Given that this Court reversed in *Walker* because of such "flagrant, pervasive, and prejudicial" misconduct, it should certainly do so here. *Id.* This Court cannot have any confidence in the fairness of a death sentence obtained by such tactics.

d. The prosecutor improperly urged the jury to convict based on political arguments and facts not in evidence.

Although the misconduct discussed above on its own warrants reversal, the misconduct present here surpassed *Walker* in several respects. For one, the prosecutor presented, both orally and in the slideshow, an extraordinary amount of "information" that was not introduced as evidence and that was irrelevant to the jury's job. As explained in the opening brief, the prosecutor engaged in an extended discussion of the politics of the death penalty. He listed several arguments he believed are advanced by opponents of the death penalty, then proceeded to refute them with his own personal opinions about the propriety of the punishment as well as "facts" about the use of capital punishment nationwide. The prosecutor told the jury to ignore the arguments against capital punishment

because those arguments are wrong and juries around the country are imposing death sentences so they should feel comfortable doing it, too. Not only were many of the cited "facts" inaccurate, but this discussion had *nothing* to do with the question before the jury, which was whether in this particular case the State proved the absence of sufficient mitigating circumstances beyond a reasonable doubt. AOB at 37-47.

The prosecutor also inflamed the jury's passions by giving a "pep talk" which implied the jury's job was to consider the national debate about the death penalty and the impact the jury's decision could have on the political question:



Ex. 1 (6/13/12) Slide 50; RP (5/14/12) 3022, 3027; AOB 38-39. The prosecutor implied that the jury had a duty to protect the supposed "considerable majority"[10] against an irrational fringe minority, equated a vote for death to being courageous, and expressed his personal opinion that the death penalty should be imposed. *Id.* Mr. Gregory's objection to this argument was improperly overruled. RP (5/14/12) 3027-28; AOB at 41-43.

In response, the State notes that this Court in 2000 condoned a prosecutor's brief reference to the "historical context" of capital punishment, but does not explain how that is anything like the extended discussion about the current politics of the death penalty that occurred in this case. BOR at 77 (citing *State v. Davis*, 141 Wn.2d 798, 871-74, 10 P.3d 977 (2000)).

Mr. Gregory agrees that "[t]here is nothing improper about discussing 'the issues in the case.'" BOR at 77 (citing *Davis*, 141 Wn.2d at 872). But the State's claim that "common arguments about the death penalty" are "an issue in the case" is shocking. BOR at 77. By this reasoning, the prosecutor during closing argument in a controlled substances case could discuss common arguments about the over-

[10] As noted in the opening brief, it is not true that a majority favor the death penalty when told that the only other option is life without the possibility of parole. AOB at 41. But the argument is improper regardless.

criminalization of drugs; the prosecutor in a self-defense case could discuss common arguments about "stand your ground" laws; and the prosecutor in a drive-by shooting case could discuss the scourge of gangs generally. These topics, like the wisdom of capital punishment, may be valid topics for *voir dire*, but they are wholly inappropriate in closing argument, which is supposed to be confined to the evidence and instructions in the case. *See* AOB at 41-42 (citing *State v. Perez-Mejia*, 134 Wn. App. 907, 917, 143 P.3d 838 (2006); *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991); *State v. Echevarria*, 71 Wn. App. 595, 860 P.2d 420 (1993); *State v. Case*, 49 Wn.2d 66, 69, 298 P.2d 500 (1956)).

The prosecutor then appears to concede that it was improper for him to have discussed "facts" not in evidence to make political arguments, but claims there was no prejudice because "[t]he focus of that part of the argument was the topic of the death penalty in general, not the verdict in this particular case." BOR at 78. "Those subjects were discussed in the general context of why having the death penalty in our society was appropriate, not whether it should be imposed on this defendant…." BOR at 78. In other words, according to the State, the arguments were not prejudicial for the very reasons they were improper. By this twisted logic, there would never be a remedy for this type of prosecutorial misconduct.

That is not the law. *See, e.g., Perez-Mejia*, 134 Wn. App. at 917. In any event, reversal is required here not just because of the improper political arguments based on inaccurate facts outside the evidence, but because pervasive misconduct rendered the trial unfair. *See Walker*, 341 P.3d at 985.[11]

e. The prosecutor mischaracterized the reasonable doubt standard and shifted the burden of proof.

As noted in the opening brief, the prosecutor mischaracterized the reasonable doubt standard and shifted the burden of proof numerous times, both orally and in the PowerPoint, and although Mr. Gregory objected on multiple occasions, most of the objections were improperly overruled. AOB at 26-32. For instance, as with the "speak the truth" argument, the prosecutor flouted multiple appellate decisions that had been issued before closing argument in this case when he told the jury it had to be able to explain a reason if it doubted the State's case for death. RP (5/14/12) 3046; Ex. 1 (6/13/12) Slide 88 ("What [the instruction] says is a doubt for which a reason exists. That means you can actually explain what is missing."); RP (5/14/12) 3048 ("when you're talking about the concept of mercy, you should think about whether or not your explanation for the

[11] It is not enough to say that the court issued the standard instruction telling the jury to rely only on the evidence and the instructions in the case. BOR at 78. This is of course true in all cases where courts have reversed for prosecutorial misconduct. Jury instructions cannot overcome the prejudice caused by the type of pervasive prosecutorial misconduct that occurred in this case. *See Walker*, 341 P.3d at 985.

reason about mercy, whether you grant it, whether you don't, … it has to be explainable.").

Mr. Gregory's objection to this argument was improperly overruled. The same cases that alerted the State 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. *State v. Evans*, 163 Wn. App. 644, 645-46, 260 P.3d 934 (2011); *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009); *see also State v. Johnson*, 158 Wn. App. 677, 684, 243 P.3d 936 (2010) (finding similar misconduct prejudicial and reversing); *State v. Venegas*, 155 Wn. App. 507, 524, 228 P.3d 813 (2010) (finding similar misconduct prejudicial and reversing).

Although the State conceded error with respect to the "declare the truth argument," its response brief fails to address the above misconduct at all. Perhaps it assumed the Court would infer a concession on this point from its concession as to the "speak the truth" argument, since the same cases addressed both issues. If so, this Court should accept the implied concession.

Not only is the argument improper under the cases cited above and in the opening brief, but this Court reaffirmed these holdings in *Lindsay*, 180 Wn.2d at 434-36. There, the prosecutor compared the reasonable

doubt standard to a jigsaw puzzle, and said, "You could have 50 percent of those puzzle pieces missing and you know it's Seattle." *Id.* at 434. In addressing the argument, this Court cited *Johnson* with approval. *Id.* at 435. The *Johnson* court held that a similar argument was improper, in part because it "implied that the jury had a duty to convict without a reason not to do so." *Lindsay*, 180 Wn.2d at 435 (quoting *Johnson*, 158 Wn. App. at 685).

The prosecutor in this case similarly implied that the jury had a duty to impose a death sentence without a reason not to do so. This mischaracterization of the reasonable doubt standard constituted misconduct. *State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012); *see Lindsay*, 180 Wn.2d at 435; AOB at 29-30.

The State claims that the other instances of burden-shifting were proper argument, even though they bore extraordinary similarities to arguments made in other cases where courts held the arguments constituted prosecutorial misconduct. *See* AOB at 27-32 (citing, inter alia, *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996)); BOR at 66-67, 70-71. In claiming the argument was proper, the State relies primarily on this Court's decision in Mr. Gregory's first appeal, *State v. Gregory*, 158 Wn.2d 759, 859-861, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn. 2d 757, 336 P.3d 1134 (2014). BOR at 67.

Mr. Gregory agrees that the statements at issue here are similar to those at issue in *Gregory I.*[12] But a close reading of *Gregory I* reveals this Court assumed the argument was *improper*, but held it was harmless in light of the remainder of the argument, instructions, and evidence. *See Gregory*, 158 Wn.2d at 860-61. This Court noted that the prosecutor's statements were similar to those held to be misconduct in *State v. Cleveland*, 58 Wn. App. 634, 648, 794 P.2d 546 (1990) and *State v. Music*, 79 Wn.2d 699, 716–17, 489 P.2d 159 (1971). *Id.* But as in both of those cases, "even absent the remarks, the jury would have reached the same result." *Gregory*, 158 Wn.2d at 861.

Here, in contrast, the recurrent burden-shifting was prejudicial. Unlike in *Gregory I*, in this proceeding, defense counsel repeatedly objected to the burden-shifting. *Compare Gregory*, 158 Wn.2d at 860 ("Counsel did not object to any of these remarks") with RP (5/14/12) 3031, 3032, 3034-35, 3036-38, 3048 (multiple objections to burden-shifting in this case). The trial court overruled most of Mr. Gregory's objections, thereby endorsing the prosecutor's argument as proper. Thus, whereas the jury in the first case arguably ignored the burden-shifting as

[12] The same cannot be said of *Davis*, on which the State also relies. BOR at 66 (citing *Davis*, 175 Wn.2d at 336). There, the statement at issue was the prosecutor's claim that the defendant's evidence was "excuse" and not "true mitigation." *Id.* Mr. Gregory has not challenged a similar statement made in this case. *Compare* Ex. 1 (6/13/12) Slide 56 (statement similar to that at issue in *Davis*) *with* AOB at 26-32 (challenging numerous other statements which improperly shifted the burden).

inconsistent with the law, the jury in this case presumably believed the prosecutor's descriptions of the burdens were consistent with the law, because otherwise the court would have sustained defense counsel's objections. *See Allen,* 182 Wn.2d at 378 (finding prejudice where trial court twice overruled defense objections in the jury's presence, potentially leading the jury to believe that the prosecutor's statements were a proper interpretation of the law). The burden-shifting cannot be upheld as harmless.

f. 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.

As noted in the opening brief, the prosecutor presented the jury with his personal opinion that the crime in this case is "as bad as it gets" and that Mr. Gregory is one of "the worst offenders." Mr. Gregory's attorneys properly objected on the basis that the statements were inherently comparative, and that no evidence had been presented to support the allegation. Defense counsel moved for a mistrial or in the alternative for leave to rebut the prosecutor's claim with evidence of other cases showing that this crime was not "as bad as it gets" and that Mr. Gregory was not one of the "worst of the worst offenders." The trial court denied both alternative remedies requested. The trial court erred, because

the prosecutor invoked alleged facts not in evidence to support his personal opinion that Mr. Gregory deserves the death penalty because this crime is as bad as it gets, and to urge the jury, contrary to its role, to impose a death sentence on that basis. AOB at 51-54.

In response, the prosecutor correctly notes that this Court appears to have approved of similar comparative arguments in other cases. BOR at 82-85 (citing *Gregory*, 158 Wn.2d at 857-58; *State v. Brown*, 132 Wn.2d 529, 568-69, 940 P.2d 546 (1997); *State v. Davis*, 175 Wn.2d 287, 340, 290 P.3d 43 (2012)). Mr. Gregory respectfully urges this Court to reconsider the issue or to recognize the limited nature of these prior holdings.

In *Brown*, unlike in this case, there had been no objections to any portion of closing argument in the trial court and there was no claim of pervasive misconduct on appeal. *Brown*, 132 Wn.2d at 567-69. The defendant challenged just two statements as being improper: (1) "I suggest to you that this crime screams out for the death sentence;" and (2) "If the death penalty is not appropriate in this case, I'd ask you to try to think of a case that it would be appropriate in, considering his acts, considering his evil." *Id.* at 568. This Court did not independently evaluate the propriety of the latter statement, instead reasoning:

> Both statements were supported by the evidence and thus were not improper. Appellant was convicted of committing a brutal murder with several aggravating factors. There was overwhelming evidence to support his conviction. Under these circumstances, the prosecuting attorney had wide latitude to make the argument that the evidence strongly supported imposition of the death penalty. While the words used to make that argument (such as "screams out" and "evil") may be somewhat dramatic, they do not constitute misconduct warranting reversal in this case.

Brown, 132 Wn.2d at 568-69.

There was no analysis of whether the second statement was improper because it urged a comparative analysis that is reserved for this Court on proportionality review. In fact, the opinion appears to focus on the first challenged statement, noting that although the phrase "screams out" is dramatic, the facts of the crime were brutal, and the evidence therefore supported the statement. To the extent the Court addressed the second statement, it focused not on the comparative nature of the prosecutor's exhortation, but on the word "evil," which this Court concluded did not warrant reversal. It is not even clear that Brown raised the argument Mr. Gregory makes here, so its holding is of limited value to the State.

As for *Gregory I*, the issue there arose in a different procedural posture. The State moved to preclude the defense from discussing other capital cases, and the trial court granted the motion but allowed both sides

to argue about whether the crime was "the worst of the worst." *Gregory*, 158 Wn.2d at 855. On appeal, this Court endorsed the trial court's exclusion of evidence of other cases, because the only relevant evidence in the penalty proceeding of a capital case is evidence about *this* defendant and *this* crime. *Id.* at 856-57. This holding is appropriate, so long as it is evenly applied to both sides. *See* AOB at 53-54.

The defense in *Gregory I* alternatively argued that the prosecutor committed misconduct by describing Mr. Gregory as "the worst of the worst," but this Court dismissed the argument on the basis that the issue was not preserved below. *Id.* at 858. The same is not true here, of course, where Mr. Gregory moved for a mistrial or for leave to rebut the claim. *See Lindsay*, 180 Wn.2d at 430-31 (timely motion for a mistrial based on prosecutorial misconduct preserves issue for appeal).

There is one internally inconsistent paragraph in *Gregory I* which appellant respectfully requests that this Court revisit. *Gregory*, 158 Wn.2d at 857-58. This Court began the paragraph by holding that the prosecutor's "worst of the worst" argument did not violate due process, citing *Brown, supra*. *Gregory*, 158 Wn.2d at 857. This Court then rejected the corresponding argument that it was improper to impose a death sentence based on information that the defendant "had no opportunity to deny or explain." *Id.* This Court noted that in the cases

cited by the defendant, the defendant had been improperly precluded from presenting mitigating evidence about himself or the crime in the case. *Id.* This Court reasoned:

> The information that the defendant sought to introduce in this case was not relevant to Gregory, *his* crime, or the specifics of *his* sentencing alternatives. 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.

There would be absolutely no problem with this analysis if it were applied equally to the State and the defense. But where a prosecutor is permitted to opine that a defendant is "the worst of the worst" and the crime is "as bad as it gets," it is fundamentally unfair to deny the defense the right to rebut the claim. Either both sides must be permitted to present comparative claims to the jury, or neither side may be permitted to do so. And if comparative claims *are* permissible, they must be supported by admitted evidence. Arguments based on facts outside the evidence are improper and inflammatory. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).[13]

[13] In *Davis*, this Court held the prosecutor properly argued that the death penalty was appropriate in Davis's particular case when he stated, "If not now, then when? And, if not Cecil Davis, then who?" *Davis*, 175 Wn. 2d at 339-40. Mr. Gregory respectfully disagrees that this argument references only the facts of the particular case, but in any event, it is not the same argument that the prosecutor made here. The statement that a crime is "as bad as it gets" is undeniably comparative.

Although Mr. Gregory asks this Court to clarify that it is improper for a prosecutor to make comparative claims to the jury, the Court need not reach the issue. As explained above and in the opening brief, reversal is required because of numerous other instances of prosecutorial misconduct, including: an inflammatory slideshow that presented altered evidence and personal opinions; multiple instances of burden-shifting; improper use of facts not in evidence to make political arguments unrelated to the jury's decision; and deliberate and repeated use of arguments the prosecutor knew had been denounced by appellate courts. The pervasive misconduct deprived Mr. Gregory of his right to a fair trial, in violation of the Fourteenth Amendment and article I, section 3.[14]

g. The cumulative effect of the pervasive misconduct deprived Mr. Gregory of a fair trial.

Each of the prosecutor's improper arguments was prejudicial and each independently requires reversal. The State claims that the misconduct it concedes occurred is harmless in light of the crime, criminal

[14] The prosecutor also improperly argued facts not in evidence when he claimed G.H. was looking out the window toward her mother's house when she died, and when he speculated about what G.H. must have been thinking. AOB at 47-50 (citing *State v. Pierce*, 169 Wn. App. 533, 537, 280 P.3d 1158 (2012)); *see also Zapata v. Vasquez*, ___ F.3d ___, 2015 WL 3559109 (9th Cir. no. 12-17503, filed June 9, 2015) (granting new trial where prosecutor urged jury to imagine last words the victim might have heard and creating fictional account designed to appeal to jurors' emotions). The State in response acknowledges it would have been improper to ask the jury to imagine what G.H. *said*, but claims it is not improper to ask the jury to imagine what she *thought.* BOR at 79. This is a distinction without a difference, as neither is a fact in evidence.

history, behavior in prison, and "the absence of any significant mitigation evidence." BOR at 65. But Mr. Gregory's criminal history and behavior in prison are themselves significant mitgation evidence, as Mr. Gregory has no prior violent felonies, CP 1182, and has generally behaved well in prison. During his sixteen years of incarceration, Mr. Gregory has never been involved in a gang. RP (5/10/12) 2830. He has never engaged in any type of violent behavior toward staff. RP (5/10/12) 2833. He hit another inmate only once, and he himself was the victim of one attack. RP (5/10/12) 2833, 2898, 2908. Thus, the prison expert told the jury 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. In light of this evidence of lack of future dangerousness, the absence of violent felony history, and Mr. Gregory's young age at the time of the crime, no instance of prosecutorial misconduct in this case can be dismissed as harmless.

But the Court need not decide whether each instance of misconduct on its own would require reversal, because there can be no doubt that the pervasive misconduct that occurred was prejudicial in the aggregate. *See Glasmann*, 175 Wn.2d at 707 (granting new trial even where prosecutorial misconduct was raised for the first time in a PRP because "the cumulative

effect of repetitive prejudicial prosecutorial misconduct" deprived the defendant of a fair trial).

The State's claim that there was no cumulative prejudice relies primarily on its incorrect assertion that most of the challenged arguments were proper. BOR at 91. Mr. Gregory has already addressed the improper arguments above and in the opening brief.

The State fails to acknowledge that this Court granted new trials in *Glasmann*, *Lindsay,* and *Walker* where "flagrant, pervasive, and prejudicial" misconduct rendered the trials unfair. *Walker*, 341 P.3d at 985; *see also Lindsay,* 180 Wn.2d at 443; *Glasmann*, 175 Wn.2d at 707. Similar flagrant, pervasive, and prejudicial misconduct rendered Allen Gregory's trial unfair, and the resulting death sentence "undermine[s] the integrity of our entire criminal justice system." *Walker*, 341 P.3d at 984.

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

a. Summary.

Although a new penalty-phase hearing is the remedy for the prosecutorial misconduct discussed above, that remedy is insufficient in this case. The death notice must be dismissed with prejudice because Allen Gregory's sentence fails proportionality review. Dozens of

defendants in Washington are serving life sentences for extraordinarily 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 felony histories. Allen Gregory is on death row even though he was convicted of aggravated murder of a single victim; he was only 24 years old at the time of the crime; and he has no other violent felony convictions. The death sentence is random and arbitrary and more readily explained by Mr. Gregory's race and county of conviction than by any valid variable. The disproportionate death sentence should be reversed, and the case remanded for imposition of a life sentence. AOB at 59-104; RCW 10.95.130(2)(b).

The State's cursory treatment of this issue betrays either a fundamental misunderstanding of proportionality review or an exercise in willful blindness. BOR at 159-69. The response brief's most glaring error is that it limits its comparative analysis to other *death* sentences, and ignores the hundreds of aggravated murders for which life sentences were imposed. The State also implies that this Court need not even perform proportionality review and that to do so would be usurping the role of the jury or the Legislature. But the Legislature itself has dictated that proportionality review is mandatory and is reserved for this Court and this Court alone. This mandatory review results in the inescapable conclusion

that Allen Gregory's sentence is disproportionate in light of the sentences imposed in other aggravated murder cases.

b. Mr. Gregory's case must be compared to all other aggravated murder cases, not just those in which death was imposed .

The State compares this case only to other cases in which a death sentence was imposed, and claims, "[i]f the facts of the defendant's case are similar to some of the facts taken from cases in which the death penalty was upheld, the proportionality review is satisfied." BOR at 160 (citing *State v. Elmore,* 139 Wn.2d 250, 308, 985 P.2d 289 (1999)). This is absolutely incorrect.

Indeed, the *very next section* of the State's brief acknowledges that this quote from *Elmore* has been supplanted by the Court's more recent recognition of the statutory mandate in *Davis*:

> RCW 10.95.130(2)(b) defines the comparison pool as follows:
>
> "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.
>
> The pool of similar cases includes those in which the death penalty was sought *and those in which it was not*. *State v. Davis,* 141 Wn.2d 798, 880, 10 P.3d 977 (2000).

BOR at 160 (emphasis added); *see also* AOB at 60-61 (citing RCW 10.95.120; RCW 10.95.130(2)(b); *State v. Davis*, 175 Wn.2d 287, 348, 290 P.3d 43(2012)).

When it actually performs the analysis, though, the State reverts to its misstatement that only other death sentences are relevant. Contrary to the mandate of RCW 10.95.130(2)(b), the State does not compare Mr. Gregory's case to any of the hundreds of aggravated murders for which a life sentence was imposed in the first instance. In fact, the State's brief includes not a single citation to such a case, let alone an analysis. BOR at 163-68.[15]

The State's brief goes so far as to imply that because this Court upheld *other* defendants' sentences on proportionality review after comparing their cases to the relevant pool, Mr. Gregory's sentence must be upheld as well and this Court should not even perform the required

[15] The State does cite to some cases in which death was imposed at the first sentencing hearing, but life without parole was ultimately imposed at a subsequent sentencing hearing. *See* BOR at 164-67 (citing Benn, Thomas, Stenson, Marshall, Luvene, Furman); *see also* TR 263; Exs. 9, 17, 19. However, when discussing those cases, the State does not acknowledge that these defendants are serving life sentences – even though Luvene, Thomas, and Marshall were all Pierce County cases and the Pierce County Prosecuting Attorney's Office took part in the hearings at which life sentences were ultimately imposed. The absence of updated trial reports for those defendants should be held against the State.

The State also cites Benjamin Harris, without acknowledging that his aggravated murder conviction was ultimately dismissed and he was released from custody, BOR at 164-67; *see* Ex. 12, and Clark Hazen, who committed suicide before exhausting his postconviction remedies. *See* https://news.google.com/newspapers?nid=1345&dat=19880506&id=F0NYAAAAIBAJ&sjid=5vkDAAAAIBAJ&pg=5351,1185543&hl=en.

comparative analysis. BOR at 162. But proportionality review is unique to each defendant, and one defendant's case could not possibly be *stare decisis* as to another defendant. *See* RCW 10.95.130(2)(b).

For example, the State implies that Mr. Gregory's sentence must be affirmed without regard to the scores of aggravated murderers who received life sentences because Robert Yates's sentence was affirmed. BOR at 162 (citing *State v. Yates*, 161 Wn.2d 714, 793, 168 P.3d 359 (2007)). Robert Yates brutally murdered at least 15 vulnerable victims, resulting in two aggravated murder convictions and 13 first-degree murder convictions. *Yates*, 161 Wn.2d at 789-90. The fact that his sentence was deemed proportionate does not mean that Mr. Gregory's sentence is proportionate. In fact, it is one of hundreds of data points demonstrating the contrary. Furthermore, the fact that Yates's sentence was proportionate certainly does not mean that this Court is precluded from performing the mandatory proportionality analysis for Mr. Gregory, as the State implies.[16]

Contrary to the State's claim, this Court *must* compare Mr. Gregory to "others who committed worse crimes [but] did not receive the death penalty." BOR at 162; *see* RCW 10.95.130(2)(b). It is

[16] The section of *Yates* the State cites addresses constitutional challenges to the statute, not statutory proportionality review. *See Yates*, 161 Wn.2d at 793 (discussing "Related Constitutional Challenges"). For that additional reason it is irrelevant to the question here.

understandable that the State would not want this Court to review the opening brief at pages 64-83 or the referenced trial reports, because doing so leads to the clear conclusion that Allen Gregory's sentence is disproportionate. But proportionality review is mandatory, and the State may not avoid it. RCW 10.95.130(2)(b).

Whether the State likes it or not, this Court must review not only the other capital cases, but also the horrific details of the numerous aggravated murders whose perpetrators are serving life sentences, along with the violent criminal histories and relevant personal characteristics of those perpetrators. This Court must then ask whether Mr. Gregory's death sentence is excessive or disproportionate to the penalty imposed in those cases, in light of the single-victim crime here, Mr. Gregory's lack of violent felony history, and his young age at the time of the offense. The answer to this question is indisputably "yes." AOB at 59-104. The only way the State can avoid that answer is by urging this Court not to ask the question at all. BOR at 162. This is not an option. RCW 10.95.130(2)(b).

c. <u>The trial reports filed after the opening brief further demonstrate that Mr. Gregory's sentence is disproportionate</u>.

An analysis of the hundreds of trial reports filed before Mr. Gregory wrote his opening brief amply demonstrated that the sentence in this case is disproportionate. AOB at 59-104. The additional trial reports

filed since only reinforce that conclusion. Dozens of missing trial reports were finally filed during this period, along with a handful of reports for recent aggravated murder convictions. *See* TR 317-340.[17]

In the opening brief, Mr. Gregory included in the analysis some of the aggravated murder cases for which trial reports were missing, and provided the Court with charging documents, judgments, and other relevant materials.[18] *See* AOB at 64 n.31. This Court can now review the trial reports for those cases, which have since been filed. TR 315, 316, 317, 318, 319, 320, 321, 322, 324, 325, 326, 327, 329, 331, 332, 333, 334, 335, 336.

There were a few other cases for which trial reports were missing that Mr. Gregory was unaware of and did not reference. TR 328, 330, 339. Those reports, along with reports from recent cases, can now be included in the analysis. TR 337, 338, 340.

Three of those six defendants were convicted of the aggravated murder of multiple victims, yet are serving life sentences. TR 337, 338, 340. Additionally, a King County jury just rejected a death sentence for

[17] Some are still missing. For example, as of this writing there is still no report for Terapon Adhahn, a defendant in Pierce County who kidnapped and brutally raped and murdered a 12-year-old child, yet is not on death row. *See* Ex. 1 to Motion to Complete; AOB at 73. Pierce County should not be permitted to skew the comparative pool by omitting trial reports for such defendants.

[18] These documents were filed as exhibits to the Motion to Complete the Process of Compiling a Full Set of Aggravated Murder Reports.

Joseph McEnroe, who was convicted of the aggravated murder of *six* victims, including two young children. TR 341. This brings to 97 the number of multiple-victim aggravated murderers who are serving life sentences, while Allen Gregory, convicted of the aggravated murder of one victim, sits on death row. AOB at 65.

In the opening brief, Mr. Gregory noted that dozens of defendants serving life sentences did not simply kill more victims than Mr. Gregory, but did so in a particularly brutal fashion. AOB at 66-73. Aaron Livingston, whose trial report was filed after the opening brief, may now be added to that list. TR 338. Like Allen Gregory, Aaron Livingston was prosecuted in Pierce County. Unlike Mr. Gregory, Livingston was convicted of the aggravated murder of two victims. He slashed one victim repeatedly in the head and neck with an axe. He stabbed the second victim with an axe, then killed her by strangling her with an electrical cord. Not only did he brutally murder two people, he was also convicted of the attempted murder of a third person, who survived despite being punched and choked. The defendant committed these crimes right after being released from jail for pending assault charges involving two of the victims. Yet despite all of this, Livingston was sentenced to life in prison, while Allen Gregory was sentenced to death. Livingston is white. TR 338.

Another of the new multiple-victim aggravated murderers serving life sentences is Marco Antonio Gallegos. TR 337. He not only killed two people, but was convicted of four aggravating circumstances for each count, and has prior violent felonies in his history. TR 337. Each of these factors renders him more culpable than Allen Gregory, further demonstrating disproportionality.

In addition to the three new trial reports for multiple-victim aggravated murderers serving life sentences, another new trial report is for a person who has a prior aggravated murder conviction in addition to the aggravated murder for which the trial report was submitted. TR 328. This defendant, Thomas David Davis, is serving a life sentence, while Allen Gregory, who has no prior violent crimes – let alone a prior aggravated murder – is on death row.

As noted in the opening brief, this Court upheld Cecil Davis's death sentence for a single-victim aggravated murder on proportionality review only because Davis was in "a special category of repeat murderers," and also had at least two other serious violent offenses in his criminal history. AOB at 86 (citing *Davis*, 175 Wn.2d at 352-53). But Allen Gregory is *not* in that "special category of repeat murderers." Meanwhile, many who are in that especially heinous category are serving life sentences. TR 328; *see also* AOB at 86-90.

The two remaining new trial reports are for Michael McBride, TR 330, and Gregorio Luna-Luna, TR 339, both of whom are serving life sentences. The McBride report has little information because the crime occurred in 1986 and the trial report was not completed until 2014. But contemporaneous news articles reveal the crime was vicious. McBride tied up and severely beat his victim, then forced him to swallow tranquilizers and took him to another location where he stabbed and clubbed him to death.[19]

Gregorio Luna-Luna was convicted of the aggravated murder of his longtime girlfriend, with whom he had a child. He had terrorized the woman for years, repeatedly threatening to kill her even after a restraining order was filed. He ultimately made good on his threat, breaking into her apartment, attacking her in front of their young son, then stabbing her through the heart.[20]

In sum, these new trial reports support the conclusion reached in the opening brief based on an analysis of the other 300-plus aggravated murders. There are nearly a hundred multiple-victim aggravated murderers serving life sentences. Dozens upon dozens of aggravated

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[19] https://news.google.com/newspapers?nid=1314&dat=19870122&id=x1lWAAAAIBAJ&sjid=cO8DAAAAIBAJ&pg=2174,3924263&hl=en.

[20] http://www.tri-cityherald.com/2014/09/09/3145455/pasco-man-convicted-of-murder.html.

murderers serving life sentences committed their crimes in an extraordinarily brutal fashion. Many have violent criminal histories in addition to the aggravated murder convictions. Yet they are serving life sentences, while Allen Gregory is on death row for the aggravated murder of a single victim and no prior violent felonies. All of the other defendants on death row have committed multiple violent felonies, and most have committed multiple homicides. Allen Gregory's death sentence is random and arbitrary, and fails proportionality review. AOB at 59-96.

d. Proportionality review is mandatory, and the fact that death sentences are infrequently imposed does not mean Mr. Gregory's sentence is proportionate.

In a further demonstration that it misunderstands proportionality review, the State claims, "The fact that a death sentence is so infrequently sought and rarely obtained should not be held against a death sentence that is successfully obtained during proportionality review." BOR at 161. It claims that the fact that there are so few people on death row shows that "the system is working." BOR at 170 (citing *Davis,* 175 Wn.2d at 361-62).

Whether "the system is working" is a question that will be addressed in a subsequent section.[21] Contrary to the State's implications,

[21] The fact that so few people who are theoretically eligible for death actually receive the death penalty is an important feature of a random and arbitrary system. *See* J.

proportionality review is a defendant-specific determination, not a challenge to the validity of capital punishment generally. *See* BOR at 169. The question is whether *this* defendant should be one of the few sentenced to death, or whether his selection for the ultimate punishment is random and arbitrary in light of other defendants' sentences. RCW 10.95.130(2)(b). This is a question that must be answered under the statute regardless of any constitutional claims. *See id*; *see also* BOR at 169 (inexplicably referencing constitutional argument and citing U.S. Supreme Court case in section addressing proportionality, which is purely a state statutory question).

In any event, the claim that "the system is working" because only a few people are on death row would be true *if and only if* those few were the worst of the worst. For purposes of proportionality review, Mr. Gregory assumes that the other death-row inmates fit that description. But because *he* does not, his sentence must be reversed. *See* AOB at 59-104.

The State also implies that this Court should not perform proportionality review at all because to do so would be usurping the role of the prosecutor or the jury. BOR at 169. To the contrary, "Washington's death penalty scheme clearly assigns the task of proportionality review to this court, not the jury in a penalty phase."

Marceau, S. Kamin, & W. Foglia, "Colorado Capital Punishment: An Empirical Study," University of Denver Sturm College of Law, Working Paper 13-08 (2013) at 3.

Gregory, 158 Wn.2d at 858 (citing RCW 10.95.130(2)(b)). This makes sense because the prosecutor works for an individual county, and the jury decides the facts of an individual case.[22] Only this Court reviews the data for all aggravated murder cases from all 39 counties. Thus, the legislature rationally allocated the role of proportionality review to this Court. In performing this review, this Court should hold that Allen Gregory's sentence must be reversed because it is excessive and disproportionate to the penalty imposed on similarly situated defendants. AOB at 59-104; RCW 10.95.130(2)(b).

e. <u>The updated Beckett Report, which incorporates many trial reports filed after the opening brief, reinforces the conclusion that Mr. Gregory's sentence is random, arbitrary, and racially biased</u>.

The goal of proportionality 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." *State v. Cross*, 156 Wn.2d 580, 630, 132 P.3d 80 (2006). As demonstrated in detail in the opening brief, Allen Gregory's sentence is not proportional to sentences given in similar cases, but is instead random and arbitrary. To the extent it can be explained, it is based on Mr.

[22] It is also somewhat ironic that the State urges this Court to defer to the jury's verdict, where that verdict was obtained through pervasive prosecutorial misconduct. *See* Section 1 above. Deference to the jury is never appropriate in proportionality review, but it is particularly inappropriate in this case in light of the State's misconduct before the jury.

Gregory's race and his county of conviction. This conclusion is not only evident from a review of the trial reports, but is supported by a statistical study performed by University of Washington Professor Katherine Beckett. AOB at 96-101.

After the filing of the opening brief, Professor Beckett performed the analysis anew in order to include dozens of missing trial reports that were finally completed. Mr. Gregory filed the updated Beckett Report in this Court on October 13, 2014. *See* Katherine Beckett & Heather Evans, *The Role of Race in Washington State Capital Sentencing, 1981-2012*, filed October 13, 2014. This is the version of the report that should be consulted, as it is based on a more comprehensive data set.[23]

The regression analysis demonstrates that, controlling for relevant case characteristics, African American defendants in Washington are 4.5 times more likely than white defendants to be sentenced to death. Beckett Report (filed 10/13/14) at 30, 33. The analysis also shows that although case characteristics have some impact on both prosecutors' decisions to seek death and juries' decisions to impose it, most of the variation in sentences among those convicted of aggravated murder cannot be explained. Beckett Report (10/13/14) at 25-30.

[23] Additional trial reports have been filed since, but Professor Beckett was able to include trial reports through number 335.

Thus, the statistical study of Washington's aggravated murder cases confirms the conclusions of an empirical review: Mr. Gregory's sentence is random and arbitrary, and to the extent it is not, it is impermissibly based on his race. His sentence should accordingly be reversed and remanded for imposition of a life sentence. *Cross*, 156 Wn.2d at 630; RCW 10.95.130(2)(b).

During the 13 months between the filing of the opening brief and the filing of the response brief, the State did not find a statistical expert who disagreed with Professor Beckett's methodology or conclusions. BOR at 175-76. Furthermore, the prosecutors concede that they themselves have "no expertise in statistical analysis." BOR at 177 n.18. But just as the State does not want this Court to review the trial reports, it also does not want this Court to review the statistical study. BOR at 175-78. This Court should resist the State's request to turn a blind eye to the problem of disproportionality.[24]

This Court should also be offended by the implication that Mr. Gregory's attorneys manipulated the data. BOR at 176-77. Undersigned

[24] Without citation to a provision of the Rules of Appellate Procedure permitting the argument, the State also attempts to relitigate this Court's denial of the State's motion to strike the Beckett Report. Mr. Gregory already responded to that motion on December 1, 2014, and will not rehash those arguments except to note that because this Court has previously held that proportionality review takes place in this Court in the first instance, *State v. Gregory*, 158 Wn.2d at 858, this is the proper forum in which to consider the Beckett Report.

counsel take very seriously the Rules of Professional Responsibility and the importance of ethical behavior generally. Professor Beckett similarly complies with rigorous standards of scholarship, and it goes without saying that doing otherwise would undermine her professional credibility and that of the University of Washington. If there were any mistakes in the analysis, they would be unintentional. Furthermore, if there were any errors, they would have been uncovered by the experts with whom the prosecutors presumably consulted. [25]

Mr. Gregory already explained that for both the empirical proportionality review presented in the opening brief and for Professor Beckett's study, every discretionary decision that had to be made was made in a manner that would *disfavor* Mr. Gregory's position. Not only would doing otherwise damage professional reputations, but presenting an unreliable report would serve no purpose whatsoever. Thus:

> 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). Mr. Gregory has also not

[25] The State questions counsels' commissioning of the Beckett Report, BOR at 176, as if every conclusion reached by an expert procured by one side to litigation is questionable. The State's odd view of litigation would mean the State itself should not introduce expert testimony at trial – e.g. fingerprint evidence, DNA evidence, mental health evidence – because its own role commissioning that evidence makes it unreliable.

> 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. 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 Washington. *See Davis*, 175 Wn.2d at 358 n. 34 & 363 n. 41 (excluding Hightower for this reason). Finally, Mr. Gregory excluded defendants whose IQ is 70 or below, rendering them ineligible for capital punishment. *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.

AOB at 63-64 (footnotes omitted); *see also* Beckett Report (10/13/14) at 13.

Professor Beckett and her research assistants could not have made the above decisions without the input of attorneys, because they required legal expertise. Some of the decisions necessary to developing the coding protocols also required knowledge of the law. The goals were not only to err on the side of undermining Mr. Gregory's position, but also to ensure accuracy and consistency. For example, in the "aggravating circumstances" field, some trial judges not only properly listed aggravating circumstances under RCW ch. 10.95, but also improperly listed aggravating factors or sentence enhancements under RCW ch. 9.94A. It would only have helped Mr. Gregory to count all of the

"aggravating circumstances" trial judges inaccurately identified for those serving life sentences, but the erroneously included findings were removed to ensure accuracy and reliability. *See, e.g.,* TR 276 (improperly including "armed with a firearm" in aggravating circumstances field); TR 288 (same); TR 304 (improperly including "victim vulnerability" in aggravating circumstances field).

The State's complaints in footnote 18 show that the prosecutors barely even read the Beckett Report. For instance, the State questions why fewer social factors were evaluated at the imposition stage than at the charging stage. BOR at 177 n.18. But Professor Beckett clearly explained that this decision, and others, were dictated by the size of the data pool, which is obviously smaller for the imposition stage. Beckett Report (10/13/14) at 16-18. Social factors like race are not supposed to matter in the determination of who is sentenced to death. Accordingly, it was more important to control for all of the case characteristics that *are* supposed to matter, than to evaluate the impact of additional social factors.

Professor Beckett controlled for relevant case characteristics at both stages. These included aggravating circumstances, mitigating circumstances, and prior convictions, among others. *Id.* at 18. At the imposition stage, the researchers studied each social factor separately, while controlling for the relevant case characteristics. Because "black

defendant" was the only social factor they found to be a significant predictor of the decision to impose death, they presented it in the final model along with legally relevant factors. Controlling for these legally relevant factors, African American defendants are significantly more likely to be sentenced to death than their Caucasian counterparts. *Id.* at 30, 33.

The State complains about the inclusion of "legally irrelevant considerations – such as the percentage of Republicans in the county where the case was filed…." BOR at 177 n.18. But again, that is precisely the point of including social factors in the analysis. Social factors like race and political persuasion are not supposed to have an impact in the determination of who is sentenced to die in Washington. The researchers wished to determine to what extent these irrelevant characteristics do, in fact, matter. Race is the only social factor whose impact Mr. Gregory was interested in studying, but scientists like Professor Beckett have interests extending well beyond a specific case. It is standard practice in these types of studies to evaluate factors like the political orientation of the electorate, because such factors have sometimes been found to be significant to criminal justice outcomes. *See, e.g.*, Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. Rev.

161, 185 (2006); *see also* Beckett Report (10/13/14) at 6-12 (citing this and other studies). Professor Beckett's inclusion of such variables was driven by the research literature in her field, not by Mr. Gregory, and not by any political biases.[26]

As for the State's other concerns, the reference to comparisons between stranger victims and "white" defendants was simply a clerical error. Professor Beckett compared stranger-victim cases and known-victim cases, as indicated in Table E4. Beckett Report (10/13/14) at 44.

Finally, the State complains that it is "crude" to group number of victims in categories of one, two to four, and five or more. BOR at 177 n.18. But Professor Beckett and her research assistant tested numerous measures for number of victims, including logged number of victims, squared number of victims, and a number of categorical breakdowns. Under none of these models did number of victims appear to have any impact on sentencing outcomes. The researchers thus chose the most parsimonious measure for this case characteristic, using two categorical versions to demonstrate that the number of victims does not appear to play

[26] The results of the political-party analysis are not surprising. Professor Beckett did not find a statistically significant connection between voting patterns and use of the death penalty. *See* Beckett Report (10/13/14) at 41. This is consistent with other indications that attitudes toward capital punishment do not necessarily vary by party membership and that most voters are ambivalent about the issue. For instance, the most recent state to abolish the death penalty, Nebraska, leans Republican, while the previous state to do so, Maryland, leans Democratic. *See* http://www.nytimes.com/2015/05/28/us/nebraska-abolishes-death-penalty.html?_r=0.

a statistically relevant role when other case characteristics are controlled for in the models. A handful of other case characteristics do play a statistically significant role, but most of the variation in sentencing outcomes still cannot be explained by case characteristics, and race plays a statistically significant role in the determination of who is sentenced to death. Beckett Report (10/13/14) at 25-30, 33.

In sum, the Beckett Report statistically validates what is empirically apparent: Allen Gregory's death sentence is random and arbitrary and more readily explained by his race and county of conviction than by any relevant variable. The disproportionate death sentence should be reversed, and the case remanded for imposition of a life sentence. AOB at 59-104; RCW 10.95.130(2)(b).

3. 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.[27]

a. Re-examination of this issue is appropriate in light of the large number of trial reports filed since *Cross*, and the statistical analysis of those trial reports showing the death penalty is applied in a manner that is arbitrary and racially skewed.

This Court should not only reverse Allen Gregory's sentence on the statutory grounds discussed above, but should hold that Washington's capital punishment scheme is facially unconstitutional. The statute fails to

[27] This is Argument 14 in the opening brief.

narrow the class of defendants eligible for capital punishment, resulting in the arbitrary imposition of the death penalty on a random few, and leaving "room for the play of [racial] prejudices." *See Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *id.* at 242 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 311 (White, J., concurring). This result is untenable under the Eighth Amendment. *See id.*; U.S. Const. amend. VIII. But even assuming Washington's capital punishment scheme comports with the federal constitution, article I, section 14 of the Washington Constitution does not tolerate such a system. Const. art. I, § 14; *see State v. Fain*, 94 Wn.2d 387, 393, 617 P.2d 720 (1980). AOB at 264-77.

The State implies that Mr. Gregory lacks standing to raise this issue, because he "fails to explain how broad construction of aggravating factors not relevant to this case can affect the constitutionality of his death sentence." BOR at 131. To begin with, the aggravating factors at issue in Mr. Gregory's case have been construed broadly. AOB at 275-76. But regardless, the point is that the statute as a whole is overbroad, both in terms of the number and scope of aggravating circumstances, and that the broadening of the statute has resulted in a significant number of defendants convicted of aggravated murder from which a random few are selected for the death penalty. By failing to narrow the class of offenders

eligible for execution to the worst of the worst, the scheme results in the arbitrary imposition of the death penalty, in violation of the Constitution. AOB at 268-69. As one of the random few on which the penalty has been imposed, Mr. Gregory undoubtedly has standing to raise the issue. *See Furman*, 408 U.S. at 239-40; *id.* at 310 (Stewart, J., concurring) (reversing death sentences for three petitioners because constitution cannot tolerate a system that permits the death penalty to be "wantonly and freakishly imposed").

The State correctly notes that as to this issue (unlike statutory proportionality review), *stare decisis* applies and Mr. Gregory must demonstrate a basis for revisiting *State v. Cross*. BOR at 102 (citing *Cross*, 156 Wn.2d at 623). This is easily achieved, for two reasons:

First, trial judges have filed 120 additional aggravated murder reports since Dayva Cross's was filed; 67 of those were filed after this Court issued its opinion in *Cross*, and dozens were filed in response to Mr. Gregory's Motion to Complete. The significantly larger pool of aggravated murder cases reveals a randomness that may not have been apparent in the past.

Second, the parties presented no statistical analysis in *Cross* or its progeny, but this Court now has the benefit of Professor Beckett's study. The Beckett Report demonstrates that the imposition of the death penalty

is random, arbitrary, and tied in part to the race of the defendant. For these reasons, this Court should now hold that Washington's capital punishment scheme is unconstitutional, and should strike down the statute. *Cf. Atkins v. Virginia*, 536 U.S. 304, 314, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (reevaluating and overruling prior case upholding constitutionality of death penalty for mentally retarded defendants, even though prior case was only 13 years old, because "much has changed since then").[28]

b. The statute violates the Eighth Amendment, and the State misunderstands *Furman v. Georgia*.

The State claims that there is no constitutional problem because other states also have capital punishment, and those states' statutes have been upheld under the Eighth Amendment. BOR at 125-31 (discussing capital punishment in Missouri and other states). But California's death penalty scheme was recently struck down under the Eighth Amendment and *Furman* (*see Jones v. Chappell*, 31 F.Supp.3d 1050, 1063 (C.D. Cal. 2014)), and several other states abolished the death penalty in part because of concerns about its unfair application. For instance, when New Mexico eliminated capital punishment in 2009, Governor Richardson noted that

[28] More recent opinions reaffirmed *Cross* without performing the analysis anew, and without the benefit of the Beckett Report and the dozens of trial reports filed in response to Mr. Gregory's Motion to Complete. *See, e.g., Davis*, 175 Wn.2d at 342-43; *Yates*, 161 Wn.2d at 793. The data are now available for this Court to address the issue.

one reason he signed the bill into law was that he was troubled by the fact that minorities are "over-represented in the prison population and on death row."[29] Illinois Governor Pat Quinn had similar qualms. He said he supported the death penalty when applied "carefully and fairly," but "experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment …."[30] He signed a bill repealing the death penalty in Illinois in 2011. *Id.*

Indeed, the fact that so many states have abolished the death penalty in recent years supports Mr. Gregory's Eighth Amendment argument. In *Gregg v. Georgia*, one of the reasons the Supreme Court upheld Georgia's new capital punishment statute is that, at that time, the death penalty "had a long history of acceptance both in the United States and in England." *Gregg v. Georgia*, 428 U.S. 153, 176, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality). Additionally, most states had re-enacted capital punishment following *Furman.* *Id.* at 179-80. Thus, "contemporary standards of decency" did not dictate invalidation of the death penalty. *Id.* But England has since abolished capital punishment,

[29] http://www.cnn.com/2009/CRIME/03/18/new.mexico.death.penalty/.

[30] *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES, Mar. 10, 2011 at A18. Available at: http://www.nytimes.com/2011/03/10/us/10illinois.html?_r=0.

and ten U.S. states have eliminated the death penalty since *Gregg.*[31] No state has added it. "It is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins,* 536 U.S. at 315 (invalidating death penalty for mentally retarded defendants under Eighth Amendment, after several states had abolished the penalty for intellectually disabled individuals).

In 2014, the Federal District Court for the Central District of California struck down the death penalty in California because a random few are executed in violation of the Eighth Amendment and *Furman v. Georgia. Jones v. Chappell,* 31 F.Supp.3d at 1063. The court noted that since 1978, over 900 people have been sentenced to death in California, but, because of excessive delays in the postconviction process, only 13 have been executed. *Id.* at 1053. This result is impermissible under *Furman*, which held that the Constitution "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 1061 (quoting *Furman,* 408 U.S. at 310 (Stewart, J., concurring)). The court recognized that while "*Furman* specifically addressed arbitrariness in the selection of who gets sentenced to death," the principles on which it relied apply with equal force to the selection of who is in fact executed. *Jones,* 31 F.Supp.3d at

[31] http://www.deathpenaltyinfo.org/states-and-without-death-penalty.

1063. "Arbitrariness in execution is still arbitrary, regardless of when in the process the arbitrariness arises." *Id.*

In Washington, the arbitrariness arises at both the sentencing and execution stages. The State claims that Washington's statute is restrictive enough to pass constitutional muster at the sentencing stage because it limits eligibility for the death penalty to those convicted of premeditated murder with at least one aggravating circumstance. BOR at 125, 128-29. But over 300 adults have been convicted of premeditated murder with aggravating circumstances since the death penalty was reinstated, and of those, only five have been executed and only nine are on death row. The problem – as demonstrated in detail in the proportionality section of the opening brief – is that these nine are not the "worst of the worst." Rather, their placement on death row is random and arbitrary. *See* AOB at 59-104, 264-77.

As for the execution stage, the only clear predictor of who will in fact be executed is whether the defendant "volunteered" to be killed. Three of the five inmates who have been put to death since 1981 are defendants who declined to exercise their rights to plenary postconviction review. *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). Thus, as in California, the question of

who is executed turns not on the severity of the crime relative to that of other defendants, but rather on how quickly the inmate proceeds through the postconviction process. *See Jones v. Chappell*, 31 F.Supp. at 1062.

Unlike the *Jones* court, the prosecutors here misunderstand *Furman.* The State claims that by citing concurring opinions, Mr. Gregory is relying on "personal opinion and individual viewpoint rather than legal analysis." BOR at 133. The State is incorrect. *Furman* consists of a one-paragraph per curiam decision, followed by five individual opinions concurring in the judgment. *Furman*, 408 U.S. at 239-40. It is well-settled that the reasoning of Justice White's and Justice Stewart's concurrences have precedential value, because they represent the narrowest grounds for the Court's decision. *See Gregg*, 428 U.S. at 169 n.15 ("Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds: Mr. Justice Stewart and Mr. Justice White"); *accord Walton v. Arizona*, 497 U.S. 639, 657-58, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (Scalia, J., concurring) (describing the opinions of Justices Stewart and White as the "critical opinions" of *Furman*), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 589, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

As noted in the opening brief, those precedential concurring opinions held that a capital sentencing scheme violates the Eighth Amendment if "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). This is especially true where, "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring).

The Court's decision in *Furman* was data-driven. Justice White noted that he reached the conclusion that the death penalty was randomly and arbitrarily imposed "based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty." *Furman*, 408 U.S. at 313 (White, J., concurring). Justice Stewart, in turn, endorsed Justice Douglas's reference to a study on racial bias in the imposition of the death penalty. *Id.* at 310 n.13 (Stewart J. concurring) (citing *Furman*, 92 S.Ct. at 2732-33 (Douglas, J., concurring)).

The State correctly notes that following *Furman*, Georgia amended its capital punishment statute to address the concerns of that case, and the Supreme Court endorsed the amended statute in *Gregg*, 428 U.S. at 193.

BOR at 133. But as already explained in the opening brief, although Georgia's new statute and those of other states were originally written and construed narrowly, signaling the possibility of constitutional conformity, the experiment has failed. AOB at 267-68.

At the time of *Gregg,* the Supreme Court did not yet have data demonstrating whether the new schemes successfully narrowed those subject to the death penalty to the worst of the worst, or whether instead the new schemes suffered the same infirmites as those at issue in *Furman.* The Court was willing to assume the new procedures would eliminate arbitrariness in capital sentencing, and relied on the American Law Institute's model penal code for the proposition that it was possible to develop standards that would satisfy the Eighth Amendment. *Gregg*, 428 U.S. at 193. The Court optimistically opined, "No longer should there be no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." *Id.* at 198 (plurality) (internal quotation omitted). The concurring justices agreed with the lead opinion:

> I cannot accept the naked assertion that the effort is bound to fail. As the types of murders for which the death penalty may be imposed become more narrowly defined … it becomes reasonable to expect that juries given discretion not to impose the death penalty will impose the death penalty in a substantial portion of the cases so defined. If

> they do, it can no longer be said that the penalty is being imposed wantonly and freakishly ….

Id. at 222 (White, J., concurring).

The data are now available, and they demonstrate that the required narrowing has not been achieved. Indeed, as noted in the opening brief, the American Law Institute – on whose judgment the U.S. Supreme Court repeatedly relied – withdrew the model penal code for capital punishment because "no state has successfully confined the death penalty to a narrow band of the most aggravated cases." American Law Institute, *Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty* (2009) at 30.

The State faults Mr. Gregory for citing the American Law Institute ("ALI") report on the death penalty and Governor Inslee's moratorium announcement because they are not "judicial finding[s] of unconstitutionality." BOR at 133-34; *see* AOB at 267-68. Mr. Gregory cited plenty of "judicial finding[s] of unconstitutionality," including *Furman v. Georgia*, *supra*, and *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980). AOB at 264-67, 271-72. But it is also appropriate to cite persuasive authority other than caselaw. In fact, ALI reports are cited by three different justices in *Furman* itself – two in support of the judgment and one in dissent. *See Furman*, 408 U.S. at 297

n.49 (Brennan, J., concurring); *id.* at 348 n.98 (Marshall, J., concurring); *id.* at 434 n.16 (Powell, J., dissenting); *id.* at 464 n.65 (Powell, J., dissenting). Furthermore, as noted, the Court relied on the ALI's model penal code in upholding the amended statute in *Gregg.* Thus, it is particularly significant that the ALI withdrew capital punishment from the model penal code for the very reason Mr. Gregory presents here.

As for the Governor's moratorium, the State responds not at all to Mr. Gregory's argument regarding its legal significance, and instead characterizes it as mere "personal opinion." BOR at 134. The State is wrong. Governor Inslee was not relaying his person opinion as a private citizen. Rather, as he stated in the moratorium announcement, "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." App. J to AOB at 4 (emphasis added). He invoked this authority specifically because the death penalty is applied randomly and arbitrarily. *See id.* The Governor's proclamation is not personal opinion, but persuasive authority. *See Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 216-17,193 P.3d 128 (2008) (plurality).

In Washington, the data now available lead to the same conclusion that the Supreme Court reached in *Furman*, that the American Law Institute reached in withdrawing the model penal code, and that the

Governor reached in issuing a moratorium: the death penalty is unconstitutional because it is imposed on a random few, and if any basis can be discerned for the selection of the few sentenced to die, it is the impermissible basis of race. This Court now has 341 trial reports to consider – a significantly larger data pool than the 220 that were filed through Dayva Cross's sentencing. An empirical review of those reports demonstrates that the death penalty in Washington is imposed on an arbitrary few rather than the worst of the worst. *See* AOB at 59-104, 264-77.

This Court also has the benefit of the Beckett Report, which shows that the twin concerns of *Furman* exist in Washington today. First, in a constitutional system, case characteristics like aggravating circumstances, mitigating circumstances, number of victims, and criminal history would explain most, if not all, of the selection of certain individuals for the death penalty. But a regression analysis demonstrates that relevant case characteristics explain only 9% of the variation in whether prosecutors file a death notice, and only 21% of the variation in decisions to impose the death penalty. Beckett Report (10/13/14) at 25, 29. Second, in a constitutional system, race would play no part of the determination of who is sentenced to death. But the statistical study shows that, controlling for relevant case characteristics, black defendants are 4.5 times more likely to

be sentenced to death than their white counterparts. Beckett Report (10/13/14) at 30.

To be sure, the U.S. Supreme Court upheld a defendant's death sentence in *McCleskey v. Kemp* notwithstanding a statistical study demonstrating systemic racial bias. *McCleskey v. Kemp*, 481 U.S. 279, 319, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). That its author almost immediately regretted the 5-4 opinion does not render it void. *See* AOB at 99 n.58. However, *Furman* controls over *McCleskey* for several reasons.

First, in *McCleskey*, the Court treated the issue only as an as-applied challenge, and affirmed because the petitioner's sentence was proportionate regardless of any systemic deficiencies. *Id.* at 282-83, 319. Thus, the Court technically did not reach the issue Mr. Gregory raises here. Mr. Gregory argues that because the *system* has the same flaws identified in *Furman,* Washington's capital punishment scheme, like the scheme in *Furman,* is facially invalid.

Second, the Court in *McCleskey* relied on its "unceasing efforts to eradicate racial prejudice from our criminal justice system" to assure itself that the statistical study demonstrated a mere "risk" of race-based decision-making that would not actually come to pass. *McCleskey,* 481 U.S. at 309 (citing *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)). It has unfortunately been well-established in the

interim that these "unceasing efforts" have utterly failed. *See State v. Saintcalle*, 178 Wn. 2d 34, 46, 309 P.3d 326 (2013); Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System* at 1 (2011).

Third, the *McCleskey* Court again relied on the ALI's model penal code and Georgia's adherence to it to presume the sentence was not "wantonly and freakishly" imposed. *McCleskey*, 481 U.S. at 302-03 & n.24, 308. But again, the ALI has withdrawn the model penal code because it has failed to narrow the class of defendants eligible for the death penalty and death sentences are indeed wantonly and freakishly imposed. ALI Report at 30. And, the Beckett Report demonstrates not only that race impermissibly affects capital sentencing decisions, but also that most of the variation in sentencing for aggravated murderers cannot be explained by relevant case characteristics and is instead random and arbitrary. Beckett Report (10/13/14) at 25, 29-30.

In sum, the data demonstrate that the death penalty in Washington is imposed in a random, arbitrary, and racially biased manner, in violation of the Eighth Amendment and *Furman v. Georgia*. This Court should accordingly strike down the death penalty in Washington.

c. The statute violates article I, section 14, which is more protective than the Eighth Amendment.

Even if *Furman* does not require invalidation of Washington's capital punishment scheme under the Eighth Amendment, this Court should hold that the death penalty is invalid under article I, section 14 of the state constitution. *See Michigan v. Long*, 463 U.S. 1032, 1041-42, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (U.S. Supreme Court does not have jurisdiction to review a decision clearly resting on adequate and independent state-law grounds).

Resort to state constitutional law is appropriate in capital cases just as it is in other matters. For instance, New York's high court invalidated that state's capital punishment statute because of a procedure that passed muster under the federal Fourteenth Amendment, but did "not satisfy the heightened standard of reliability required by [New York's] State Constitution." *People v. LaValle*, 3 N.Y.3d 88, 128, 817 N.E.2d 341 (2004). The Court emphasized:

> It is the responsibility of the judiciary to safeguard the rights afforded under our State Constitution. While the Legislature may vote to have a death penalty, it cannot create one that offends constitutional rights.

Id.[32]

[32] The New York legislature did not re-enact the death penalty, and in 2008 Governor David Paterson issued an executive order requiring the removal of all execution

This Court has similarly held that Washington's Constitution requires a heightened standard of reliability in capital cases. *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) ("*Bartholomew II*"). In *Bartholomew I*, this Court held that certain provisions of Washington's death penalty statute violated the federal due process clause because they permitted consideration of any relevant evidence at the penalty phase regardless of its reliability. *State v. Bartholomew*, 98 Wn.2d 173, 654 P.2d 1170 (1982) ("*Bartholomew I*"). The U.S. Supreme Court vacated the judgment and remanded for reconsideration in light of its decision in *Zant v. Stephens*, 462 U.S. 862, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983). On remand, this Court relied on the Washington Constitution:

> [I]n interpreting the due process clause of the state constitution, we have repeatedly noted that the Supreme Court's interpretation of the Fourteenth Amendment does not control our interpretation of the state constitution's due process clause. *Olympic Forest Prods., Inc., v. Chaussee Corp.*, 82 Wn.2d 418, 511 P.2d 1002 (1973); *Pestel, Inc. v. County of King*, 77 Wn.2d 144, 459 P.2d 937 (1969).

Bartholomew II, 101 Wn.2d at 639. The Court held that the statute violated article I, section 3, declaring, "We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability." *Id.* at 640. The Court stressed that "the independent

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equipment from state facilities. http://www.deathpenaltyinfo.org/new-york-1 (viewed 5/13/15).

state constitutional grounds we have articulated are adequate, in and of themselves, to compel the result we have reached." *Id.* at 644.

In *McCleskey v. Kemp*, the four dissenters disagreed with the majority in part because of the heightened standards of reliability the Court had required in capital cases. *McCleskey*, 481 U.S. at 340 (Brennan, J., dissenting); *id.* at 345 (Blackmun, J., dissenting); *id.* at 366 (Stevens, J., dissenting). Although the dissents did not carry the day under the federal constitution, the fact that the Washington Constitution establishes an even higher reliability standard in capital cases means our state cannot tolerate a death-penalty scheme that is demonstrably riddled with random and race-based decision-making. Moreover, this Court has recognized that statistical studies may be considered in determining whether capital punishment in Washington satisfies our state's statutory and constitutional guarantees of fairness. *Davis*, 175 Wn.2d at 373 (majority); *id.* at 389 (Wiggins, J., dissenting).

Reliability is not the only concern. Like the due process clause of the state constitution, the cruel punishment provision is more protective than its federal counterpart in the capital context. *See* AOB at 104-05; *State v. Roberts*, 142 Wn.2d 471, 506 n.11, 14 P.3d 713 (2000).[33] In

[33] As noted in the opening brief, 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 other

Roberts, this Court held that "major participation by a defendant in the acts giving rise to the homicide is required in order to execute a defendant convicted solely as an accomplice to premeditated first degree murder." *Roberts*, 142 Wn.2d at 505. This Court reasoned that any lesser showing would violate the Eighth Amendment under *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). *Id.* at 503-05. But even if "[m]erely satisfying the minimal requirements of the accomplice liability statute" were sufficient to justify a death sentence under the federal constitution, the Washington Constitution would demand more. *Id.* at 505-06. This Court held that a standard finding of accomplice liability could not support a death sentence in this state "in light of our repeated recognition that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment." *Roberts*, 142 Wn.2d at 506.

Similarly here, although Washington's capital punishment scheme violates the Eighth Amendment under *Furman v. Georgia*, this Court need not resolve the case on federal constitutional grounds. Our state constitution does not condone a system that lacks reliability in selecting the "worst of the worst" for execution, and which instead results in

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contexts, article I, section 14 provides stronger protection against cruel punishment than the federal constitution. *See State v. Thorne*, 129 Wn.2d 736, 772 & n.10, 921 P.2d 514 (1996); AOB at 104-05.

arbitrary and race-based decisions of who is sentenced to death. Such unfair sentencing practices not only violate article I, section 14, but also offend due process and the fundamental principles on which this state was founded. *See* Const. art. I, § 3 (due process); *Bartholomew II*, 101 Wn.2d at 640 (same); Const. art. I, § 32 ("fundamental principles"); *State v. Strasburg*, 60 Wash. 106, 112-13, 123-24, 110 P. 1020 (1910) (striking down statute prohibiting insanity defense under article I, sections 3, 21, and 32). This Court should hold that Washington's capital punishment scheme is facially invalid under the state constitution.[34]

4. Proportionality is a necessary determination before the State can execute someone; RCW 10.95 is unconstitutional because it assigns to judges the tasks of finding the necessary facts.

a. RCW 10.95 violates *Apprendi*.

The State argues that RCW 10.95 does not violate *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and its progeny because this Court's mandatory sentence review is not based on judicial fact-finding. Rather, the State argues that "when a jury has authorized the death sentence with its fact finding, there is no higher

[34] Mr. Gregory will rest on the opening brief for the argument that his sentence violates article I, section 14 as applied. The Court need not reach that issue if it reverses Mr. Gregory's sentence on statutory proportionality grounds and/or holds that Washington's death penalty statute is constitutionally invalid on its face.

penalty that can be imposed" and this Court does not increase the punishment authorized by the jury. BOR at 147-48.

The State's argument is misplaced. Washington's proportionality review is required by RCW 10.95.100 and RCW 10.95.130(1)(b) before the State can execute someone. A jury verdict for death at a special sentencing proceeding is just a preliminary step in the process. There is no authority to execute anyone, even a "volunteer," without this Court determining whether the sentence is proportionate – such a review is mandatory and cannot be waived. *State v. Dodd*, 120 Wn.2d 1, 13-20, 838 P.2d 86 (1992). It is only after judges (at both the trial and Supreme Court level) make the required findings that a person can be executed. In this way, mandatory proportionality review is what separates serving life in prison from being executed by the State.

As argued in the opening brief, this Court's mandatory review is necessarily tied to judicial fact-finding. The process does not involve traditional appellate review of a fixed trial record. Mandatory review is also not based upon the exercise of judicial mercy – that is, a last ditch determination by judges as to whether someone should live or die based upon feelings of pity, rather than legal analysis.

In contrast, mandatory statutory proportionality review is necessarily a process that involves judges resolving disputed facts that are

then used in the proportionality review. First, the trial court makes findings of fact for a particular defendant's Trial Report, findings that are not necessarily record-based and which do not involve jury determinations of disputed facts. Second, other trial courts, in other cases, make similar factual determinations that are used in this Court's proportionality analysis.[35] Third, this Court then makes determinations of a series of facts including those about race, the comparative brutality of crimes, and criminal history. AOB at 118-23. There is no standard of proof set out in the statute for this procedure.

This Court's mandatory proportionality review typically involves making determinations that, in a post-*Apprendi* era, are required to be assigned to juries. For instance, this Court upheld death sentences in *Cross*, 156 Wn.2d 580, *Yates*, 161 Wn.2d 714, and *Davis*, 175 Wn.2d 287, based upon the cruel nature of the crimes involved. Cross's murders exhibited a "marked level of cruelty" and "involv[ed] substantial conscious suffering of the victim." *Cross*, 156 Wn.2d at 632 (internal quotes omitted). In *Yates*, the Court found the death sentence proportional because "Yates's crimes, in fact, reflected a more calculated cruelty than

[35] The collection of data for the Trial Reports is one into which the person whose case is pending before this Court has no input. Here, 29 new Trial Reports were filed after Mr. Gregory's appeal was filed. These reports necessarily impact the proportionality review this Court will conduct in his case. This lack of input violates Due Process of Law under the Fourteenth Amendment and article I, section 3. *See Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313-14, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

did Cross's crimes." *Yates,* 161 Wn.2d at 789. In *Davis,* the Court relied upon its determination that the crime's nature was "brutal" and "cruel" with the victim's "substantial conscious suffering." *Davis,* 175 Wn.2d at 349.

There is little functional difference between this Court's determinations that a particular crime is sufficiently cruel so as to warrant execution and a judicial determination that a non-capital offense was "deliberately cruel," such that an exceptional sentence is warranted. Yet, this is the very type of judicial fact-finding that the Supreme Court struck down as a violation of the Sixth Amendment in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The same type of factual analysis is involved in both determinations, and both types of judicial fact-finding are unconstitutional. This judicial fact-finding is unconstitutional here because it is what allows execution to take place – it is a procedural step that is required before a person can be executed, and it rests of on factual findings that ought, under the Sixth, Eighth and Fourteenth Amendments (and article I, sections 3, 14 and 22), to be assigned to the jury with a reasonable doubt standard.

b. RCW 10.95.130 is not severable.

The State argues that if the judicial fact-finding required before the State can execute someone is unconstitutional, the problem can just be

cured by severing the unconstitutional provision from the statute. BOR at 148-49 (citing RCW 10.95.900). There are two reasons why the State's argument here is flawed.

First, Mr. Gregory has always sought to introduce evidence before the sentencing jury of comparable cases. This Court in Mr. Gregory's earlier appeal rejected his arguments, holding that RCW 10.95 assigns the task of proportionality review to "this court, not the jury." *Gregory*, 158 Wn.2d at 858. Then, in the second sentencing proceeding, the trial court denied Mr. Gregory's attempts to introduce evidence of comparable cases to rebut the State's claims that Mr. Gregory's case "is as bad as it gets," and that the death penalty was appropriate for the "worst offenders." RP (5/14/12) 3030, 3056-63; Ex. 1 (6/13/12) at Slide 23.

If RCW 10.95.130 is unconstitutional because it removes fact-finding necessary to determine proportionality from the jury and assigns that task to judges, Mr. Gregory has been specifically harmed because he attempted to show the jury that executing him would be disproportionate – that there are others who received life sentences who were really "the worst of the worst." Thus, the violation of the Sixth, Eighth and Fourteenth Amendments and article I, sections 3, 12, 14 and 22, caused by RCW 10.95.130 cannot be cured simply by striking that portion of the statute. Mr. Gregory's sentence must also be reversed.

Second, the fact of the existence of a severability provision, RCW 10.95.900, does not always require the Court to severe the unconstitutional provisions. *Leonard v. Spokane*, 127 Wn.2d 194, 201-02, 897 P.2d 358 (1995). As a rule, various provisions of a statute are not severable if "the constitutional and unconstitutional provisions are so connected – that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature." *Leonard v. Spokane*, 127 Wn.2d at 201. "The invalid provision [footnote omitted] must be grammatically, functionally, and volitionally severable." *McGowan v. State*, 148 Wn.2d 278, 295, 60 P.3d 67 (2002).

Here, mandatory proportionality review is intimately connected to the rest of RCW 10.95. At the time of the passage of the current death penalty statute, in 1981, the U.S. Supreme Court had not yet held that proportionality review was not required under the Eighth Amendment, a decision that was not to come until 1984. *See Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). Prior to *Pulley*, it was assumed that a constitutional death penalty statute required proportionality review because the Georgia death penalty statute upheld in *Gregg* contained within it a requirement of mandatory proportionality review.

See Bartholomew I, 98 Wn.2d at 185. On the other hand, this Court had just issued its decision in *Fain*, which requires proportionality review under article I, section 14. *See State v. Campbell*, 103 Wn.2d 1, 32, 691 P.2d 929 (1984).

Thus, when the Legislature passed the 1981 death penalty statute, it was concerned very much about the issue of proportionality, with the authors of the statute noting the importance of such review to a "constitutional capital punishment scheme." Ronald Franz, *Explanatory Material for "An Act Concerning Murder and Capital Punishment*" (12/31/80); AOB, App. K at 17. *See also id*. at 19-20 (discussing the importance of uniformity and referencing this Court's rulings in *State v. Floyd William Marr*, No. 45634 (12/14/79)) (filed in this Court on 1/8/14).

Proportionality review, therefore, is a critical component of the 1981 death penalty statute. The Legislature believed this to be the case at the time the statute was adopted. The fact that the U.S. Supreme Court would later determine that proportionality review was not required by the Eighth Amendment does not mean that at the time the statute was passed, in 1981, proportionality review was not intimately connected to the balance of the act.

If the assignment of proportionality review to judges, rather than the jury, is unconstitutional, that portion of the statute cannot be severed.

The entire statute should be stricken and the case remanded for imposition of a life without parole sentence.

5. There was no authority to seek death in 2012 because of the State's failure to file and serve a notice of intent to seek death regarding the fourth amended information in 2001.

The State seeks to avoid the strict requirements of RCW 10.95.040, wishing to execute Mr. Gregory even though it never filed and served a notice of intent to seek the death penalty with regard to the Fourth Amended Information filed on February 21, 2001. CP 6120-21. The State argues that (1) this issue cannot be raised now because of the "law of the case" doctrine, and (2) the issue should be rejected on its merits, citing what it calls "firmly established law." BOR at 15-23. The State is wrong.

To begin with, the "law of the case" has no applicability here.[36] The first appeal addressed the death sentence imposed in 2001. The current appeal does not address any challenges to the sentencing proceeding that took place in 2001. Rather, the current appeal addresses the legality of the death sentence imposed in *2012*. Whether or not Mr. Gregory could have challenged the 2001 death sentence based upon the State's procedural default in 2001 is no longer an issue in the current case.

[36] For fuller discussion of the "law of the case" doctrine, see Section 6(c).

Rather, what is in issue is whether there is legal authority for the imposition of death as a sentence in 2012.

In *State v. Dearbone*, 125 Wn.2d 173, 883 P.2d 303 (1994), and *State v. Luvene*, 127 Wn.2d 690, 903 P.2d 960 (1995) – two cases that the State does not cite – this Court made it clear that it requires strict compliance with the procedures of RCW 10.95.040: "[F]iling and service of notice is mandatory – no notice, no death penalty." *State v. Dearbone*, 125 Wn.2d at 177. Thus, the statutory requirement of filing and service of a death notice is a procedural prerequisite to the State's ability to obtain a death sentence. Absent such strict compliance, there is no legal authority for the State to execute someone, even if, as in *Luvene*, there was no objection below.

In this case, the issue is the propriety of the *2012* death sentence – did the State satisfy the strict procedural requirements of RCW 10.95 such that the *2012 judgment* sentencing Mr. Gregory to death is valid? Is there any statutory authority that would support imposing a death sentence in 2012? Because the 2012 death sentence had not yet been imposed, it was impossible for Mr. Gregory to have challenged it in the earlier appeal. Even if applicable generally to a death case, the "law of the case" doctrine simply cannot be applied here – it makes no sense to require Mr. Gregory

to have challenged in an appeal that took place between 2001 and 2006 a sentence that might be imposed years later, in 2012.

The State then argues that "it is firmly established law that RCW 10.95.040 applies solely to the prosecutor's original decision to seek the death penalty," and that therefore, once the original notice was filed and served, that should end the matter. As evidence of "firmly established law," the State relies heavily this Court's decision in *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001). BOR at 19-21.

The State, however, concedes that the holding of *Woods* was limited simply to a situation where the State filed an amended information which *added* an aggravating factor. BOR at 20. The holding of *Woods* makes sense because if the State was going to seek death based upon the original number of aggravators, adding an additional aggravator would not call into question the propriety or justness of the county prosecutor's original decision. However, the Court in *Woods* recognized that a different situation could arise where the amended information reduced the number of aggravating factors. *Woods*, 143 Wn.2d at 590 n. 9.

The State argues: "That footnote certainly does not constitute a holding." BOR at 21. This statement is to some extent correct, but the Court's footnote's very existence constitutes a limitation on the holding of *Woods*. *See Woods*, 143 Wn.2d at 590 ("*Under the circumstances before*

us, it was not required to file another notice after Woods's rearraignment on the amended information.") (emphasis added). Courts often decide cases on narrow grounds, saving for another day questions not presented in the appeal before the court. *See, e.g., Mohr v. Grant*, 153 Wn.2d 812, 822 n. 8, 108 P.3d 768 (2005).

Thus, the footnote in *Woods*, rather than simply being some cryptic remark, as the State suggests, should be seen as an important limit to the precedential effect of the majority decision. Presumably, the Court meant what it said in this footnote, and, contrary to the State's suggestion, the language of the footnote should not just be seen as some random thought, placed into the opinion for no apparent reason. Thus, the holding of *Woods* is that a new death notice is not required when an amended information is filed that increases the number of aggravating factors, and nothing more, with the Court having left open, for another day, the issue raised in the footnote. That day is now here.

The State argues that "the direct language" of RCW 10.95.040 "applies solely to the prosecutor's initial decision to seek death," and argues that subsequent cases have not questioned that position. BOR at 21 (citing *State v. Woods, supra*; *State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987); and *State v. Clark*, 129 Wn.2d 805, 920 P.2d 187 (1996) ("*Clark I*").

Yet, the footnote just discussed in *Woods* clearly questions the State's analysis. As for *Rupe*, the State is mixing apples with oranges. *Rupe* addressed the issue (not raised by Mr. Gregory) of whether a new death notice needed to be filed *after* a prior death sentence was reversed, and the case remanded for a new sentencing hearing. There had not been a new information filed in *Rupe* and there had not been a new arraignment. This is very different from what took place here where the State's procedural error occurred after the Fourth Amended Information was filed and Mr. Gregory was arraigned on that new information in 2001, not after remand.

Clark I also has no bearing on this case. *Clark I* only addressed the *type* of service required under RCW 10.95.040 – whether leaving the notice in the dedicated public defender box at the prosecutor's office sufficed. The case did not involve the situation expressly left open a few years later in *Woods*.

The State's brief then moves on to discuss the issue in terms of statutory construction. Some of its arguments are simply beside the point. For instance, the State points to the lack of any requirement in RCW 10.95.050(4) for a new death notice in the event of the reversal of a death sentence. BOR at 22. Yet, the absence of such a requirement in RCW 10.95.050(4) is of little consequence because the remand anticipated by

the statute would be for the same charge as originally filed, for which a death notice had already been properly filed and served.[37]

Similarly, the State cites to 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." BOR at 22 (State's emphasis). Yet, this language supports Mr. Gregory's construction of the statute that a special sentencing proceeding can only be held if a notice was filed and served "as provided by RCW 10.95.040." The fact that the words "a notice" were used does not change this result.

The State also points to the lack of any language in RCW 10.95.040 requiring multiple notices or new notices whenever any amendment is made to the charging document. BOR at 21. However, the triggering event for RCW 10.95.040 is the "arraignment upon the charge of aggravated first degree murder." RCW 10.95.040(2). Given the arraignment on the Fourth Amended Information, that took place on February 12, 2001, RP (2/12/01) 4010-12, the statute clearly requires the service and filing of **a** notice of intent to seek death, a notice tied to the specific allegations in the amended information which reduced the aggravating factors.

[37] In any case, under RCW 10.95.090, once a death sentence is reversed, the statutory remedy is for imposition of a life sentence. AOB at 257-64.

What the State's analysis ignores is any discussion of the constitutional requirement that a prosecutor's decision to seek death be based upon the individualized weighing of the "unique circumstances of every case." *State v. McEnroe*, 179 Wn.2d 32, 44, 309 P.3d 428 (2013). RCW 10.95 has withstood constitutional scrutiny under the Eighth and Fourteenth Amendments and article I, sections 3, 12 and 14 because of such channeling of prosecutorial discretion. As argued in the opening brief, when the State downgrades the seriousness of the charge, by removing an allegation of the presence of an aggravating circumstance, 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 is still appropriate. AOB at 149-51. The State has no response to this argument at all.

In *Luvene*, the Court held, "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." *State v. Luvene*, 127 Wn.2d at 719 n.8. Where the Legislature adopts ambiguous language in a penal statute, the "rule of lenity" requires that the statute be strictly construed in favor of the defendant. *See State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013).

Here, if there is any ambiguity about RCW 10.95.040's requirements when the State files an amended information, which decreases the number of aggravating circumstances – if the quoted footnote in *Woods* creates ambiguity – then the rule of lenity requires that the statute be construed against the State, and in favor of Mr. Gregory.

The Court should therefore reverse the death sentence, and remand the case for imposition of life without possibility of parole.

6. The State of Washington should not execute someone where the main evidence used both to convict the person and to obtain a death sentence was obtained without a valid search warrant.

a. <u>The State does not dispute the invalidity of the warrant and blood draw orders</u>.

In the opening brief, Mr. Gregory challenged the admission of the key evidence against him under the Fourth Amendment and article I, section 7. Mr. Gregory identified several separate problems, including:

1. That the January 12, 2000, blood draw order, CP 443-44, did not actually authorize Mr. Gregory's blood to be turned over to the police for testing;[38]

2. That the September 8, 1998, blood draw order, CP 410-11, was invalid under *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010);

3. That the August 25, 1998, search warrant, CP 486-87, was not supported by a sworn affidavit.

[38] This argument is now explicitly supported by *State v. Figeroa Martines*, 182 Wn. App. 519, 331 P.3d 105, *rev. granted* 181 Wn.2d 1023, 339 P.3d 634 (2014).

AOB at 152-92.

The State makes no substantive arguments in response to the above constitutional claims, averring only that the arguments are procedurally barred by RAP 2.5(a) and/or the "law of the case" doctrine. BOR at 36-41. The failure to present argument on the substantive issues should be deemed a concession of error.[39] As for the State's procedural arguments, they are unavailing.

b. The claims are not barred by RAP 2.5(a).

The State claims that this Court should not address the invalidity of these orders because not all of the precise arguments Mr. Gregory makes were made below. BOR at 36. The State is wrong, because it is well-settled that a manifest error affecting a constitutional right may be raised for the first time on appeal under RAP 2.5 (a)(3). That rule "recognizes that constitutional errors are treated specially because they often result in serious injustice to the accused." *State v. Lamar*, 180 Wn.2d 576, 582, 327 P.3d 46 (2014) (internal quotation omitted). This is of particular concern in capital cases, and therefore procedural rules are more liberally construed in favor of permitting review of issues in death penalty appeals. *State v. Lord*, 117 Wn.2d 829, 849, 822 P.2d 177 (1991).

[39] *See In re J.J.*, 96 Wn. App. 452, 454 n.1, 980 P.2d 262 (1999); *United States v. Real Property Known as 22249 Dolorosa Street*, 190 F.3d 977, 983 (9th Cir. 1999).

The errors Mr. Gregory raises are constitutional because they implicate his right to privacy under the Fourth Amendment and article I, section 7. U.S. Const. amend. XIV; Const. art. I, § 7; *see Figeroa Martines*, 182 Wn. App. at 523. And they are "manifest" because they are apparent on the record.[40] S*ee Lamar*, 180 Wn.2d at 586. Thus, there is no question that RAP 2.5(a)(3) permits review of these constitutional violations.

c. The claims are not barred by the "law of the case" doctrine.

The State also invokes the "law of the case doctrine," urging this Court to "refuse to address issues that were raised or could have been raised in a prior appeal." BOR at 28. "Law of the case" is a "common law doctrine" that is a "mere rule of practice, but not a limitation on the courts' power." *Greene v. Rothschild*, 68 Wn.2d 1, 6, 8, 414 P.2d 1013 (1966).

The State acknowledges, as it must, that RAP 2.5(c) limits that common law doctrine. BOR at 28. Like other Rules of Appellate Procedure, RAP 2.5(c) should be "liberally interpreted." RAP 1.2(a).

[40] CP 410-11, 443-44, 452-53, 486-87, 492-505, 5758 5883, 5888 5930; RP (12/15/00) 606-44, 657-73; RP (12/18/00) 678-724; RP (4/16/10) 59 (98-1-03691-7 case number).

Both prongs of RAP 2.5(c) operate as a limitation on the "law of the case" doctrine and support reviewing these constitutional issues – whose substance is not disputed by the State – on their merits. *See State v. Elmore*, 154 Wn. App. 885, 897, 228 P.3d 760 (2010) (where two prior appeals did not address issues pertaining of merits of the convictions or sentence, "there are few, if any, settled issues and Elmore is entitled to a meaningful analysis of the merits of her issues.").

Even though RAP 2.5(c) forecloses the State's argument, it is also worth noting that applying the "law of the case" doctrine is, in many senses, inappropriate in criminal proceedings, and particularly in capital proceedings. In Washington, the common-law "law of the case" doctrine has its origins in civil cases where money, not people's lives, were at stake.[41] Later in the State's history, the doctrine was imported into the criminal realm in non-capital cases.[42]

In such cases, there has been little analysis, and at no time has the Court analyzed whether the application of the "law of the case" doctrine in criminal cases can be justified in light of the constitutional right to appeal

[41] *See, e.g., Menasha Wooden Ware Co. v. Nelson*, 53 Wash. 160, 161, 101 Pac. 720 (1909); *Hammock v. Tacoma*, 44 Wash. 623, 627-28, 87 Pac. 924 (1906); *Furth v. Snell*, 13 Wash. 660, 665-66, 43 Pac. 935 (1896).

[42] *See, e.g., State v. Worl*, 129 Wn.2d 416, 420-26, 918 P.2d 905 (1996); *State v. Schoel*, 58 Wn.2d 58, 61-64, 360 P.2d 561 (1961); *State v. Bauers*, 25 Wn.2d 825, 830-35, 172 P.2d 279 (1946).

such cases under article I, section 22 – a right that does not exist in civil proceedings. *See In re Grove* , 127 Wn.2d 221, 239, 897 P.2d 1252 (1995).

The mere presence of article I, section 22 in the state constitution requires giving the right to appeal "the highest respect." *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). In contrast, "the United States constitution is silent upon the right of appeal," *In re Woods v. Rhay*, 54 Wn.2d 36, 42, 338 P.2d 332 (1959), and "under the Federal constitution, appellate review is a privilege." *State v. Schoel*, 54 Wn.2d 388, 392, 341 P.2d 481 (1959). Washington was the first state to constitutionalize the right to appeal, a fact that has led this Court to give enhanced rights to appellants.[43] Because of Washington's unique role of having been the first American jurisdiction to adopt a constitutional right to appeal in criminal cases, this Court has repeatedly held that there is a presumption against finding a waiver of the right to appeal. *See State v. Tomal*, 133 Wn.2d 985, 989, 948 P.2d 833 (1997).

In light of the strength of the right to appeal under article I, section 22, the Court should look with suspicion on a common law rule of practice that bars review of constitutional issues in criminal cases because they

[43] *Compare State v. Rafay*, 167 Wn.2d 644, 222 P.3d 86 (2009) *with Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000).

were not raised in a prior appeal. However, the Court need not decide such an expansive issue at this time, because whatever its application is to garden-variety criminal cases, the "law of the case" doctrine is not well-suited to capital litigation. "[A]s has been observed many times, death as a punishment is different. When a defendant's life is at stake, the courts have been particularly sensitive to insure that every safeguard is observed." *State v. Frampton*, 95 Wn.2d 469, 478, 627 P.2d 922 (1981). *See also Gregory*, 158 Wn.2d at 859.

This is particularly the case where the State does not dispute the merit of many of Mr. Gregory's arguments. Here, use of the "law of the case" doctrine to bar review of constitutional issues whose merit is uncontested is overly harsh and elevates form over substance. Mr. Gregory should not die because of a judicially created discretionary rule of procedure. Such a result would be freakish and arbitrary, and would violate the Eighth Amendment and article I, section 14.

The Court has applied the "law of the case" doctrine in a capital case only one time previously, in *State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006 (2001) ("*Clark II*"). In *Clark II*, the Court rejected an attempt to relitigate an issue – whether the notice of intent to seek the death penalty had been properly served – that had been the subject of the prior interlocutory appeal in *Clark I*, 129 Wn.2d 805. When Mr. Clark re-raised

the same exact issue on his direct appeal, this Court held that "the law of the case doctrine prevents Clark from seeking further reconsideration of our decision. . . . The court's unanimous ruling in *Clark I* is not clearly erroneous." *Clark II*, 143 Wn.2d at 744-45.

Mr. Clark also raised a subsidiary issue in the second appeal – the forced disclosure of the "public defender's own time-stamped copy of the death penalty notice" – that this Court concluded "sound[ed] like another attempt to relitigate *Clark I*." *Clark II*, 143 Wn.2d at 746. The Court then quoted from a civil case: "[Q]uestions determined on appeal, *or which might have been determined had they been presented*, will not again be considered on a subsequent appeal." *Id*. (quoting *Folsom v. County of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988) (internal quotes omitted) (emphasis in original).[44]

Clark II is of limited relevance to the instant case. Mr. Clark wished to relitigate, in his direct appeal, precisely the same issue he raised in his prior interlocutory appeal, based upon the same record that previously existed. Although in his second appeal (the direct appeal), Mr.

[44] The quoted language – "or which might have been determined had they been presented" – is not a necessary component of the "law of the case" doctrine. This Court has, on occasion, held that "law of the case" does not bar consideration of issues not specifically addressed in the first appeal. *See Junkin v. Anderson*, 21 Wn.2d 256, 257, 150 P.2d 678 (1944). *See also United States v. Lummi Nation*, 763 F.3d 1180, 1185 (9th Cir. 2014) (for law of the case to apply "the issue in question must have been decided explicitly or by necessary implication in the previous disposition") (internal quotes and emphasis deleted).

Clark argued that the Court should reconsider its earlier decision to prevent a "manifest injustice," this Court actually decided that his claim had no substantive merit: "Clark had both actual and timely notice of the state's intent to seek the death penalty." *Clark II*, 143 Wn.2d at 745. Therefore, citation to the "law of the case" doctrine was not even necessary to the holding which actually rested on substantive grounds. Since the Court had remanded the case specifically for a special sentencing proceeding in *Clark I*, application of the "law of the case" doctrine made sense.

Mr. Gregory's case is quite different. In 2006, after the first appeal, this Court reversed Mr. Gregory's sentence, and thus there was no final judgment. *See In re Skylstad*, 160 Wn.2d 944, 946, 162 P.3d 413 (2007). Because there was no final judgment, in 2006, Mr. Gregory could not even seek *certiorari* review in the United States Supreme Court on the Fourth Amendment issues. *See Johnson v. California*, 541 U.S. 428, 124 S. Ct. 1833,158 L. Ed. 2d 696 (2004). It was only in 2012 that a new judgment and sentence was entered, and Mr. Gregory's appeal of that new judgment ordinarily would bring up with it the propriety of all prior orders, even prior appealable orders. *See Fox v. Sunmaster Products*, 115 Wn.2d 498, 503-05, 798 P.2d 808 (1990).

When the case was returned to superior court, after this Court's 2006 decision, Mr. Gregory specifically raised motions to suppress under the Fourth Amendment and article I, section 7. Not only did the trial court deny those motions on their merits, but the State then introduced evidence at the second penalty trial, DNA evidence and the knife, that had been obtained as a result of the three searches and seizures noted above. The State did not have to introduce this evidence – it could have presented to the jury a brief overview of the facts of the case and the fact that Mr. Gregory was convicted of murder without having to introduce the DNA evidence and the knife. Had the State chosen not to introduce any DNA evidence or the knife, and had Mr. Gregory not moved for suppression of those items on remand, then, perhaps the State's arguments about "law of the case" would be stronger. The case would be more like *Clark II* – a second appeal based on the same record as the first appeal.

However, given the State's use of the DNA and knife evidence at the second penalty trial in 2012, not as evidence of guilt, but as a reason why the jury should vote to execute Mr. Gregory, *Clark II* does not apply. The "law of the case" doctrine should not be applied in a capital case to bar review of constitutional issues whose merit the State does not dispute.

Accordingly, the Court should consider the substance of the issues raised by Mr. Gregory in this appeal involving the three searches and

seizures that had not previously been raised in the prior appeal. This is particularly the case where there is a full record upon which review can be made and Mr. Gregory has consistently, at every step of the way, challenged the searches and seizures in his case. *See State v. Jones*, 163 Wn. App. 354, 359-60 & n.9, 266 P.3d 886 (2011).

7. This Court should remand the case to the superior court for a *Franks* hearing where it is apparent that the State and cooperating law enforcement agencies knowingly misrepresented the background of Robin Sehmel.

The State does not dispute any of the facts in Mr. Gregory's brief about Robin Sehmel's background. AOB at 157. It asserts only that the failure to mention Ms. Sehmel's longtime work as a professional informant for Tacoma and Pierce County does not constitute a material omission sufficient to warrant a *Franks*[45] hearing. BOR at 35-36. In so arguing, the State ironically omits key facts from its brief. Most notably, the Tacoma Police Department knew that Ms. Sehmel not only had a history of committing crimes of dishonesty, but that shortly before accusing Mr. Gregory of rape, her mental health had deteriorated to such a degree that she tried to sell her baby at a bus stop. CP 5888-5930 (specifically TPD Inc. No. 982160548 (CP 5916-19)).

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

The search warrant affidavit also omitted mention of the fact that Ms. Sehmel claimed to have scratched her attacker's back, yet Mr. Gregory had no scratch marks whatsoever. CP 413-14. This information clearly undermines the credibility of the accusation, and its omission was material. These facts are in the record and support remand for a *Franks* hearing regardless of the fact that counsel below emphasized Ms. Sehmel's work as a police informant in arguing the motion. *See supra* fn. 42.

Although the above defects on their own are sufficient to warrant a hearing, this Court should also be concerned about the degree to which Robin Sehmel was involved with the Pierce County Prosecuting Attorney's Office and its cooperating law enforcement agency, the Tacoma Police Department. What is now known about Ms. Sehmel raises major questions that need to be answered before the State should be allowed to execute Mr. Gregory. These questions include who else knew that Ms. Sehmel's allegations were false and when they knew of the perjury.

Finally, the trial court's ruling on this issue should be afforded no deference because it rested on the erroneous belief that this Court had already ruled on the *Franks* issue during the first appeal. RP (6/24/11)

284.[46] This Court never ruled on *Franks*-type issues in the first appeal. The Court's opinion addressed other suppression issues related to the blood draws, but the issue regarding the exclusion of information about Ms. Sehmel's background from the blood draw applications was never discussed.

In sum, the State seeks to execute Mr. Gregory based on evidence obtained as a result of allegations from a long-time professional informant, with significant mental health problems undermining her credibility. The informant later admitted that her allegations and prior testimony were lies. The TPD and the prosecutor never told the judges who authorized the three key searches about the informant's true history. Under these circumstances, the Court should remand the case for a *Franks* hearing before Mr. Gregory is executed.

[46] The State confuses the court's ruling on an argument *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), with the ruling on the *Franks* issue. *See* BOR at 35; RP (6/24/11) at 283-84. Only the *Franks* ruling is at issue on appeal.

8. The refinement of recent jurisprudence applying article I, section 7, and Fourth Amendment requires reexamination of the suppression holdings of *State v. Gregory*.

a. *Garcia-Salgado* made it clear that orders to obtain body samples under CrR 4.7 must comport with the same requirements as search warrants.

The State argues that because this Court's decision in *State v. Garcia-Salgado, supra,* was based on the holding of *State v. Gregory*, *supra*, *Garcia-Salgado* "is yet another reason this court should decline to revisit what is now clearly settled law." BOR at 38. However, before *Garcia-Salgado,* CrR 4.7 had not been interpreted as requiring courts to make findings consistent with a search warrant before ordering defendants to give bodily samples.

Indeed, in *Garcia-Salgado* itself, the State cited to *Gregory* and argued that an order under CrR 4.7 did not need to meet the requirements of a search warrant because of a prior determination of probable cause to support the filing of information. *See Brief of Respondent, State v. Alejandro Garcia-Salgado* (COA No. 60823-1-I) at 13. The Court of Appeals adopted this State's argument. *State v. Garcia-Salgado,* 149 Wn. App. 702, 706-07, 205 P.3d 914 (2009), *rev'd State v. Garcia-Salgado*, *supra*. This Court ultimately rejected the State's argument and the Court of Appeals' decision, but until this Court's decision, *Gregory*'s holding

was not clear. Only after *Garcia-Salgado* could it be said that a blood draw order under CrR 4.7 needed to conform to the same requirements of a search warrant.

Given the refinement of the requirements for the issuance of a court order authorizing a search of someone's body for forensic evidence, RAP 2.5(c)(2) allows this Court to review again the suppression issues raised in *State v. Gregory*, *supra*, as well as issues that were not clearly raised in the first appeal.

b. *Winterstein* requires consideration of the 1998 blood draw order.

This Court's decision in *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009), made it clear that there was no "inevitable discovery" exception to the exclusionary rule under article I, section 7. The State accuses Mr. Gregory of "twisting of the court's phrasing" so he could raise an issue not raised in the trial court. BOR at 39-40. It is not clear what exactly the State is arguing.

Both in the trial court and in the first appeal, Mr. Gregory indisputably challenged the September 1998 blood draw order. CP 5990-6046; *Appellant's Opening* Brief, No. 71155-1 at 104-11. That order does not survive scrutiny under *Garcia-Salgado*. *See* AOB at 185-87.

In the first appeal, this Court specifically declined to review the propriety of the 1998 blood draw order. *State v. Gregory*, 158 Wn.2d at 825. The Court's decision here relied on *State v. Warner*, 125 Wn.2d 876, 889, 889 P.2d 479 (1995), a case explicitly grounded in the doctrine of the federal inevitable discovery exception to the exclusionary rule. *Id*. (citing *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)).

Mr. Gregory did not "twist" any phrasing – this Court did not review the propriety of the September 1998 blood draw because of a federal doctrine that no longer has any applicability in Washington State under article I, section 7. In light of *Winterstein*, this Court can review its earlier ruling anew. RAP 2.5(c)(2).

c. Recent case law supports reconsidering this Court's holding in *Gregory* regarding the use of Mr. Gregory's DNA seized in one case to investigate a separate offense.

In his opening brief, Mr. Gregory asked this Court to reconsider its holding regarding the use of his genetic material, seized in the context of the now-dismissed rape case, to compare against samples in the murder case. AOB at 181-84. The State argues against this position, claiming that Mr. Gregory "cites no authority from after this court issued *Gregory* and makes no substantive argument whatsoever." BOR at 40. Yet, Mr.

Gregory did make a substantive argument and did cite to authority that post-dated *Gregory* (such as *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552, 185 L. Ed.2d 696 (2013)). AOB at 183.

Finally, Mr. Gregory's arguments here are supported by a recent Fourth Circuit opinion. *United States v. Davis*, 690 F.3d 226 (4th Cir. 2012). There, the Fourth Circuit concluded that the police conducted an unreasonable search in violation of the Fourth Amendment when they extracted the defendant's DNA profile from his lawfully seized clothing but then tested it as part of an unrelated murder investigation. The court concluded that the defendant had an expectation of privacy in his DNA profile, a privacy right violated by the extraction, testing and comparison of his DNA against that found in the unsolved murder investigation. *Davis*, 690 F.3d at 242-50.

Similarly, here, even if the State properly obtained Mr. Gregory's blood sample in the now-dismissed rape case, Mr. Gregory still retained a privacy interest in his genetic information. The warrantless use of that information as part of *another* investigation violated Mr. Gregory's privacy rights and thus the Fourth Amendment and article I, section 7. Accordingly, under RAP 2.5(c)(2), this Court should reconsider its earlier decision.

9. 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.

As noted in the opening brief, the trial court violated Mr. Gregory's constitutional right to an impartial jury by denying his motion to excuse Juror 132 for cause. 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. Juror 132's bias and inability to follow the law warranted excusal for cause under the relevant caselaw. AOB at 192-206 (citing, inter alia, *Uttecht v. Brown*, 551 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007); *Morgan v. Illinois*, 504 U.S. 719, 726-28, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988); *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997); *Fugett v. Commonwealth*, 250 S.W.3d 604, 612-16 (Ky. 2008)).

The State implicitly concedes that this issue was fully preserved and that if error occurred it was prejudicial, not harmless. BOR at 41-47. The State denies there was error, but in addressing the issue it does not

even cite *Morgan* and *Ross*, which are the seminal and controlling U.S. Supreme Court cases on this issue. BOR at xvi-xvii; 41-47. It discusses the trial court's duty to "death qualify" the jury, without mentioning the corresponding duty to "life qualify" the jury. *Compare* BOR at 41-42 *with Morgan*, 504 U.S. at 724 & 728-29 (citing *Ross*, 487 U.S. at 85). Only the latter is at issue in this case. *See* AOB at 192-206.

The State attempts to insulate the trial court's ruling from review by describing the judge's ruling as demeanor-based when in fact there is no support in the record for such a contention. BOR at 46 (referencing court's alleged reliance on juror's "appearance, body language, tone of voice, [and] posture," with no citation to the record). This is improper. *Cf. Snyder v. Louisiana*, 552 U.S. 472, 479, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) (in context of *Batson* challenge, reviewing court cannot presume trial judge relied on demeanor where "the record does not show that the trial judge actually made a determination concerning [the juror's] demeanor").

The State agrees with Mr. Gregory that in addressing the question of whether a for-cause challenge was improperly denied, a juror's voir dire responses must be viewed as a whole. BOR at 44-47; AOB at 201-05; *see Uttecht v. Brown*, 551 U.S. at 13-18; *Fugett*, 250 S.W.3d at 613-16. But the State then proceeds to ignore the totality of circumstances in favor of

the juror's isolated assertions of his ability to follow the law. BOR at 44-47.

As explained in the opening brief, this case is like *Brown* and *Fugett*. AOB at 201-05. In both of those cases, jurors' multiple assurances that they could follow the law were insufficient to overcome the reasonable inference from their other statements that they were substantially impaired. *Uttecht v. Brown*, 551 U.S. at 18; *Fugett*, 250 S.W.3d at 615. 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.

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.

The State claims that it was merely Juror 132's "personal opinion" that the defense should bear the burden of proof. BOR at 45. The State notes, as Mr. Gregory already acknowledged, that the prosecutor attempted to rehabilitate this juror and convinced the juror to say he could "commit" to holding the State to its burden. *Id.* But the State neglects to mention that right after this exchange – as before it – Juror 132 made clear that he would place the burden on the defense. This was no mere "opinion":

> MR. PURTZER: Are we going to have to prove to you that there's reasons why Mr. Gregory should live, even though he brutally killed this lady?
>
> JUROR NO. 132: Yes.
>
> MR. PURTZER: That's even with the presumption that he should live, we have to prove to you that he should live?
>
> JUROR NO. 132: Yes.

RP (4/18/12) 2058-59.

The trial court's denial of the defense motion to exclude this substantially impaired juror for cause violated Mr. Gregory's rights under the Sixth and Fourteenth Amendments and article I, sections 21 and 22. The remedy is reversal and remand for a new penalty-phase hearing.

10. The State's view of "passion or prejudice" review is stilted.

The State essentially ignores most of Mr. Gregory's arguments regarding "passion or prejudice." The State focuses solely on this Court's prior statements as to how closing arguments which appeal to fear and anger could possibly be the basis for reversal under RCW 10.95.130(2)(c). BOR at 171 (citing *Cross*, 156 Wn.2d at 634-35; *Elledge*, 144 Wn.2d at 85; *Davis*, 175 Wn.2d at 374-75). Of course, such arguments were in fact made in this case. *See* AOB at 20-59.

While this Court has cited closing arguments as a possible basis for "passion or prejudice" reversal, the Court has never restricted review under RCW 10.95.130(2)(c) to review of closing arguments. "[A] court must not interpret a statute in any way that renders any portion meaningless or superfluous." *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014) (internal quotes omitted). Limiting "passion or prejudice" review simply to whether the State committed prosecutorial misconduct in closing argument would essentially gut RCW 10.95.130(2)(c) of any independent force because presumably prosecutorial misconduct in closing would result in reversal on that basis alone. Understandably, the State would like this Court to adopt a narrow standard of review under RCW 10.95.130(2)(c) because such a constricted

view allows the State to minimize the racially and emotionally charged atmosphere that pervaded the trial level proceedings in this case.

The State also appears to believe that "passion or prejudice" review should be confined only to events that actually took place in front of the jury during the second penalty trial. BOR at 179-80. Under the State's myopic view, if there was a lynch mob outside the courthouse calling for a defendant's death during the 2001 murder trial, but no such mob was present during the later penalty phase, the defendant would be powerless to raise a "passion or prejudice" argument. Yet, if a guilty verdict is based upon "passion or prejudice," then the "sentence of death" necessarily is a result of that tainted verdict.

Moreover, there is nothing in RCW 10.95.130(2)(c)'s structure that limits it simply to evidence or argument before the jury. The statute is worded in the passive voice, and clearly does not restrict review to evidence introduced before the jury. Rather, it is worded in a manner to allow this Court to review the entire case for evidence of "passion or prejudice."

The State does not dispute certain historic facts that demonstrate the role that race or emotion played in this case, whether or not they were facts presented to the second sentencing jury. Mr. Gregory, an African-American male on trial for raping and murdering a European-American

woman, was restrained during the murder trial, restraints which were justified, in part, because of his size, age and physical condition. AOB at 210. When Mr. Gregory's family (who were African-American) came to court to watch the trial, they were treated differently for relatively minor infractions (facial expressions in response to testimony) than how (white) law enforcement witnesses or prosecutors were treated for far-worse misconduct (such as conversations with jurors). AOB at 215-16.

The murder trial was characterized by the repeated use of antiquated racial terminology such as "Negroid," AOB at 213, while the prosecutor used racially charged phrases outside the jury's presence such as "lily-white."[47] To be sure, the State now claims the prosecutor's use of that term to be innocent, even going so far as to quote Shakespeare. BOR at 180 n. 20.[48] However, the issue is not what "lily-white" meant in 16th century England, but what it means today, in the U.S. with its legacy of slavery and racism. A quick look at the dictionary reveals the racist use of that term:

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[47] In closing argument, the State also quoted English judge, Lord Alfred Denning, RP (5/14/12) 3026-27, Ex. 1 (filed 6/13/12) (Slide 49), who was forced to resign because of his racist views. *See* "Noted British Judge Quits After Charges of Racism in a Book," *New York Times* (5/29/82) (http://www.nytimes.com/1982/05/29/world/noted-british-judge-quits-after-charges-of-racism-in-a-book.html) (last viewed 6/23/15).

[48] The full quote from *A Midsummer Night's Dream* actually includes an anti-semitic slur: "Most radiant Pyramus, most lily-white of hue . . . Most brisky juvenal and eke most lovely Jew." Act III, Scene I.

> designating or pertaining to any faction, organization, or group opposing the inclusion of blacks, especially in political or social life.

Dictionary.com (http://dictionary.reference.com/browse/lily-white?s=t) (last viewed 6/23/15).

The explicit and implicit racism swirling around this case must now be viewed against the backdrop of Professor Beckett's study on race and the death penalty in Washington. While the State's lay criticisms of this study and failure to produce its own study is addressed more thoroughly in section 2 of this brief, Professor Beckett has concluded "black defendants are four and one half more likely than similarly situated non-black defendants to be sentenced to death." Beckett Report (10/13/14) at 30.

The reason for this bias in favor of executing black defendants is complicated, but the type of subconscious racism explained by the lead opinion in *Saintcalle*, 178 Wn.2d at 46, is apparent in this case. From shackling Mr. Gregory at trial because of his "size," to the differential treatment afforded to people who misbehaved in court, it was apparent that the justice system in Pierce County works one way for white people but another for black people. On top of this, the State exploited the "victim impact" testimony and other personal details about G.H.'s life to present an emotionally charged and angry contrast between the white victim, and

black defendant, charged with rape/murder. AOB at 218-21. The State did not want to "humanize" Mr. Gregory, RP (5/8/12) 2740, for a reason – the State wanted the jury to see him as "other," perpetuating racist stereotypes, and thus make it easier to vote to execute him.

In *In re Gentry*, 179 Wn.2d 614, 316 P.3d 1020 (2014), this Court was presented with a time-barred PRP claiming prosecutorial misconduct based on racial bias. The Court held that its ruling in *Monday* would not be applied retroactively, but that, in any case, for purposes of a collateral attack petition, Mr. Gentry needed to show actual and substantial prejudice, and he was unable to do so. *In re Gentry*, 179 Wn.2d at 630-42.

Mr. Gregory's case is different. To begin with, this case is on direct appeal, rather than collateral review, and there is no question but that this Court's holding in *Monday* applies. More importantly, the issue here is not narrowly confined to whether there was prosecutorial misconduct as a result of racial bias. Rather, the issue is whether the implicit and overt racism that permeated this case – both at the systemic level and in the context of this case – is a ground for relief under RCW 10.95.130(2)(c)'s "passion or prejudice" review.

While two decades ago, in *State v. Gentry*, 125 Wn.2d 570, 658, 888 P.2d 1105 (1995), the Court rejected a "passion or prejudice" argument, despite racist remarks made by the prosecutor and witnesses

about the defendant and defense counsel, twenty years have passed and the entire legal system is now more sensitive to institutionalized racism than it was in the 1990s.[49]

Here, given the research – research that did not exist in 1995 – it is clear that race drives the imposition of the death penalty in Washington. That conclusion is apparent from the way that Mr. Gregory's case was handled, from start until finish. This Court should use its unique supervisory role, overseeing all death penalty cases in Washington, RCW 10.95.100, to strike down the death sentence imposed on Mr. Gregory.

11. The State presented insufficient evidence to prove beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency.

As explained in the opening brief, the State presented insufficient evidence as a matter of law to prove beyond a reasonable doubt that death was the appropriate sentence in this case. Although the crime was brutal, it involved a single victim and the conviction represented an aberration in Mr. Gregory's life. He had no history of violent felonies, was young at the time of the crime, and behaved well in prison as he matured. An expert testified he was extremely unlikely to exhibit future dangerousness. Mr. Gregory was an especially thoughtful son, grandson, brother, father,

[49] *See, e.g.*, Research Working Group of the Task Force on Race and the Criminal Justice System, "Preliminary Report on Race and Washington's Criminal Justice System," 87 *Wash. L. Rev*.1 (2012).

uncle and cousin, despite having been beaten and abandoned by his own father. There was insufficient evidence to support a death sentence. AOB at 222-28.

The State misunderstands the standard of review for a sufficiency challenge. It claims, "The mere presence of mitigating factors does not require reversal if *the jury* is convinced the circumstances of the crime outweigh the proposed mitigating factors." BOR at 151 (emphasis added). What the jury decided is not the issue. Any time the sufficiency of the evidence is challenged, the *jury* has already decided whether it believes the State proved its case. The State's explication of the rule therefore amounts to a rubber stamp. But on review, the appellate court determines whether a hypothetical rational jury could find the State proved its case beyond a reasonable doubt – not whether this jury, in fact, made such a finding. *See Jackson v. Virginia,* 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013); U.S. Const. amend. XIV; Const. art. I, § 3.

The State properly concedes that Mr. Gregory's history is "void of any violent offenses." BOR at 153. It nevertheless opines that Mr. Gregory's "fourteen years" of involvement in the criminal justice system is "significant." *Id.* This is a disingenuous mischaracterization of Mr. Gregory's history. Six years separated the first two convictions. *See id.* at

152. The first conviction was for theft of a skateboard at age thirteen. CP 1182; Ex. 7 (admitted 5/7/12). If anything, it is a *mitigating* circumstance that Mr. Gregory lived in a community that chose to charge him with a felony for an incident which in most places would be addressed outside the criminal justice system. Regardless, it is irresponsible to describe that incident – which was many years before the next conviction – as the beginning of a "fourteen-year" crime spree. Mr. Gregory's minimal criminal history is a significant mitigating circumstance that undercut the State's case. *Compare, e.g., 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).

The State is of course correct that the crime was brutal. BOR at 152. But although reasonable inferences from the evidence must be drawn in favor of the prosecution, the State shifts from permissible inference to impermissible conjecture by presuming Mr. Gregory and G.H. had never talked, and by opining that the crime was caused by "rage, hatred, and

viciousness" rather than childhood trauma or mental health issues. BOR at 152. There was no such evidence. *See State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006) (reversing for insufficiency of the evidence because although court views evidence in light most favorable to the State, "the existence of a fact cannot rest upon guess, speculation, or conjecture.").

Finally, the State wrongly implies that Mr. Gregory's inability to maintain fulltime employment is a factor tending to prove a death sentence is appropriate. BOR at 156. To begin with, Mr. Gregory did have several jobs. He not only worked as a parent to his daughter, but had also served as an electrician's apprentice, worked for a drilling company, and held other positions. RP (5/8/12) 2776, 2690-97, 2756; RP (5/10/12) 2941-42, 2953-54. Although he did not work full-time, there is no support in the record for the State's claim that "there was nothing to prevent [Mr. Gregory] from earning a living other than his own inertia." BOR at 156. The evidence showed that Mr. Gregory was a young, African-American male with a criminal (albeit nonviolent) record who did not have a high school diploma and who was busy raising his daughter. To the extent the jury could draw inferences about the reasons for his lack of fulltime employment, it could draw them from these pieces of evidence. Perhaps more importantly, there is no basis in law for the suggestion that a

person's lack of employment should render him more suitable for execution than a defendant with a job. *Cf. Bearden v. Georgia*, 461 U.S. 660, 671, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983) (constitution prohibits punishing a person for his poverty). In sum, the State failed to prove beyond a reasonable doubt that a death sentence was appropriate in this case, and this Court should reverse.

12. The State offers no compelling reason why Richard Clark received a benefit that Mr. Gregory did not receive.

Richard Clark kidnapped and raped Roxanne Doll, a seven year old child, and then stabbed her to death and dumped her body in a field. Clark was white, as was the victim. By the time of the murder, Clark, who was 26 years old, had a string of prior convictions, including one for unlawful imprisonment of his neighbor, a four year old girl, whom he bound in his garage and then sexually molested. Mr. Clark was convicted of aggravated murder for killing Roxanne Doll and sentenced to death. TR 175 & 277; *Clark II*, 143 Wn.2d at 738-44. At the time of the imposition of the sentence, Mr. Clark called the victim's family "murderers." A. Koch & D. Brooks, "Roxanne Doll's Killer Lashes Out At Girl's Parents," *Seattle Times*, April 26, 1997.[50]

[50] Found at http://community.seattletimes.nwsource.com/archive/?date=19970426&slug=2535775

Mr. Gregory was 24 years old when the murder (involving a rape and stabbing) in this case took place. The victim, G.H., was an adult woman. Mr. Gregory is African-American; G.H. was white. Prior to trial, the State specifically withdrew an allegation that Mr. Gregory kidnapped G.H. CP 5747-48, 6120-21. Mr. Gregory had a string of minor prior offenses, but no prior violent felonies.

In both Mr. Gregory's and Mr. Clark's cases, this Court reversed the death sentences, but affirmed the murder convictions. But in Mr. Clark's case, in contrast to the earlier holding of *State v. Bartholomew*, 104 Wn.2d 844, 850, 710 P.2d 196 (1985) ("*Bartholomew III*"), the Court gave the State the discretion to seek death a second time. *Clark II*, 143 Wn.2d at 783-84. On remand, the State exercised this discretion and opted not to seek death again, and no new sentencing jury was ever convened pursuant to RCW 10.95.050. TR 277.

The second Trial Report for Mr. Clark states that on "March 31, 2006, [the] State withdrew notice of intent to seek second death sentence," that Mr. Clark admitted he was solely responsible for the murder just before the sentencing hearing was to begin, and that the "wishes of the victim's family were a significant factor in the decision to withdraw the notice of special sentencing proceeding." TR 277. Contemporary press accounts detail an agreement that was worked out between Mr. Clark and

his attorneys, the victim's family, and the prosecutors: Mr. Clark was to admit the details of his crime in open court, he would drop all appeals and serve a life without parole sentence, and there would not be a second special sentencing proceeding.[51] In part because of this Court's order, Mr. Clark is alive and resides at the Monroe Corrections Center. *See* Department of Corrections, Find an Offender (DOC No. 962427) (http://www.doc.wa.gov/offenderinfo/Default.aspx).

Last year, expressing the public policy of the State of Washington, Governor Jay Inslee adopted a moratorium on executions based on the randomness and arbitrariness of capital punishment in Washington. AOB at 101-04. The different fates of Mr. Clark and Mr. Gregory illustrate precisely that arbitrariness and is a reason why RCW 10.95 is unconstitutional. There are no standards or guidelines in the statute governing the criteria by which someone whose death sentence is vacated on direct appeal will or will not face a second sentencing jury upon remand.

Mr. Clark is off death row because he admitted sole responsibility for his crime, because he no longer blamed the victim's family for stabbing seven year-old Roxanne Doll to death, and because Roxanne's

[51] S. North & J. Haley, "Deal Spares Girl's Killer: Richard Clark Evades Death Penalty in 1995 Murder of Roxanne Doll," *HeraldNet*, April 1, 2006 (http://www.heraldnet.com/article/20060401/NEWS01/604010750).

family went along with the deal. None of these factors are contained within the statutory scheme as legitimate reasons for not seeking death in a second penalty proceeding. Mr. Gregory, in contrast, did not stand up in open court and admit sole responsibility for G.H.'s murder, and her mother continues publicly to call for executing Mr. Gregory.[52] Mr. Gregory is currently on death row.

The State is correct when it argues that the record does not reveal the precise nature of any negotiations over the death penalty that took place below. BOR at 108-10. It is unknown whether Mr. Gregory did not get the benefit of the life sentence that Mr. Clark received (1) because Mr. Gregory did not take sole responsibility in open court for the murder of G.H.,[53] (2) because of G.H.'s mother's support of the death penalty, or (3) because of some other reason. It is also unknown, as the State points out, whether the parties truly believed that the State had discretion to abandon a second jury proceeding at this stage, or, rather, were not actually negotiating over whether the prosecutor would simply stand before the

[52] *See* R. LaCorte, "Washington Death Penalty Suspended By Governor Jay Inslee," *Huffington Post*, 2/11/14 (http://www.huffingtonpost.com/2014/02/11/washington-death-penalty-suspended_n_4768424.html).

[53] The State argues "defendant's conviction was left intact after the first appeal and the state did not need an admission of guilt from defendant in order to proceed with the second penalty hearing." BOR at 111. But, Mr. Clark's conviction was also "left intact after the first appeal" and thus an admission in court was not legally needed in that case to proceed to a second penalty proceeding. There was no difference procedurally between the two cases.

jury and ask for a life sentence. BOR at 110 ("[T]he negotiations could have involved whether the prosecution would advocate for the death penalty at a second penalty phase rather than whether a second penalty phase would occur.").

The lack of a record here is not dispositive because the issue is not why the State chose to go down the path to execute Mr. Gregory, but rather what criteria are there in RCW 10.95 to insure that this decision was made fairly, based upon constitutionally permissible considerations. If the prosecutor in Pierce County had the sole discretion to pick and choose who gets a life deal after an appeal and who must face a second sentencing jury, the statutory scheme would be unconstitutional, as the majority in *Bartholomew III* concluded. *Bartholomew III*, 104 Wn.2d at 848-50.

The State argues that Mr. Gregory cannot complain that RCW 10.95.050 was "not followed in his case," BOR at 106, and "[t]he fact that a second penalty phase hearing was held in defendant's case shows compliance with the statute, as opposed to 'a decision based upon improper grounds.'" BOR at 112. But, the "complaint," as the State words it, is not simply that RCW 10.95 was applied to require a second penalty proceeding after a successful appeal, but that Mr. Gregory did not get the benefit that Mr. Clark received and that there are no standards in the

statute that govern the exercise of the State's discretion to pick and choose.

Unlike RCW 10.95.040(1)'s requirement that a prosecutor "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," RCW 10.95 generally contains no standards for a prosecutor to determine, after a death verdict is set aside by this Court, whether or not to seek death a second time.[54]

The fact that Mr. Clark received a benefit denied to Mr. Gregory is what gives Mr. Gregory standing to raise this claim. Mr. Clark certainly would not be able to argue that he was harmed by being allowed to live when others are to be killed. Mr. Gregory is the one who has to raise this issue because he is the one being hurt by the arbitrariness of the statute.

The State also argues that the remedy ordered by this Court in *Clark II* was not really part of its holding because the Court did not cite RCW 10.95.050. BOR at 107. But whether the Court ever specifically

[54] Whether the State continues to believe that there are "not sufficient mitigating circumstances to merit leniency" is not the issue. RCW 10.95 does not confine the State to continue to seek death a second time based only on reasons related to mitigating circumstances. Rather, RCW 10.95 allows the State to decide not to seek death, upon remand, for *any* reason, including, for instance, budgetary concerns, a factor not contained in the statute. *See Bartholomew III*, 104 Wn.2d at 849 ("In contrast, if the prosecutor can decide after trial whether to seek the death penalty, the prosecutor has unfettered discretion after a case is remanded for error in the penalty stage. No statute exists to give him any guidance whatsoever in administering such power.").

cited RCW 10.95.050 in *Clark II* is not material. A court does not have to cite explicitly to any principle of law for the court's decision to constitute a holding. *See, e.g., Harrington v. Richter*, 562 U.S. 86, 99-100, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (summary denial orders can constitute adjudication on the merits of federal constitutional claims). The mere fact that the Court in *Clark II* gave the State the sole discretion to seek death a second time is what is legally significant, whether or not the Court gave an extended analysis of its decision. As much as the State would like to ignore it, the last line of *Clark II* is the decision of the case. Whether well-reasoned or not, the State cannot deny that this Court explicitly gave prosecutors the power that it had previously denied them in *Bartholomew III*.

Having given the State, in *Clark II*, the power to abandon the quest for death after a successful capital appeal, the only issue is whether RCW 10.95 is constitutional in light of the unbridled discretion the State now enjoys. Mr. Gregory relied on this Court's decision in *Bartholomew III* to argue that the power given to the State in *Clark II* was unconstitutional under the Eighth and Fourteenth Amendments and article I, sections 12 and 14. AOB at 235-38.

The State argues that the portion of *Bartholomew III* that discusses constitutional considerations is only dicta, and that it rests upon a case,

State v. Zornes, 78 Wn.2d 9, 475 P.2d 109 (1970), that is no longer "good law." BOR at 112-13. Yet, the Court's discussion of constitutional principles in *Bartholomew III*, 104 Wn.2d at 848-50, was not "dicta." Rather, the Court explicitly buttressed its statutory construction of RCW 10.95.050 with principles both from the Fourteenth Amendment's Equal Protection Clause[55] and from Eighth Amendment jurisprudence.[56] It is an accepted practice of statutory construction to construe a statute to avoid serious constitutional problems. *See DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988). Thus, the constitutional principles that underlay the Court's analysis of RCW 10.95.050 in *Bartholomew III* were part and parcel of its ultimate holding. *See Bartholomew III*, 104 Wn.2d at 850 ("The prosecution has no right, statutory or constitutional, to usurp the jury's functions to determine *mitigation* in this case, and make the decision whether the defendant should live or die.") (emphasis in original).

As for the Court's citation to *Zornes*, the Court cited the case for the unremarkable proposition that the Fourteenth Amendment's Equal Protection Clause prohibits giving a prosecutor unbridled discretion to

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[55] *See Bartholomew III*, 104 Wn.2d at 848-49, where the Court addresses the equal protection problems of having unbridled prosecutorial discretion.

[56] *See Bartholomew III*, 104 Wn.2d at 849-50, where the Court, although not mentioning explicitly the Eighth Amendment, cites to *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), and the importance in capital cases of having a link between the community and the penal system.

determine what penalties could be imposed on similarly situated defendants. *Bartholomew III*, 104 Wn.2d at 849. *Zornes* was later overruled, but on a narrow ground. *See State v. Kirwin*, 165 Wn.2d 818, 831, 203 P.3d 1044 (2009). Nothing about the history of *Zornes* invalidates the general equal protection and 8th Amendment problems with giving the prosecutor the type of unbridled discretion to pick and choose who gets life and who dies that the Court announced in *Clark II*.

The State also argues that giving the State the ability to afford an individual person mercy does not violate the Constitution. BOR at 114-15. Here, the State relies on statements made in the three-justice opinion in *Gregg*. However, the paragraph of this opinion, quoted by the State, actually supports this Court's conclusions about unbridled discretion in *Bartholomew III*:

> The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, [408 U.S. 238], *in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense*. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.

Gregg, 428 U.S. at 199 (opinion of J. Stewart) (emphasis added).

The issue here is not just whether the State can exercise mercy at an earlier stage of the case, and remove someone from consideration for the death penalty. Rather, the issue raised in *Bartholomew III* and presented here is whether the State can afford someone mercy *after he or she has already been convicted of aggravated murder*, but prior to sentencing. Here, both Mr. Clark and Mr. Gregory, upon remand, stood guilty of aggravated murder. Allowing a prosecutor, without standards, to pick and choose, at this point, who should receive mercy and live and who should face death before a second sentencing jury, is what violates the Eighth and Fourteenth Amendments and article I, sections 12 and 14.

In any case, what the State ignores in its briefing is the fact that whatever legal principle the State thinks should govern, in reality, this Court has announced two different possible remedies in cases that are similarly situated – mandatory resentencing before a death qualified jury, as announced in *Bartholomew III*, and discretionary resentencing, based upon the State's "desires," as announced in *Clark II*. In practice, this Court has *applied* RCW 10.95 in an arbitrary and capricious manner, in violation of the Eighth Amendment and article I, section 14 (and the Due Process and Equal Protection Clauses of the Fourteenth Amendment and article I, sections 3 & 12). *Godfrey*, 446 U.S. at 428; *Hicks v. Oklahoma*, 447 U.S. 343, 346-47, 100 S. Ct. 2227, 65 L.Ed.2d 175 (1980).

The State ignores this inconsistent application because there is no way to fix the problem at this stage and at the same time execute Mr. Gregory. The Court cannot, without violating the above-noted state and federal constitutional provisions, simply overrule *Clark II*, and return to *Bartholomew III*, deciding that the "mercy" afforded to Mr. Clark was a mistake, and that Mr. Gregory should be denied the same opportunity.

The discretion this Court gave to the State in *Clark II* is unconstitutional, as this Court held in *Bartholomew III*. RCW 10.95 violates the Eighth and Fourteenth Amendments and article I, sections 3, 12 and 14. The Court should vacate the death sentence in this case and remand for entry of a life without parole sentence.

13. The State's arguments related the "facts and circumstance" of the murder do not address key issues and misrepresent the record.

a. <u>This issue is preserved</u>.

The State argues that Mr. Gregory has not preserved all of the challenges he has made to RCW 10.95.060(3) or the challenges to the introduction of various categories of evidence at the special sentencing hearing. BOR at 48-58. The State is mistaken.

In the trial court, Mr. Gregory argued that RCW 10.95.060(3) was unconstitutional because the statute "inappropriately permits the

introduction of evidence of the crime that will effectively act as non-statutory aggravating factors, and fails to provide any meaningful guidance to the jury to channel its decision." CP 534. Mr. Gregory's brief set out a detailed constitutional analysis as to why RCW 10.95.060(3)'s failure to define "facts and circumstances" violated *Bartholomew I*, *Bartholomew II*, and the due process and cruel and unusual punishment provisions of the Eighth and Fourteenth Amendments and article I, sections 3 & 14. CP 524-42.

At the time Mr. Gregory filed the general brief on this subject in May 2011, it was not clear yet exactly what evidence the State sought to introduce, so Mr. Gregory noted that he would file a separate motion to address specific evidence. CP 526. Later, after the trial court denied Mr. Gregory's motion to declare RCW 10.95.060(3) unconstitutional, CP 620-21, Mr. Gregory filed a brief which sought exclusion of four categories of evidence which included gruesome photos, DNA evidence and the knife. Mr. Gregory specifically referenced the prior briefing attacking the constitutionality of RCW 10.95.060(3), and argued that allowing in this evidence would violate various constitutional provisions and the principles of the *Bartholomew* cases. CP 666-79. The trial court denied the motion to limit the evidence. CP 738-39.

The trial court's rulings in this regard were final. The trial court never required the defense to renew its objections. CP 620-21; CP 738-39; RP (6/24/11) 307-08; RP (8/19/11) 316-17; RP (3/5/12) 73-74; RP (3/6/12) 138-39. Mr. Gregory therefore had a standing objection to this evidence and did not have to object again. *See State v. Powell,* 126 Wn.2d 244, 256, 893 P.2d 615 (1995).

The State is just wrong when it argues that "the defense retracted its objection" to the DNA evidence. BOR at 57. Actually, defense counsel stated that the evidence was "irrelevant at this point in time for purposes of presentation of the evidence." RP (5/7/12) 2621. Instead, counsel agreed that the DNA evidence could come before the jury by means of a stipulation, instead of live witnesses. There was no evidence of abandonment of the prior objections to the admission of the evidence at all. RP (5/7/12) 2620-21; CP 1030-31.

On appeal, Mr. Gregory is still contesting the admission of the same categories of evidence that he sought to exclude below – gruesome evidence, DNA and the knife. In his opening brief, Mr. Gregory simply provided a more detailed explanation as to why these categories of evidence constituted improper non-statutory aggravating factors. He described, for instance, how a proceeding that was designed to focus on mitigation evidence was turned, in his case, into the type of unitary

guilt/penalty proceeding was that was common in the pre-*Furman* and pre-*Gregg* era.

It was in this context that Mr. Gregory explained how the DNA evidence was used by the State as evidence of "lack of residual doubt," which is an improper non-statutory aggravating factor. AOB at 246-49. While trial counsel did not attach this label – "lack of residual doubt" – to the evidence, they clearly objected to the evidence itself on exactly the same legal basis as is being raised on appeal.

Similarly, trial counsel objected to the admission of the knife and the gruesome photographs, again in a brief that set out the constitutional objections to such evidence. CP 666-79. On appeal, Mr. Gregory has renewed those objections. To the extent he has raised more specific constitutional objections, such as an argument under *State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984), or why gruesome photographs violated the principles of the *Bartholomew* cases, such arguments can certainly be considered under RAP 2.5(a)(3) and the expanded review of issues in a death penalty case. *See Gregory*, 158 Wn.2d at 859.

Finally, even though, below, Mr. Gregory did not object to evidence of the thoroughness of the police investigation (AOB at 247 n. 143), because of the way this issue ties into Mr. Gregory's other arguments about non-statutory aggravating factors, the Court can consider

this argument. Mr. Gregory has always objected to the way the sentencing proceeding in his case was transformed from one that was supposed to focus on mitigation to one that allowed the State seek death because of the efficiency of the police.

b. A trial court does not have the discretion to admit evidence into the penalty phase of a capital case that violates the Eighth Amendment and article I, section 14.

The State argues that "[t]his Court reviews rulings on the admissibility of evidence to determine if the trial court manifestly abused its discretion." BOR at 48 (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). However, the issue in *Stenson* was the admission of evidence, not at the penalty portion of a capital trial, but at the murder trial itself.

In *Davis*, 175 Wn.2d at 318, this Court did state that a trial court's evidentiary rulings in a penalty proceeding (involving the *exclusion of defense* evidence) were reviewable under an abuse of discretion standard. However, the Court followed up by stating: "Discretion can be abused if the trial court's action is manifestly unreasonable or based on untenable grounds or reasons." *Id*. What this means is that if the trial court makes an evidentiary ruling that is based on an "error of law," such a ruling is necessarily an abuse of discretion. *See Sales v. Weyerhaeuser Co.*, 163

Wn.2d 14, 19, 177 P.3d 1122 (2008). Thus, in past cases involving the erroneous *admission of State's evidence* that violates the dictates of *Bartholomew I* & *II*, this Court has not deferred to the trial court's actions with the "abuse of discretion" standard.[57] Similarly, here, admission of evidence at the penalty phase of the capital trial that was improper under *Bartholomew I* & *II*, constituted errors of law, to which no deference is owed by this Court.

Finally, the issue is not one simply involving review of a trial court's evidentiary rulings. Mr. Gregory has challenged the constitutionality of RCW 10.95.060(3), pointing out how the vagueness of the statute led to the admission of damaging evidence. This Court reviews constitutional challenges, not with an "abuse of discretion" standard, but with de novo review. *In re Welfare of A.W.*, 182 Wn.2d 689, 701, 344 P.3d 1186 (2015).

c. <u>The knife had no relevance</u>.

The State argues that the trial court properly admitted evidence of the knife found in Mr. Gregory's car in 1998, arguing that this Court already decided the issue in 2006. The State asks why the "law of the case" doctrine should not be applied. BOR at 54-56.

[57] *See, e.g., Clark II*, 143 Wn.2d at 776-83; *Rup*e, 101 Wn.2d at 703-08.

However, as Mr. Gregory argued in the opening brief, this Court decided the issue of the admissibility of the knife only in the context of its admissibility in the murder trial. *Gregory*, 158 Wn.2d at 835. The Court never addressed the admissibility of this knife – one unrelated to the murder, found two years later, with no blood on it – as proper evidence in the new sentencing hearing upon remand. Since the Court was never asked to make such an advisory ruling, the issue was never determined in the first appeal. The "law of the case" doctrine simply does not apply because the issue was never raised or resolved.

The State then offers absolutely no fact or consequence in dispute at the second penalty proceeding to justify admission of the knife. The State does argue that the evidence that the knife did not contain blood was "favorable" to the defendant. BOR at 58. Yet, the fact that the knife did not contain G.H.'s blood made the object extremely prejudicial to Mr. Gregory – that he was a person who generally possessed dangerous weapons. Notably, the State's argument in another section of the brief that Mr. Gregory's prior conviction for carrying a concealed weapon suggests that "he is ready to engage in physical violence if the need arises," BOR at 153, illustrates the prejudice of the knife and demonstrates the true reason why the State wished the jury to view it when determining whether Mr. Gregory lives or dies. If the State believes that carrying a concealed

weapon shows a propensity for violence, some of the jurors would likely reach the same conclusion.

d. The DNA evidence had no relevance.

The State argues that the DNA evidence "provided additional 'facts and circumstances' about the murder that went beyond identity," listing evidence of where semen was located on G.H.'s body and a bedspread, that G.H.'s blood was found in the kitchen, and the timing of when various DNA testing occurred. BOR at 57-58.

Yet, the statistical probabilities that Mr. Gregory was the donor of the semen were relevant only to identity. For instance, the jury was told: "The chance that defendant Allen Gregory's DNA profile was just a random match with the DNA profile for the male fraction of the semen stains on the bedspread was less than 1 in 1 billion people." RP (5/7/12) 2635. In a case where the defendant stipulated that he was the person convicted of aggravated murder in this case, RP (5/7/12) 2642; CP 746-47, and where there has been much popular attention paid to people exonerated after years on death row, there can be no other purpose to the

introduction of such statistics other than to make the jurors feel good about executing Mr. Gregory – that there was no residual doubt of his guilt.[58]

All of the facts about the murder that the State wished to put before the jury – the rapes, the struggle in the kitchen – all could have been accomplished without introducing statistical evidence that showed that there was no reason to even suspect that Mr. Gregory was not guilty. It was constitutional error to use the "facts and circumstances" language in RCW 10.95.060 to show the jury that there was no residual doubt of Mr. Gregory's guilt. The DNA evidence was therefore a non-statutory aggravating factor that violated the *Bartholomew* cases, the Eighth Amendment and article I, section 14.

e. <u>The photos, video and bloody bedspread were used for shock value</u>.

The State clearly used gruesome videos and photographs and unfurled the bloody bedspread as a mechanism to obtain a death verdict. The State knew, from the first trial, that jurors grew to hate Mr. Gregory because, in their minds, *he* forced them to look at graphic photographs. CP 677. The State claims, however, that there was a legitimate reason to force the jurors to view these exhibits at the second sentencing hearing:

[58] The stipulation itself assuaged concerns about wrongful convictions by stating that PCR STR DNA testing "has been used to exonerate people who were wrongfully convicted of crimes." RP (5/7/12) 2639.

"circumstantial evidence of the terror the victim endured in the last moments of her life, of the viciousness of the attack on her person, and of her physical suffering." BOR at 53.

Yet, the State used the photos in closing to assist its argument that 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. *See also* Ex. 1 (admitted 6/13/12) at Slide 15. Not long after making this statement, the State told the jurors:

> And I watched during the course of this trial and I saw you react to those pictures and you reacted again during closing argument at the beginning. And I'm telling you right now, you're going to see some of those again and again and again because you have to be mindful about what he did.

RP (5/14/12) 3014.

This is not telling the jurors to listen dispassionately to the medical examiner's testimony and evaluate the photographs to determine if G.H. was conscious, experiencing terror, in her final moments. This is telling the jurors to vote to kill Mr. Gregory because of gruesome photographs that they obviously did not want to see and reacted to. This conscious use of gruesome evidence to obtain a death verdict violates the Eighth Amendment, article I, section 14 and the *Bartholomew* cases.

f. RCW 10.95.060 (3) violates equal protection.

The State claims that "[t]he factual basis for defendant's equal protection argument does not appear in the record below." BOR at 138. The State is wrong. Mr. Gregory argues that RCW 10.95.060(3) violates equal protection because it treats defendants who successfully exercise their constitutional rights to appeal differently from those who are subject to bifurcated proceedings in the first instance. The factual basis for the argument is the difference in evidence admitted in Mr. Gregory's second penalty phase proceeding relative to a penalty proceeding that follows immediately after a murder trial. While Mr. Gregory has not moved to make the transcripts from the first penalty proceeding part of the record of this appeal, the Court has those transcripts and could either simply look at them or supplement the record of this appeal to illustrate the differences in how the evidence unfolded at each of the two proceedings.

The State complains that Mr. Gregory cited *In re Elmore*, 162 Wn.2d 236, 255-56, 172 P.3d 335 (2007), for the proposition that "by conducting a trial on guilt, the jury can begin to discharge its emotional reactions to the crime." BOR at 138. But the State does not dispute the merits of the *Elmore* expert's statement, and with good reason. The benefits of a bifurcated proceeding are widely understood. *See* P. Wen, "Admitting guilt, but not pleading it, aims at sparing Dzhokhar Tsarnaev's

life," *The Boston Globe* (3/6/15) (the "psychologically-astute strategy" used in the Boston bombing case).[59]

Of course, whether such a strategy works or not is not the issue. Rather, the issue is whether Mr. Gregory was deprived of a sentencing proceeding focused on mitigation, not because of anything he did, but because of a successful appeal. RCW 10.95.060(3) treated Mr. Gregory differently than other people facing execution simply because he won an appeal, a reversal caused in part by state misconduct. In this way, Mr. Gregory's fundamental right to appeal under article I, section 22, was burdened.

The State argues that the equal protection issue is being raised for the first time on appeal. BOR at 137-39. However, both RAP 2.5(a)(3) and the expanded review of issues in a death penalty case, *State v. Gregory*, 158 Wn.2d at 859, allow for consideration of this issue now.

g. RCW 10.95.060 (3) is vague and overbroad.

Mr. Gregory argued that RCW 10.95.060(3)'s failure to delineate what "facts and circumstances" of a murder should be introduced into a second special sentencing proceeding renders the statute unconstitutionally vague and overbroad in violation of the Eighth and

[59] Available at: https://www.bostonglobe.com/metro/2015/03/05/tsarnaev-admission-appears-part-legal-strategy-avoid-death-penalty-specialists-say/7DS461zLpm6QJoPavHz3FO/story.html) (last viewed 6/23/15).

Fourteenth Amendments and article I, sections 3 and 14. AOB at 241-44. In response, the State argues that this Court already decided this issue in *Bartholomew I* and *II*. BOR at 120.

The State, however, fails to respond to Mr. Gregory's argument that the Court has never actually addressed the vagueness and overbreadth of paragraph 2 of RCW 10.95.060(3) in the context of retrial of a capital sentencing proceeding. AOB at 242 n.139. The Court has simply never been presented with the situation raised in this case. Neither of the two *Bartholomew* decisions nor *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999), involved construction of "facts and circumstances" in the context of a resentencing after a successful appeal (brought about, in part, by State misconduct).[60]

The State cites to this Court's decision in *In re Brown*,143 Wn.2d 431, 21 P.3d 687 (2001), a decision which rejected a challenge to the vagueness of RCW 10.95.070's language that the sentencing jury could consider "any relevant factors" as it related to a capital defendant's criminal history. BOR at 123-24. The Court in *Brown* simply reiterated what it had held earlier in *Bartholomew II* as the proper procedure for introducing criminal history in a penalty proceeding, and noted that the

[60] *Elmore* involved a person who pled guilty, and thus faced only a penalty proceeding. Where an accused person makes a tactical decision to avoid a murder trial by pleading guilty, this situation is analytically different than what took place here. Mr. Elmore made a choice to have a single unitary proceeding. Mr. Gregory did not.

State complied with that procedure. *In re Brown*, 143 Wn.2d at 459. This holding has no bearing on the issue raised by Mr. Gregory about the "facts and circumstances" provision in the second paragraph of RCW 10.95.060(3) and how it relates to a retrial of a reversed death sentence.

Ultimately, the lack of clarity of "facts and circumstances" is illustrated by what took place in this case. A proceeding that was supposed to be about whether the State could prove there were not sufficient mitigating circumstance to merit leniency turned into a proceeding concentrating on gruesome photographs and exhibits, the one in a billion chance that Mr. Gregory was not the murderer, a knife that had nothing to do with the crime, and other facts that were irrelevant to whether Mr. Gregory's life had sufficient meaning so that the State should not extinguish it. RCW 10.95.060(3)'s second paragraph is unconstitutional.

14. Justice Dolliver's opinion in *Bartholomew I* should be overruled.

RCW 10.95.090 clearly provides that "[i]f any sentence of death imposed pursuant to this chapter is . . . held to be invalid by a final judgment of a court . . . the sentence for aggravated first degree murder . . . shall be life imprisonment." In the opening brief, Mr. Gregory argued that, after this Court reversed his death sentence in 2006, this statute required a remand for imposition of a life without parole sentence, not a

new penalty proceeding. Mr. Gregory asked this Court to follow part VI of Justice Pearson's opinion in *Bartholomew I*, 98 Wn.2d at 214-16 (Pearson, J., opinion), and to overrule Justice Dolliver's oddly-titled "concurrence/dissent" which garnered a majority of votes. *Bartholomew I*, 98 Wn.2d at 223-26 (Dolliver, J., "concurring in part, dissenting in part"). *See* AOB at 257-64.

The State urges the Court not to overrule Justice Dolliver's majority opinion. However, the State does not make any substantive arguments, does not attempt to justify Justice Dolliver's conclusions on their merits, and makes no argument that Part VI of the lead *Bartholomew I* decision was incorrect. The State only argues *stare decisis*. BOR at 141-44. The Court should reject the State's sole argument, and overrule the "concurrence/dissent" in *Bartholomew I*.

This Court has held that it will not overrule precedent unless there is showing that the precedent is incorrect and harmful. *State v. Glasmann*, ___ Wn.2d ___, ___ P.3d ___, Slip Op. at 2 (No. 88913-9, 5/7/15). The leading case setting out this principle, cited by the State (BOR at 142), provides:

> [W]e also recognize that stability should not to be confused with perpetuity. If the law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires.

In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Applying these principles, this Court then overruled nearly fifty years of precedent involving riparian water rights. *Id*. at 657.

Here, the State advances *stare decisis* without an analysis of the substantive issues at stake, urging the Court to uphold Justice Dolliver's opinion in *Bartholomew I* simply for the sake of doctrinal consistency. The State's lack of substantive analysis is telling because the State wants this Court to uphold Justice Dolliver's opinion in *Bartholomew I* without any discussion of whether the holding is incorrect and harmful. In this regard, the State's brief is seriously deficient.

In the opening brief, Mr. Gregory set out extensive arguments why Justice Dolliver's "concurrence/dissent" was both incorrect and harmful. AOB at 258-64. Mr. Gregory pointed out that the issues addressed in Part VI of Justice Pearson's lead opinion and the issues raised by Justice Dolliver were not the result of briefing by the parties, and it is difficult even to understand what the holding of the case was.

Section VI of the lead opinion ends as follows:

> Defendant's conviction of aggravated first degree murder is affirmed. The sentence of death is invalidated and *defendant is remanded to the trial court to be sentenced to life imprisonment* as provided in RCW 10.95.030(1).

Bartholomew I, 98 Wn.2d at 216 (Pearson, J., opinion) (emphasis added).

This conclusion appears to be the Court's remedy, leading one to think that Mr. Bartholomew was going to be given a life sentence rather than having to face another sentencing jury.[61] That this Court actually ordered a life sentence as a remedy is also a conclusion one would reach after reading Justice Dolliver's concluding paragraph, which is labeled a "dissent" and certainly reads like one:

> *I believe there should now be a retrial of defendant under the special sentencing proceeding* as provided for by RCW 10.95.050(4) consistent with the principles established by the majority opinion.

Bartholomew I, 98 Wn.2d at 225-26 (Dolliver, J., opinion) (emphasis added).

This internal confusion, such that it is not even clear which opinion constitutes the holding of the Court and which is the dissent, is a basis to conclude the decision is "harmful." *See State v. Guzman Nuñez*, 174 Wn.2d 707, 716-17, 285 P.3d 21 (2012) (a rule is harmful if it creates unnecessary confusion for trial courts and juries).

Justice Dolliver's "concurrence/dissent" is also "harmful" because it causes constitutional problems which were not immediately apparent in 1982 at the time it was written. The State feigns ignorance of these issues,

[61] Part VI of the lead opinion contains other language that makes it read like a majority decision, rather than a dissenting opinion. *See Bartholomew I*, 98 Wn.2d at 215 ("*We hold* that RCW 10.95.090 is controlling.") (emphasis added).

stating: "But as he does not show any constitutional infirmities with RCW 10.95 in the other sections of his brief, this does not provide the court with a reason to abandon precedent." BOR at 143 n.13.

Only by not reading the other sections of Mr. Gregory's brief could the State write this sentence. In his opening brief, Mr. Gregory specifically identified several constitutional infirmities with RCW 10.95 as it relates to the situation where a condemned prisoner may face a second sentencing jury after successfully winning a reversal of a death sentence on appeal. *See* AOB at 228-38 (statute unconstitutional because of unfettered discretion of prosecutor to seek death or life upon remand); AOB at 239-56 ("facts and circumstances" provision of RCW 10.95.060(3) unconstitutional).

In 1982, shortly after the adoption of the current death penalty statute, these issues had not yet arisen and no one could anticipate what would take place during the next three decades. Certainly, no one could have anticipated the situation that would arise when a prosecutor might not want to seek death upon remand. In 1982, the tension between this Court's holdings in *Bartholomew III*, 104 Wn.2d 844 and *Clark II*, 143 Wn.2d 731, had not yet been created. Similarly, in 1982, there had not yet been any retrials of penalty proceedings after a first successful appeal, and thus none of the evidentiary issues that exist in this case (*see* AOB §

E(12)) could have been anticipated and addressed at the time Justice Dolliver wrote his majority "dissent."

The emergence of constitutional issues, such as those raised by *Clark II*, is a reason for this Court to reassess the odd "dissent" in *Bartholomew I*. The consequences of Justice Dolliver's opinion can now be viewed as "harmful" in a way that they could not have been seen in 1982.

Additionally, the policy reasons behind *stare decisis* do not apply in the instant case. As the State recognizes, "[t]he law must be reasonably certain, consistent, and predictable so as to allow citizens to guide their conduct in society and to allow trial judges to make decisions with a measure of confidence." BOR at 141-42. Such lofty goals simply are irrelevant to the issues at stake here.

It is inconceivable that any individual person will make the decision whether or not to commit aggravated murder based upon an assessment of the possible remedies available upon remand after winning an appeal of the imposition of a death sentence. *See Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 2164, 186 L. Ed. 2d 314 (2013) (Sotomayor, J., concurring) ("[W]hen procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced.").

On the other hand, the existence of the problem caused by *Clark II* – unbridled discretion to determine who faces a second sentencing jury – in no way furthers the goal of consistency and predictability. In fact, the arbitrariness that results from *Clark II*, by which two roughly similarly situated individuals (Mr. Clark and Mr. Gregory) end up either serving a life sentence or awaiting execution, is precisely a reason to reassess Justice Dolliver's majority "dissent" in *Bartholomew I*.

To be sure, as the State points out, the Legislature has not changed RCW 10.95 in the 33 years since Justice Dolliver's majority "dissent" in *Bartholomew I*. BOR at 143-44.[62] However, legislative acquiescence by inaction is not necessarily the determinative factor to consider as to whether this Court should overrule a prior decision. This Court has often overruled prior decisions, despite years of legislative acquiescence. *See, e.g.*, *In re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002).

To claim legislative acquiescence, there also must be some evidence that the Legislature was conscious of what it was doing. *See Pringle v. State*, 77 Wn.2d 569, 574, 464 P.2d 425 (1970). Where this Court has determined that prior decisions were "novel and unwarranted,"

[62] The Legislature also did not change RCW 10.95 in the 14 years since *Clark II*, thus evidencing acquiescence with this Court giving prosecutors the discretion to pick and choose which cases to take back to a sentencing jury upon reversal of a death sentence. Does this Legislative silence mean approval for *Clark II*'s holding, which effectively overruled *Bartholomew III*'s construction of RCW 10.95.050?

adopted in the "in the midst of a fog of utter confusion," and which were "as wrong in principle as [they were] unfounded in authority," this Court has not hesitated to overrule prior cases, despite legislative silence. *In re Estate of Bordeaux*, 37 Wn.2d 561, 593, 225 P.2d 433 (1950).

With regard to RCW 10.95, there is no evidence that the Legislature has even been aware of the constitutional issues arising from Justice Dolliver's majority "dissent" in *Bartholomew I*. The issue does not come up very often, impacting only a handful of cases over the last 34 years. Given the few people impacted by the confusion in *Bartholomew I*, it is not significant that the Legislature did not attempt to change the law. *See Bordeaux*, 37 Wn.2d at 594 ("[S]tatutes do not spring up spontaneously in legislative chambers; nor do amendments to statutes. The *Raine*[63] case involved a tax of $943.50. Its magnitude was obviously not of such a degree as would, in ordinary circumstances, provoke or inspire amendment.").

Given the lack of any substantive disagreement by the State that Part VI of Justice Pearson's lead opinion in *Bartholomew I* was correct, and given the limitations of the judicially created doctrine of *stare decisis*, this Court should overrule Justice Dolliver's "concurrence/dissent" in *Bartholomew I*. The Court should hold that RCW 10.95.090 required the

[63] *In re Raine's Estate*, 193 Wash. 394, 75 P.2d 933 (1938).

imposition of a life sentence on Mr. Gregory after this Court vacated the original death sentence. There being no statutory authority to impose a second death sentence, this Court should reverse the judgment and remand the case for imposition of a life without parole sentence.

C. 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.[64]

DATED this 30th day of June, 2015.

Respectfully submitted,

/s Neil M. Fox
Neil M. Fox – WSBA 15277

/s Lila J. Silverstein
Lila J. Silverstein – WSBA 38394

Attorneys for Appellant Allen Gregory

[64] Mr. Gregory will rely on his opening brief related to the argument that the Fourth Amended Information did not contain all essential elements of the crime of capital first degree aggravated murder.

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 30TH DAY OF JUNE, 2015, I CAUSED THE ORIGINAL **REPLY 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:

[X] KATHLEEN PROCTOR, DPA JOHN NEEB, DPA [PCpatcecf@co.pierce.wa.us] PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	( )	U.S. MAIL
	( )	HAND DELIVERY
	(X)	E-MAIL

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JUNE, 2015.

X_____

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