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

SUPPLEMENTAL BRIEF OF APPELLANT ALLEN GREGORY

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A. INTRODUCTION

Forty-five years ago the U.S. Supreme Court struck down the capital punishment statutes that existed at that time under the Eighth Amendment. The statutes gave too much discretion to juries, judges, and prosecutors, resulting in the arbitrary imposition of the death penalty on a random few, and raising the specter of racial bias.

States enacted new death-penalty statutes in an attempt to cure these problems. "Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed."[1] Indeed, the American Law Institute has withdrawn the death penalty from the Model Penal Code for this reason. And the Connecticut Supreme Court recently invalidated capital punishment under its state constitution, in part because "the selection of which offenders live and which offenders die appears to be inescapably tainted by caprice and bias."[2]

The same problem exists in Washington. Drs. Katherine Beckett and Heather Evans performed multivariate logistic regression analyses on Washington's aggravated murder cases and concluded that "the race of the defendant has had a marked impact on sentencing in aggravated murder cases in Washington State since the adoption of the existing statutory

[1] *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2755, 192 L. Ed. 2d 761 (2015) (Breyer, J., dissenting).

[2] *State v. Santiago*, 318 Conn. 1, 107, 122 A.3d 1 (Conn. 2015).

framework."[3] Specifically, black defendants were more than four times as likely to be sentenced to death as other defendants, after controlling for relevant case characteristics.[4]

The study was subjected to rigorous adversarial testing in proceedings presided over by Commissioner Pierce. Drs. Beckett and Evans thoroughly responded to the State's evaluation and the Commissioner's interrogatories, and updated the study accordingly.[5] Following this exhaustive scrutiny, the regression results continue to show that black defendants are more than four times as likely to be sentenced to death as other defendants, and these findings are remarkably robust and consistent across all models.[6]

In sum, the findings "provide strong, consistent and compelling evidence that jury decision-making in capital cases in Washington State has been notably influenced by the race of the defendant."[7] This Court should hold that Washington's death penalty scheme is unconstitutional.

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[3] *Updated Report* (10/13/14) at 33.
[4] *Id*. at 1.
[5] *See generally, Response to Evaluation* (8/25/16); *Response to Commissioner's Interrogatories* (7/12/17); *Response to Supp. Interrogatories* (9/29/17).
[6] *Response to Evaluation* (8/25/16) at 5, 40.
[7] *Id*. at 7.

B. SUPPLEMENTAL ARGUMENT

1. The Beckett Report is reliable and demonstrates that African Americans are significantly more likely to be sentenced to death than other defendants.

a. The dataset is complete and the coding is accurate.

i. *The dataset is complete; correcting the isolated errors identified did not change the result that African Americans are significantly more likely to be sentenced to death.*

Drs. Beckett and Evans analyzed the role of race in capital sentencing using the same dataset this Court uses for proportionality review, i.e., data derived from all aggravated murder Trial Judge Reports filed since 1981. *Updated Report* (10/13/14) at 13; *Commissioner's Report* at 8; *see* RCW 10.95.120, 130. It was appropriate to use this dataset because the Court has stated the purpose of gathering this data for proportionality review "is to avoid random arbitrariness and imposition of the death sentence based on race." *In re Elmore*, 162 Wn.2d 236, 270, 172 P.3d 335 (2007). Justice Wiggins suggested that the proportionality statute triggered a duty in this Court to evaluate the statistical significance of an apparent racial disparity in capital sentencing. *State v. Davis*, 175 Wn.2d 287, 389-98. 290 P.3d 43 (2012) (Wiggins, J., dissenting). Thus, the researchers properly analyzed the same cases this Court reviews in evaluating whether death sentences are imposed fairly.

Trial judges failed to file reports for some aggravated murder cases, but this Court has repeatedly held that the dataset is sufficiently comprehensive to facilitate a thorough review. *See Elmore*, 162 Wn.2d at 270. Nevertheless, in an effort to ensure the most accurate analysis possible, Mr. Gregory filed a Motion to Complete the Process of Compiling a Full Set of Aggravated Murder Reports in November of 2013. This Court denied the motion – presumably because it had already held there were enough trial reports to perform a thorough analysis. However, following this motion, numerous reports that had been missing were finally filed, and these reports were included in the study. *Updated Report* (10/13/14) at 13 (explaining that dataset included reports filed through May of 2014).

During the special proceedings, the researchers were able to add a few more reports to the analysis. First, they added TR 34A, because that report is not merely an addendum to TR 34 but instead describes a second aggravated murder committed by the same defendant against another victim a few months after his first aggravated murder. *Response to Evaluation* (8/25/16) at 13 n.30; *Commissioner's Report* at 7-8.

Second, they included reports that had previously been excluded due to missing data in necessary fields. The Commissioner provided counsel with criminal history attachments for TRs 8 and 15, which had

previously been missing, and the researchers added these data to the analyses. *Response to Supp. Interrogatories* (9/29/17) at 1-2; *Commissioner's Report* at 31. The researchers also ascertained the race of the defendant in TR 210 and added this case to the analysis. *Response to Supp. Interrogatories* (9/29/17); *Commissioner's Report* at 31.

Finally, the researchers corrected a handful of coding errors that were identified during the special proceedings. They entered "0" for number of defenses in TR 313, which had previously been left blank; changed mitigating circumstances for TR 25 from 1 to 2; corrected the sentences imposed for TRs 132 and 167; and coded TR 75 as "white" rather than "other race." *Response to Evaluation* (8/25/16) at 14; *Response to Interrogatories* (7/12/17) at 2; *Commissioner's Report* at 19.

None of these modifications materially affected the outcome. Running the primary model with these alterations showed that African American defendants are 4.86 times as likely to be sentenced to death as other defendants, with a p-value of 0.039. *Response to Interrogatories* (7/12/17) at 11. The same model without these modifications indicated African Americans are 4.5 times as likely to be sentenced to death as other defendants, with a p-value of 0.055. *Updated Report* (10/13/14) at 31, 43.[8]

[8] The primary model includes the case characteristics that were found to have a statistically significant impact on sentencing, along with race of defendant. *See generally*, *Response to Interrogatories* (7/12/17) at 44-46.

In sum, the researchers used the appropriate data set, corrected isolated coding errors, and included in the analysis a handful of reports for which previously missing information became available. Following these modifications, the primary regression model shows that black defendants in Washington are more than 4.8 times as likely to be sentenced to death as other defendants, after controlling for relevant case characteristics.

ii. *The researchers properly coded mitigating circumstances, and the Commissioner endorsed the protocol.*

The researchers carefully controlled for the effect of mitigating circumstances because this factor is supposed to be a critical consideration in capital sentencing. RCW 10.95.060(4). Juries must be permitted to consider all relevant mitigating circumstances when determining whether to impose the death penalty. *Lockett v. Ohio*, 438 U.S. 586, 606-08, 98 S. Ct. 2954, 2965, 57 L. Ed. 2d 973 (1978). Thus, it was important to test whether the apparent racial disparity in Washington capital sentencing was instead due to differences in mitigating circumstances presented.

The trial reports contain one field for statutory mitigating circumstances and one field for nonstatutory mitigating circumstances. For each field, judges check Yes or No to the question of whether credible evidence was presented, and then list the mitigating circumstances if the answer is Yes. As the Commissioner noted, the researchers counted the

number of individual concepts in each field and added them in order to control for the total number of mitigating circumstances in each case. *Commissioner's Report* at 14. The Commissioner endorsed the protocol and described it as "internally consistent." *Id.* at 15.

The Commissioner noted that this Court appeared to use a different protocol in *Davis*, 175 Wn.2d 287. *Commissioner's Report* at 10-11. In fact, this Court undercounted mitigating circumstances by treating the nonstatutory mitigating circumstances field as binary. *See Commissioner's Report* at 11-13. For example, in TR 77 the trial judge provided numbered lists of four statutory mitigating circumstances and seven nonstatutory mitigating circumstances; researchers coded 11 mitigating circumstances, but the *Davis* court counted only five. *Commissioner's Report* at 11; TR 77. In TR 186, the trial judge answered "no" to statutory mitigating circumstances and listed the following nonstatutory mitigating circumstances after answering Yes: "Abusive childhood, poverty, parental abandonment, deficits in executive mental functions, drug abuse." TR 186. The researchers coded five mitigating circumstances but the *Davis* court counted only one. *Commissioner's Report* at 11. If the researchers had followed the *Davis* protocol and undercounted mitigating circumstances, they would not have been able to ascertain the full impact of this variable on sentencing decisions.

After coding and controlling for all mitigating circumstances, African Americans are more than four times as likely to be sentenced to death as other defendants. *Updated Report* (10/13/14) at 31, 43; *Response to Interrogatories* (7/12/17) at 11-16.

iii. *The researchers' protocol for coding aggravating circumstances was reasonable, and using the Commissioner's alternate method yields similar results.*

The researchers coded aggravating circumstances by counting the number of aggravating circumstances "found applicable" in question 2(e) of the trial reports. *Commissioner's Report* at 16; *Codebook* (5/27/16) at 62. This protocol was appropriate, but it resulted in some inconsistencies – in part because different trial judges treated the same aggravating circumstances differently. For instance, where defendants were convicted of multiple counts of aggravated murder, in some cases judges listed the total number of aggravating circumstances for each count, but in others they listed aggravating circumstances only once – even though they applied to all counts. *Commissioner's Report* at 17. The coders lacked detailed legal knowledge to resolve the judges' inconsistencies. Similar issues arose with respect to the treatment of murders committed in the course or furtherance of multiple crimes, and murders committed to conceal the crime or perpetrator's identity. *Id.* at 16-18.

Although it was reasonable for the coders to take the trial reports as they found them, the Commissioner's concerns are well-taken. In response, the researchers have applied a protocol consistent with the Commissioner's suggestions, and have updated the database and codebook accordingly.[9] The researchers then re-ran the regression analyses. All models continue to show that African Americans are significantly more likely to be sentenced to death than other defendants. Appendix A at 3-7. The primary model shows African Americans are 4.94 times as likely to be sentenced to death as other defendants, with a p-value of 0.047. *Id.* at 3. The findings indicate that the impact of being black on the odds that a death sentence was imposed is equivalent to 3.2 additional aggravating circumstances. *Id.*

iv. *The researchers properly included all special sentencing proceedings in the analysis.*

Drs. Beckett and Evans included in their analyses all cases for which special sentencing proceedings occurred. For most cases, juries decided whether the State met its burden to prove death was the appropriate sentence, but for some cases, defendants waived their right to a jury and judges determined the penalty. The purpose of the regression

[9] The updated database and codebook are being filed by e-mail on the same day this brief is filed through the portal. The updated protocol for aggravating circumstances is also in the attached appendix.

analyses of sentencing proceedings was to determine whether the race of the defendant had an impact on the decision-maker, whether jury or judge.

The Commissioner questioned the inclusion of four bench trials in the analysis: Trial Reports 92, 167, 182, and 224. *Commissioner's Report* at 24-27. It is true that in these cases the State stipulated it could not prove insufficient mitigating circumstances to merit leniency. However, the cases were included in the regression analyses because the death notices do not appear to have been withdrawn, and special sentencing proceedings actually took place. The judge, exercising independent judgment based upon the facts of the crime, could still have imposed a death sentence, even if that possibility was likely minimal in each case. *See State v. Drum*, 168 Wn.2d 23, 33-34, 225 P.3d 237 (2010) (court is not bound by stipulations of parties regarding sufficiency of the evidence).

In any event, in response to the Commissioner's request, the researchers ran alternative analyses without these four trial reports. Absent these cases, the analyses still show that African American defendants are more than four times as likely to be sentenced to death as other defendants. *Response to Supp. Interrogatories* (9/29/17) at 10-11 (odds ratio = 4.072, p=0.074); Appendix A at 5 (odds ratio = 4.505, p=0.071).

The Commissioner also identifies as a point of contention the inclusion of multiple special sentencing proceedings for defendants Rupe,

Davis, and Gregory. *Commissioner's Report* at 31-41. Black defendants Gregory (TRs 216, 312) and Davis (TRs 180, 281) were twice sentenced to death by juries. White defendant Rupe was twice sentenced to death and finally sentenced to life by a third jury. Trial reports exist for only his first two proceedings. (TRs 7, 31).

All of these trial reports were properly included in the analyses. The unit of analysis was not the defendant, but the proceeding. The purpose of the study was to evaluate the impact of race and other factors on each jury's (or judge's) sentencing determination.

In each instance, there were multiple trials that involved different case characteristics, and therefore could have resulted in different outcomes.[10] Thus, this is <u>not</u> equivalent to counting "the exact same case multiple times."[11] For instance, Mr. Davis's prior convictions increased between his two proceedings, while Mr. Gregory's decreased. There were also different mitigating circumstances, different attorneys, and different juries. As the Commissioner recognized, other experts agree that multiple

[10] The State's expert concluded that removal of the first Rupe, Gregory and Davis cases ("redundant cases") was required to preserve the assumption of independence. *State's Evaluation* (7/8/16) at 25. But, as the Commissioner recognized, there were later special sentencing proceedings for Rupe, Bartholomew and Finch that resulted in life sentences. *Commissioner's Report* at 6-7. That three juries returned life sentences for three cases where other juries had previously imposed death suggests that the proceedings were, in fact, independent.

[11] *Commissioner's Report* at 34 (quoting a 2001 New Jersey report).

penalty proceedings for the same defendant should be included in this type of study. *Commissioner's Report* at 36.[12]

Excluding either the first or second special sentencing proceedings for these defendants would introduce bias into the study. Two of these three defendants who were twice sentenced to death were black. The regression analyses indicate that the race of the defendant helps explain why this occurred. Excluding information about the first trials of these three defendants leads to an under-estimate of the impact of defendant race on capital sentencing outcomes.

Despite the impropriety of excluding relevant proceedings, the researchers ran the analyses without these three cases as requested. Even without these cases, the analyses show that African Americans are more than four times as likely to be sentenced to death as other defendants. *Response to Supp. Interrogatories* (9/29/17) at 7-8 (odds ratio = 4.001, p=0.076); Appendix A at 4 (odds ratio = 4.493, p=0.066).[13]

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[12] (citing David Baldus, *et al.*, Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on the Key Methodological Issues, in THE FUTURE OF AMERICA'S. DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH 159 (2009)).

[13] Even removing *all seven* relevant cases discussed in this section, the analyses show that African Americans are at least three-and-a-half times as likely to receive the death penalty as other defendants. *Response to Supp. Interrogatories* (9/29/17) at 12 (odds ratio = 3.558, p=0.111). Using the coding protocol for aggravating circumstances suggested by the Commissioner, black defendants are more than four times as likely to be sentenced to death as other defendants even after removing all seven cases. Appendix A at 6 (odds ratio = 4.127, p=0.094).

b. The regression analyses are valid and demonstrate that black defendants in Washington are significantly more likely to be sentenced to death than other defendants, after controlling for relevant case characteristics.

i. *P-values and other relevant measures show that the race effect is statistically significant.*

The findings regarding the race effect are statistically significant. Statistical significance is a holistic determination, made by considering p-values, the design of the study (e.g. whether the relevant population or only a sample is evaluated), and other contextual factors. *Response to Evaluation* (8/25/16) at 5 (citing Alberto Abadie, Susan Athey, Guido W. Imbens, Jeffrey M. Wooldridge, *Finite Population Causal Standard Errors*, Working Paper 20325 http://www.nber.org/papers/w20325). The American Statistical Association clarified these principles for determining statistical significance in a March, 2016 statement. American Statistical Association, *Statement on Statistical Significance and P-Values* (March, 2016).[14]

A p-value is "the probability under a specified statistical model that a statistical summary of the data (e.g., the sample mean difference between two compared groups) would be equal to or more extreme than its

[14] Available at: http://amstat.tandfonline.com/doi/full/10.1080/00031305.2016.1154108?scroll=top&needAccess=true#.Wk5uOpWWyUk

observed value." *Id.* "The smaller the *p*-value, the greater the statistical incompatibility of the data with the null hypothesis," *id.* – in this case, that race is irrelevant in capital sentencing.

It is no longer appropriate to characterize p-values as describing the probability that random chance produced the observed data, nor is it appropriate to apply bright-line p-value thresholds to determine statistical significance. *Id.*

> A conclusion does not immediately become "true" on one side of the divide and "false" on the other. Researchers should bring many contextual factors into play to derive scientific inferences, including the design of a study, the quality of the measurements, the external evidence for the phenomenon under study, and the validity of assumptions that underlie the data analysis.

Id. Indeed, the State's expert endorsed this position, *State's Evaluation* (7/8/16) at 22-23, and the Commissioner generally agreed with this conclusion. *Commissioner's Report* at 58.[15]

The use of bright-line, conservative benchmarks of statistical significance may be appropriate in other contexts – such as those in which the danger of a false positive finding is notably greater than the risk associated with a false negative. For example, a conservative significance test designed to avoid a false positive might be appropriate when

[15] Drs. Beckett and Evans have also explained that the significance of a p-value is lessened when analyzing the entire population as compared to a sample. *Response to Supp. Interrogatories* (9/29/17) at 15.

researchers are evaluating whether to make available a new medication that carries many risks and serious negative side effects. But in other contexts, the risk of a false negative is arguably greater than that of a false positive. For example, "[i]n matters of public health and regulation, it is often more appropriate to be protected against erroneously concluding no difference exists when one does."[16]

Similarly, in the context of this study, the danger of falsely concluding that the race of the defendant does not matter in capital cases is a far greater risk than the converse. A false negative would mean wrongly rejecting evidence that race matters and carrying out constitutionally flawed executions in cases that have, in fact, been influenced by race. This is a far more dangerous error than wrongly concluding that race has affected sentencing outcomes when in fact it has not.

In any event, the p-values for all models in this study are below 0.10 (*see* Appendix A). As the Commissioner recognized, this is the appropriate threshold where the primary hypothesis is directional, *Commissioner's Report* at 62-63, and numerous studies find that black defendants are treated more harshly than white defendants. *See Response to Evaluation* (8/25/16) at 23-24.

[16] J. Hoenig and D. Heisey, "The Abuse of Power: The Pervasive Fallacy of Power Calculations for Data Analysis," *The American Statistician* 55, 1: 1-6 (February 2001) at 5.

The impact of defendant race on capital sentencing in Washington is both significant and large in magnitude. The odds ratio is extraordinarily high and remarkably consistent across all models: no matter which case characteristics are included in the regression models, African Americans are more than four times as likely to be sentenced to death as other defendants. *Response to Evaluation* (8/25/16) at 5, 40 (noting odds ratio is greater than four for all 13 models tested). The p-value for all models was very low, ranging from 0.015 to 0.054. *Id.* Even when relevant cases are excluded, the odds ratio is consistently high and the p-value consistently low. Appendix A at 7 (odds ratio ranging from 4.127 to 4.939, p-value ranging from 0.047 to 0.094).

In sum, the impact of race on aggravated murder sentences is undeniable. The findings "provide strong, consistent and compelling evidence that jury decision-making in capital cases in Washington State has been notably influenced by the race of the defendant." *Response to Evaluation* (8/25/16) at 7.

ii. *The dataset is large enough to produce a meaningful study, and the consistency and magnitude of the race effect across all models show the results are reliable.*

The statistical study evaluated all aggravated murder cases for which special sentencing proceedings occurred and trial reports were filed.

Dozens of such proceedings have taken place since 1981; the primary model included 81 cases. *Response to Supp. Interrogatories* (9/29/17) at 5; Appendix A at 3. The number of cases in other models varied slightly; cases were omitted if data was missing in the relevant fields or if the Commissioner requested analyses with certain cases omitted. Across all models, the dataset size ranged from 74 to 81. Appendix A at 7; *Response to Evaluation* (8/25/16) at 25, 34-40.

The researchers used logistic regression and MLE (Maximum Likelihood Estimation) procedures, which is an appropriate method for analyzing binary outcomes. *Response to Interrogatories* (7/12/17) at 16.

> The benefit of this technique is that it produces estimates that tend toward the true values and uses the data most efficiently to do so. In statistical terms, MLE generates estimates that are consistent, asymptotically normal, and asymptotically efficient.

Id. at 16-17 (citing Jeffrey Woolridge, *Introductory Econometrics: A Modern Approach*, 3rd Ed. Mason, Ohio: Thomson Higher Education, 2006, pp. 586-594).

Contrary to the State's expert's claims, it is <u>not</u> correct that MLE is necessarily unreliable or impermissible when the sample size or dataset includes fewer than 100 cases. *See Commissioner's Report* at 75. Unlike experimental studies, observational studies are necessarily limited by the number of cases in the real world. It is standard practice to use MLE in

such studies, and experts provide guidelines for working with datasets of various sizes.[17]

The Commissioner suggests that performing MLE regressions on datasets of less than 100 is analogous to flipping a coin 10 times, obtaining heads seven times, and concluding the coin is weighted. This analogy is misleading. In the Commissioner's example, there are no independent variables other than chance. While randomness is present in both small and large datasets, multivariate regression analysis isolates and tests the impact of multiple and potentially systematic variables on the ultimate outcome.[18]

Although there is no minimum requirement of 100 cases when using MLE, it is important to assess a wide range of results, including not

[17] *See, e.g.*, Martina Mittblock and Michael Schemper, "Explained Variation for Logistic Regression," *Statistics in Medicine* 15, 9: 1987-1997 (1996). Here, Drs. Beckett and Evans took the precautions applicable when analyzing relatively small datasets. They identified and assessed the impact of potential outliers, and ensured that the regression results were robust across numerous model specifications. As is abundantly clear, this study did *not* suffer from one of the typical challenges associated with smaller datasets: the production of false negatives. Instead, the results indicate that defendant race has a large effect on sentencing outcomes.

[18] The Commissioner cites to *United States v. City of New York,* 637 F. Supp. 2d 77, 95 (E.D.N.Y. 2009) when discussing the coin-toss analogy. *Commissioner's Report* at 72-73. This was a Title VII case involving the disparate impact on Black and Hispanic applicants of New York City's firefighter exams, but regression analysis played no role in the case. Moreover, even in the Title VII disparate impact arena, statistical evidence has been accepted with small sample sizes where descriptive statistics are combined with expert testimony. *See Pietras v. Bd. of Fire Comm'rs of Farmingville Fire Dist*.,180 F.3d 468, 475 (2d Cir. 1999); *Boston Police Superior Officers Fed'n v. City of Boston*, 147 F.3d 13, 22 (1st Cir. 1998).

only p-values but also odds ratios, when analyzing smaller data sets.[19] Moreover, concerns regarding sample size do not depend solely on the number of cases (observations) included in the data set: the number of variables included in the model, the number of "events" (i.e. positive outcomes), and the ratio of the former to the latter (called Events Per Variable, or EPV) are also important factors.[20]

Research indicates that problems are uncommon (i.e., studies are considered reliable) where the EPV is 5 or higher.[21] In the Beckett study, there are 35 "events" (death sentences) and seven variables in the base model, for an EPV of five. To increase the EPV even more, the researchers have re-run the analyses including just the five independent variables that are often or always found to be significant and excluding the two independent variables (whether the victim was held hostage and number of prior convictions) that are not. In these models, the EPV is seven. Across all of these models, black defendants are well over four

[19] See Peter Bacchetti, "Small sample size is not the real problem," *Nature Reviews Neuroscience*, Volume 14: 585 (2013); Peter Bacchetti, "Current sample size conventions: Flaws, harms and alternatives,' *BMC Medicine* 2010, 8: 17-24.

[20] James R. Lewis and Jeff Sauro, "When 100% isn't Really 100%: Improving the Accuracy of Small Sample Estimates of Completion Rates," *Journal of Usability Studies* 1, 3: 136-150 (2006); Eric Vittinghoff and Charles E. McCulloch, "Relaxing the Rule of Ten Events Per Variable in Logistic and Cox Regression," *American Journal of Epidemiology* 165, 6: 710-18 (2007).

[21] Eric Vittinghoff and Charles E. McCulloch, "Relaxing the Rule of Ten Events Per Variable in Logistic and Cox Regression," *American Journal of Epidemiology* 165, 6: 710-18 (2007).

times as likely to be sentenced to death as other defendants. Appendix A at 8 (odds ratio = 4.84-5.37; p=0.034-0.061).

As a practical matter, it makes little sense to say Washington must wait for another 20 special sentencing proceedings to be held before the legal system will address the remarkable evidence of racial bias infecting capital case outcomes. The risks are too great to continue a system riddled with bias on the off-chance that another decade will see an increase in the number of white people sentenced to death at a rate to compensate for the last 35 years of inequity.[22]

Just as this Court has concluded the dataset is large enough to perform proportionality review, esteemed social scientists have concluded that the dataset is large enough to perform meaningful regression analyses. Those analyses demonstrate that African Americans are significantly more likely to be sentenced to death than other defendants, after controlling for relevant case characteristics. This Court should address the problem now by striking down the death penalty.

[22] Given the impact of Governor Inslee's Moratorium, current bipartisan efforts to repeal (even if unsuccessful) and the reluctance of juries in the few remaining counties where prosecutors have recently sought death to return death verdicts (*see* TR 341 (McEnroe) and TR 346 (Monfort)), it may be at least a decade before there are another 20 special sentencing proceedings in Washington State. Because current statistical analyses demonstrate a significant race effect, this Court should act now rather than wait for additional cases to confirm what is already clearly established.

iii. *The State's expert could not replicate the results only because he committed serious errors, resulting in the omission of numerous cases.*

The State's expert claimed "the data do not indicate that black defendants are more likely than non-black defendants to receive a death sentence in the State of Washington." *State's Evaluation* (7/8/16) at 30. The State is wrong; capital sentencing is not exempt from the racial bias that permeates the criminal justice system. In fact, the data show that the race of the defendant plays a significant role in capital sentencing. *Updated Report* (10/13/14) at 1, 30-31; *Response to Evaluation* (8/25/16) at 1, 3, 7, 24-25, 40-41; *Response to Interrogatories* (7/12/17) at 3-4, 15-16.

The State's expert reached a contrary conclusion because he committed serious errors resulting in the exclusion of numerous cases from the analysis. *Response to Evaluation* at 26-32. First, when he logged mitigating circumstances and prior convictions, he neglected to make the adjustment necessary to prevent cases in which the values for one or both of these variables was zero from dropping out of the analysis. He accordingly omitted all cases in which there were zero mitigating circumstances and all cases with zero prior convictions – a total of 22 relevant cases. *Id.* at 28-30. These omissions rendered his analysis meaningless. The State's expert subsequently fixed this error, and

concluded black defendants are 4.115 times as likely to be sentenced to death as other defendants, with a p-value of 0.072. *Commissioner's Report* at 88.

Second, when including victim race in the analysis, the State's expert improperly combined victim race and defendant race into a single variable. He excluded all cases in which there were multiple victims of different races, all cases in which the defendant was neither white nor black, and all cases in which a victim was neither white nor black – a total of 16 relevant cases. *Response to Evaluation* at 30-32. Again, it is improper to omit whole categories of relevant cases. The Commissioner concluded:

> Dr. Scurich fails to explain how his variant of a model that shows effects for the race of the defendant results in a conclusion that there were no racial effects for either the race of the defendant or the race of the victim. He offers no explanation of how adding consideration of victim race suggests race neutral reasons for sentencing decisions.

Commissioner's Report at 93.

In sum, the State's expert's claim that there is no race effect in capital sentencing is patently false. The data demonstrate that African

American defendants are significantly more likely to be sentenced to death than other defendants, after controlling for relevant case characteristics.[23]

iv. *The study's results are consistent with those of other studies in Washington and elsewhere.*

The substantial racial bias in Washington's capital sentencing system is unsurprising. The results of Washington's statistical study are consistent with those of studies in other jurisdictions, and with those of other studies in our state.

"Social scientists repeatedly have confirmed that the risk of capital punishment falls disproportionately on people of color and other disadvantaged groups." *State v. Santiago*, 318 Conn. 1, 13, 122 A.3d 1 (Conn. 2015). In 1990, the United States General Accounting Office performed a meta-analysis of dozens of studies and detected a "pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty …." *Id.* at 153-54 (Norcott and McDonald, JJ., concurring) (citing United States General Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities (February 1990) p. 5).

[23] Despite having access to the trial reports, and despite years of opportunity, the State simply submitted a critique of Drs. Beckett and Evans, without performing its own analysis.

Subsequent studies confirmed that across jurisdictions, capital sentencing is heavily influenced by the race of the defendant, race of the victim, or both. *Id.* at 154-57 (citing numerous analyses).[24] Although a handful of studies obtained conflicting results,

> multiple meta-analyses and multijurisdictional studies conducted by respected scholars and government agencies all have concluded, after reviewing both those primary studies purporting to find a racial effect and those that did not, that it is more likely than not that there are racial disparities in capital charging or sentencing.

Santiago, 318 Conn. at 169 (Norcott and McDonald, JJ., concurring) (emphasis omitted). "We have no reason to gainsay such overwhelming evidence of racial bias." *Id.* at 157.

Racial bias not only influences capital sentencing, it infects the justice system as a whole. A 2011 study found that African Americans in Washington are arrested, searched, and charged at significantly higher rates than Caucasians – and this difference cannot be explained by a difference in crime commission rates. Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System* (March 2011) at 7. The Task Force concluded,

[24] For instance, like Washington's study, a Philadelphia regression analysis found that black defendants faced significantly greater odds (there, 3.8 times higher) of receiving the death penalty than non-black defendants, after controlling for aggravating and mitigating factors. Baldus et al., *supra,* at 153.

"there is substantial evidence to support the notion that racial iniquities do permeate the criminal justice system." *Id.*

In light of the data, the question is no longer whether race influences capital sentencing in Washington. There is substantial evidence of significant racial bias in the imposition of the death penalty. The only question is what action should be taken in response.

Inaction is not an option. As the Task Force noted in its closing remarks, "A time comes when silence is betrayal." *Id.* at 23 (quoting Dr. Martin Luther King, Jr.). This Court should strike down the death penalty as unconstitutional.

2. Washington's death penalty scheme is unconstitutional.

In light of the Beckett Report and other relevant data, this Court should hold that the death penalty violates the cruel punishment provisions of the federal and state constitutions. Although this Court rejected such arguments in the past, the issue must be revisited in light of new evidence.[25] This Court now has the benefit of the statistical study and dozens of previously missing trial reports. This new evidence shows the death penalty is imposed in an arbitrary and racially biased manner. The

[25] *See, e.g.*, *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"); *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (overruling prior case and invalidating death penalty for juveniles in light of new studies on brain development).

Court must also consider local and national developments, including executive moratoria and legislative repeals of capital punishment. These trends show that capital punishment no longer comports with evolving standards of decency. For all of these reasons, this Court should hold that the death penalty violates the Eighth Amendment and article I, section 14.

a. The death penalty violates the Eighth Amendment because it is imposed in an arbitrary and racially biased manner and does not comport with evolving standards of decency.

i. *Furman struck down the death penalty because it was imposed in an arbitrary and racially biased manner.*

The United States Supreme Court invalidated the death penalty as then administered in *Furman v. Georgia*, 408 U.S. 238, 239-40, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). The Court reversed the petitioners' death sentences under the Eighth and Fourteenth Amendments in a single-paragraph *per curiam* decision. *Id.*; U.S. Const. amends. VIII, XIV. Five justices each wrote concurring opinions; the opinions of Justices Stewart and White represent the holding of the Court.[26]

[26] *See Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality) ("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").

The Court 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." *Id*. at 309-10 (Stewart, J., concurring).

The Court's decision in *Furman* was data-driven. For instance, Justice Stewart endorsed Justice Douglas's reference to a study on racial disparity in the imposition of the death penalty. *Id.* at 310 n.13 (Stewart J. concurring) (citing *Furman*, 408 U.S. at 249-51(Douglas, J., concurring)). Because the death penalty was imposed arbitrarily on a few defendants and the evidence raised the specter of racial bias, the capital punishment schemes at issue violated the Eighth Amendment's prohibition on cruel and unusual punishment. *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

ii. *States drafted new statutes in an attempt to reduce caprice and bias in capital sentencing.*

The *Furman* Court invalidated the then-existing death penalty statutes because they resulted in an unfair application of the punishment.

The Court did not resolve the question of whether capital punishment was unconstitutional *per se* in light of "evolving standards of decency that mark the progress of a maturing society." *See Furman*, 408 U.S. at 277-78 (Douglas, J., concurring) (discussing standard). The majority instead struck down the statutes that permitted imposition of the death penalty on a random handful of defendants, but left open the possibility that different procedures could prevent such problems. *See Gregg v. Georgia*, 428 U.S. 153, 168-69, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (discussing *Furman*).

Following *Furman*, some states tried to address the problem of arbitrariness by making capital punishment mandatory for certain crimes, but the Supreme Court invalidated those laws on the grounds that the Eighth Amendment requires individualized sentencing, including "consideration of the character and record of the individual offender and the circumstances of the particular offense." *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

Other states drafted statutes which retained individualized sentencing but limited the discretion of prosecutors, judges, and juries "by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence." *Gregg*, 428 U.S. at 180.

These states contended that such "guided discretion" would prevent arbitrary, capricious, or biased decision-making. *See id.* at 188-89.

The U.S. Supreme Court upheld a "guided discretion" statute in 1976 in *Gregg*, 428 U.S. at 207 (plurality). The Court first rejected a renewed argument that the death penalty was unconstitutional *per se*. *Id.* at 169. It reasoned that capital punishment was not contrary to contemporary standards of decency because most states had re-enacted the death penalty following *Furman*. *Id.* at 176, 179-80.

The Court also rejected the petitioner's argument that the death penalty was unconstitutional as administered because the new scheme did not fix the problems identified in *Furman*. *Gregg*, 428 U.S. at 180-98. The Court was willing to assume the new procedures would eliminate arbitrariness in capital sentencing, and it relied on the American Law Institute's Model Penal Code provision for the proposition that statutes could simultaneously permit the exercise of discretion yet eradicate caprice and bias. *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 (internal quotation omitted).

Washington followed the national trend. In the wake of *Furman*, this Court struck down Washington's capital statute because of the lack of

standards to guide juror discretion. *State v. Baker*, 81 Wn.2d 281, 282, 501 P.2d 284 (1972). The Court then declared Initiative 316, which provided for a mandatory death penalty for certain types of first degree murder, to be unconstitutional. *State v. Green*, 91 Wn.2d 431, 444-47, 588 P.2d 1370 (1979). The Legislature next adopted a fairly narrow and protective capital statute, former RCW 10.94, but this Court struck it down because it allowed defendants to escape the death penalty by pleading guilty. *State v. Frampton*, 95 Wn.2d 469, 474-84, 627 P.2d 922 (1981).

When the current 1981 statute was adopted, although the Court identified constitutional problems with the new law, the Court opted not to strike it down entirely but chose to fix the problems through judicial construction. *State v. Bartholomew*, 98 Wn.2d 173, 180-99, 654 P.2d 1170 (1982), *upon remand* 101 Wn.2d 631, 633-44, 683 P.2d 1079 (1984). Then, over the next generation, the Court repeatedly upheld the statute, following *Gregg*'s optimism that the statute contained protections within it so that it could be administered fairly, in a non-arbitrary fashion. *See State v. Cross*, 156 Wn.2d 580, 622-24, 132 P.3d 80 (2006).[27]

[27] *See also State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984); *State v. Rupe*, 101 Wn.2d 664, 697-701, 683 P.2d 571 (1984). *But see Cross*, 156 Wn.2d at 641-52 (Johnson, J., dissenting, joined by Madsen, Sanders & Owens, JJ).

iii. *Forty years of experience show that the problems identified in Furman have not been fixed, and the death penalty is unconstitutional.*

The evidence that has developed since *Gregg* – and even since *Cross* – shows: (1) The death penalty no longer comports with evolving standards of decency; and (2) The "*Furman* fix" statutes did not work; the death penalty is still imposed in an unconstitutionally arbitrary and racially biased manner. The Beckett Report supports this conclusion.

First: Local, national, and international trends disfavor the death penalty. Locally, Washington's governor issued a moratorium in 2014.[28] Nationally, nine states have abolished capital punishment since *Gregg*, and three other governors have issued moratoria.[29] Internationally, dozens of countries have abolished capital punishment since *Gregg*, including Canada and all European Union nations.[30] Thus, capital punishment is no longer consistent with "the evolving standards of decency that mark the progress of a mature society." *Gregg*, 428 U.S. at 173.

Second: Even if the death penalty is not unconstitutional *per se*, it is unconstitutional as administered, just as it was in 1972. After 40 years of experimentation it is now apparent that the post-*Furman* statutes,

[28] https://www.governor.wa.gov/news-media/gov-jay-inslee-announces-capital-punishment-moratorium

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

[30] https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries

including Washington's, have not worked. The death penalty is still imposed on a random few, in an arbitrary and racially biased manner.

The American Law Institute recognized as much in 2009. The ALI withdrew the death penalty from the Model Penal Code "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."[31] The Institute declined to draft new procedures, in part because "real-world constraints make it impossible for the death penalty to be administered in ways that satisfy norms of fairness and process." American Law Institute, *Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty* 5 (2009).[32]

Several concerns motivated the decision. Among other issues, the group cited: (1) the "near impossibility" of addressing "conscious or unconscious racial bias" in a statute; (2) "the difficulty of limiting the list of aggravating factors so that they do not cover (as they do in a number of state statutes now) a large percentage of murderers"; and (3) the tension between the requirements of fair sentencing and individualized sentencing. *Id.* The American Law Institute's abandonment of the death penalty is particularly significant because the Supreme Court has always relied on the judgment of the ALI in its major capital punishment cases. *See Gregg*,

[31] https://www.ali.org/projects/show/sentencing/.
[32] Available at https://www.ali.org/projects/show/sentencing/.

428 U.S. at 193; *McCleskey v. Kemp*, 481 U.S. 279, 302-03 & n.24, 308, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

Justices Breyer and Ginsburg have similarly concluded that post-*Furman* efforts to ensure fairness in the administration of the death penalty have failed. *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726, 2755-80, 192 L. Ed. 2d 761 (2015) (Breyer, J., dissenting). Although the issue in *Glossip* was whether a particular lethal injection drug created a substantial risk of severe pain, Justice Breyer, joined by Justice Ginsburg, wrote separately to question the constitutionality of the death penalty as a general matter. *See id.* Referencing *Gregg*, the justices noted:

> In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed.

Glossip, 135 S. Ct. at 2755 (Breyer, J., dissenting).

Justices Breyer and Ginsburg cited statistical studies demonstrating that capital sentencing outcomes are arbitrary and depend more on race and geography than on the egregiousness of the crimes. *Id.* at 2760-62. No justice indicated that reliance on such studies was foreclosed by *McCleskey v. Kemp, supra. See id.* (Justices Breyer and Ginsburg discuss numerous statistical studies); *see also id.* at 2746-50 (Scalia, J.,

concurring) (disagreeing with Justices Breyer and Ginsburg but not citing *McCleskey*); *id.* at 2750-55 (Thomas, J., concurring) (same).[33] This makes sense: *McCleskey* was technically an as-applied challenge to a particular defendant's death sentence, and the holding does not apply to systemic bias claims. *McCleskey*, 481 U.S. at 282-83, 319.

Furthermore, the *McCleskey* Court relied on its "unceasing efforts to eradicate racial prejudice from our criminal justice system" to assure itself that the statistical study presented in that case demonstrated a mere "risk" of race-based decision-making that would not actually come to pass. *Id.* at 309 (citing *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)). It has been well-established in the ensuing decades that these "unceasing efforts" have utterly failed – in part because racial bias is often unconscious rather than purposeful. *See State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326 (2013).

Like the ALI, Justices Breyer and Ginsburg determined that any further efforts to cure this problem would be futile. *Glossip*, 135 S. Ct. at 2762 (Breyer, J., dissenting). *Furman*'s prohibition on arbitrary, capricious, and racially biased outcomes cannot be reconciled with *Woodson*'s requirement of individualized sentencing. *See id.* at 2762-63.

[33] Even the author of the 5-4 *McCleskey* opinion, Justice Powell, later disclaimed it, characterizing it as the one decision he regretted. ALI Report, *supra*, at 14.

The justices explained:

> [R]acial and gender biases may, unfortunately, reflect deeply rooted community biases (conscious or unconscious), which, despite their legal irrelevance, may affect a jury's evaluation of mitigating evidence. … Nevertheless, it remains the jury's task to make the individualized assessment of whether the defendant's mitigation evidence entitles him to mercy.

Id. (internal citations omitted).[34]

The justices concluded by issuing a call to action to revisit the "basic question" of whether the death penalty violates the Eighth Amendment. *Id.* at 2776-77.

This Court should answer the call, and should hold that Washington's death penalty scheme violates the Eighth Amendment. A review of the trial reports shows that a "random handful" of defendants end up on death row, while scores of defendants whose crimes are "just as reprehensible" are sentenced to life in prison. *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring); *see* Appellant's Opening Brief ("AOB") at 59-104; Appellant's Reply Brief ("ARB") at 34-54, 65-68. And the Beckett Report demonstrates that, "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring). Thus

[34] In 1972, Justice Marshall well understood that any system that gave jurors discretion in capital sentencing "was an open invitation to discrimination." *Furman*, 408 U.S. at 365 (Marshall, J., concurring). That various justices over time who have been supporters of capital punishment now understand Justice Marshall's fears is significant.

the death penalty, as administered, is unconstitutional. This Court should strike down Washington's capital punishment statute under the Eighth and Fourteenth Amendments.

b. The death penalty violates article I, section 14, which is more protective than the Eighth Amendment.

Although Washington's death penalty scheme violates the Eighth Amendment, this Court need not reach the federal question. *See State v. Jorgenson*, 179 Wn.2d 145, 152, 312 P.3d 960 (2013) ("Where feasible, we resolve constitutional questions first under our own state constitution before turning to federal law"). Article I, section 14 provides stronger protection against cruel punishment than the Eighth Amendment, and this Court should hold that our capital punishment scheme violates the Washington Constitution.

i. *Article I, section 14 provides greater protection against disproportionate punishment and greater protection in the capital context.*

Because of the differences in text and history, this Court has long held that article I, section 14 of the Washington Constitution provides greater protection than the Eighth Amendment. Const. art. I, § 14; U.S. Const. amend. VIII; *State v. Fain*, 94 Wn.2d 387, 393, 617 P.2d 720

(1980) .[35] Accordingly, a *Gunwall*[36] analysis is not necessary. *State v. Roberts*, 142 Wn.2d 471, 506 n.11, 14 P.3d 713 (2000). Rather, this Court will "apply established principles of state constitutional jurisprudence." *Id*.

This increased protection is particularly applicable here, where Mr. Gregory is arguing that his sentence is disproportionate and that the death penalty statute is unconstitutional. In the seminal article I, section 14 case, this Court invalidated the petitioner's habitual-offender sentence as disproportionate to his relatively minor offenses – even though the U.S. Supreme Court had upheld similar sanctions under the Eighth Amendment. *See Fain*, 94 Wn.2d at 391, 402 (contrasting *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)). And in the capital context, this Court has repeatedly held that the state constitution is more protective than the federal constitution. *See, e.g.*, *Roberts*, 142 Wn.2d at 505-06 (holding that, regardless of whether Eighth Amendment would permit capital punishment for a mere accomplice, article I, section 14 permits the death penalty only for major participants); *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) (state

[35] The only exception is where a capital defendant wishes to waive general appellate review. *State v. Dodd*, 120 Wn.2d 1, 21, 838 P.2d 86 (1992). Article I, section 14 does not bar such a waiver any more than the Eighth Amendment does. *Id*. But in all other contexts, article I, section 14 provides stronger protection against cruel punishment than the federal constitution. *State v. Thorne*, 129 Wn.2d 736, 772 & n.10, 921 P.2d 514 (1996).

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

constitution's requirement of "fundamental fairness" in capital sentencing is more stringent than that of federal constitution and prohibits admission of unreliable evidence in penalty phase of capital proceeding).

ii. *This Court may look to other jurisdictions which have invalidated the death penalty under state constitutional law.*

Like this Court, courts in other jurisdictions have held their state constitutions provide stronger protection than the federal constitution in the capital context. For instance, New York's high court invalidated that state's capital punishment statute because of a procedure that passed muster under the federal constitution, 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).[37] More recently, the Connecticut Supreme Court struck down the death penalty altogether under its state constitution. *Santiago*, 318 Conn. at 9.

Santiago is particularly relevant. There, the court held that, following the Connecticut legislature's prospective repeal of the death penalty, capital punishment violates the state constitutional prohibition against cruel and unusual punishment. *Id.* The Court made clear that its reasoning did not depend on the partial-abolition problem. Rather, the

[37] 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 equipment from state facilities. http://www.deathpenaltyinfo.org/new-york-1.

evidence demonstrated that the death penalty as a general matter no longer comports with state constitutional requirements. *Id.* at 14-140.

Among other reasons, the court recognized the same problem Mr. Gregory raises here: "[T]he selection of which offenders live and which offenders die appears to be inescapably tainted by caprice and bias." *Santiago*, 318 Conn. at 107. The capital sentencing process is "both under inclusive and over inclusive" and "the exercise of unfettered discretion at key decision points in the process has meant that the ultimate punishment has not been reserved for the worst of the worst offenders." *Id.* at 114.

In reaching these conclusions, the court relied in part on scientific and sociological studies. *Id.*at 127. It was appropriate to do so because courts' judgments "often hinge on facts about the world in which we live, facts the study of which is the domain of natural and social scientists." *Id.* at 128. The court noted that even if the studies' findings were not "indisputably true," it was appropriate to rely on such facts if they "at least appear to be more likely than not true[.]" *Id.* at 127.

Like the American Law Institute and Justices Breyer and Ginsburg, the Connecticut Supreme Court concluded that one reason capital sentencing is infected with caprice and bias is the irreconcilable conflict between *Furman* and its progeny and *Woodson* and its progeny. *Id.* at 107-12. The former requires that statutes "cabin" decision-makers' discretion

in order to avoid arbitrariness, while the latter insists that "the discretion of the jury to accord the capital defendant mercy may not be confined or restricted in any way." *Id.* at 107-08.

> The question is whether this individualized sentencing requirement inevitably allows in through the back door the same sorts of caprice and freakishness that the court sought to exclude in *Furman,* or, worse, whether individualized sentencing necessarily opens the door to racial and ethnic discrimination in capital sentencing. In other words, is it ever possible to eliminate arbitrary and discriminatory application of capital punishment through a more precise and restrictive definition of capital crimes if prosecutors always remain free not to seek the death penalty for a particular defendant, and juries not to impose it, for any reason whatsoever? We do not believe that it is.

Santiago, 318 Conn. At 108-09.

The Connecticut Supreme Court noted that multiple U.S. Supreme Court justices had acknowledged this conflict. Justice Marshall suggested the solution was invalidation of the death penalty, while Justice Scalia urged an overruling of *Furman. Santiago,* 318 Conn. at 110-11 (citing *Godfrey v. Georgia*, 446 U.S. 420, 439, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980) (Marshall, J., concurring in the judgment); *id.* at 111-12 (citing *Walton v. Arizona*, 497 U.S. 639, 664-65, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (Scalia, J., concurring)).

The Connecticut Supreme Court held that its state constitution required it to resolve the conflict in favor of fairness rather than discretion.

Santiago, 318 Conn. at 113-15. This Court should hold the same is true under the Washington Constitution, and should invalidate the capital punishment statute that has permitted the death penalty to be imposed in an arbitrary and racially biased manner.

This Court should consider not only the majority opinion in *Santiago*, but also the concurring opinion of Justices Norcott and McDonald. These justices fully joined the majority, but wrote separately to underscore the problems of racial and ethnic discrimination that have plagued the administration of capital punishment. *Santiago*, 318 Conn. at 140 (Norcott and McDonald, JJ., concurring). After tracing the history of the death penalty in their state, the justices noted, "historical accounts of persistent racial disparities in capital sentencing have been borne out, repeatedly, by contemporary statistical evidence both in Connecticut and throughout the United States." *Id.* at 148-49.

The concurrence discussed a recent Connecticut study which, like Washington's study, controlled for numerous legally relevant variables and found that minority defendants are substantially more likely to be sentenced to death than white defendants. *Id.* at 159. The justices suggested that these unfair outcomes were likely due to both unconscious aversive bias against defendants of color and unconscious in-group

favoritism toward white individuals. *Id.* at 160.[38] They concluded, "A thorough and fair-minded review of the available historical and sociological data thus strongly suggests that systemic racial bias continues to infect the capital punishment system in Connecticut in the post-*Furman* era." *Id.* at 159. Regardless of whether these studies were sufficient to raise a federal constitutional concern, the justices expressed "grave doubts" that "a capital punishment system so tainted by racial and ethnic bias could ever pass muster under our state constitution." *Id.* at 161.[39]

This Court should similarly hold that Washington's capital punishment system, which is tainted by racial and ethnic bias, does not pass muster under our state constitution. This Court should recognize that the Beckett Report is reliable, and its findings and conclusions accurate. But it should also hold that, *even if the study's findings are only more likely than not true*, our capital punishment scheme is unconstitutional. *See Santiago*, 318 Conn. at 127 (endorsing this standard for consideration of legislative facts); *id.* at 163 (Norcott and McDonald, JJ., concurring) ("a system that features a significant probability that sentencing decisions are

[38] For a discussion of these phenomena, see *Br. of Amicus Curiae Korematsu Center* (12/15/15) at 12-17 (citing studies).

[39] The justices discussed and distinguished the "roundly criticized" opinion in *McCleskey*, 481 U.S. at 319. *Santiago,* 318 Conn. at 161-64 (Norcott and McDonald, JJ., concurring). They urged, "we would express to our sister courts, for whom the issue is not yet a dead letter, our suggestion that they consider closely whether the legal standard articulated in *McCleskey v. Kemp* … affords adequate protection to members of minority populations who may face the ultimate punishment." *Santiago*, 318 Conn. at 172 (Norcott and McDonald, JJ., concurring).

influenced by impermissible considerations cannot be regarded as rational") (internal citation omitted). Death is different from other punishments, and if it is likely that racial bias influences capital sentencing outcomes, the death penalty should be deemed unconstitutional.

In sum, the Trial Judge Reports and the statistical study demonstrate that the death penalty in Washington is imposed in an unfair, arbitrary, and racially biased manner. Whether or not such a scheme passes Eighth Amendment muster, it does not survive state constitutional scrutiny. This Court should hold that Washington's capital punishment scheme violates article I, section 14 of the Washington Constitution.

3. Mr. Gregory's death sentence fails proportionality review and passion-or-prejudice review.

If this Court rejects the above arguments regarding the constitutionality of Washington's death penalty scheme, it should nonetheless reverse Mr. Gregory's sentence pursuant to its mandatory statutory review. RCW 10.95.130(2)(b), (c). The death sentence was brought about through subtle and overt racial prejudices, and is disproportionate to the sentences imposed in other aggravated murder cases.

a. The sentence fails passion-or-prejudice review because racial issues infected the case.

In prior briefing, Mr. Gregory demonstrated how the issue of race infected both the trial and special sentencing proceeding. AOB at 207-22; ARB at 107-12. The updated Beckett Report confirms the insidious role that race plays in capital cases in Washington. The findings should lead this Court to conclude that the sentence of death in this case was "brought about through passion or prejudice." RCW 10.95.130(2)(c).

There has been very little discussion in this Court's capital jurisprudence about the nature of mandatory "passion or prejudice" review. In most cases, the review has been limited to trial issues, such as prosecutorial misconduct in closing, the admission of inflammatory evidence or whether the jury pool was fair.[40] However, review for "passion or prejudice" does not need to be so circumscribed as simply an additional mechanism for review of trial error. A review of the language and history of RCW 10.95.130(2)(c) reveals that it is an alternative tool that this Court has to strike down a death sentence based upon pervasive race discrimination.

Mandatory review for "passion or prejudice" was adopted in 1981, and was not included in prior Washington statutes. The Legislature

[40]*See e.g.*, *Davis*, 175 Wn.at 373-74; *Cross*, 156 Wn.2d at 634-35; *State v. Mak*, 105 Wn.2d 692, 762, 718 P.2d 407 (1986); *Campbell*, 103 Wn.2d at 30.

included this provision in part because similar language was part of the Georgia statute upheld in *Gregg v. Georgia, supra*.[41] Notably, Georgia's statute[42] was adopted in 1973 specifically in response to criticisms about systemic race discrimination in *Furman v Georgia, supra*.[43]

Since 1981, this Court has acknowledged that race discrimination can be one aspect of "passion or prejudice" review, even in cases where the Court has affirmed death sentences, but where evidence of prejudice has not been fully developed. For instance, in *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001), the Court rejected a "passion or prejudice" argument based simply upon undeveloped statistical assertions and anecdotal evidence of racism in Spokane and America historically. *Id*. at 619. Citing to *McCleskey v. Kemp, supra*, the Court held that Woods had not submitted sufficient evidence to support his claims. *Woods*, 143 Wn.2d at 620-21.[44] The Beckett Report changes the situation completely

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[41] *See* RAF [Ronald Franz], *Explanatory Material for "An Act Concerning Murder and Capital Punishment*," December 31, 1980, at 20 (original in State Archives for HB 76 (1981)) ("[I]t seems appropriate that one not be executed as a result of a jury's passion or prejudice and because a similar factor was in Georgia's sentencing review process.").

[42] O.C.G.A. § 17-10-35(c).

[43] *See Conner v. State*, 251 Ga. 113, 303 S.E.2d 266, 275 & n.10 (1983) (referring to *Furman*, "racial prejudice" and discrimination).

[44] *See also State v. Elledge*, 144 Wn.2d 62, 83-84, 26 P.3d 271 (2001) (no issue as to racial bias because defendant, victim and all jurors were white); *State v. Sagastegui*, 135 Wn.2d 67, 95, 954 P.2d 1311 (1998) (even though none of jurors were of the same race as defendant and were of the same race as victims, these facts "without more do not cast doubt on the verdict."); *State v. Davis*, 141 Wn.2d 798, 885, 10 P.3d 977 (2000) (rejecting an argument that a trial court's failure to *sua sponte* to question the jurors about race constituted "passion or prejudice"); *State v. Gentry*, 125 Wn.2d 570, 609-11, 658, 888 P.2d 1105 (1995) (rejecting a "passion or prejudice" argument based on previously

as Mr. Gregory's claims do not rely on crude statistics or just the history of racism.

Notably, Washington's "passion or prejudice" statute differs slightly from the wording of the Georgia statute. Statutory review in Georgia is "[w]hether the sentence of death *was imposed under the influence* of passion, prejudice, or any other arbitrary factor." O.C.G.A. § 17-10-35(c)(1) (emphasis added). Washington's wording is "[w]hether the sentence of death was *brought about* through passion or prejudice." RCW 10.95.130(c)(2) (emphasis added).

"Imposed" entails the presence of a direct human agent – i.e., a judge or a jury. Thus, the inquiry would be whether a particular jury imposed a death sentence because of overt racial prejudice.[45] In contrast, "brought about" has a more passive connotation, and can include indirect causation through a variety of factors, including systemic bias, implicit bias and general social attitudes of white jurors toward black defendants.[46]

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rejected arguments about racial comments made by the prosecutor to the defense attorney *outside* the presence of the jury or racist words used by various witnesses).

[45] *See, e.g., Tharpe v. Sellers*, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (No. 17–6075, 1/8/18) (juror later gave declaration that revealed his extreme racist views); *Peña-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017) (racist comments during deliberations);

[46] Interestingly, this Court has previously pointed to the term "brought about by racial discrimination" in a case involving the justification for Pierce County's affirmative action program, not because of specific evidence discrimination by any particular person, but because of the history generally of race discrimination in Pierce County. *See Southwest Washington Chapter, Nat. Elec. Contractors Ass'n v. Pierce Cty*., 100 Wn.2d 109, 121-24, 667 P.2d 1092 (1983). A commitment to eradicating the long-term effects of racial

Here, the Beckett Report confirms that death sentences in Washington are "brought about," in significant part, by "passion or prejudice." This Court should set aside the death sentence in this case under RCW 10.95.130(2)(c).

b. The sentence fails proportionality review because death has not been imposed generally in similar cases and racial bias permeates the system.

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." *Cross*, 156 Wn.2d at 630; *see* RCW 10.95.130(2)(b).

Allen Gregory's sentence fails proportionality review. He was convicted of the aggravated murder of a single victim when he was only 24 years old. He does not have any other violent felony convictions. Yet he is on death row, while scores of other defendants who brutally killed multiple victims and have violent felony histories are serving life sentences. AOB at 59-104; ARB at 34-54.

The opening and reply briefs set forth the details of the other aggravated murder cases as required. In summary:

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discrimination is also mandated by our international law commitments. *See International Convention on the Elimination of All Forms of Racial Discrimination*, Article 2(1)(c), 140 Cong. Rec. S7634-02 (June 24, 1994) (noting obligation to review laws that "have the effect of creating or perpetuating racial discrimination.").

- Mr. Gregory was convicted of killing one victim, but at least 103 adults who committed multiple aggravated murders were sentenced to life in prison. At least 23 of those defendants committed three or more aggravated murders, but are serving life sentences.

- Although the crime in this case was gruesome, most aggravated murder defendants who are serving life sentences committed their crimes in extraordinarily brutal fashion and caused substantial victim suffering. Many defendants serving life sentences raped children before killing them; others stabbed their victims dozens of times and caused them to slowly bleed to death; others kidnapped and tortured victims for hours before finally killing them; others buried or burned their victims alive.

- Mr. Gregory was convicted of two aggravating circumstances, but most people convicted of two aggravating circumstances are serving life sentences, and most people convicted of the same aggravating circumstances as Mr. Gregory are serving life sentences.

- Mr. Gregory is on death row despite having no violent felony history. He is unique in that regard. Everyone else who is on death row either committed multiple aggravated murders or at least committed other violent felonies before committing aggravated murder.

AOB at 59-104; (discussing dozens of trial reports); ARB at 34-54 (discussing TRs filed after opening brief); TRs 342-54 (filed after reply brief).[47]

[47] *See also Davis*, 175 Wn.2d at 352-53 (affirming Cecil Davis's sentence in part because he was in "a special category of repeat murderers," and also had at least two

The trial reports demonstrate beyond doubt that Mr. Gregory's sentence fails comparative proportionality review. They raise the question of why, in light of the obvious disproportionality, Allen Gregory ended up on death row. The Beckett Report provides the likely answer.

Systemically, the race of the defendant plays a significant role in the sentences imposed. Mr. Gregory is African American, and he sits on death row while dozens of equally or more culpable offenders serve life sentences. The statistical study suggests that had Allen Gregory not been black, his odds of being sentenced to death would have been notably lower. This Court cannot conclude with any confidence that Mr. Gregory's sentence is proportionate to sentences given in similar cases, and is not based in part on his race.[48]

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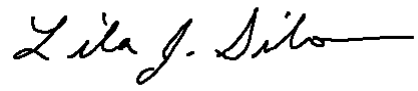
other serious violent offenses in his criminal history); *contrast* TR 312 (Allen Gregory's only other felonies are one count of drug possession and one count of theft of a skateboard when he was 13 years old).

[48] *See Davis*, 175 Wn.2d at 400 (Wiggins, J., dissenting) (emphasizing, "the purpose of conducting comparative proportionality review is 'to avoid random arbitrariness *and imposition of the death sentence based on race.*'"); *Santiago*, 318 Conn. at 167-68 (Norcott and McDonald, JJ., concurring) (noting Hispanic defendant's crime against white victim was "terrible and tragic" but it was questionable whether it was among the "worst of the worst"; justices "simply cannot be assured that, had their races been reversed, the outcome would have been the same").

C. CONCLUSION

This Court should strike down Washington's capital sentencing scheme as unconstitutional because it results in the arbitrary and racially biased imposition of the death penalty. In the alternative, this Court should reverse Mr. Gregory's sentence under RCW 10.95.130(2)(b) or (c).

Respectfully submitted this 22nd day of January, 2017.



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APPENDIX A

Appendix A. Results of New Analyses Using Updated Coding Protocol for Aggravating Circumstances Found

Updated Coding Protocol for Number of Aggravating Circumstances Found:

- Number of victims (number of counts of aggravated murder) is controlled for as a separate variable, so do not double-count it here. For example, a person who committed 4 aggravated murders, each with the aggravating circumstances of "multiple victims," and "course of robbery" would count as 2 aggravating circumstances, not 8. The heightened culpability would be reflected in the Vics_Num field (which would be 4).
- Count "course/furtherance of" as one aggravator per crime if jury found each separately. So, e.g., course/furtherance of rape is 1, course/furtherance of rape and robbery is 2. But course/furtherance of rape *or* robbery is 1. Where it is not clear, err on the side of assuming the jury made one finding ("or").
- Similarly, if the jury made separate findings that the defendant committed the murder to conceal identification *and* to conceal commission of crime, it counts as two. But if it is one finding, it is one aggravator.
- In the rare case where trial report is unclear, court decisions and dockets may be consulted for clarification. At least one aggravator exists for every case.

Below are the new results obtained when the revised coding protocol described above is used to identify the number of aggravating circumstances found and the data are re-analyzed. For reference, however, we first show the results obtained when the updated dataset is analyzed but the original coding protocol for identifying the number of aggravating circumstances found is utilized. This reference table is Table D1 from our Response to Commissioner's Supplemental Interrogatories (9/29/2017) at 5. In this model, all arguably relevant Special Sentencing Proceedings for which data regarding all predictors is available are included in the analysis (n=81). (Whether the victim was held hostage is unknown in one case, and this special sentencing proceeding therefore cannot be included in any of the models that include this variable).

Table D1. Impact of Case Characteristics and Defendant Race on Capital Sentencing Outcomes in Cases with Special Sentencing Proceedings, December 1981 - May 2014				
N= 81	Death Penalty Imposed			Pseudo R^2 = 0.2399 LR chi2(7) = 26.58 Prob > chi2 = 0.0004
Variable	Coefficient	Exact P-Value	Odds Ratio	90% Confidence Interval
Prior Convictions (ln)	-0.080	0.556	0.923	-.303, .143
1 Victim	-0.655	0.249	0.520	-1.59, .280
Aggravating circumstances	0.651	0.011	1.917**	.228, 1.07
Mitigating Circumstances (ln)	-0.263	0.084	0.769*	-.513, -.012
Defenses	-0.839	0.025	0.432**	-1.45, -.224
Victim Held Hostage	0.738	0.195	2.092	-.199, 1.68
Black Defendant	1.519	0.048	4.568**	.258, 2.78
* significant at α = .10	** significant at α = .05			*** significant at α = .01

Unaltered Statistical Output Associated with Table D1

```
logit DP_Sentence  lnPriors Vics_1Total AppliedAggCir_Num  LnTotMitCircum Defenses_Num
Vics_AnyHostage D_RaceB, level(90) ;

Iteration 0:   log likelihood = -55.395695
Iteration 1:   log likelihood = -42.668294
Iteration 2:   log likelihood = -42.107671
Iteration 3:   log likelihood = -42.103606
Iteration 4:   log likelihood = -42.103605

Logistic regression                               Number of obs     =         81
                                                  LR chi2(7)        =      26.58
                                                  Prob > chi2       =     0.0004
Log likelihood = -42.103605                       Pseudo R2         =     0.2399

------------------------------------------------------------------------------
      DP_Sentence |      Coef.   Std. Err.      z    P>|z|     [90% Conf. Interval]
------------------+-----------------------------------------------------------------
         lnPriors |  -.0799751   .1356967    -0.59   0.556    -.3031763    .1432261
      Vics_1Total |  -.6545582   .5682018    -1.15   0.249    -1.589167    .2800506
AppliedAggCir_Num |   .6508112     .25691     2.53   0.011     .2282319    1.073391
   LnTotMitCircum |  -.2625053   .1520873    -1.73   0.084    -.5126666   -.0123439
     Defenses_Num |  -.8391754   .3737478    -2.25   0.025    -1.453936   -.2244149
  Vics_AnyHostage |   .7381753    .570023     1.29   0.195     -.199429    1.67578
          D_RaceB |   1.519062   .7665843     1.98   0.048     .2581425    2.779981
            _cons |  -1.113436   .7334553    -1.52   0.129    -2.319863    .0929906
```

Table 1 shows the results obtained for the same model depicted in Table D1 above except that the updated coding protocol for identifying aggravating circumstances found is utilized. This model includes all relevant cases for which there is data available on all of the predictors included in the model (N = 81).

Table 1. Impact of Case Characteristics and Defendant Race on Capital Sentencing Outcomes in Cases with Special Sentencing Proceedings, December 1981 - May 2014				
N = 81	Death Penalty Imposed			Pseudo R^2 = 0.2314 LR chi2(7) = 24.63 Prob > chi2 = 0.0006
Variable	Coefficient	Exact P-Value	Odds Ratio	90% Confidence Interval
Prior Convictions (ln)	-0.063	0.652	0.939	-.291, .166
1 Victim	-1.170	0.041	0.310**	-2.11, .229
Aggravating circumstances	0.799	0.006	2.224***	.317, 1.28
Mitigating Circumstances (ln)	-0.299	0.054	0.741*	-.555, -.044
Defenses	-0.792	0.024	0.453**	-1.37, -.216
Victim Held Hostage	0.453	0.425	1.573	-.481, 1.39
Black Defendant	1.597	0.047	4.939**	.274, 2.92
* significant at α = .10	** significant at α = .05			*** significant at α = .01

Unaltered Statistical Output for Table 1

```
logit DP_Sentence  lnPriors Vics_1Total AggFoundLegalCoded  LnTotMitCircum
Defenses_Num  Vics_AnyHostage D_RaceB, level(90) ;

Iteration 0:   log likelihood = -55.395695
Iteration 1:   log likelihood = -42.658144
Iteration 2:   log likelihood = -42.580092
Iteration 3:   log likelihood = -42.579897
Iteration 4:   log likelihood = -42.579897

Logistic regression                               Number of obs     =         81
                                                  LR chi2(7)        =      25.63
                                                  Prob > chi2       =     0.0006
Log likelihood = -42.579897                       Pseudo R2         =     0.2314

------------------------------------------------------------------------------
       DP_Sentence |      Coef.   Std. Err.      z    P>|z|     [90% Conf. Interval]
-------------------+----------------------------------------------------------------
          lnPriors |  -.0625985   .1388314    -0.45   0.652    -.2909559    .1657589
       Vics_1Total |  -1.169698   .5719526    -2.05   0.041    -2.110476   -.2289196
AggFoundLegalCoded |   .7994062    .293384     2.72   0.006     .3168325     1.28198
    LnTotMitCircum |   -.299639   .1553462    -1.93   0.054    -.5551608   -.0441171
      Defenses_Num |  -.7915546   .3497443    -2.26   0.024    -1.366833   -.2162764
   Vics_AnyHostage |   .4529539   .5676198     0.80   0.425    -.4806976    1.386605
           D_RaceB |   1.597259    .804196     1.99   0.047     .2744738    2.920043
             _cons |  -1.022312   .6966185    -1.47   0.142    -2.168148    .1235235
------------------------------------------------------------------------------
```

Table 2 shows the results obtained when the same model is run with two modifications: the updated coding protocol for identifying aggravating circumstances found is utilized and three special sentencing proceedings describing cases for which data is available are nevertheless excluded from the analysis. Specifically, Trial Reports 7, 180, and 216 (the first special sentencing proceedings for Rupe, Davis, and Gregory) are excluded from the analysis shown in Table 2 (N = 78).

Table 2. Impact of Case Characteristics and Defendant Race on Capital Sentencing Outcomes in Cases with Special Sentencing Proceedings, December 1981 - May 2014

N= 78	Death Penalty Imposed			Pseudo R^2 = 0.2075 LR chi2(7) = 21.91 Prob > chi2 = 0.0026
Variable	Coefficient	Exact P-Value	Odds Ratio	90% Confidence Interval
Prior Convictions (ln)	-0.015	0.920	0.985	-.261, .231
1 Victim	-1.104	0.053	0.332*	-2.04, -.166
Aggravating Circumstances	0.731	0.014	2.076**	.242, 1.22
Mitigating Circumstances (ln)	-0.289	0.064	0.749*	-.545, -.032
Number of Defenses	-0.759	0.030	0.468**	-1.33, -.185
Victim Held Hostage	0.480	0.399	1.612	-.456, 1.42
Black Defendant	1.503	0.066	4.493*	.156, 2.85
* significant at α = .10	** significant at α = .05			*** significant at α = .01

Unaltered Statistical Output for Table 2

```
logit DP_Sentence  lnPriors Vics_1Total AggFoundLegalCoded  LnTotMitCircum
Defenses_Num  Vics_AnyHostage D_RaceB, level(90) ;

Iteration 0:   log likelihood = -52.802235
Iteration 1:   log likelihood = -41.928383
Iteration 2:   log likelihood = -41.847618
Iteration 3:   log likelihood = -41.847527
Iteration 4:   log likelihood = -41.847527

Logistic regression                               Number of obs     =         78
                                                  LR chi2(7)        =      21.91
                                                  Prob > chi2       =     0.0026
Log likelihood = -41.847527                       Pseudo R2         =     0.2075

------------------------------------------------------------------------------
       DP_Sentence |      Coef.   Std. Err.      z    P>|z|     [90% Conf. Interval]
-------------------+----------------------------------------------------------------
          lnPriors |  -.0150709   .1497768    -0.10   0.920    -.2614318    .2312901
       Vics_1Total |  -1.103615   .5703289    -1.94   0.053    -2.041723   -.1655075
AggFoundLegalCoded |   .7305084   .2970681     2.46   0.014     .2418748    1.219142
    LnTotMitCircum |   -.288868   .1559897    -1.85   0.064    -.5454483   -.0322878
      Defenses_Num |  -.7593058   .3490311    -2.18   0.030    -1.333411   -.1852008
   Vics_AnyHostage |     .48035   .5690183     0.84   0.399    -.4556018    1.416302
           D_RaceB |   1.502627   .8184839     1.84   0.066     .1563411    2.848914
             _cons |   -1.00644    .696232    -1.45   0.148     -2.15164    .1387594
```

Table 3 shows the results obtained when the same model is run with two modifications: the updated coding protocol for identifying aggravating circumstances found is utilized and Trial Reports 92, 167, 182, 224 (describing Special Sentencing Proceedings for Darrah, Spillman, Ellis, and Vasquez) are excluded from the analysis (N = 77).

Table 3. Impact of Case Characteristics and Defendant Race on Capital Sentencing Outcomes in Cases with Special Sentencing Proceedings, December 1981 - May 2014;

N= 77	Death Penalty Imposed			Pseudo R^2 = 0.2634 LR chi2(7) = 27.95 Prob > chi2 = 0.0002
Variable	Coefficient	Exact P-Value	Odds Ratio	90% Confidence Interval
Prior Convictions (ln)	-0.001	0.972	0.995	-.242, .232
1 Victim	-1.322	0.029	0.266*	-2.32, -.352
Aggravating Circumstances	0.840	0.006	2.317**	.342, 1.34
Mitigating Circumstances (ln)	-0.289	0.071	0.748*	-.554, -.025
Number of Defenses	-0.985	0.009	0.373**	-1.61, -.364
Victim Held Hostage	0.390	0.514	1.477	-.594, 1.37
Black Defendant	1.505	0.071	4.505*	.134, 2.88
* significant at α = .10	** significant at α = .05			*** significant at α = .01

Unaltered Statistical Output for Table 3

```
logit DP_Sentence  lnPriors Vics_1Total AggFoundLegalCoded  LnTotMitCircum
Defenses_Num  Vics_AnyHostage D_RaceB, level(90) ;

Iteration 0:   log likelihood = -53.053711
Iteration 1:   log likelihood = -39.218468
Iteration 2:   log likelihood = -39.078297
Iteration 3:   log likelihood = -39.078078
Iteration 4:   log likelihood = -39.078078

Logistic regression                               Number of obs     =         77
                                                  LR chi2(7)        =      27.95
                                                  Prob > chi2       =     0.0002
Log likelihood = -39.078078                       Pseudo R2         =     0.2634

------------------------------------------------------------------------------
       DP_Sentence |      Coef.   Std. Err.      z    P>|z|     [90% Conf. Interval]
-------------------+----------------------------------------------------------------
          lnPriors |  -.0050055   .1441456    -0.03   0.972    -.2421039     .232093
       Vics_1Total |  -1.322634   .6066074    -2.18   0.029    -2.320414   -.3248533
AggFoundLegalCoded |   .8403924   .3031836     2.77   0.006     .3416998    1.339085
    LnTotMitCircum |   -.289736   .1606963    -1.80   0.071     -.554058   -.0254141
      Defenses_Num |  -.9854949   .3780394    -2.61   0.009    -1.607314   -.3636755
   Vics_AnyHostage |   .3901153   .5981869     0.65   0.514    -.5938146    1.374045
           D_RaceB |   1.505282    .833694     1.81   0.071     .1339772    2.876587
             _cons |  -.7135308   .7143655    -1.00   0.318    -1.888558     .461496
```

Table 4 shows the results obtained when the same model is run with three modifications: the updated coding protocol for identifying aggravating circumstances found is utilized, Trial Reports 7, 180, and 216 (the first special sentencing proceedings for Rupe, Davis, and Gregory) are excluded, and Trial Reports 92, 167, 182, 224 (describing Special Sentencing Proceedings for Darrah, Spillman, Ellis, and Vasquez) are also excluded (N=74).

Table 4. Impact of Case Characteristics and Defendant Race on Capital Sentencing Outcomes in Cases with Special Sentencing Proceedings, December 1981 - May 2014

N= 74	Death Penalty Imposed			Pseudo R^2 = 0.2421 LR chi2(7) = 24.51 Prob > chi2 = 0.0009
Variable	Coefficient	Exact P-Value	Odds Ratio	90% Confidence Interval
Prior Convictions (ln)	0.045	0.774	1.046	-.213, .303
1 Victim	-1.263	0.037	0.283*	-2.26, -.268
Aggravating Circumstances	0.771	0.012	2.162**	.266, 1.28
Mitigating Circumstances (ln)	-0.282	0.081	0.755*	-.547, -.016
Number of Defenses	-0.950	0.012	0.387**	-1.57, -.330
Victim Held Hostage	0.426	0.477	1.532	-.561, 1.41
Black Defendant	1.417	0.094	4.127*	.024, 2.81

* significant at α = .10 ** significant at α = .05 *** significant at α = .01

Unaltered Statistical Output for Table 4

```
logit DP_Sentence  lnPriors Vics_1Total AggFoundLegalCoded  LnTotMitCircum
Defenses_Num  Vics_AnyHostage D_RaceB, level(90) ;

Iteration 0:   log likelihood = -50.615144
Iteration 1:   log likelihood = -38.474604
Iteration 2:   log likelihood = -38.360762
Iteration 3:   log likelihood = -38.360315
Iteration 4:   log likelihood = -38.360315

Logistic regression                               Number of obs     =         74
                                                  LR chi2(7)        =      24.51
                                                  Prob > chi2       =     0.0009
Log likelihood = -38.360315                       Pseudo R2         =     0.2421

------------------------------------------------------------------------------
       DP_Sentence |      Coef.   Std. Err.      z    P>|z|     [90% Conf. Interval]
-------------------+----------------------------------------------------------------
          lnPriors |   .0449629   .1567537     0.29   0.774     -.212874    .3027997
       Vics_1Total |  -1.263119   .6050957    -2.09   0.037    -2.258413   -.2678254
AggFoundLegalCoded |   .7710941   .3070696     2.51   0.012     .2660095    1.276179
    LnTotMitCircum |  -.2815889   .1613025    -1.75   0.081    -.5469079     -.01627
      Defenses_Num |  -.9502564   .3770427    -2.52   0.012    -1.570436   -.3300763
   Vics_AnyHostage |   .4264834   .6001117     0.71   0.477    -.5606125    1.413579
           D_RaceB |    1.41762   .8474622     1.67   0.094     .0236687    2.811571
```

Table 5 below summarizes the results of the findings presented in Tables 1-4 above.

Table 5. Summary of Findings Obtained When Revised Coding Protocol for Identifying Aggravated Circumstances Found is Utilized				
	Table 1	**Table 2**	**Table 3**	**Table 4**
N	81	78	77	74
Trial Reports with No Missing Data Excluded	None	Nos: 7, 180, 216	Nos: 92, 167, 182, 224	Nos: 92, 167, 182, 224, 7, 180, 216
% of Observations Included	98.8%	95.1%	93.9%	90.2%
Prob > chi2	0.0006	0.0026	0.0002	0.0009
Pseudo R2	0.2314	0.2075	0.2634	0.2421
	Odds Ratio (P-Value)	Odds Ratio (P-Value)	Odds Ratio (P-Value)	Odds Ratio (P-Value)
Prior Convictions (ln)	0.939 (0.652)	0.985 (0.985)	0.995 (0.972)	1.046 (0.774)
1 Victim	**0.310** (0.041)**	**0.332* (0.053)**	**0.266* (0.029)**	**0.283* (0.037)**
Aggravating Circumstances	**2.224*** (0.006)**	**2.076** (0.014)**	**2.317** (0.006)**	**2.162** (0.012)**
Mitigating Circumstances (ln)	**0.741* (0.054)**	**0.749* (0.064)**	**0.748* (0.071)**	**0.755* (0.081)**
Number of Defenses	**0.453** (0.024)**	**0.468** (0.030)**	**0.373** (0.009)**	**0.387** (0.012)**
Victim Held Hostage	1.573 (0.425)	1.612 (0.399)	1.477 (0.514)	1.532 (0.477)
Black Defendant	**4.939** (0.047)**	**4.493 * (0.066)**	**4.505* (0.071)**	**4.127* (0.094)**
* significant at α = .10	** significant at α = .05		*** significant at α = .01	

Note: All statistically significant results are bolded. Odds Ratio = 1 indicates no effect; Odds Ratio < 1 indicates a decrease in likelihood; Odds Ratio > 1 indicates an increase in likelihood.

Finally, Table 6 presents the results of the analysis of the same models are rerun (and the number of aggravating circumstances is determined via the updated coding protocol) but only the five independent variables that are often or always found to be significant predictors of sentencing outcomes across numerous model specifications are included; the two independent variables (victim held hostage and number of prior convictions) that have not been found to be significant are excluded. In these models, the Events Per Variable ratio is 7 rather than 5 (35/5= 7).

Table 6. Summary of Findings Obtained When Revised Coding Protocol for Identifying Aggravated Circumstances Found is Utilized and Only Five Independent Variables are Included				
	Model 1	**Model 2**	**Model 3**	**Model 4**
N	82	79	78	75
Trial Reports Excluded	None	Nos: 7, 180, 216	Nos: 92, 167, 182, 224	Nos: 92, 167, 182, 224, 7, 180, 216
% of Observations Included	100%	96.3%	95.1%	91.5%
Prob > chi2	0.0002	0.0009	0.0000	0.0002
Pseudo R2	0.2198	0.1950	0.2586	0.2340
	Odds Ratio (P-Value)	Odds Ratio (P-Value)	Odds Ratio (P-Value)	Odds Ratio (P-Value)
1 Victim	**0.338** (0.049)**	**0.362* (0.065)**	**0.297** (0.038)**	**0.318* (0.050)**
Aggravating Circumstances	**5.035*** (0.003)**	**4.619** (0.006)**	**6.001*** (0.002)**	**5.521*** (0.003)**
Mitigating Circumstances (ln)	**0.785* (0.089)**	**0.789* (0.099)**	0.792 (0.117)	0.796 (0.127)
Number of Defenses	**0.495** (0.037)**	**0.499** (0.040)**	**0.394** (0.012)**	**0.401** (0.014)**
Black Defendant	**5.369** (0.034)**	**4.991** (0.047)**	**5.165** (0.048)**	**4.840* (0.061)**
* significant at α = .10	** significant at α = .05		*** significant at α = .01	

Note: All statistically significant results are bolded. Odds Ratio = 1 indicates no effect; Odds Ratio < 1 indicates a decrease in likelihood; Odds Ratio > 1 indicates an increase in likelihood.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALLEN GREGORY, Appellant.	)))))))))	NO. 88086-7

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF JANUARY, 2018, I CAUSED THE ORIGINAL **SUPPLEMENTAL 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:

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