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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALLEN EUGENE GREGORY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Roseanne Nowak Buckner

No. 98-1-04967-9

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO SUPPLEMENTAL BRIEF.

1. When a statistical analysis is too flawed to produce reliable results, should this court refuse to consider it in deciding whether to uphold the jury's verdict of death?

B. STATEMENT OF THE CASE.

For the most part this has been set forth in prior briefing. This supplemental brief is limited to whether the Court should consider Dr. Beckett's statistical analysis in *The Role of Race in Washington State Capital Sentencing, 1981-2014* ("Updated Report") when deciding whether defendant's death sentence should be upheld.

Dr. Beckett has provided two spreadsheets of data over the course of this proceeding. The first set she provided was so the State's expert, Dr. Scurich, and then in turn the Commissioner, could evaluate the Updated Report. Since that spreadsheet was first provided there have been many corrections and additions to the data contained within it based upon identified errors and the entry of previously omitted information. At the end of the Commissioner's evaluation process, she requested that Dr. Beckett provide an updated spreadsheet, which was done. All references to a "Spreadsheet" in this brief are referring to this second updated spreadsheet.

C. ARGUMENT.

1. THE UPDATED REPORT IS SO FLAWED THAT THE COURT SHOULD NOT RELY UPON IT.

In computer science "garbage in, garbage out" is where flawed, or nonsense input data produces nonsense output or "garbage." This concept can also be applied generally to any analysis that is based upon inaccurate or unreliable data. As noted in the Commissioner's findings, many errors have already been detected in the Updated Report and Dr. Beckett has completely disavowed positions that she took in that report. *Findings and Report Relating to Parties Expert Reports* ("Commissioner's Findings") at p. 7, 13 n.8, 19, 23, 97. As will be discussed below, there are still errors in the data used to generate the results than what have been previously identified. There are also fundamental flaws to the structure of this statistical analysis. Highlighting these should convince this Court that the report's results are too unreliable for consideration.

a. There are too many coding errors for the results to be considered reliable.

The State's expert issued a caveat to his critique of Dr. Beckett's report as he had not independently verified "that the variables are reliably coded within the file." N. Scurich, *Evaluation of "The Role of Race in Washington State Capital Sentencing, 1981-2014"* ("Scurich Report") at

p.6. He noted that that Beckett's results "are valid if, and only if, one makes the assumption that the data were coded with 100% reliability." Scurich Report at p.7.

As noted above, Dr. Scurich did not examine all of Dr. Beckett's coding but did examine the coding to see if she had correctly identified those defendants who received the death penalty and whether she had properly coded the race of those defendants; this limited examination revealed three errors in coding. Those errors were: Jack Spillman (TR 167/ID # 167) was incorrectly coded as having received the death penalty; Richard Pirtle (TR 132/ID # 132) was incorrectly coded as not receiving a death sentence; and, Gary Benn (TR 132/ID # 75) was incorrectly coded as to race. Scurich Report at p. 26. All of these coding errors were acknowledged by Dr. Beckett, who subsequently recoded those entries. Commissioner's Findings at p. 19. Later in the process it was also pointed out that Dr. Beckett had not included any information from Paul St. Pierre's TR 34A in her data. This trial report is in regards to a different murder than St. Pierre's TR 34, and involved a different proceeding in front of a different judge, but whoever had reviewed it for coding assumed that TR 34 and TR 34A pertained to the same murder and omitted any information about the second case. *See*, Commissioner's Findings at p. 7-9; *compare* TR 34 *with* TR 34A.

The fact that there were four errors in such fundamental categories should give this Court pause. Dr. Beckett issued a report on the impact of race on receiving the death penalty yet never double checked her data against the trial reports as to who faced the death penalty, who received the death penalty, or her coding as to their race. As will be discussed below, this failure to inspect her data was not limited to these categories.

i. Aggravating circumstances have not been consistently coded.

The Commissioner aptly explained how the various ways trial judges have listed aggravating circumstances in the reports has resulted in numerous inconsistencies in how this case characteristic has been coded. *See*, Commissioner's Findings at p. 15-18. She concluded that these "inconsistencies likely stem from a combination of various formats used by the trial judges to report aggravating circumstances and coding by persons without the expertise necessary to understand the substance of the information reported." *Id.* at 19.

These inconsistencies are also attributable to deficient coding protocols. A coding protocol could have addressed, for example, whether the same aggravating circumstance found for three different victims in a single case should be coded as a "1" or a "3." *See*, Commissioner's Findings at p. 17-18. The lack of a detailed coding protocol has resulted

in inconsistent coding of aggravating circumstances where there are multiple victims.

The number of aggravating circumstances present in a given case is important to assessing the nature of the crime and it is clear that there are deficiencies in coding aggravating circumstances in the study.

ii. Deficiencies in coding procedures for mitigating circumstances make their coding suspect.

The Commissioner has articulated many of the difficulties with the coding of mitigating circumstances in her findings. *See* Commissioner's Findings at p. 10-15. In particular she noted that "there is some merit to Dr. Scurich's challenge that the Updated Report does not provide an intelligible coding manual or information on the efficacy of coding as to the number of mitigating circumstances." *Id.* at p. 12. The Commissioner discerned a general protocol then asked Dr. Beckett in an interrogatory if this was the coding protocol employed. *Id.* at 13. Only then did Professor Beckett articulate a coding protocol for mitigating circumstances.

The Commissioner also identified a coding error, which Professor Beckett acknowledged and corrected. Commissioner's Findings at p. 13, n 8. Professor Beckett then asserted that all of the coding for mitigating circumstances had been double checked in cases where there was a special sentencing proceeding and that only one additional error was found and

corrected. *Id.* It appears that her "double checking" still failed to catch at least one coding error on mitigating circumstances.

In the trial report for Sammie Luvene, TR 135, for whom the jury returned a death sentence, the judge answered "No" to question 3(c), which asks if there was any credible evidence of statutory mitigating circumstances. Under the protocols ultimately articulated by Dr. Beckett, this should have been coded as a "0." *See*, Commissioner's Findings at p. 12 -14. Yet looking at the coding for this defendant in the study, it has been coded as a "1." Spreadsheet ID # 135 MitCircum_Statutory. Errors in coding mitigating circumstances still exist; such errors indicate the unreliability of the report's results.

Then there are also issues of judgment in coding using the proffered protocols. For example, in the report regarding Bryan Scherf, TR 313, the judge in response to question 3(c) about statutory mitigating factors did not check either box for yes or no and wrote:

> There was evidence sufficient to present to the jury of such mitigating circumstances. The Court expresses no opinion as to the credibility of the evidence.

TR 313. In response to the next question about non-statutory mitigating circumstances the court did not check the box for either yes or no and wrote:

> Possibly. A reasonable juror may have considered some of the evidence mitigating even if it was not statutory.

TR 313. Defendant's attorneys coded this as "1" statutory mitigating circumstance and "1" non-statutory mitigating circumstance. Spreadsheet ID # 313 MitCircum_Statutory, MitCircum_NonStat. As the court gave no description as to the mitigating evidence in either comment, it is questionable as to whether this coding complies with the protocols. It is impossible to know from the court's notations if mitigation evidence was presented on more than one subject. The trial court also rewrote the question, which called for it to make a determination of credibility of the evidence. The trial court indicated that it would not do that. TR 313. Yet this response is scored the same as a court that made a credibility determination, indicated "yes" to both questions and described the nature of the mitigating evidence presented. If the only thing being considered is the trial report, the coding on Mr. Scherf's case is largely speculative.

Finally, the defendant's attorneys did the coding for the mitigating circumstances and the State submits that neither of these attorneys is a neutral social scientist. As shown above, the coding of mitigating circumstances is subjective and it has been done by a biased party.

iii. Errors, inconsistencies and omissions in coding as to number of wounds inflicted and number of body parts injured show the unreliability of the study.

The protocols call for identifying the number of wounds inflicted and the number of body parts injured as to each victim (V1_Wounds, V2_Wounds, V1_BodyParts, etc.) *See* Protocols at pp. 39-40. Then there is a coding for the total number of wounds inflicted on all victims that aggregates all of these numbers (Vics_TotalWounds) as well as a coding for an aggregation of all body parts affected (Vics_TotalBodyParts).[1] *Id.*

There are two trial reports involving Billy Neal, Jr., TR 218 and 219. Each pertains to a different cause number. *Compare* TR 218 *with* TR 219. It is clear upon reading the trial reports, however, that the information within each trial report pertains to both cause numbers as it is essentially identical and both reference victims "Olmos," Gomez," and "Mendoza." *Id.* Dr. Beckett has included coding for both TR 218 and 219 in her data. *See*, Spreadsheet ID # 218 and 219. Looking at the coding for these trial reports, each has been coded as having three victims and each victim has been coded as having 141 wounds (V1_Wounds, V2_Wounds V3_Wounds) inflicted for a total of 423 wounds (Vics_TotalWounds)

[1] There is an error in the code book at p.39. It indicates the range for "Vics_TotalBodyParts" is 0 to 423. There is no case that has "423" in the column that pertains to this code.

amongst all victims. *Id.* These injuries have been coded as affecting one body part for each victim (V1_BodyParts, V2_BodyParts, V3_BodyParts). This coding is based upon the following information in the trial reports as to the victims' injuries.

> All three victims were stabbed numerous times. The count of wounds done by the State indicates that there were at least 140 wounds found on the bodies of the three victims.

TR 218 and 219.

The coding on these two cases is clearly in error. The trial report does not indicate 141 wounds per victim but "at least 140 wounds" collectively among all three victims. As there is no information as to what body parts were stabbed, the coding of one body affected can only be labeled as speculation. Moreover, it is also clear that Mr. Neal did not murder three people in each of two cause numbers for a total of six victims as has been coded, but that he murdered three people and these murders were charged across two separate cause numbers. Dr. Beckett's study has inaccurately coded the injuries inflicted on each of Mr. Neal's victims, then double counted those victims as well.

As noted above, the coding on Mr. Neal's cases was that 141 wounds affected one body part for each victim. Compare this to the coding for Mr. Lindamood, based upon TR 30, which is that the victim received 30 wounds affecting 30 body parts. *See*, Spreadsheet ID # 30

V1_Wounds, V1_BodyParts. That coding is based upon the following language in the trial report:

> There were 19 distinct injuries to Mr. George's head. Both jaw and nose were broken. The sockets of both eyes were smashed and eye sacs broken. Ten ribs were broken and an aorta was severed.

TR 30. The coder put in the same number for body parts injured and wounds inflicted even though it is clear that many of the wounds were to the same body part - the victim's head. Finally, the trial report on Mr. Walradt, TR 227, refers the reader to the report of the forensic pathologist who conducted the autopsy, which is not attached to the trial report. The wound count in his case was coded as "45" and the number of body parts affected was coded at "50." *See*, spreadsheet ID # 227 of V1_Wounds, V1_BodyParts.

While it might be possible to explain how the coder arrived at the number of body parts affected when looking at each trial report in a vacuum, it is not possible to articulate a consistent coding protocol for identifying body parts affected that was used across the board for the cases involving Mr. Neal, Mr. Lindamood, and Mr. Walradt.

Another problem with the coding of victim wounds is one of omission; several cases lack *any* coding entry despite it being impossible

to murder anyone without inflicting some injury. As an example, the trial judge in Charles Campbell's case described the injuries as:

> All three victims had been beaten and assaulted prior to death. Reanae Wicklund was severely beaten and sustained substantial physical injury. Shannah Wicklund sustained numerous cuts and puncture wounds prior to the fatal wounds. Barbara Hendrickson was assaulted to a lesser degree prior to the infliction of fatal wounds.

TR 9. Yet there are no data entries for these injuries – the boxes for each of the three victims are simply blank. *See*, Spreadsheet ID # 9 V1_Wounds, V2_Wounds, V3_Wounds. There was information in the trial report about the injuries to the victims, but it was not coded. *Id.* There are many blanks in the V1_Wounds column but it is unknown why there are blanks. Dr. Beckett provides no explanation in her protocols for why such information would not be coded.

Perhaps the clearest example as to the unreliability of the coded information on wounds and body parts injured is to look at the coding that was done for Mr. Gregory's two trial reports, TR 216 and 312. The first trial report described the victim's injuries as:

> Blunt impact injury with bleeding (probably to face)
> Vaginal Rape
> Anal Rape
> 3 Stab Wounds to back (potentially fatal)
> 1 Stab Wound to Neck
> 3 Lacerations to Neck (potentially fatal)
> Multiple bruises
> Broken Neck (6 cervical vertebrae)

TR 216. This was coded as the victim receiving 15 wounds with 8 body parts being injured. Spreadsheet ID # 216 V1_Wounds, V1_BodyParts. After the second penalty phase hearing the trial report described the victim's wounds as follows:

> The victim had multiple blunt impacts to her face and body. She had a badly swollen left eye and cheek. There was blood on her floor that was likely from her mouth or nose. She had multiple fresh bruises on her back, arms, and legs. Her hands were bound behind her back tightly enough to cut off circulation and cause chafing injury to her wrists. The victim had 3 separate stab wounds to her back, each of which was potentially fatal. She had a stab wound and multiple slicing wounds to her neck, which cut through her larynx/neck cartilage and into her esophagus behind it. Those wounds were also potentially fatal. The victim was vaginally raped and anally raped. There was evidence produced at the guilt phase in 2001 that the victim also suffered a broken vertebrae in her neck during this attack. All of the above wounds were inflicted while the victim was alive.

TR 312. This was coded as the victim receiving 23 wounds with 21 body parts being injured. Spreadsheet ID # 312 V1_Wounds, V1_BodyParts.

One thing is certain – the victim's wounds did not change between the first trial and sentencing hearing in 2001 and the second penalty phase hearing in 2012. Yet the coding on these two reports does not agree; the injuries are coded as 15 wounds based upon the first report but coded as 23 in the second; 8 body parts were injured based upon the first report, but 21 in the second. Any argument that the disparity has more to do with

variances in how the trial judge described the injuries rather than an inconsistency in coding, simply raises another concern with Dr. Beckett's study. For her report, or its conclusions, to have any import, the coding must accurately reflect the nature of the case characteristic it purports to examine *rather* than accurately reflecting the description provided by the trial judge. The two reports pertain to the same crime and there should not be differences in how injuries are coded.

According to Dr. Beckett the "trial reports were coded according to a detailed protocol" by two students whose work was "periodically audited" to "ensure reliability." Updated Report at p.14. Whatever auditing she did was clearly insufficient. It also seems unlikely that she ever looked at the coding results in spreadsheet format to check for possible errors. That is how the State found the coding errors in Mr. Neal's case. Looking at the spreadsheet it seemed unlikely that a murderer would inflict exactly 141 wounds on each of three victims; that it should have happened in two different cases seemed preposterous. Consequently, the State looked closer at the coding in these two cases and what looked implausible to the eye in a spreadsheet turned out to be erroneously coded data.

Considering the specific cases discussed above and comparing the columns for V1_BodyParts and V1_Wounds in the spreadsheet, it would

appear that one of the students doing this coding did not equate a wound as necessarily injuring a body part and the other student did. This would explain how it was possible, for example, for Mr. Ramil, TR 4, and Mr. Briden, TR 310, to each inflict 3 wounds to their victims, but injure zero body parts. Spreadsheet ID # 4 V1_Wounds, V1_BodyParts, Spreadsheet ID # 310 V1_Wounds, V1_BodyParts.

Dr. Scurich was critical that there was no information in Dr. Beckett's report regarding the "efficacy of the coding" and indicated that "failure to provide a numerical estimate of the degree to which coding by different raters is in agreement is not consistent with contemporary social science standards" so that, in his opinion, Beckett's manuscript would be rejected for publication by a peer reviewed journal. Scurich Report at p.6. The Commissioner seemed to accept Dr. Beckett's response that the data entry assistants were simply entering the information provided by the judges in the trial reports so there was no need for inter-rater reliability for most of the entries. *See* Commissioner's Findings at p. 9-10. The inconsistencies noted in the examples above as to how "wounds inflicted" and "body parts injured" were coded shows that lack of consistency in coding is a serious defect to the study. Lack of specifics as to how injuries *should be* coded also makes it impossible to check the accuracy of how any particular case *was* coded. Information about a victim's injuries

provides insight as to the pain and suffering of the victim and can reflect the heinousness of the defendant's crime(s). This is a case characteristic that should be carefully and consistently coded and double checked for accuracy. This was not done.

Again, the State has not examined all of the coding on "wounds inflicted" or "body parts injured;" it simply has given Dr. Beckett's spreadsheet an "eye test" which has uncovered several errors, omissions, and inconsistencies in coding. According to Dr. Scurich if the data entry was not accurately coded then the results of the study are unreliable, or in other words "garbage in/garbage out." The numerous examples of inaccurate and inconsistent coding should cause the court to doubt the reliability of the report's results.

iv. Inclusion of information on victims of crimes other than aggravated murder

The trial reports are required only in cases of aggravated murder and ask specific questions about the victim or victims. In some cases, other crimes are tried at the same time as the aggravated murder. In other cases, the prosecutor may have charged more than one count of aggravated murder but the jury returned a verdict for non-aggravated murder on one or more of the victims. Examples of these situations are Naveed Haq, TR 301 (six victims, five shot but only one died, sixth victim held hostage),

and Gerald Davis TR186 (charged with two counts of agg. murder convicted of murder 2 and agg. murder). In Haq's case, the Updated Report includes information as to four of the six victims (the study only accommodates information as to four). *See* ID # 301; *see also*, Coding protocol # 59, Codebook at p. 63. Information was coded as to both of the victims in Gerald Davis's case. *See e.g*, Spreadsheet ID # 186 V1_Wounds, V2_Wounds.

While it might be appropriate to include information about victims of other types of crimes that are connected to a capital case in a statistical study, it is inappropriate to treat victims of a capital offense as being interchangeable with victims of non-capital and non-homicide offenses. As no trial report is required if a defendant is convicted of something less that an aggravated murder, it seems reasonable to conclude that the trial report questionnaire is aimed at gathering information only about the victim(s) of aggravated murder. This means that the data on victims of crimes other than aggravated murder should not have been referenced in the trial report or included in the study. This problem could have been avoided with a detailed protocol.

Dr. Beckett found that the number of victims did not impact the prosecutorial decision-making in aggravating murder cases nor the jury's decision to impose the death penalty. Updated Report at p. 26, 29. But

she has counted people who were not murdered as "victims," such as five of the six victims of Mr. Haq. Thus, her report cannot be read as finding that the number of *murder* victims (much less aggravated murder victims) did not have an impact on either the prosecutorial decision making or the jury's determination. The number of murder victims would seem to be the more relevant characteristic to examine.

Dr. Scurich was unable to replicate many of Dr. Beckett's reported findings. Dr. Scurich summarized his evaluation by stating "My overall view of [the Updated Report] and the accompanying data file is that both are unacceptably sloppy and untrustworthy." Scurich Report at p. 30. The findings of the Commissioner confirm this characterization – it is sloppy and untrustworthy. The data Dr. Scurich was given to run his tests has been modified several times by Dr. Beckett as various errors and omissions have been identified, yet there is more correction still to be done.

The Commissioner's findings and the examples given above show that there are numerous problems with the coding of data in Dr. Beckett's study. If the data coding is not trustworthy, then neither are the results. The Court should give no weight to the Updated Report in deciding this case.

b. The Updated Report is flawed because it does not use the most accurate information known about an aggravated murder case to code its data.

The reports required by RCW 10.95.120 have been completed by many different superior court judges from many different counties over the span of three decades. Some of the judges completing the report did not preside over the case that is the subject of the trial report. *See, e.g.* TR 321, TR 326, TR 329, TR 330. Some of the reports were completed years after the case resolved in the trial court and are the product of faded memories. *See e.g.*, TR 315, TR 317, TR 318, TR 325, TR326, TR 331. Generally, if the case went to trial, there is more detailed information in the trial reports than if the case resolved by entry of a guilty plea. If the case did go to trial and the aggravated murder conviction was appealed, however, the appellate court's opinion on direct review is almost always going to be a better and more detailed source of information about the case than the trial report. *Compare, e.g.*, TR 9 *with State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984) (subsequent history omitted).

Dr. Beckett has based her study and its conclusions on information contained in the trial reports filed pursuant to RCW 10.95.120. The report assesses the accuracy of the coding of information against the information in the trial report; it does not necessarily accurately reflect the facts or evidence adduced at trial or what might be gathered from examining the

superior court file, the trial record, or an appellate opinion. The State submits that this is a fundamental weakness of the study. The data employed in any analysis of aggravated murder cases should be based upon the most accurate and complete information known about the cases rather than a single source of information.

As noted above, when there are differences in wording between two reports written about the same crime, it can result in differences in how the case characteristics were coded. Similarly, when one judge lists the aggravating circumstances applicable to each victim separately it gets coded differently than another judge who lists the aggravating factors once for all victims. Neither judge is incorrect in the manner that the aggravating factors are reported, but the difference in reporting style results in coding that indicates one case has many more aggravating circumstances than the other when that difference does not necessarily exist.

Dr. Beckett reported that "[e]vidence that a victim was held hostage also had a significant impact on decisions to impose a death sentence: defendants believed to have held their victims hostage were more than three times more likely to be sentenced to death than a defendant who did not." Updated Report at p. 29-30. Trial judges are asked to answer a question about whether the victim was "held hostage"

but there is no guidance as to what "held hostage" means. This can result in differing answers based upon very similar facts.

As an example, Allen Gregory attacked his victim in her home, forced her to the bedroom where he raped her repeatedly, and killed her viciously. *See*, *State v. Gregory*, 158 Wn.2d 759, 811-13, 147 P.3d 1201 (2006) (subsequently history omitted). Cecil Davis attacked his victim in her home, forced her to the bedroom where he raped her, then forced her to the bathroom where he burned her with chemicals, and asphyxiated her. *See*, *State v. Davis*, 141 Wn.2d 798, 808-21, 10 P.3d 977 (2000) (subsequent history omitted). The trial judge for Gregory indicated that the victim was "held hostage," *see*, TR 216, 312, while the trial judge for Davis did not, *see*, TR 180, 181. One can only conclude that there was some quality about Gregory's crime that led the trial judge to find his victim was "held hostage," but what that quality was is unknown. Conversely, Davis's judge found some quality missing, but whether that was the same quality found by the judge in Gregory's case or a different one is unknown. *See also*, John Witaker, TR 290 (judge did not check box for "held hostage" and describes crime as the victim being tied up and placed in duffle bag then transported by car to remote location where she was shot).

Finally, the trial reports fail to seek information on relevant subjects that might strongly influence a jury's decision on whether to impose the death penalty. For example, no questions are asked about whether the defendant testified at the trial or penalty phase, whether he allocuted, or what was the content of his allocution. A defendant who tells the jury "I did something wrong. I deserve the death penalty.... I'm not sorry for what I did, and I don't know how to explain that, but I'm not[,]" *see*, *State v. Sagastegui*, 135 Wn.2d 67, 81, 954 P.2d 1311 (1998), will have a very different impact than a defendant who pleads for mercy in a compelling manner. Because the trial reports do not ask about allocution, this important factor is not taken into consideration in Dr. Beckett's report.

The trial reports were not designed as a source for statistical analysis; trial judges have not been instructed as to how to complete them nor given definitions for various terms used within the questionnaire; the questionnaire does not seek information on topics that are pertinent to the sentencing decision. As such the reports have qualified utility as a source for data for a statistical analysis. As the trial reports are not the best source for information about a particular crime, a study that limits its information to material contained within the trial reports is unlikely to produce reliable results.

c. Dr. Beckett Has Included Trial Reports that Should Not Be Considered

There is disagreement as to whether multiple trial reports about the same crime should be included in the dataset when a defendant has been subject to multiple sentencing hearings for the same underlying crime.

Dr. Beckett maintains that all the reports should be considered, but Dr. Scurich contends only the second, or most recent, should be included or the assumption of independence in logistic regression is violated. Commissioner's Findings at p. 31-32. At issue is whether the first trial report for Mitchell Rupe, TR 7, Cecil Davis, TR 180, and Allen Gregory TR 216, should be included in the dataset.[2] Commissioner's Findings at p. 31-41.

The question posed to the jury in a special sentencing proceeding instructs them to have "in mind the crime of which the defendant has been found guilty," when deciding whether there are not sufficient mitigating circumstances to merit leniency. RCW 10.95.060(4). When there is a second sentencing phase proceeding, the jury in the second hearing is going to be considering the same facts about the crime that the first jury did. Thus, most of what both juries weighed were identical facts. That is not independence.

[2] Both Davis and Gregory are African –American.

The Commissioner indicated that the "Reference Guide on Statistics" defines "independence" as: "events are independent when the probability of one is unaffected by the occurrence or non-occurence of the other." Commissioner's Findings at p. 36-37. Under Washington law, the only time there has been a second penalty phase in the same case is because the jury returned a death verdict in the first hearing but this verdict was vacated on appellate review, such as occurred with Rupe, Davis, and, Gregory. *See also*, RCW 10.95.060(4), 10.95 080(2). This is not necessarily true in other states which permit a second penalty phase hearing if the first jury was unable to reach a unanimous verdict. *See, e.g.*, *People v. Ramirez*, 50 Cal.3d 1158, 791 P.2d 965 (1990) (death verdict was returned by second jury after first jury was unable to agree on penalty and mistrial was declared). In Washington, the probability of a second penalty phase hearing occurring is affected by the occurrence of the first. The first penalty phase hearing greatly reduces the likelihood of a second penalty phase hearing occurring as only a unanimous death verdict in the first creates the potential for there to be a second. Thus, the occurrence of a second penalty phase in the same case is completely dependent on the outcome of the first penalty phase.

It should be noted that some technical experts believe that including different cases involving the same defendant violate the

independence of observation. *See*, Commissioner's Findings at 37, n.39. This would mean, as an example, that either TR 34 or TR 34A would be considered since both pertain to the same defendant, Paul St. Pierre. The State does not see an issue of inclusion when the two reports pertain to separate proceedings for different murders by the same defendant as the two juries are going to be considering very different crimes when determining the appropriate punishment and the occurrence of the penalty phase in one case is not dependent upon the penalty phase in the other.

The same cannot be said about two different juries considering the same crime in the same case. Consequently, only one report for Mr. Rupe, Mr. Davis, and Mr. Gregory should be included. *Id.* at 41. Dr. Beckett insists on double counting, when that violates the assumption of independence in logistic regression.

As noted earlier, Dr. Beckett has also double counted regarding Mr. Neal. If these two cause number were tried together in a single proceeding, then only TR 218 or TR 219 should be counted.

d. <u>The dataset is too small to produce reliable results.</u>

The Updated Report is based on a dataset that is too small to provide a basis for a statistically significant study, which, in turn impacts the reliability of the results. *See*, Commissioner's Findings at p.69-80.

While Dr. Beckett recognizes the use of Maximum Likelihood Estimates (MLE) procedures, such as employed in her Updated Report, with datasets of less than 100 cases "should be interpreted with caution" *see*, Updated Report at p. 17, she does not provide any authority that using a sample size of less than 100 for MLE procedures is acceptable science. *See*, Commissioner's Findings at p 75,79-80. Dr. Beckett advocates for the inclusion of 81 special sentencing proceedings or trial reports in her dataset, nearly 20% below the recommended *minimum* number. The State submits that there are only 73[3] that should be included, a 25% deficiency.

This deficiency is critical because when there is a small dataset, errors in coding have a greater impact on the reliability of the results. *Id.* at p.78 n.69. As noted above, there are many errors in coding that have yet to be corrected. Unreliable data coding in a MLE study that involves a dataset below the recommended minimum means that the study's results are not reliable and should not be considered.

e. <u>The Updated Report no longer reflects Dr. Beckett's current position.</u>

As noted above, throughout this process, errors have been called to Dr. Beckett's attention and she has made corrections and rerun her data to

[3] This is comprised of the 74 trial reports that are included in Table D5, Commissioner's Findings Report at p. 68, less one case to account for the double counting of Mr. Neal's cases; only TR 218 or TR 219 should be counted.

see if the corrections affected the results or her conclusions. Her results in some instances have changed and in one respect, regarding R^2 and Pseudo R^2 results, she has completely disavowed claims that she made in the Updated Report. *See*, Commissioner's Findings at p. 7, 13 n.8, 19, 23, 66-67, 97. Dr. Beckett's dataset, coding, and results have been a moving target and to track these changes in position, one must go through many pleadings and responses to interrogatories that have been filed in this case. In other words, no single document authored by Dr. Beckett sets forth her current position or results. To make the situation more complicated, her answers to interrogatories include some models that she does not endorse but which were provided at the request of the Commissioner. *Id.* at p. 67-68. As it is a known and admitted fact that the Updated Report is not accurate, the Court cannot rely upon it. There is no other document to replace it. Perhaps in another case, a "New and Improved" version of her report may be submitted, but the Updated Report is demonstrably flawed and should not be considered.

D. CONCLUSION.

For the foregoing reasons this court should find the Updated Report to be too flawed to produce reliable results and, consequently, it should play no role in the court's decision in this case.

DATED: January 22, 2018

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/22/18
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

January 22, 2018 - 3:38 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Allen Eugene Gregory
Superior Court Case Number:	98-1-04967-9

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